



# Engineering Change. Inspiring Leadership.

**2020** California Hospital Volunteer Leadership Conference





# Your Volunteer Workforce: Compliance, Human Resources and Legal Issues

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# Enloe Medical Center

- 425 Volunteers
- 40,450 Hours of Service in 2019
- 298 Bed Not-for-Profit Hospital
- 4,500 Employees

# Goals For Today

- To provide you with specific tools to assist you in:
  - Managing a volunteer workforce
  - Complying with legal requirements
  - Spotting issues before problems arise

# Who Is A Volunteer & Why Does It Matter?

- Employee or Volunteer?
- This is the multi-million dollar question because misclassification can result in liability for:
  - Four years of past wages
  - Benefit liability
  - Taxes
  - Penalties

# Employee - Definition

- Any individual who is “suffered or permitted to work” by an employer
  - Mere knowledge by an employer that work is being performed on the employer’s behalf will satisfy the “suffer-or-permit-to-work” requirement
- This is a very broad definition so that an exception for unpaid interns/volunteers is very narrow
- There is a presumption is that the individual is an employee rather than a volunteer
- Burden is on the employer to prove volunteer status
- Generally the same definition under federal and state law

# Volunteer - Definition

- An individual who intends to donate their services to religious, charitable or similar non-profit corporations
  - without contemplation of pay and
  - for public service, religious or humanitarian objectives
- U.S. Department of Labor approves for-profit hospital use of volunteers on “rare occasions”
  - For-profit hospital may not allow employees to volunteer

# Volunteer - Definition

- Individual intent:
  - To perform work for civic, charitable or humanitarian reasons, without promise, expectation or receipt of pay
  - To volunteer freely and without pressure or coercion from employer
- Also must ensure that the individual is not employed by the non-profit organization to perform the same type of services as those for which the individual proposes to volunteer, e.g., RNs cannot “volunteer” to work at a health fair doing BP checks without being paid



# Volunteer - Definition

- *Tony and Susan Alamo Fund, 471 US 290 (1985)*  
U.S. Supreme Court case applying the federal Fair Labor Standards Act:
  - No expectation of compensation
  - Solely for personal purpose or pleasure
  - Applied the economic realities test
  - Found an employment relationship

# The Gift Shop Issue

- Wage and Hour Opinion Letter – June 28, 1996
  - Working in a gift shop does not qualify as “charitable” activity
  - Use of paid employees as well as volunteers in the gift shop further undermines volunteers status
  - This principle not limited to “gift shop”
  - NOTE: CA Labor Commissioner has adopted a similar approach
- *Eltman v. Columbia/HCA Healthcare Corp* (U.S. Dist Ct. Florida, 2000)
  - Rejected June 28, 1996 Opinion Letter as contrary to Alamo
  - However, this opinion is not binding in California, other federal courts or the DOL
  - Unclear what approach current Secretary of Labor would take

# Using Volunteers – Best Practices

- Volunteers should not be utilized to operate commercial enterprises which serve the general public, e.g., restaurants or stores
- Cannot have both paid employees and unpaid volunteers performing the same or similar work
- Should not have volunteer assume duties that were previously performed by employees
- Volunteers should perform duties that are ancillary to/supportive of patient care
- Contemplation of “pay” does not have to be monetary
  - An individual cannot “volunteer” to gain experience

# Enloe's Use of Volunteers

- “Gift Shop” is not a commercial enterprise, it is a fundraiser
- “Job” vs “Service” Description
- Limited shift lengths and limited time on units
- Nature of Work limits where employees may volunteer
- No compensation – not even meals

# Intern – Definition

- An individual who performs work as part of an educational training opportunity for his/her benefit which must be:
  - an essential part of an established course of an accredited school or of an institution approved by a public agency to provide training for licensure or to qualify for a skilled vocation or profession
  - California Labor Commissioner Opinion Letter dated 4/7/10

## Intern – Federal and State Test

- 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;
- The training is for the benefit of the trainees or students;
- The trainees or students do not displace regular employees, but work under their close observation;
- The employer derives no immediate advantage from the activities of trainees or students, and on occasion the employer's operations may be actually impeded;
- The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

# Intern – Federal and State Test

- Criteria more likely to be met if:
  - Internship training is related to the individual's course of study
  - Internship provides skills that can be used in multiple employment settings as opposed to skills particular to one employer's operation
  - College/university exercises oversight over the program and provides educational credit
  - Intern program supervised by the school or a disinterested agency
  - There is a "predominant" benefit to the student as compared to just "some" benefit

## Intern – Federal and State Test

- Title of position/program or individual does not dictate, e.g., trainee, intern, extern, volunteer
- Interns require close supervision (greater than that provided to regular employees) which can offset any perceived advantage received by the employer, e.g., weekly evaluations and feedback, regular monitoring and mentoring by supervisors



# Using Interns – Best Practices

- Internships should not be used as a trial period for individuals seeking employment
- Internship should be of fixed duration established prior to outset of the program
- Criteria can still be met even if employer receives *incidental* benefits from the tasks performed by the intern while practicing his/her skills (especially towards the end)

# Enloe's Use of Interns

- Interns are onboarded through HR & Education
- Interns must be receiving academic credit
- Intern responsibilities are consistent with course objectives
- Interns have a set weekly schedule that meets the hours requirement of course
- Interns are scheduled for weekly mentoring sessions
- Interns do not provide *immediate* benefit

# Volunteers & Interns – Workplace Protections

- Volunteers and Interns are Protected Against Harassment
- Interns are Protected Against **Discrimination and Harassment**
- Applies to recruitment, selection and environment
- California Fair Employment & Housing Act, Cal. Gov't Code sections 12940(c) and (j)

# FEHA – Protected Categories

- Age (40 and over)
- Ancestry
- Color
- Religious Creed (including religious dress and grooming practices)
- Denial of Family and Medical Care Leave
- Disability (mental and physical) including HIV and AIDS
- Marital Status
- Medical Condition (cancer and genetic characteristics)
- Genetic Information
- Military and Veteran Status
- National Origin (including language use restrictions)
- Race
- Sex (which includes pregnancy, childbirth, breastfeeding and medical conditions related to pregnancy, childbirth or breastfeeding)
- Gender, Gender Identity, and Gender Expression
- Sexual Orientation
  - Also covers perception and association

# Workplace Protections – Best Practices

- Interview:
  - Treat the same as you would an employee applicant in terms of acceptable questions
  - Avoid questions that are not position-related or that can directly or indirectly identify an individual on a basis protected by law, e.g., disability, etc.
  - <https://equity.ucla.edu/wp-content/uploads/2016/06/Questions-to-Avoid-dfeh-161.pdf>
- Selection:
  - Consistent use of background checks and other selection criteria
- Orientation:
  - Description of anti-harassment/discrimination policy and what to do if volunteer or intern would like to lodge a complaint

# Recruiting Volunteers – Best Practices

- Use a detailed application
- Similar to employee application
- Key points:
  - Reason for wanting to intern or volunteer
  - Signed acknowledgment that:
    - No expectation of pay
    - Not intended, nor expected, to result in job opportunity
    - At will relationship
    - No employment relationship unless signed by authorized person

# Recruiting Volunteers – Best Practices

- Conduct Background check and health clearance
- Develop and apply consistent standards (considering CDPH and accreditation requirements)
  - Centers for Disease Control recommends that volunteers receive vaccinations
  - California Department of Public Health
    - “Health care personnel” includes volunteers
    - Outreach and data collection must include volunteers
- Can wait until assignment decision is made
  - Treat information the same as if the prospective intern or volunteer is applying for a job, e.g., if background check turns up a conviction, analyze under job-relatedness
    - NOTE: Labor Code 432.7 limitations
- Be careful about using Social Media or Google searches

# Recruiting Volunteers – Best Practices

- Conduct an interview – using standard questionnaire
- Recommendations
  - Ask for a list of personal and professional recommendations and what the prospective intern/volunteer thinks that individual will say about them
- Offer (or declination) letter
  - Start date of the volunteer service or internship and end date, if any
  - Describe duties and assignment
  - Explanation of at-will status
  - Expected time commitment
  - Use language that follows the volunteer definition
- Ensure that the hospital's website does not include any language that could suggest the program accepts individuals for reasons other than those allowed for by law
- E.g., no mention that those interested in gaining experience should apply as a volunteer (educational internships are different)



# On-Boarding Volunteers – Best Practices

- Maintain Volunteer files
  - Application
  - Background check
  - Offer (or declination) letter
  - Confidentiality agreement
  - Notice of expectations
  - Handbook
  - Documentation of in-person orientation
  - Mentoring agreement

# On-Boarding Volunteers – Best Practices

- Orientation
  - Should include at a minimum:
    - Thorough explanation of expectations
    - Who to contact if concerns about the program arise
    - HIPAA and confidentiality expectations
    - General review of all topics in manual including what happens if there is a violation of policy

# Workplace Expectations - Confidentiality

- California law requires hospitals to ensure patient confidentiality and to report any breach
  - Penalties for breaches and failure to report
- California law also imposes individual liability for privacy breaches
  - Penalties range from \$1,000 to \$250,000

# Workplace Expectations – Diversity & Inclusion

- Like employees, volunteers and Interns are expected to treat all patients, visitors, family members, employees and others with respect
- What training do you provide to your volunteers and interns?
- How do you communicate this expectation?

# Workplace Expectations – Safety & Security

- Workplace violence prevention
  - Cal/OSHA regulations were effective April 1, 2017
  - Do not specifically cover volunteers, but...
- Issues that arise due to increased community-based activity
- What steps are you taking to evaluate the risks?
  - What safety/security training do you provide?



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# Questions?

