Volunteer exposure risks to your agency

For many public agencies, volunteers or unpaid interns provide an important function to allow the agency to provide essential services to the public. Recently California law has been expanded to provide 'protected' status to volunteers and unpaid interns from retaliation and discrimination in the workplace.

AB 1443 amends the California Fair Employment and Housing Act ("FEHA") and extends its prohibitions against discrimination and harassment to volunteers and unpaid interns. Previously, these prohibitions (e.g., on account of race, religious creed, national origin, disability, sex, sexual orientation -- and many others) expressly applied to "apprentice programs" and "training programs" that specifically "led to employment," but they did not apply expressly to unpaid intern or volunteer programs that were not designed to lead to actual employment. In addition, the FEHA now prohibits discrimination and harassment not just in the "selection" or "termination" of apprentices, unpaid interns and volunteers, but also discrimination and harassment in the "training" or "other terms or treatment" of such persons. As a result, virtually any discriminatory act is prohibited throughout the duration of the unpaid intern or volunteer's involvement with an employer. The proponents of AB 1443 expressed a concern that the economic recession has resulted in many individuals having to rely on unpaid positions and internships in an effort to enhance their employability. The new law extends basic workplace protections to those who do so in order to gain work experience.

Protecting Your Agency

- Develop a Volunteer Policy Manual. Specifically identify the rights and duties of the Volunteer/Unpaid Intern within the organization;
- Include in the Manual the agency's Harassment/ Discrimination/Retaliation policy and reporting policy procedures;
- Develop a specific Volunteer Position description identifying the physical requirements for the position;
- General duties should be identified and easily transferable for normal 'household' activities, i.e. sitting, standing, lifting, computer work, etc.;
- The Volunteer Policy manual should state that the Volunteer/Unpaid intern does not receive any benefits from the agency in exchange for performing the volunteer duties;
- Document in the Policy manual that the Volunteer/ Unpaid Intern is NOT ELIGIBLE for Workers' Compensation benefits pursuant to California Labor Code §3352: "Employee" excludes the following:
  (i) Any 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.
- The Volunteer/Unpaid Intern is NOT AN EMPLOYEE of the agency;
- The Volunteer Policy Manual is not an offer of employment or a contract of employment;
- The Volunteer position is an "AT WILL" position and each party (Volunteer/Agency) can exercise its right to terminate the relationship;
- Provide the Volunteer a form to acknowledge receipt of the Volunteer Policy Manual;
- Review annually with all volunteers and unpaid interns.

Frequently Asked Questions

Are Volunteers/Unpaid Interns covered under our agency's Liability Coverage Agreement?

For SDRMA Members, Volunteers/Unpaid Interns are considered COVERED INDIVIDUALS and the Volunteer/Unpaid Intern as well as the Member is covered under the Liability Coverage Agreement issued by SDRMA.

SDRMA

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Covered Individual(s) means: Any of the Member's individual Volunteers while acting within the course and scope of their service or duties as Volunteers, or workers who participate in an internship or training program which may lead to employment with the Member, while acting within the scope of their duties in their internship or training program.

Can Volunteers/Unpaid Interns drive an agency vehicle?
Yes. They are considered a Permissive User and are acting as an agent of the agency.

If a Volunteer/Unpaid Intern is injured while performing their duties are they covered for their injuries/medical treatment?
No. While the Volunteer/Unpaid Intern is covered for a Third Party Liability claim filed against the agency, they are not covered for any injuries they sustain while performing their duties.

What about Workers' Compensation coverage?
Under California Labor Code §3352 (i) Volunteers/Unpaid Interns are not eligible for workers' compensation benefits.

In order to provide workers' compensation coverage to volunteers/Unpaid Interns, the agency must pass a resolution as required by Labor Code §3363.5; the volunteer/Unpaid Intern is responsible for their own medical treatment.
Notwithstanding Sections 3351, 3352, and 3357, a person who performs voluntary service without pay for a public agency, as designated and authorized by the governing body of the agency or its designee, shall, upon adoption of a resolution by the governing body of the agency so declaring, be deemed to be an employee of the agency for purposes of this division while performing such service.

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For purposes of this section, "voluntary service without pay" shall include services performed by any person, who receives no remuneration other than meals, transportation, lodging, or reimbursement for incidental expenses.

Volunteer/Unpaid Intern hours are tracked and reported with the annual payroll audit to determine the cost of coverage.

Legal Update

Torts – Vicarious Employer Liability – Going and Coming Rule
Court of Appeal, Fourth Appellate District (September 10, 2014)

Under the theory of respondeat superior, employers are vicariously liable for tortious acts committed by employees during the course and scope of their employment. However, under the "going and coming" rule, employers are generally exempt from liability for tortious acts committed by employees while on their way to and from work because employees are said to be outside of the course and scope of employment during their daily commute. This case considered an exception to the going and coming rule, which occurs where the use of the car gives some incidental benefit to the employer.

This case arises from these same facts as in the prior appeal on a summary judgment motion in *Lobo v. Tamco* (2010) 182 Cal.App.4th 297 ("Lobo I"). Deputy Sheriff Daniel Lobo ("*Lobo*") was killed in 2005 when Luis Duay Del Rosario ("Del Rosario") – while leaving the premises of Tamco, which manufactures steel bars for use in construction – turned into the path of Lobo and two other motorcycle deputies approaching with lights and sirens activated. Del Rosario, a 16-year employee of Tamco, was a metallurgist and the sole employee with the expertise necessary to determine whether the company's products were defective, according to the plaintiffs' evidence. That specialty involved travel to customers' facilities that occurred infrequently, so the company reimbursed Del Rosario for his mileage rather than provide him with a company car. On those infrequent occasions, he was thus required to use his own car.

In *Lobo I*, Lobo's widow and three daughters sued Tamco, but the company moved for summary judgment contending it was not vicariously liable for Lobo's death. It argued that Del Rosario was not acting within the course and scope of his employment, but merely leaving work at the end of his work day, intending to go home, driving his personal vehicle. The trial court granted summary judgment in favor of Tamco, and plaintiffs appealed.

On appeal in *Lobo I*, the Court of Appeal concluded that evidence that Del Rosario was required to drive home in his personal vehicle, and have it accessible at all times in case he needed to visit customers on short notice, raised a triable issue of fact, even if he did not have to use his car for work on the day in question. The Court of Appeal felt it was a triable issue of fact as whether there was still some incidental benefit to the employer. The Court of Appeal reversed summary judgment in favor of the defendant, Tamco, and remanded the matter for further proceedings in the trial court. Following Lobo I, trial was held solely on the issue of Tamco's vicarious liability for the negligence of its employee, Del Rosario. At trial, one of the Tamco employees changed their testimony, stating that the employer gained no benefit from Del Rosario's vehicle and that, to the contrary, it cost the company additional funds requiring mileage reimbursement for two vehicles/ employee travels when Del Rosario used his vehicle.

The jury found in favor of Tamco.

Plaintiffs' appealed, contending that based on the legal principles the Court enunciated in Lobo I, the evidence adduced at trial compelled a finding that Del Rosario was acting within the scope of his employment when the accident occurred. They also argued that the trial court erred in refusing a requested jury instruction. The Court of Appeal noted that in *Lobo I*, its denial of summary judgment was not based on a determination of Tamco's liability as a matter of law. Rather, it was based on the possibility that a jury could conclude that even though Del Rosario was not required to use his vehicle on the day in question, the employer might still have obtained an "incidental benefit" by his having it available every day. At trial, the jury held that the evidence did not support a finding of such an incidental benefit, so the "going and coming" rule applied, and there could be no vicarious liability.

Moreover, the Court of Appeal noted that the facts adduced at trial were different than at the time of the summary judgment motion, in that Del Rosario's supervisor changed his testimony as to his being "required" to have his vehicle available. Based on the facts at trial, the verdict was supported, and there was no vicarious liability on the part of the employer.

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For questions or additional information, contact SDRMA Chief Risk Officer Dennis Timoney at 800.537.7790 or dtimoney@sdrma.org.