NONPROFIT LEGAL RESOURCE HUB

Compliance Issues When Using Volunteers and Interns

Who counts as a volunteer or intern, who counts as an employee, and what California law requires

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AUGUST 20, 2026

ABOUT US

Nonprofit Legal Resource Hub

Who We Are

Bet Tzedek

Public Counsel

LAFLA

Our Goal

Nplegalhub.org supports nonprofit organizations with legal resources, trainings, and services

Our Approach

Connect partners with educational and capacity-building resources and identify Pro bono services

Agenda

01 Volunteer or Employee?

02 Unpaid Interns

03 Contractors

04 Practical Considerations

05 The Basics: Where to Start & Q&A

Learning Goals

By the end of this session, participants will be able to:

1. Apply the correct legal tests to distinguish volunteers, interns, and employees in California

2. Identify compensation and other practices that preserve or destroy volunteer status

3. Recognize the compliance obligations that extend to volunteers and interns

4. Implement core elements of a legally compliant volunteer program and avoid common pitfalls

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Poll: Who Is in the Room?

Select the option that best describes your role:

🏢 **Executive Leadership**

CEO / Executive Director

📋 **Board of Directors**

Governance & oversight roles

🤝 **Program Staff**

Staff members & volunteers

💼 **Consultants/ Others**

Advisors & external partners

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Section 1

Volunteer or Employee

The two-part *Spilman* test, and where commercial activity fits

Volunteer or Employee? Start Here

The Labor Code excludes nonprofit volunteers from "employee" status — but calling someone a volunteer does not make them one. *Spilman v. Salvation Army* (2026) sets the test.

The Statutory Exclusion

The California Labor Code expressly excludes nonprofit volunteers from the definition of "employee" for workers' compensation and wage-and-hour purposes.

Prong 1 — Genuine Benefit

The worker freely agreed to work for the nonprofit to obtain a personal or charitable benefit, rather than for compensation.

Prong 2 — No Workaround

Overall, the nonprofit's use of volunteer labor is not a workaround to evade wage laws.

Prong 1: Personal or Charitable Benefit

The *Spilman* court called this "the essential distinction between a volunteer and an employee."

Personal Benefit

A person works to obtain a non-wage personal benefit — drug rehabilitation, for example.

Charitable Benefit

A person is motivated to perform uncompensated work by a desire to advance a cause the nonprofit champions.

Compensation

An express or implied promise of ordinary wages — or nonmonetary benefits that amount to "wages in another form" — indicates the worker is an employee.

When Do Benefits Become "Compensation"?

Not every benefit a volunteer receives converts the relationship into employment.

The Contingency Test

Compensation exists when the benefits are contingent on the worker's labor and satisfactory performance. The absence of an agreement for compensation is not dispositive.

Example — Benefits as Wages

Workers were barred from the cafeteria when absent from work due to illness or injury. Tying food to attendance suggested the benefit was "wages in another form."

What Is Still Permitted

Reasonable meals, lodging, transportation, incidental expenses, and nominal nonmonetary awards do not defeat volunteer status if, in the entire context, they are not a substitute form of compensation.

Example — Rehabilitation Program Context

Room and board, small gratuities, and similar benefits that are typical of rehabilitation and treatment programs weigh against a finding of compensation.

Prong 1: Free Choice and Duration

Two further factors shape whether the worker freely agreed to work for a personal or charitable benefit, rather than for compensation.

Freely Chosen

The individual chose to provide services without compensation freely, without coercion by the nonprofit.

Example — Probation

A criminal defendant can rationally choose a voluntary rehabilitation program as a condition of probation to avoid jail. Offering a court-approved program is not, by itself, coercion.

Duration of the Relationship

In-kind benefits provided over a long, prolonged period suggest a program akin to an ordinary job, where workers become "entirely dependent" on the organization.

Prong 2: No Workaround to Evade Wage Laws

The second prong looks past the individual relationship to the nonprofit's overall use of unpaid labor.

The Core Question

Is the use of volunteer labor a workaround to evade wage laws? For example, in a rehabilitation program, the nonprofit should show the promised "work therapy" is reasonably calculated to serve a rehabilitative purpose, rather than a ploy to sidestep wage protections.

Factor: Genuine Belief in the Mission

The nonprofit's actual and reasonable belief that the work serves the nonprofit's purpose.

Factor: Replacing Paid Staff

Whether volunteers replace, and perform the same functions as, preexisting paid employees.

Example — Competitive Advantage

Unpaid volunteers and paid employees performing identical work in a commercial venture may suggest the nonprofit is gaining an advantage at its workers' expense.

Commercial Activities Are Not an Automatic Bar

Revenue-generating work does not automatically convert volunteers into employees — but it raises the stakes.

The Old DLSE Position

A 1988 opinion letter from the Division of Labor Standards Enforcement stated that when a nonprofit operates a commercial enterprise serving the public — restaurants, stores, services for businesses — volunteers may not be utilized.

Spilman Rejects a Blanket Rule

The court directly rejected that position, holding that volunteers should not be categorically excluded from all commercial functions of a nonprofit.

But Prong 2 Still Applies

Benefit dinners, bake sales, merchandise sales, and thrift stores were identified as revenue-generating activities genuine volunteers may support. Commercial activity still heightens the risk of employee status.

CASE STUDY

Two Scenarios: Spilman Test

The Thrift Store Shift

Your thrift store is staffed entirely by volunteers who previously worked alongside two paid clerks whose roles were eliminated.

What changes under prong 2?

The Meal Policy

Volunteers in your residential program can eat in the dining hall, but only on days they complete a shift.

Is that a reasonable meal, or wages in another form?

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Section 2

Unpaid Interns

The DLSE's six-factor test and the primary beneficiary test

Interns: Paid, Unpaid, and the Line Between

California has no statute expressly exempting interns from minimum wage and overtime requirements.

Paid Interns

When a nonprofit pays an intern in exchange for doing work, California generally treats that intern as an employee.

Unpaid Interns

An unpaid intern is evaluated to determine whether the person is genuinely a student or trainee, or is actually an employee who must be paid.

No Safe Harbor

There is no blanket exemption to rely on. The classification turns on how the program is designed and documented.

Which Test Applies to Unpaid Interns?

California courts have not definitively settled the question — so plan for both.

The DLSE Standard

California's Division of Labor Standards Enforcement historically follows the federal six-factor test, drawn from *Portland Terminal* via DOL guidance, under a totality-of-the-circumstances analysis.

The Federal Standard

The DLSE has not formally adopted the 2018 DOL primary beneficiary test, but the Ninth Circuit in *Benjamin* predicted California courts would likely apply it.

Where That Leaves You

The DLSE's most recent published guidance still uses the six-factor test, while federal courts applying California law have used the primary beneficiary test.

The Practical Answer

Design the internship so that it satisfies both tests. Meeting only one leaves the organization exposed to whichever standard a court ultimately applies.

Unpaid Interns: The DLSE's Six -Factor Test

All six criteria are considered in light of all the circumstances surrounding the intern's activities.

1. Vocational -school -like training

The training, even though it includes actual operation of the employer's facilities, is similar to what a vocational school would give

2. Training benefits the trainee

The training is for the benefit of the trainees or students

3. No displacement of employees

Trainees do not displace regular employees, but work under their close observation

4. No immediate employer advantage

The employer derives no immediate advantage, and operations may occasionally be impeded

5. No entitlement to a job

Trainees are not necessarily entitled to a job at the conclusion of the training period

6. Shared understanding: unpaid

Both sides understand that trainees are not entitled to wages for time spent in training

The Six-Factor Test: Factors 1 –3

All factors are weighed in light of all the circumstances.

1. Vocational -School-Like Training

An intern's use of the employer's facilities is permissible if that use is directly related to training and to the educational and vocational objectives of the program.

The internship need not be run by a school — what matters is that instruction, activities, and completion certification resemble a vocational program.

2. Training Benefits the Trainee

The student must derive more than "some" benefit — enough to enhance marketability in the vocational area.

College credit, a marketable certificate on completion, and wraparound support: advisors, mentors, guest speakers, career counselors, financial aid application help.

3. No Displacement, Close Observation

Activities must bear a direct relationship to the educational objectives and must not unreasonably intrude into work paid employees would otherwise do.

Regular employees supervise, train, and mentor interns directly, stay available as a resource, evaluate regularly, and monitor performance against the program's educational objectives.

The Six-Factor Test: Factors 4 –6

All factors are weighed in light of all the circumstances.

4. No Immediate Employer Advantage

Some benefit is acceptable if activities serve the educational objectives and are offset by the time, cost, and burden of training and supervision.

Educational validity of the program, substantial supervision of interns, and the immediacy of the benefits to the employer are considerations. Increased intern responsibility late in the program is fine if interns stay supervised and never assume regular duties.

5. No Entitlement to a Job

Acceptance forms should state that interns are not necessarily entitled to a position at the conclusion of the internship. Later hiring of some interns does not defeat this.

The intern application and acceptance criteria should not operate as a screening mechanism for employees.

6. Shared Understanding: Unpaid

Program documentation and the acceptance form should expressly state that the internship is unpaid and is part of the student's educational experience.

Educational stipends are treated separately — see the next slide.

Educational Stipends: When They're Acceptable

Stipends are permitted if their purpose is to cover living expenses while learning — not to pay for work.

Set the Purpose

The stipend should exist to cover reasonable living expenses incurred while the intern is learning, not to compensate for labor performed.

Set the Amount

Fix the stipend at an amount aimed at covering the reasonable expenses interns actually incur.

Watch the Funding Source

School-paid stipends are generally treated more favorably than employer-paid ones. Sponsorship fees from corporate partners should fund the program overall rather than being tied directly to the stipend.

CASE STUDY

Two more scenarios: DLSE's Six Factor Test

The IT Skills Program

Your nonprofit trains underserved young adults in IT skills. Trainees get hands-on practice on your own computers and network systems.

Does using your facilities disqualify the training?

The No-Credit Internship

A student's school requires an internship but does not offer academic credit for it.

Can the placement still be lawfully unpaid?

The Primary Beneficiary Test: Where It Came From

A second framework has emerged in the federal courts — and California has not yet resolved whether it governs.

2017 — Ninth Circuit

The Ninth Circuit adopted the primary beneficiary test for determining employee status under federal law, and predicted the California Supreme Court would apply a similar analysis under California law.

2018 — Dept. of Labor

The U.S. Department of Labor adopted the test.

Today — Still Unsettled

The DLSE's most recent published guidance still uses the six-factor test. Whether California courts will adopt the primary beneficiary test remains unsettled.

The Seven Primary Beneficiary Factors

Courts weigh and balance seven non-exhaustive factors. No single factor is dispositive.

1. No expectation of compensation
Any promise of compensation, express or implied, suggests the intern is an employee — and vice versa

2. Training like an educational environment
Including the clinical and other hands-on training provided by educational institutions

3. Tied to the formal education program
Through integrated coursework or the receipt of academic credit

4. Accommodates academic commitments
By corresponding to the intern's academic calendar

5. Duration limited to beneficial learning
The internship lasts only as long as it provides the intern with beneficial learning

6. Complements rather than displaces
The intern's work complements paid employees' work while providing significant educational benefit

7. No entitlement to a paid job
Both sides understand the internship is conducted without entitlement to a paid job at its conclusion

Primary Beneficiary Factors 1 –3

Courts weigh and balance all seven. No single factor is dispositive.

1. No Expectation of Compensation

Any promise of compensation, express or implied, suggests the intern is an employee.

Participants should enter understanding the position is unpaid, with no guaranteed offer of paid employment.

2. Training Like an Educational Environment

Including the clinical and hands-on training an educational institution would provide.

Recommended inclusions: classroom education, shadowing, supervised instruction, and the chance to apply skills learned in the classroom.

3. Tied to the Formal Education Program

Meaningfully integrated into the intern's education: coursework, academic credit, faculty oversight, or degree and licensing requirements.

Academic credit helps, but does not by itself make an unpaid internship lawful.

Primary Beneficiary Factors 4 –7

The remaining four ask whether the program is built around the intern or around your staffing needs.

4. Accommodates the Academic Calendar

Scheduling should accommodate classes, examinations, and academic requirements rather than the nonprofit's staffing needs — for example, letting a student log the hours required to sit for a licensing exam.

5. Duration Limited to Beneficial Learning

The internship should last only as long as needed to achieve defined educational objectives. Requiring students to stay past the hours needed for a licensing exam suggests it runs longer than its educational benefit.

6. Complements Rather Than Displaces

An intern's labor need not be useless to the employer, but it should be supervised and advance the learning objectives. At a cosmetology school running salons with unpaid students, the school kept staff for front desks, the dispensary, logistics, and janitorial work — so students did not displace paid employees.

7. No Entitlement to a Paid Job

The internship should not operate as an unpaid trial or probationary period. The intern may later apply for employment, but completing the internship creates no entitlement to a paid position.

QUICK ACTIVITY

Activity: Lower or Higher Risk?

Vote on each scenario — the presenter will confirm each right after .

1. Mileage reimbursement with receipts
Paying back a real, documented expense

2. $50 gift card each month for showing up to all shifts
A reward tied to attendance — that works like pay

3. $15/hour "stipend"
Pay calculated by the hour is a wage, whatever it's called

4. Annual appreciation dinner and a $25 gift
Small, occasional, and not promised in advance

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Section 3

Contractors

The ABC test and what FEHA covers for volunteers and interns

Volunteers vs. Unpaid Interns Under FEHA

The two categories are defined differently — and they do not receive the same protections.

Volunteer — Definition

A volunteer performs services for civic, charitable, personal, or humanitarian reasons without any expectation of compensation.

Volunteer — Protections

Receives anti-harassment protections under FEHA.

Unpaid Intern — Definition

An unpaid intern participates in a structured educational or vocational training program primarily for their own learning benefit.

Unpaid Intern — Protections

Receives both anti-discrimination and anti-harassment protections under FEHA.

Independent Contractors and the ABC Test

Labor Code section 2775 treats a person providing labor or services for remuneration as an employee unless the hiring entity proves all three prongs. True volunteers and unpaid interns who receive no compensation fall outside this framework entirely.

A. Freedom from Control

The worker is free from the control and direction of the hiring entity in connection with the performance of the work.

B. Outside the Usual Business

The work performed is outside the usual course of the hiring entity's business.

C. Independent Established Trade

The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

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Section 4

Practical Considerations

What to put in writing, and could raise your risk

Practical Considerations: Building Your Foundation

Exposure often comes from undocumented arrangements rather than bad intentions.

Document Every Role

Use a written volunteer agreement or internship acceptance form that states the role is unpaid, describes the benefit to the individual, states the individual is not entitled to a job, and sets out what the organization will provide.

Assess Benefits Annually

Review every meal, stipend, housing benefit, and gratuity you provide. Ask whether any of it is contingent on labor or satisfactory performance.

Separate Volunteers from Staff Roles

Map volunteer and intern duties against the job descriptions of your paid staff. Overlap is a potential signal of displacement under both tests.

Protecting Your Mission: What to Watch For

Long-Running Placements

In-kind benefits over a prolonged period make a program look like an ordinary job.

Commercial Operations

Volunteers in thrift stores and cafés are permitted, but they draw scrutiny under prong 2 of the volunteer test.

Performance -Linked Benefits

Any benefit that stops when the shift is missed reads as wages in another form.

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If unpaid workers and paid staff do identical work, assume a regulator will notice.

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Section 5

The Basics of a Volunteer Program

Where to Start?

The Basics: Your Classification Checklist

Start here — the non-negotiables for every nonprofit using volunteers or unpaid interns.

Written agreement for every unpaid role
Volunteer agreements and internship acceptance forms that state the role is unpaid

Benefits reviewed against the contingency test
No meal, stipend, or housing benefit conditioned on labor or satisfactory performance

Internships mapped to both tests
The program satisfies the six -factor test and the primary beneficiary test

Duties compared against paid job descriptions
No unpaid role performing the same functions as a current or eliminated paid position

Supervision and evaluation documented
Named supervisors, scheduled feedback, and records showing close observation

GROUP ACTIVITY

Activity: Assess Your Own Program

Does your organization have these items in place?

1. Signed volunteer agreements
We have signed volunteer agreements acknowledging no expectation of pay or entitlement to a job

2. Distinct position descriptions
Our volunteer position descriptions are distinct from paid roles

3. Harassment policy covers unpaid roles
Our harassment policy and complaint procedure explicitly cover volunteers and interns

The Seven Primary Beneficiary Factors

Courts weigh and balance seven non-exhaustive factors. No single factor is dispositive.

1. No expectation of compensation
Any promise of compensation, express or implied, suggests the intern is an employee — and vice versa

2. Training like an educational environment
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Resources

Get More Help

Visit **nplegalhub.org** to access templates, resources, and pro bono legal support.

Post-Survey: Ensuring Compliance with HR Issues When Using Volunteers and Interns

Webinar Evaluation

Purpose:

1. Identify future trainings
2. Improve content/format
3. Learn from the participants on relevant issues

Have any questions?

Please enter your questions in the Q&A box

Thank you!