

# Ensuring the Safety of Students in School to Work Activities: Who's Liable?

by  
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The School-to-Work (STW) Opportunities Act of 1994 promotes the development of statewide systems that support workforce and economic development through changes in the ways that students are educated. Jointly funded by the U.S. Departments of Labor and Education, the Act emphasizes school-based and work-based learning and activities designed to connect the two. In order to fulfill the Act's work-based learning component, employers are recruited to work with students. Recruitment efforts have generated questions from employers concerning their obligations and legal responsibilities should they become involved in STW programs. This paper attempts to clarify these issues.

## Work-Based Learning and Student Safety

Elements of work-based learning include instruction in workplace skills and all aspects of an industry, workplace mentoring, job shadowing, and paid or unpaid work experiences. Clearly, some of these activities ( e.g., instruction) occur in a school setting, while others take place at business locations ( e.g., workplace mentoring, work experience, job shadowing). The latter raise concerns about the physical, psychological, and emotional safety of students in the workplace. The question is: Who is responsible if the student is injured or otherwise harmed? The issue is one of liability.

## Liability

Liability is the legal responsibility for injuries or damages arising from negligent acts or a breach of duty. Simply stated, negligence is the failure to do what a "reasonable person" would do to maintain a safe work environment. In general, everyone involved in providing a work-based experience is responsible for providing students with a safe environment, where safety includes physical safety

as well as psychological and emotional safety. To ensure safe work environments, businesses must follow applicable federal and state laws. Moreover, both schools and businesses are obligated to shield students from people with criminal histories.

## What laws are in question?

Federal laws such as the Occupational Health and Safety Act (OHSA), Fair Labor Standards Act (FLSA), and the Civil Rights Act set the safety standards which businesses must meet for their employees. *Arizona's School to Work System: School to Work Partnerships and Legal Issues* provides checklists which allow businesses and schools to determine their statutory responsibilities in relation to each Act.

There also are Arizona statutes designed to disclose any past or pending criminal history of individuals working with minors. Two laws, in particular, mandate background checks. One is a law in Arizona's Education Code—Arizona Revised Statutes (ARS) 15-512: "Noncertificated personnel; fingerprinting personnel; affidavit." The other law is ARS 46-141, "Criminal History Checks."

**ARS 15-512** requires all school employees and volunteers who supervise students to undergo a background check. Background checks must be obtained whenever a person works directly with students without being under the direction, or within sight, of a certificated employee. **ARS 46-141** imposes the same background check requirements for people working with minors. The only significant difference between this statute and ARS 15-512 is its reference in Arizona's Revised Statutes.

Another state statute of concern to employers relates to Workers' Compensation. The question is: When are businesses responsible for providing this

coverage for student workers?

### When do the laws apply?

The specific applicability of various laws depends primarily on whether a student in a work-based situation is considered an employee or a student (i.e., trainee). Most students are generally considered trainees. According to the FLSA, a student in a work-based activity is a trainee when *all* of the following conditions are met:

- Work-site training is similar to training in a school-based vocational program.
- The training activities benefit the student and not the business.
- A student does not replace or displace a regular employee.
- Student work is closely supervised by a regular employee.
- There is no entitlement to a job at the conclusion of the training.
- All parties—schools, teachers, parents, businesses and students—understand that the student is not *entitled* to wages.

If *all* of the above conditions are *not* met, the student should be considered an employee.

**When students are trainees**, employers must abide by safety standards outlined in federal and state laws. Furthermore, trainees must be supervised by someone who has undergone a criminal background check. When the trainee is supervised by a school employee, the assumption is that the employee has complied with ARS 15-512. If the supervisor is *not* a school employee, then ARS 46-141 applies.

**When students are employees**, not only are employers responsible for maintaining a safe work environment, they also are subject to laws (e.g., Child Labor Laws; Workers' Compensation) specifying minimum wage, hours of work, overtime pay, and activity restrictions. However, employers are *not* required to conduct background checks of employees who supervise student employees.

### Ultimately, who is liable if a student is harmed at a work site?

The answer to this question is: ***It depends.*** It depends on whether the student is a trainee or employee. It also depends on who, if anyone,

perpetrates the injury or is negligent in providing supervision. And, it depends on who has assumed primary responsibility for student safety. Ultimately, all matters of liability are determined in a court of law.

### Arizona Examples of How STW Partners are Addressing Liability and Student Safety Issues

The following three work-based learning scenarios illustrate implications for liability. Each case views students somewhat differently. In each, there are variations in terms of what entity assumes primary responsibility for student safety.

#### Case #1: A school partner assumes responsibility

**Background:** Many programs under the STW umbrella were initiated by schools prior to the STW Act. Often, such programs are considered school activities and fall under existing school/district guidelines. This means that the school assumes responsibility for the safety of youth involved in the programs (e.g., as per ARS 15-512).

**Example:** In Mohave County's Lake Havasu High School, the Career Center runs a job shadowing program which provides students with unpaid work-based experiences. Two-hour shadowing experiences allow students to observe a work environment first-hand and gain knowledge of the skill requirements and how skills are used.

The Career Center recruits and screens employers, matches students with employers, and documents each shadowing experience. The Center generally places one to two students at the same site at one time, or as many students as the employer allows. Even though students are at a work site, the high school considers job shadowing to be a school activity; therefore, the school district is primarily responsible for student safety.

That is, job shadowing is considered a field trip. Parents sign a "Field Trip Permission Form" for the day and time of the shadowing. Students check in and out of the Career Lab. When they check-in, they return an attendance form signed by the employer who provided the shadowing experience. Student transportation is arranged by the student/student guardian. If injured while in transit, insurance is provided by the transportation carrier.

## Case #2: A business partner assumes **responsibility**

Background: Other programs under the STW umbrella include those initiated by businesses. In some of these programs, students are viewed as employees. In these cases, businesses generally assume responsibility for student safety as part of their compliance with federal and state safety statutes and other laws.

Example: In Maricopa County, Motorola's Apprenticeship Program for Students (MAPS) is a registered apprenticeship program subject to specific training and work guidelines established by the U.S. Department of Labor (DOL), Bureau of Apprenticeship Training. MAPS provides training for high school students interested in careers in the semiconductor industry. Candidates for the program are referred by the high school. Motorola then interviews and tests students. Finalists become part-time employees with full benefits.

Each apprentice receives a combination of classroom and on-the-job training. Each is supervised one-on-one by a full time employee and is assigned a mentor (not their work supervisor) who assists the apprentice in adjusting to the work environment. Supervisors provide feedback on work performance; mentors provide feedback on more personal issues (e.g., work habits; interpersonal relations).

Motorola is not required to conduct criminal history background checks for employees who supervise students. This is because a) MAPS is not a school activity, but rather a registered apprenticeship program, b) students are employees, and c) the program was initiated prior to STW.

## Case #3: A STW Partnership facilitates shared responsibility

Background: In contrast with pre-existing programs, some programs are a direct result of state-funded STW partnerships. In these cases, responsibility for student safety should be considered "up front" since the partnerships are subject to ARS 46-141 as prescribed in the state's STW contracts with them.

Example: One example of a work-based initiative stemming from the implementation of STW is an internship program established by the Northland STW Opportunities System operating in Apache

and Navajo Counties. This internship program offers junior and senior high school students both paid and unpaid work opportunities during a school semester — about 15 to 16 weeks in length, three to four hours per week. Students provide their own transportation to the work sites. STW Coordinators monitor the internships which are with a myriad of businesses. As a part of the internship program, parents/guardians, teachers, the business and students are included in developing internship goals. Selected learning objectives provide a way of evaluating the experience for each student.

In the case of unpaid internships, comprising approximately 75% of these work-based experiences, placements are considered to be a school activity (much like Case #1). In these cases, the school assumes primary responsibility for students. In the case of paid internships, comprising roughly 25% of the work-based experiences, placements are considered employment opportunities (much like Case #2). In these cases, the business assumes primary responsibility for students.

Even in the latter cases ( *i.e.*, where businesses are assuming primary responsibility for students), the Northland STW partnership addressed legal issues involving compliance with ARS 46-141. The partnership paid a discounted cost of \$18 to fingerprint work-based student supervisors and provided each business with a copy of Arizona's Child Labor Laws and an internship guide which describes the program in detail.

## Summary

The above examples describe cases where partners in a STW venture have decided who is primarily responsible for student safety. Barring such decisions, the assignment of liability is unclear in the event of student injury or harm. For example, case law reveals that a school is not necessarily released from liability—even when a student is classified as an employee. Similarly, a business is not necessarily released from liability—even when a student is classified as a trainee. Ultimately, the details of an individual case determine the assignment of liability.

The easiest solution is to have schools assume liability for all students participating in an

approved STW program. However, costs associated with providing insurance covering students off school grounds may be prohibitive for a school's budget. Likewise, employers could elect to provide the necessary insurance, but it may be cost prohibitive for them as well. Shared costs (between schools and businesses) pose one solution. Other solutions have been generated at the state level, as discussed in the next section.

### **National Examples of How Liability and Student Safety Issues are Being Addressed**

In response to concerns about liability, a recent *STW National Trends Report* shows that many states are taking a variety of actions to address such issues. For example, in West Virginia and New Hampshire, the state provides supplemental liability insurance to employers. This is provided through state risk management groups or trusts.

Kansas and Maine allow nonprofit entities [ e.g., 501(c)(3) organizations] to serve as the employer of record for STW participants. Nonprofits provide students with Workers' Compensation insurance. An additional benefit for students is that they are paid equally regardless of where they work ( e.g., the size of the business or type of industry does not dictate the student wage).

Amended Workers' Compensation insurance laws in Hawaii, South Carolina, and Wyoming, now provide coverage to students in work-based activities. In Hawaii, the state serves as the employer of record for their state student internship program and, as such, provides Workers' Compensation insurance. In contrast, South Carolina designates STW participants as "employees" of the sponsoring employer. In this case, employers pick up the costs associated with Workers' Compensation. In Wyoming, employers also assume the costs for Workers' Compensation insurance; however, the definition of "employer" has been broadened to include school district boards and the state's Department of Education.

Clearly, issues of student safety and liability are of national concern. In response to this concern, the National STW Office convened a workgroup to discuss these issues and make recommendations. Recommendations included: identifying who is responsible for student safety in work-based activities, clarifying the terms "trainee" and

"employee," and producing a national report on how states are addressing liability issues.

### **Conclusions and Recommendations**

Arizona examples of work-based learning illustrate that responsibility for student safety in work environments varies. Programs which began before STW often designate either a school or business as responsible. Businesses are generally responsible only when students are paid employees. Programs which began as a result of a STW partnership need to negotiate responsibility "up front." The bottom line is that there are no clear-cut guidelines for determining liability.

In accordance with national recommendations, all Arizona STW partnerships and their partners should explore liability and safety issues prior to placing students in work environments. At a minimum, partners should inventory existing insurance coverage, establish whether the student is a trainee or employee, determine the student's supervisor, and decide whether the supervisor is (or should be) subject to a criminal background check. Furthermore, while many solutions to potential problems of liability and student safety are appropriately generated at the local or regional level, Arizona may wish to explore state-level options to guarantee the safety and well-being of STW participants in work-based programs.



For additional information about Arizona's School To Work initiative, contact :

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School To Work is a division of the Arizona Department of Commerce, Office of Workforce Development Policy.

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