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Employee or Volunteer? How Nonprofits Can Tell the Difference

by Sandra A. Girifalco

About 64.5 million people volunteered through or for an organization at least once between September 2011 and September 2012 according to the Bureau of Labor Statistics. Volunteers can be vital to a nonprofit organization and are frequently relied upon to help carry out the nonprofit's mission. Employees, of course, are also vital to the mission. As everyone knows, the difference is that employees get paid and volunteers don't. However, the Fair Labor Standards Act (FLSA) and similar state laws make the status of these two different types of worker much more complicated. Many nonprofits have discovered there is more to distinguishing between employees and volunteers than whether an individual receives a regular paycheck.

The Fair Labor Standards Act

The FLSA is the federal law that covers minimum wage, overtime rules, employment status, child labor and record-keeping requirements. It applies to just about every business. The FLSA determines which employees are exempt from the act (not covered by it) and which are nonexempt (covered by the act). The Department of Labor (DOL) enforces the FLSA and has produced volumes of regulations.

The FLSA requires that all employees be paid at least minimum wage for all hours worked and time and a half for all hours worked in excess of 40 in a workweek. It also requires the employer to keep records of hours worked. If the line that distinguishes a volunteer from an employee is crossed, a nonprofit can face significant financial liability.

What Is a Volunteer?

According to the DOL, a volunteer is an "individual who performs hours of service ... for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered."

There are a number of factors to consider in determining whether an individual is a true volunteer. No single factor controls. These are the factors:

- Is the entity that will benefit/receive services from the volunteer a nonprofit organization?
- Is the activity less than a full-time occupation?
- Are the services offered freely and without pressure or coercion?

- Are the services of the kind typically associated with volunteer work?
- Have regular employees been displaced to accommodate the volunteer?
- Does the worker receive (or expect) any benefit from the entity to which he/she is providing services?

A volunteer position is likely to be regarded as “ordinary volunteerism” if the answer to the first four questions is “yes” and the answer to the last two is “no.”

Can Employees Be Volunteers?

Sometimes employees want to volunteer for a particular event. Can they be considered volunteers since they want to help out and are willing to work without being paid? No.

Allowing regular employees to work “off the clock” raises the risk of costly investigations by the DOL and payment of wages that should have been paid, with penalties and interest. Your happiest employee today could be your most disgruntled next year. It is the employer’s duty to keep track of time worked by nonexempt employees and ensure FLSA compliance. When the employer does not keep track of hours employees work, the DOL will rely on the word of the employee to determine how many “volunteer” hours were worked.

If you do allow an employee to “volunteer” for an event, she or he must be paid for the time and the hours worked counted in calculating overtime.

Exempt employees, on the other hand, can work as volunteers. If they do, they should go through the same process and be subject to the same rules as volunteers who are not employees.

Can Volunteers Be Paid?

Yes, under very limited circumstances and in nominal amounts. Any compensation given to a volunteer must be limited to reimbursement for expenses, reasonable benefits and/or nominal payments. The two questions that must be examined are:

1. Whether the payments or benefits are taxable compensation?



If you have questions or need a volunteer policy for your organization, contact Sandy Girifalco, Esq., at 215.564.8064 or sgirifalco@stradley.com.

and

2. Whether payments to a volunteer jeopardize the worker’s volunteer status?

In general, a nonprofit employer must treat payments to volunteers the same as payments to employees, which means that income tax and FICA contributions must be withheld. Living allowances, stipends and in-kind benefits should generally be treated like wages.

Inexpensive items (e.g., a \$50 gift card, free meal, holiday gift, occasional tickets) are *de minimis* fringe benefits and do not have to be included as income. The more expensive the item or the more frequent its use, the less likely it is to qualify as *de minimis* benefit.

In-kind benefits that do not qualify for a tax exemption must be assigned a dollar value for tax purposes. The nonprofit is responsible for determining the fair market value of the goods it distributes to volunteers and for withholding the tax from a volunteer’s stipend or other income provided. Generally, the fair market value of a benefit is the amount an individual would have to pay for the item. Reimbursements to volunteers are taxable to the same extent as reimbursements to employees. Only if the expense qualifies as a tax deduction for an employee does the volunteer also avoid tax liability. For example, reimbursement for a volunteer’s purchase of a uniform, required for program participation, would not be part of taxable income.

Reimbursements for ordinary living expenses like food, clothing, and commuting to and from home are taxable income. You may be able to provide meals tax-free in some circumstances, but reimbursements for meals on an on-going basis or for groceries to cook meals will ordinarily be subject to tax.

Whatever is given to the volunteer should not be viewed as compensation or tied to productivity.

What Risks Does the Employer Face?

The risks are huge if an individual is not a true volunteer but is determined to be an employee of a nonprofit organization. Probably the biggest risk is that the nonprofit will have to pay the “volunteer” minimum wage for each hour worked plus time and a half for more than 40 hours worked in a workweek over the past two to three years. This could also result in penalties, interest and attorneys’ fees.

In addition, if the individual is really an employee, not a volunteer, she or he may be eligible for workers’ compensation, unemployment compensation and other benefits. The person would also be protected by various employment laws, including laws providing for leave time and laws protecting against discrimination.

What Risks Does the Volunteer Face?

Payments to volunteers could lead to a loss of legal protection for the volunteer. The Volunteer Protection Act (VPA) specifically protects a volunteer from

liability in the performance of his or her volunteer work if the volunteer:

1. performs services;
2. for a nonprofit organization or governmental entity; and
3. either:
 - a) receives no compensation (although reasonable reimbursement for expenses incurred is allowed); or
 - b) does not receive anything of value in lieu of compensation in excess of \$500 per year.

The VPA does not cover employees.

Most volunteers retain that status without risk, but if the line is crossed it can place the organization’s mission in jeopardy. Word to the Wise: Nonprofits need to know and understand the rules applicable to volunteer versus employee status and to make sure they do not cross that line. ■



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