



“VOLUNTEERING” IN THE CROSSROADS OF IMMIGRATION AND LABOR LAW

From the NAFSA Region VIII Conference in Bethesda, Maryland - November 2002

Helene Robertson, Director

Murray Welsh, Director
International Student, Faculty & Staff Services
The Johns Hopkins Medical Institutions
Baltimore, Maryland

International Student, & Scholar Services
The Catholic University of America
Washington, DC

Volunteering is a vital part of American society and many academic institutions are enormously indebted to the true volunteers that make many programs possible – the volunteers in our hospitals who read to the patients, candy strippers, alumni volunteers that organize events, interns seeking to observe and learn business practices ... The list is almost endless. These activities are wholeheartedly (and rightly) encouraged. Care should be taken to make sure that volunteerism is not abused and does not abuse the Fair Labor Standards Act.

THE EMPLOYER

Under the FLSA, an

“Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

[FLSA Sec. 3(d)]

THE EMPLOYEE

Section 3 (e) of the FLSA offers the following definition for determining who is an employee:

“(1) Except as provided in paragraphs (2),(3), and (4), the term “employee” means any individual employed by an employer....

(2) In the case of an individual employed by a public agency, such term means –

(A) any individual employed by the Government of the United States – (i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code), (ii) in any executive agency (as defined in section 105 of such title), (iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service, (iv) in a non-appropriated fund instrumentality under the jurisdiction of the Armed Forces, or (v) in the Library of Congress;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual – (i) who is not subject to the civil service laws of the State, political subdivision or agency which employs him; and (ii) who – (I) holds a public elective office of that State, political subdivision, or agency, (II) is selected by the holder of such an office to be a member of his personal staff, (III) is appointed by such an officeholder to serve on a policy making level, (IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or (V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer’s immediate family.

(4) (A) The term “employee” does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate government agency, if – (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (ii) such services are not the same type of service which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.”

THE VOLUNTEER

A volunteer is often viewed simply as someone who offers his or her services for free. Contained in the definition of “employee” above is also the FLSA guidance on volunteers, albeit in the context of employees of public agencies.

The regulations define a volunteer as:

(29 C.F.R. 553.101)

(A) An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours. Individuals performing hours of service for such a public agency will be considered volunteers for the time so spent and not subject to sections 6, 7, and 11 of the FLSA when such hours of service are performed in accord with sections 3(e)(4)(A) and (B) of the FLSA and the guidelines in this subpart.

(B) Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes, but expressed its wish to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to “volunteer” their services.

(C) Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.

(D) An individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.

EMPLOYMENT

The FLSA provides a fairly broad definition of employment:

“Employ” includes to suffer or permit to work. [Sec. 3 (g)]

Guidance from the FLSA

DOL looks to Section 3(e)(4) for guidance for determining what constitutes a volunteer, even though it addresses only volunteers in the context of public agencies. Essentially the follow general guidelines apply:

- No expectation of compensation, and
- Services are not the same services for which the individual is employed by the employer
- If the services are the same for which the individual is normally employed, they can be provided only for a different employer/public agency.

Essentially, the following test, which is adapted from the publication *Negotiating the Legal Maze to Volunteer Service* by Anna Seidman of the [Nonprofit Risk Management Center](#), may be helpful in determining volunteer status:

- Are the services performed for civic, charitable or humanitarian purposes?
- Are the services entirely voluntary, with no direct or indirect pressure by the employer, with no promise of advancement and no penalty for not volunteering?
- Are the activities predominately for the individual’s own benefit?
- Does the individual impair the employment opportunities of others by performing work that would otherwise be performed by regular, paid employees? Does the “volunteer” provide services that are the same as services provided by a paid employee?
- Is there no expectation of compensation either now or in the future for these services?
- Do the activities take place during the individual’s regular working hours or scheduled overtime hours?
- Is the volunteer time insubstantial in relation to the individual’s regular hours?

OTHER FACTORS THAT DOL MAY CONSIDER

The government and the employer should look at the economic reality of the arrangement.

- Does the individual depend on the employer for sustenance? Is a faculty or staff member providing the volunteer with “gifts” in the form of money or food?
- Does the employer gain a significant benefit from the “volunteer?” What is the nature of this benefit?

The Department of Labor does provide the following guidance for religious, charitable, and nonprofit organizations, schools, institutions, and volunteer workers in Section 10b3 of their Field Operations Handbook 10/20/93:

(a) There is no special provision in the FLSA which precludes an employee-employer relationship between a religious, charitable or nonprofit organization and persons who perform work for such an organization. For example, a church or religious order may operate an establishment to print books, magazines, or other publications and employ a regular staff who do this work as a means of livelihood. IN such cases there is an employee-employer relationship for purposes of this Act.

(b) Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be "employees." However, the fact that such a person is a member of a religious order does not preclude an employee-employer relationship with a State or secular institution.

(c) In many cases the nature of religious, charitable and similar nonprofit organizations, and schools is such that individuals may volunteer their services in one capacity or another, usually on a part-time basis, not as employees or in contemplation of pay for services rendered. For example, members of civic organizations may help out in a sheltered workshop; women's organizations may send members or students into hospitals or nursing homes to provide personal services for the sick or the elderly; mothers may assist in a school library or cafeteria as a public duty to maintain effective services for their children; or fathers may drive a school bus to carry a football team or band on a trip. Similarly individuals may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross; working with children with disabilities or disadvantaged youth, helping in youth programs as camp counselors, scoutmasters, den mothers, providing child care assistance for needy working mothers, soliciting contributions or participating in benefit programs for such organizations and volunteering other services needed to carry out their charitable, educational, or religious programs. The fact that services are performed under such circumstances is not sufficient to create an employee-employer relationship.

(d) Although the volunteer services (as described in (c) above) are not considered to create an employment relationship, the organizations for which they are performed will generally also have employees performing compensated services whose employment is subject to the standards of the Act. Where such an employment relationship exists, the Act requires payment of not less than the statutory wages for all hours "worked" in the w/w/ [work week]. However, there are certain circumstances where such an employee may donate services as a volunteer, and the time so spent is not considered to be compensable "work." For example, an office employee of a hospital may volunteer to sit with a sick child or elderly person during off-duty hours as an act of charity. WH [Wage and Hour] will not consider that an employee-employer relationship exists with respect to such volunteer time between the establishment and the volunteer or between the volunteer and the person for whose benefit the service is performed. Another example is where an office employee of a church may volunteer to perform non-clerical services in the church, preschool during off duty time from his or her office work as an act of charity. Conversely a preschool employee may volunteer to perform work in some other facet of the church's operations without an employment relationship being formed with respect to such volunteer time. However, this does not mean that a regular office employee of a charitable organization can volunteer services on an uncompensated basis to handle correspondence in connection with a special fund drive or to handle other work arising from exigencies of the operations conducted by the employer.

THE US CITIZENSHIP AND IMMIGRATION SERVICE (USCIS)

The USCIS has a slightly different definition of an employee that should also be kept in mind:

An individual who provides services or labor for an employer for wages or other remuneration.

Remuneration can include such innocuous things as reimbursements, food (coffee, doughnuts, pizza, etc.)

PENALTIES

Employers who wrongly classify individuals as volunteers may be liable for:

- The payment of back wages
- Federal fines of \$10,000 for violating wage and hour laws
- State fines of up to \$10,000 for employing an individual without proper employment authorization
- Potential loss of federal research grants and contracts as a result of Executive Order #12989 and the inability to re-apply for federal grants/contract for 1 – 2 years.

Individuals found to have been working without appropriate employment authorization have violated the terms of their status and are subject to deportation. This could also negatively impact their plans to remain in the U.S.

Resources:

Seidman, Anna, *Negotiating the Legal Maze to Volunteer Service: A Community Service Brief*. Nonprofit Risk Management Center, Washington, DC

<http://www.ed.gov/americanreads/resourcekit/Negotiating/title.html>

Managing Volunteers within the Law

<http://ed.gov/americanreads/resourcekit/ManageVolunteers/index.html>