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VOLUNTEERS AND THE DEPARTMENT OF LABOR

The Definition of a "Volunteer"

A "Volunteer" is an individual who donates his or her services without contemplation of pay, to a religious, charitable or similar non-profit organization for public service, religious or humanitarian purposes. The Department of Labor ("DOL") considers the following factors in determining whether someone is engaged in volunteering:

- Whether the work is for public service, religious, charitable or humanitarian objectives;
- Whether volunteer status is not given merely as a means by the employer of avoiding minimum wage and overtime requirements;
- Whether the individual's services are offered voluntarily and freely, without pressure or coercion from the employer;
- Whether the services are of the kind typically associated with volunteer work;
- Whether the services performed are different from those typically performed by paid workers; and
- Whether the individual works without promise, expectation, contemplation or receipt of either pay or future employment.

The following may trigger problems in the eyes of the DOL that an individual is an employee rather than a volunteer:

- A volunteer displacing another paid worker;
- A volunteer providing services in competition with a paid worker or otherwise impairing employment prospects of paid workers;
- A volunteer engaging in services not typically associated with volunteer work;
- An employer using the volunteer full-time;
- A volunteer receiving compensation or benefits other than "nominal" compensation;
- Exercising too much control over the volunteer;
- Scheduling the volunteer to a strict schedule like you would for an employee; or
- A volunteer indicating that he or she expected to receive compensation for the services.

It is important to understand that any one of the above on its own may not be enough to lead the DOL to conclude the individual is an employee. The DOL would look at the totality of the circumstances to determine whether the individual is a volunteer or an employee.

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Criteria for Volunteering by Employees

In the absence of any statutory or regulatory exemption, the U.S. Department of Labor has utilized statutory precedent to formulate an exemption for the employees of charitable entities who wish to perform volunteer work for their nonprofit employers. The Department has drafted a set of six criteria that will qualify nonprofit organization employees for an FLSA exemption. Volunteer status will be granted under the following circumstances:

1. The services are entirely voluntary, with no coercion by the employer, no promise of advancement, and no penalty for not volunteering;
2. The activities are predominantly for the employee's own benefit;
3. The employee does not replace another employee or impair the employment opportunities of others by performing work which would otherwise be performed by regular employees;
4. The employee serves without contemplation of pay;
5. The activity does not take place during the employee's regular working hours or scheduled overtime hours;
6. The volunteer time is insubstantial in relation to the employee's regular hours.

In addition, although not specified within the aforementioned criteria, the Department of Labor appears to require that nonprofit employee volunteers offer their uncompensated services in activities distinct from their normal employment duties. Thus, the following would constitute permissible volunteer situations for the employees of a nonprofit public broadcasting television station:

- An administrative assistant or janitor who volunteers to work as a member of the production crew;
- A secretary or bookkeeper who offers to do some announcing and air work.

Compensation for Non-Employee Volunteers

Although true "volunteers" may expect no compensation in exchange for service, some may still receive reasonable benefits, a nominal fee, or any combination thereof, without losing their volunteer status. No specific amount of compensation separates an employee from a volunteer. The U.S. Department of Labor regulations address this issue in relation to some of the questions raised for volunteers at public agencies[1]. These regulations offer a number of examples of payments, reimbursements, benefits and awards that will not deprive an individual of his or her volunteer status including:

- A uniform allowance or reimbursement for reasonable cleaning expenses paid to volunteers requiring a uniform to perform their duties;
- Reimbursements for out-of-pocket expenses incidental to providing volunteer services, including costs of meals and transportation;
- Reimbursements for tuition, transportation and meal cost involved in attending classes to learn how to effectively perform volunteer services;
- Reimbursements for books, supplies and other materials essential to volunteer training;
- Awards such as "length of service" awards.

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[1] Although the FLSA regulations identify volunteering for public agencies as an exception to the minimum wage laws, the DOL has applied this exception more broadly to include volunteer work for religious, charitable, humanitarian or civic purposes on behalf of a non-profit organization.

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- Nominal compensation is allowed, such as stipend which is not tied to productivity or the amount of time spent on the volunteer work
- Reimbursement for reasonable expenses is allowed. Free memberships are NOT nominal compensation and should not be offered to volunteers.

The regulations also permit volunteers to a public agency to receive nominal fees that are neither a substitute for compensation nor tied to productivity. To determine whether a payment constitutes a "nominal fee" that will not result in a volunteer's loss of FLSA exempt status, the U.S. Department of Labor will examine the following:

- The distance traveled and the time and effort expended by the volunteer;
- Whether the volunteer has agreed to be available around the clock or only during certain specified time periods;
- Whether the volunteer provides services as needed or throughout the year.

The regulations specify that an individual who volunteers to provide periodic services on a year-round basis may receive nominal monthly or annual stipend or fee without losing volunteer status.

A volunteer who receives any or all of the payments, benefit, and fees identified within the regulations does not automatically qualify for an FLSA exemption. The Department of Labor reserves the right to examine each case on an individual basis, explaining:

> Whether the furnishing of expenses, benefits, or fees would result in individuals' losing their status as volunteers under the FLSA can only be determined by examining the total amount of payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation.

Courts also look at the "economic realities" of a particular situation to determine an individual's employment status. Using the "economic reality" test, some courts have ruled that an employee is one who is dependent for sustenance upon the business to which he or she renders service. Thus, if a worker expects to receive compensation, whether as cash or as in-kind benefits, in exchange for the services rendered, the services constitute "employment." Even the expectation of food and shelter in exchange for labor can create an employment relationship that will place the individual within the protections of the federal labor law.

An individual's motivation, such as whether he or she expects compensation for his or her labor, factors greatly in the determination of whether he or she qualifies as a volunteer. Nonetheless, a worker may not simply waive his or her right to FLSA coverage in order to enable his or her employer to escape the wage, hour and child labor provisions.

Other Significant Factors

In addition to compensation, the Department of Labor looks at other benefits flowing from the relationship. If the employer/organization profits too greatly from the service rendered, his or her gain suggests an employment relationship. In contrast, if the worker secures education and experience at the expense of or even to the detriment of the employer, the flow of benefits suggests an exempt arrangement.

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Competition is yet another factor that influences the Department of Labor's evaluation. A volunteer should never displace or replace a member of the workforce. If his or her service jeopardizes the employment of another individual, the Department of Labor is unlikely to grant volunteer status.

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