What is the difference between an employee and volunteer and why does it matter?

By Kara M. Craig

Your nonprofit organization may rely on volunteers, as well as employees, to accomplish your mission. The law certainly recognizes the importance of, and seeks to encourage volunteerism. However, blurring the distinction between your volunteers and employees may inadvertently subject you to liability for wages, overtime and back-taxes under the Fair Labor Standards Act (FLSA).

Who is an employee under the FLSA?

As I discussed in my June article regarding nonprofit interns (http://is.gd/y82qef), “employ” is broadly defined under the FLSA as “to suffer or permit to work.” Under the Act, covered, non-exempt individuals who are “suffered or permitted” to work must be compensated for the work they perform for their employer.

Who is a volunteer under the FLSA?

On the other hand, nonprofit volunteers should not expect, and are generally not entitled to compensation under the FLSA. According to the Department of Labor (DOL), a volunteer is an individual who:

1. volunteers his or her services for civic, charitable or humanitarian reasons;
2. without expectation of pay;
3. offers services freely and without coercion from the employer; and
4. is not already employed by the organization to render the same type of services.

Volunteer roles generally:

1. do not require the worker to follow a consistent, full-time schedule;
2. are required on an “as needed” basis throughout the year;
3. vary depending on the programs and services of the nonprofit; and
4. are different in scope, duties and expectations from paid positions in the organization.

Can I compensate my volunteers?

Yes, subject to restrictions under the FLSA of course. Think of a small minefield. According to the DOL, you may offer your volunteers reimbursement for out of pocket expenses, reasonable benefits, or a nominal fee to perform services. But what does reasonable and nominal mean? It depends on your
specific situation. As a rule, however, monetary benefits should never be tied to hours worked, productivity or the organization’s ability to pay. Given the DOL’s low threshold, it is best to try to avoid offering compensation that has a real dollar value.

So what’s a nonprofit employer to do?

- **Put it in writing.** To effectively distinguish between your employees and volunteers, document the distinct roles that each type of worker plays in the organization. Even better, create written job descriptions for your paid positions, including classification and status, education and other requirements, and specific job duties. Volunteer roles should also be defined in position descriptions or volunteer agreements that emphasize volunteer status and make it clear that no compensation will be provided.

- **Document policies in separate handbooks.** Employee handbooks should be developed and distributed to employees only. Likewise, volunteer handbooks or volunteer agreements should be developed and distributed to your volunteers only, with minimal overlap with employee policies.

- **Pay attention to “off the clock” service.** When your non-exempt workers “volunteer” outside their regular hours, you may be exposed to wage and hour claims. It is your duty to track employees’ time and compensate them in compliance with the FLSA. If your employee is not freely volunteering outside of his or her regular duties with no expectation of pay, then he or she is on the clock.

- **Be careful about paying volunteers.** Paying your volunteers any monetary benefit may inadvertently convert them to employees and expose you to wage and hour claims. If you do want to compensate your volunteers, seek legal advice to craft a plan that preserves volunteer status under the FLSA. You will find that there are many creative ways to reward volunteer service short of pay.

NOTE: This article is strictly informational and is not intended to be or convey legal advice or guidance. Readers should discuss particular situations with legal counsel before relying or acting upon any information in this article.

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**About the Author**

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