Spotlight on People: Managing Volunteer and Employee Risks

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When Does Compensating Volunteers Turn Them Into Employees?

Last year the questions flowing from the Center's newsletter article on this issue were surprising. We didn't realize that so many organizations find ways to "pay" their volunteers in small, and sometimes, big ways! New guidance from the U.S. Department of Labor may help answer questions about when paying a volunteer is "too much." In two recently issued opinion letters, the DOL has indicated that a "20% rule" seems to be in play when determining whether a volunteer should in fact be treated as an employee for Fair Labor Standard Act purposes (minimum wage, overtime, and other hour and wage regulations).

In one fact pattern involving a public agency, the DOL determined that when a public agency pays volunteer fire fighters who provide a minimum of 24 hours of volunteer service in a month, a monthly stipend to *reimburse them for their expenses*, but no other benefits, the fire fighters are still considered *volunteers*, as long as the fee is "not a substitute for compensation or tied to productivity" and *does not exceed 20%* of the total compensation that the agency would pay an employee for performing similar services.

In the other fact pattern involving a public agency, the DOL determined that employees who also volunteered in a different capacity for their employer and were paid more than a nominal fee, should be treated as employees when volunteering because the fee they received exceeded 20% of the total compensation that would have been paid to an employee to perform similar services. Additionally, and in contrast to the first case above, the payments were not reimbursements for expenses incurred by the "volunteers."

In a third opinion letter involving a private nonprofit, the DOL underscored its position that employees can only *volunteer* for their employer if they do so *in a capacity that is different* from their regular employment duties. If the employer is volunteering in the same capacity (doing the same duties for which s/he is also paid) then the hours worked, whether "volunteered" or not, must be combined for FLSA purposes and the employee must be paid for *all the service hours provided to the employer.*

New Family Leave Regulations Effective NOW!

A key member of your staff requests a leave of absence to take care of a seriously ill family member. What is your response? Beyond preserving jobs and benefits, do you know what obligations your nonprofit has to provide employees with notice of their rights, and what forms to use with staff member requesting leave? Nonprofits with 50+ employees are now required to follow the revised, final regulations of the Family Medical Leave Act (FMLA).

The final regulations incorporate amendments to the FMLA made during 2008 by the passage of new laws that provide special leave time for family members of those serving in the military. Now, eligible family members/caregivers of US service members seriously injured in the line of duty are entitled to up to 26 weeks of

leave in a 12-month period. Other provisions extend the 12-week leave period to family members of the National Guard and Reserves in certain circumstances.

Highlights of the final rules:

1. **Notice of Rights Under FMLA**: Employers are required to notify employees of their right to family leave through a *general notice* about the FMLA (such as a poster). Employers must also include the information in this general notice in any employee handbook or other written policies or manuals describing employee benefits and leave provisions. An employer that doesn't use a handbook must provide this general notice to new employees at the hiring stage. Employers must also provide *specific notice about an employee's rights and responsibilities under the FMLA*. There is a $110 penalty for failing to provide notice. More information about these notice requirements is available here.
2. **Designation of Leave**: Employees who request leave must be given *written notice of their designation of leave* within five days of the employer learning that the employee is taking leave for a FMLA-qualifying reason.
3. **Serious Health Condition**: To qualify for leave due to a serious health condition, an employee must be incapacitated and miss work for three or more consecutive days *and* be seen by a medical health professional on two or more occasions within the first 30-days: the first visit must occur *within seven days* of the first day of incapacity.
4. **Limitation on Supervisors**: Direct supervisors *may not* contact an employee's medical health provider to inquire about the employee's health or ability to return to work.
5. **Certification Forms**: Forms for employers to use to request certification of an employee's serious medical condition have been revised. Click here for links to the **new certification forms** that covered nonprofits should now use. Certification from medical health professionals should be requested within five days of an employee's request for leave.
6. **Fitness to Return to Work**: Fitness for return to work certifications need to be requested at the *beginning* of leave and may request that the medical health professional specifically address the employee's ability to fulfill the "essential functions" listed on the job description.
7. **Light Duty**: The final rules clarify that if an employee returns to work under "light duty" restrictions imposed by the employer, the light duty work is not part of his/her 12-week leave period.

Among other changes, the new rules, which take effect on January 16, 2009, enhance the remedies employees may seek for FMLA violations.

The Nonprofit Risk Management Center provides guidance on volunteer risk management and employment matters to nonprofit leaders throughout the year. To request a proposal to undertake a review of your volunteer risk management or HR policies, contact the NRMC at (703) 777-3504.