Classify Volunteers with Care to Minimize Liability for Misclassification

Resource Type: Articles

Topic: Volunteer Risk Management

In addition to the liability exposures discussed in this article, a nonprofit is also exposed to liability for misclassifying volunteers. In rare instances, volunteers may be considered employees by the federal or applicable state labor departments, triggering liability for minimum wage, tax withholding, and other employee fringe benefits and protections. And when volunteers are injured while serving a nonprofit mission, the injured volunteer could allege that they were actually an employee in order to gain access to workers' compensation benefits.

The Fair Labor Standards Act (FLSA) defines employment broadly as "to suffer or permit to work." Under the FLSA, a person can be properly classified as a volunteer if two conditions are met. First, the person must freely donate their services for a civic, charitable, religious or humanitarian purpose without any expectation or receipt of compensation. Second, the person's volunteer service must not displace regular paid employees.

Volunteer Classification Minimums:

- *No compensation*. Reducing the possibility of misclassification begins with addressing the issue of compensation. Paying volunteers anything of value that could reasonably be construed to be payment in exchange for work exposes your nonprofit to the risk of the volunteer being deemed an employee, triggering liability for back pay, taxes and penalties.
- *No coercion or dual roles*. U.S. Department of Labor guidance emphasizes that volunteer service must be given without actual or implied pressure, coercion or intimidation. This also means a nonprofit's employees may not be required to provide, on a volunteer basis, the same type of services for which they are being paid.
- *Civic, charitable, religious or humanitarian purpose*. Volunteering at a for-profit commercial business violates the FLSA, as does assigning volunteers to work in a commercial activity run by a nonprofit.
- *No displacement*. Volunteers should not replace or substitute for paid staff. Do not create positions in your organizations that are alternately filled by paid staff and volunteers. It is permissible, however, as part of a restructuring or redesign process to change a position on an ongoing basis from a paid employee role to a volunteer role.

Classification Risk Tips:

- *Do not adopt a fixed, prescribed schedule of work for all volunteer roles that mimics the schedule of paid staff*, such as 9 am-5 pm, Monday-Friday. You may, however, request that volunteers work a regular schedule, or choose the day(s) on which it is most convenient to serve. The more prescriptive you are about days and hours of work, the more the volunteer role begins to look like a paid employee role.
- *Do not ask volunteers to sign a contract of employment or agree to follow the rules found in your Employee Handbook*. Do, however, use Volunteer Position Descriptions and a Volunteer Handbook to convey the expectations and essential rules at the organization.
- *Do not pay volunteers other than reimbursing them for expenses*. What's the harm of token

compensation to show appreciation for volunteer service? One area of potential harm is loss of the liability protection volunteers enjoy under the federal Volunteer Protection Act of 1997 and similar state laws. One of the conditions of VPA is that the volunteer receives no compensation, other than reasonable reimbursement of expenses, and nothing of value in lieu of compensation in excess of $500 per year.

Resources:

- Factsheet #14A: Non-Profit Organizations and the FLSA, WHD, US DOL
- Employee or Volunteer: What's the Difference? Nonprofit Risk Management Center