

Employee or Volunteer: What's the Difference?



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Nonprofit organizations frequently depend on the service and commitment of volunteers as well as the labor of employees. The skills and talents of both types of workers bring nonprofit missions to life. At first glance, the simple difference between these two types of workers is that employees get paid and volunteers don't. Yet many nonprofit leaders have discovered that there is more to distinguishing between employees and volunteers than whether an individual receives a regular paycheck. This article explores two subtopics under the umbrella issue of employee versus volunteer status: whether employees may also volunteer, and the consequences of compensating volunteers.

When Employees Also Volunteer

May your nonprofit's paid employees also serve as unpaid volunteers? Each year the NRMCM team receives numerous calls and email messages from leaders who tell us that their dedicated, paid staff are eager to volunteer in the evenings and on weekends. In some cases these willing staff volunteer to work "off the clock," while in other instances they sign up or formally apply for volunteer roles, such as volunteer ticket takers, coaches or special event staff, or as volunteer mentors in the nonprofit's mentoring program. But we also receive calls from employees who want to know whether they can be forced to "volunteer" and on occasion from employees who are indignant after having been told that they cannot volunteer their services in the agency where they are employed.

At the time the Fair Labor Standards Act ("FLSA") was revised in 1985, Congress stated its desire to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to 'volunteer' their services. Yet the Department of Labor's Wage and Hour Division has recognized that a volunteer in a religious, charitable, civic, humanitarian or similar nonprofit is not subject to the FLSA. Volunteers may work for nonprofits without expectation of compensation, and nonprofits are free to recruit and retain true volunteers without undue worry about the risk of wage and hour claims.

According to the Department of Labor, a volunteer is: an "individual who performs hours of service' for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered. To determine whether an individual is a true volunteer engaged in "ordinary volunteerism," the Department of Labor considers a number of factors. No single factor is determinative. The factors include:

- Is the entity that will benefit/receive services from the volunteer a nonprofit organization?
- Is the activity less than a full-time occupation?
- Are the services offered freely and without pressure or coercion?
- Are the services of the kind typically associated with volunteer work?
- Have regular employees been displaced to accommodate the volunteer?
- Does the worker receive (or expect) any benefit from the entity to which it is providing services?

A volunteer position at your nonprofit is likely to be regarded as “ordinary volunteerism” and safely exempt from the minimum wage requirements of the FLSA if you can answer “yes” to the first four questions and “no” to the final two questions.

Risk Management Tips

If your nonprofit engages both paid personnel and unpaid volunteers and paid employees are eligible to volunteer, consider the following tips to increase the safety of your HR and volunteer management practices.

- **Put it in Writing** — An important step in distinguishing between your employees and volunteers is to document the distinct roles that each group of workers plays in the organization. First, make certain that you have written job descriptions for each paid role in your nonprofit. A job description should contain information on the employee’s classification and status (e.g., regular/non-exempt/part-time or temporary/full-time/exempt, etc.), education and other requirements, as well as specific job duties. Volunteer roles should be defined in position descriptions or volunteer agreements that emphasize volunteer status and make it clear that no compensation will be provided. A Volunteer Agreement is especially helpful when the volunteer is also an employee, because it requires both the nonprofit and the volunteer to agree and acknowledge that volunteer service is separate from employment and that the willingness to volunteer will have no impact on the terms of a volunteer’s employment with the agency.
- **Document Policies in Separate Manuals** — While the NRMC team recognizes the desire to economize in developing policies, we believe it is inappropriate and risky to consolidate policies for employees and volunteers in a single handbook or manual. An Employee Handbook or Personnel Policies Manual should be developed and distributed to employees only. A Volunteer Handbook or Volunteer Policies Manual should be developed for your volunteer workforce. The overlap in policies should be minimal, such as those related to safety matters. Employees who also volunteer should be instructed that their volunteer service is governed by the policies in the Volunteer Handbook, and that their paid service is governed by the policies in the Employee Handbook. An employee who volunteers should have a job description and a Volunteer Agreement.
- **Never Ignore “Off the Clock” Service** — Employers who look the other way when nonexempt workers “volunteer” after hours expose their nonprofits to costly wage and hour claims. The nonexempt employee who is content to volunteer today could be an aggrieved plaintiff demanding unpaid wages and penalties six months from now. Keep in mind that it is the employer’s duty (not the employee’s!) to keep track of the hours worked by nonexempt employees and to ensure that compensation practices are FLSA compliant. Exempt employees are expected to work the hours required to perform their jobs. Most exempt employee schedules include occasional long days and extended work weeks. The additional time spent beyond a customary eight-hour day or 40-hour work week is generally part of the job, and not “volunteer” service to the agency. If, however, an exempt worker seeks a formal volunteer role in the nonprofit he or she should be required to follow the proper channels and should be subject to the rules and supervision associated with that volunteer role.
- **Never Coerce Employees to Volunteer** — An employee who feels coerced to “volunteer” after regular work hours is a wage and hour claim waiting to happen. No individual—whether they are on your payroll or not—should be coerced to volunteer their time for your nonprofit. Make certain that all supervisors at your organization are aware of the distinction between employee and volunteer status, and that they understand that strong-arming employees to work without pay is a violation of policy that may subject the supervisor to discipline.
- **Remember the Volunteer Service Rule of Three** — “True” volunteers are those who: (1) work toward public service, religious, or humanitarian objectives; (2) do not expect or receive compensation for services; and (3) do not displace any genuine employees.

Can We Pay Our Volunteers?!

Many nonprofit organizations offer some monetary benefit to their volunteers, such as stipends, reimbursement for out of pocket expenses, discounts on services, and so forth. “Bona fide” volunteers are those whose

compensation is limited to reimbursement for expenses, reasonable benefits and/or nominal fees for services.

There are at least two key issues that arise when volunteers receive payment or benefits from the nonprofit organizations they serve. The first issue is whether the payments or benefits are taxable compensation. The second issue is whether payments to a volunteer jeopardize the worker's volunteer status.

Taxation of Benefits Provided to Volunteers

In general, a nonprofit employer must treat payments to volunteers the same as payments to employees, which means that income tax and FICA contributions must be withheld. (See 26 U.S.C. § 3402). Living allowances, stipends and in-kind benefits should generally be treated like wages.

Inexpensive items (e.g., a coffee cup, t-shirt, or admission to an event where the volunteer is representing the organization) may be excluded from reportable, taxable income as *de minimis* fringe benefits (See Internal Revenue Code section 132(a)(4)). Additional examples include holiday gifts, light refreshments, occasional personal use of the nonprofit's office equipment, occasional tickets for entertainment events, and personal use of a cell phone provided primarily for the nonprofit's business. The more expensive the item or the more frequent its use, the less likely it is to qualify as *de minimis* benefit. Keep in mind that a *de minimis* fringe benefit should never be a form of disguised compensation. But, except as specifically provided (i.e., occasional meal money or local transportation fare and reimbursements for public transit passes), a cash fringe benefit (including a gift card) is not excludable as a *de minimis* fringe benefit. See Regulations §1.132-6(c). For more information on cell phones as taxable benefits, visit: http://www.irs.gov/irb/2011-38_IRB/ar07.html.

In-kind benefits that do not qualify for a tax exemption must be assigned a dollar value for tax purposes. Your nonprofit is responsible for determining the fair market value of the goods it distributes to volunteers and for withholding the tax from a volunteer's stipend or other income provided. Generally, the fair market value of a benefit is the amount an individual would have to pay for the item at a local store or restaurant.

Reimbursements to volunteers are taxable to the same extent as reimbursements to employees. Only if the expense qualifies as a tax deduction for an employee does the volunteer also avoid tax liability. Thus, reimbursement for a volunteer's purchase of a uniform, required for program participation, would not be considered part of taxable income.

Jeopardizing Volunteer Status

A second issue is whether the payment of a fee, stipend or valuable benefits jeopardizes the legal status of a volunteer. The unwitting conversion of a volunteer to employee status has potential negative consequences for the employer as well as the volunteer. In contrast with their volunteer counterparts, employees are subject to various forms of legal protection, such as the guarantee of a minimum wage under the federal and state wage and hour laws, and protection from illegal discrimination under Title VII. Nonprofit employers should therefore proceed with care when determining the benefits that will be provided to volunteer workers.

Short of changing a volunteer's status to that of employee, payments to volunteers can also lead to a *loss* of legal protection for the volunteer. The Volunteer Protection Act specifically protects a volunteer who: (1) performs services; (2) for a nonprofit organization or governmental entity; and (3) either (a) receives no compensation (although reasonable reimbursement for expenses incurred is allowed), or (b) does not receive anything of value in lieu of compensation in excess of \$500 per year. Therefore a "volunteer" who receives a stipend of \$50 per month, or \$600 annually, is *not protected* under the VPA.

What is Nominal Compensation?

While there is no clear-cut guidance on what constitutes "nominal compensation" to a volunteer, 29 C.F.R. § 553.106(e) provides that "a fee is not nominal if it is a substitute for compensation or tied to productivity." In addition, Section 553.106(f) of FLSA regulations provides that "determining whether the expenses, benefits, or fees would preclude an individual from qualifying as a volunteer under the FLSA requires examining the total amount of payments in the context of the economic realities of a particular situation." DOL's Wage and Hour Division presumes that fees paid to volunteers are nominal as long as the fee does not exceed twenty percent of what an employer would otherwise pay to hire a full-time employee for the same services. See Wage and Hour Opinion Letters [FLSA2006-28](#) (Aug. 7, 2006) and FLSA2005-51.

In a wage and hour case involving a volunteer school golf coach (who also served as a paid safety and security assistant for the same school system), both a U.S. District Court and the 4th Circuit Court of Appeals found that the coaching role was properly classified as a volunteer position. In its ruling the District Court held that the coaching role was different from the plaintiff's paid position, and that a stipend of \$2,114 was nominal. The 4th Circuit Court also appeared to be swayed by the plaintiff's decision to choose the volunteer coaching role over a part-time paid position due to the satisfaction he derived from his volunteer role. (Source: *Purdham v. Fairfax County School Board*, 4th Cir., No. 10-1048, March 10, 2011.)

Risk Management Tips

- **Proceed with Care When Paying Volunteers** — Remember that the definition of volunteer is grounded in the idea of service without contemplation of pay. Keep in mind that paying your volunteers “a little something” could have negative consequences for your nonprofit (e.g., exposure to wage and hour claims, extension of protection under civil rights laws, etc.) and negative consequences to your volunteers (e.g., loss of protection under the Volunteer Protection Act).
- **Never Offer Benefits Tied to Hours of Work** — Paying volunteers in accordance with their hours of work may be regarded as a “substitute for compensation” and inadvertently convert volunteers to employees. A key factor in determining whether payments to a volunteer are a substitute for compensation is “whether the amount of the fee varies as the particular individual spends more or less time engaged in the volunteer activities.” (See Wage and Hour Opinion Letter FLSA 2005-51).
- **Never Base Classification Solely on the Nonprofit's Ability to Pay**— The classification of a position as a volunteer role versus a paid employee role in a nonprofit should be based on a number of factors, and never solely on whether funds are available to pay the worker. Generally, volunteer roles are those that:
 - do not require the worker to follow a consistent, full-time schedule;
 - are required on an “as needed” basis throughout the year, versus a fixed number of hours on a regular basis;
 - vary depending on the programs and services of the nonprofit (e.g., special events, seasonal work, etc.); and
 - are dissimilar in scope, requirements and expectations from paid positions in the organization.

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