LEGAL HOT TOPIC:

Volunteer or Employee: What is the Difference?
By John C. Gilliland II, The Gilliland Law Firm PC

This issue’s legal hot topic focuses on the distinction between volunteers and employees. Whether an individual is a volunteer or an employee is an important distinction. If the individual is treated as a volunteer when he/she is really an employee, it means your organization can be liable for failure to comply with the many laws applicable to the employment relationship.
Volunteer or Employee: What is the Difference?

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Volunteers often play a vital role for health care providers. This is especially true for nonprofit home care agencies and hospices. But, who is a volunteer? What distinguishes a volunteer from an employee? Does it matter if the individual receives a stipend for volunteering? May volunteers’ expenses be reimbursed? May a for-profit agency or hospice have volunteers? Are internships volunteer services?

This article will attempt to give you some guidance concerning those questions.

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Recent Appeals Court Decision

Whether an individual is a volunteer has become a hot subject for discussion due to a recent U.S. Court of Appeals decision. Medel v. City of Gibraltar, 727 F3d 565 (6th Cir 2013).

In that case, the Court of Appeals held that volunteer firefighters were employees for purposes of federal Family and Medical Leave (“FMLA”) and the federal Fair Labor Standards Act (“FLSA”). The FLSA is the federal law governing minimum wage and overtime pay.

The firefighters were paid $15 per hour for the time they spent on duty and the city kept personnel files on the fighters and could discharge or promote them. Under these circumstances, the court found the firefighters were employees because they were “suffered or permitted to work” and received substantial wages for doing so.

The court also found the firefighters did not fall within an exception in the FLSA (discussed below) which states that individuals who perform services for
a public agency are not employees under the FLSA simply because they receive compensation for doing so.

**Who Is a Volunteer?**

The determination of whether an individual is a volunteer or an employee is especially important for purposes of minimum wage and overtime pay. If the person is a volunteer, he/she is not entitled to minimum wage and overtime pay. If the person is an employee, he/she is entitled to minimum wage and overtime pay unless an exemption under the wage and hour law applies.

If the person must be paid minimum wage and overtime pay, that generally will result in the person being an employee for other purposes such as for IRS withholding and unemployment compensation because compensation is being paid for the person’s services.

If no compensation is paid to the individual, the individual’s volunteer status for other purposes becomes rather murky with no clear answers.

For example, although it depends on all the facts and circumstances involved, the IRS says that if an organization controls the manner and means by which the individual’s volunteer services are performed, the individual usually will be an employee. Recently, however, IRS considered the issue of whether volunteer firefighters were employees for purposes of the Employer Mandate of the Affordable Care Act. In January 2014, IRS said it does not consider them to be employees for that purposes. Unfortunately, we don’t know if IRS will take the same view with regard to other kinds of volunteers. Hopefully, volunteers will be addressed in the final regulations for the Employer Mandate.

**FLSA**

The rules for volunteering of services under the FLSA are the best available guidance for an individual’s status even though they pertain only to the FLSA.

The FLSA rules are different for nonprofit, for-profit and public employers.

**Nonprofit Employers**

For nonprofit employers, persons who volunteer and donate their services for activities of a humanitarian, public service or religious nature to which they desire to make a contribution are generally not “employees” for FLSA purposes.

In a case involving a nonprofit religious foundation, the U.S. Supreme Court stated that “ordinary volunteerism is not threatened by the FLSA”

“... [the Department of Labor] considers many factors, including receipt of any benefits from those for whom the services are performed, whether the activity is a less than full time occupation, and whether the services are of
the kind typically associated with volunteer work. The Department has recognized as volunteer services those individuals “who help to minister to comfort of the sick, elderly, indigent, infirm, or handicapped, and those who work with the retarded or disadvantaged youth.” *Tony & Susan Alamo Foundation v. Sec of Labor*, 105 S.Ct. 1953, 1962 (1985).

Guidelines to help establish an individual as a volunteer for a nonprofit agency or hospice are addressed later in this article.

**For-Profit Employers**
The government does not recognize any volunteering of services for a for-profit employer for FLSA purposes. All purported volunteers’ work must be paid time unless they fall within one of the usual exemptions under the FLSA.

**Public Employers**
Public employers are a special case. The FLSA and its regulations expressly address volunteers and public employers.

In 1986, Congress amended the FLSA to state that individuals who volunteer to perform services for a public agency are not employees for purposes of minimum wage and overtime pay under the FLSA and, thereby, not for Family and Medical Leave either.

As a result of that amendment, the FLSA now states:

“The term “employee” does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if - -

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such agency.” 29 U.S.C. § 203(e)(4)(A)

Regulations under the FLSA further explain this exception in more detail. The Court of Appeals in the *Mendel* case summarized these in its opinion as follows:

“… The regulations define “volunteer” as “[a]n individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensations for services rendered.” The regulations proceed to recognize, “Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their services without losing their status as volunteers.” The specific provision addressing nominal fees provides, in part, “A nominal fee is not a substitute for compensation and must not
be tied to productivity. However, this does not preclude the payment of a nominal amount on a ‘per call’ or similar basis to volunteer firefighters.” Finally, the regulations caution, “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.” (Citations omitted.)

If your agency or hospice is part of a governmental entity and you want to characterize someone providing services to your organization as a volunteer, you should review the complete wage and hour regulation in that regard. 29 CFR § 553.100 et seq.

Guidelines

Each situation will depend on its own facts, but, in my opinion, the following are accurate guidelines concerning whether an individual is a volunteer or an employee.

Public Agencies and Hospices

If your organization is a public agency or hospice and you want to establish an individual as a volunteer, follow the FLSA rules mentioned above. Be sure to consult the actual regulations in that regard at 29 CFR § 553.100 et seq. (The Code of Federal Regulations (“CFR”) can be found through this link: www.gpo.gov/fdsys/)

For-Profit Agencies and Hospices

If your organization is a for-profit agency or hospice, the government’s position is that a for-profit entity cannot have volunteers.

However, this appears to be a carry over from the days when most health care organizations were nonprofit. Today, there are for-profit hospitals, where volunteers and for-profit hospices have become common. The situation is not the same as when the FLSA rules were established.

If a for-profit agency or hospice can clearly establish that the individuals it treats as volunteers: (1) are not full-time; (2) are not otherwise employed by the agency/hospice; (3) do not perform services of the type performed by the agency/hospice’s employees; (4) voluntarily perform services to minister to the sick, elderly, infirm or handicapped; and, (5) perform those services without expectation of compensation; then, an argument can be made they are true volunteers even though the agency or hospice is for-profit. However, my opinion is simply that with those circumstances such an argument can be made for a for-profit health care employer. There is no assurance a government agency or the courts would agree.
Non-Profit Agencies and Hospices

Unlike public agencies and hospices, there are not specific rules concerning volunteers for non-profit entities. Still, individuals who volunteer and donate their services to minister to the sick, elderly, infirm or handicapped can be volunteers for a nonprofit entity. If a nonprofit agency or hospice wants to establish such individuals as volunteers, I suggest you follow these guidelines:

- It does not matter what you call the individual. Merely calling someone a volunteer does not make them one.

However, if you hope to establish someone as a volunteer, do call them a volunteer and do not keep “personnel files” concerning that individual or have them be covered by your employee handbook. Instead, have “volunteer files” and keep volunteer policies and procedures separate from employee policies and procedures.

- Do not pay the volunteer a stipend or other compensation for his/her services.

- You may reimburse the volunteer’s reasonable expenses or give the volunteer a nominal gift (such as a gift card of small value or a holiday gift) in recognition of the volunteer’s services.

- Have the volunteer’s services be of a type typically associated with volunteer work in health care.

- Allow the volunteer to arrange his/her own schedule to provide services so it is convenient for the volunteer.

- Do not allow a volunteer to provide services which are substantially the same as the services provided by an existing employee.

- Do not have a volunteer displace an employee.

- If the volunteer also is an employee of your agency or hospice, do not allow him/her to provide volunteer services which are similar to the employee’s regular duties. An employee’s volunteer services must be outside of his/her regular working hours.

- If the volunteer also is an employee of your agency or hospice, do not pressure or coerce the employee to volunteer; the employee’s volunteering should be entirely voluntary.

- Do not have the volunteer work a full-time schedule.
What About Unpaid Interns?

The issues and rules concerning interns are different than those for volunteers. Having an unpaid intern raises the question of whether or not the intern is a trainee or actually is an employee who must be paid for his/her services.

The intern issue most often arises in the for-profit, private sector but could arise for other entities as well. The Wage and Hour Division of the U.S. Department of Labor has established six criteria to apply in determining if an internship meets this exclusion:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

2. The internship experience is for the benefit of the intern;

3. The intern does not displace regular employees, but works under close supervision of existing staff;

4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.”

Wage and Hour Division, Fact Sheet #71.

If your organization has an unpaid intern and you have not reviewed with your attorney whether the intern is actually an employee, you should do so.
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