

Can Your Organization's Employees Also Be Volunteers? What Are the Risks?

What are the legal consequences of confusing volunteers with paid staff?

By *Melanie Lockwood Herman*

Nonprofit organizations frequently depend on the commitment of volunteers as well as the labor of employees. The skills 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's more to distinguishing between employees and volunteers than whether an individual receives a regular paycheck.

This article explores two main questions under the topic of employee versus volunteer status:

1. Can Employees Volunteer?

May your nonprofit's paid employees also serve as unpaid volunteers? Each year the Nonprofit Risk Management Center receives numerous calls and e-mail 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." In other instances they sign up or formally apply for volunteer roles, such as volunteer ticket takers, coaches, special event staff, or 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 we get questions from employees who are indignant after being told that they can't volunteer their services in the organization where they're employed.

When 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



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nonprofit isn't subject to the FLSA. Volunteers may work for nonprofits without expecting compensation, and nonprofits are free to recruit and retain true volunteers without undue worry about the risk of wage and hour claims.

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. These questions will help you decide if someone is a true volunteer:

- **Is the entity that will 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 FLSA's minimum wage requirements if you can answer “yes” to the first four questions and “no” to the final two questions.

2. Is It OK to Pay Your 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.

Two key issues arise when volunteers receive payment or benefits from the nonprofit organizations they serve:

Issue No. 1: Are the Payments Or Benefits Taxable Compensation?

In general, your organization must treat payments to volunteers the same as payments to employees. That means that you need to pay attention to the following rules:

- **You must withhold income tax and FICA contributions** (Internal Revenue Code 26 U.S.C. § 3402).
- **You need to treat living allowances, stipends, and in-kind benefits** like wages.

The Risk & the Reward

Your employees, including volunteers, are keys to your organization's success. But you can jeopardize your organization if you aren't up on personnel law and risk management. Begin with these articles at NonprofitWorld.org:

How to Write Effective Anti-Bias Policies (Vol. 30, No. 4)

Use Background Checks to Avoid Legal Pitfalls (Vol. 29, No. 1)

Where to Find Free Legal Assistance (Vol. 26, No. 2)

The Most Likely Lawsuits – and How to Protect Yourself (Vol. 19, No. 1)

Free Webinar Recording for Members: Welcome, Adapt, Or Avoid? Responding to Trends in Volunteerism. This webinar offers an overview of key trends and the issues they raise for volunteer engagement.

Also see Learning Institute programs on-line: Volunteer Management (NonprofitWorld.org/LearningInstitute).

- **You may exclude inexpensive items** from income as “de minimis” fringe benefits, as described in Internal Revenue Code section 132(a)(4). Examples of such benefits include:

- **holiday** gifts
- **light** refreshments
- **occasional personal use** of your organization's office equipment
- **admission to an event** where the volunteer is representing your organization
- **occasional tickets** for entertainment events
- **personal use of a cell phone** provided primarily for your organization's business.

The more expensive the item or the more frequent its use, the less likely it is to qualify as a de minimis benefit. Keep in mind that a de minimis fringe benefit should not be a form of disguised compensation.

- **If in-kind benefit doesn't qualify for a tax exemption, you must assign it a dollar value** for tax purposes. Your organization 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 for ordinary living expenses like food, clothing, and commuting to and from home** are taxable income. You may be able to provide meals tax-free

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in some circumstances, but reimbursements for meals or for groceries to cook meals are subject to tax.

Issue No. 2: Can Payments to a Volunteer Jeopardize the Worker's Volunteer Status?

The unwitting conversion of a volunteer to employee status can have negative consequences for your organization 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 state and federal wage and hour laws
- **protection from illegal discrimination** under Title VII.

Your organization should therefore proceed with care when determining the benefits you provide to volunteer workers.

Payments to volunteers can also lead to a loss of legal protection for the volunteer. The Volunteer Protection Act specifically protects a volunteer who performs services for a nonprofit organization or governmental entity and either:

- **receives no compensation** (although reasonable reimbursement for expenses incurred is allowed), or
- **doesn't 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, isn't protected under the Volunteer Protection Act.

What Is Nominal Compensation?

While there's no clear-cut guidance on what constitutes "nominal compensation" to a volunteer, there is some guidance:

- **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."
- **Section 553.106(f) of FLSA regulations tells us 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

Risk Management Tips

PUT ROLES 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. Be sure to:

Create a job description for every employee. The description should contain information on the employee's classification and status (regular/non-exempt/part-time or temporary/full-time/exempt, etc.), education and other requirements, as well as specific job duties.

Define volunteer roles in position descriptions or volunteer agreements. Emphasize the volunteer status. Make it clear that no compensation will be provided. A volunteer agreement is especially helpful when the volunteer is also an employee. It requires your organization and the volunteer to agree that volunteer service is separate from employment. It also makes it clear that the willingness to volunteer will have no impact on the terms of a volunteer's employment with your organization.

DOCUMENT POLICIES IN SEPARATE MANUALS.

It's risky to consolidate policies for employees and volunteers in a single handbook or manual. Here are some ways to assure "separate but equal" status:

Develop and distribute an Employee Handbook or Personnel Policies Manual to employees only.

Create a separate Volunteer Handbook or Volunteer Policies Manual for your volunteer workforce. There may

be some overlap in policies, such as those related to safety matters. But this overlap should be minimal.

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 an employee job description and a separate Volunteer Agreement.

DON'T IGNORE "OFF THE CLOCK" SERVICE.

If you look the other way when non-exempt workers "volunteer" after hours, you're exposing your organization to costly wage and hour claims. The non-exempt employee who is content to volunteer today could be an aggrieved plaintiff demanding unpaid wages and penalties six months from now. Keep the following in mind:

It's your organization's duty (not your employee's!) to keep track of the hours worked by non-exempt 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 organization.

If exempt workers seek formal volunteer roles in your organization, require them to follow the rules and supervision associated with that volunteer role.

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payments in the context of the economic realities of a particular situation.”

- **The Department of Labor’s Wage and Hour Division presumes that** fees paid to volunteers are nominal as long as the fee doesn’t exceed 20% 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 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.) 

Melanie Lockwood Herman is executive director of the Nonprofit Risk Management Center. She welcomes your feedback on this article and questions about the Center’s resources at Melanie@nonprofitrisk.org. Melanie’s books include Ready . . . Or Not: A Risk Management Guide for Nonprofit Executives and Exposed: A Legal Field Guide for Nonprofit Executives. This article is adapted by permission from the Nonprofit Risk Management Center, nonprofitrisk.org. Use the Center’s affordable online tool, My Risk Management Policies, to develop a custom Volunteer Agreement (and 200+ other risk management policies) in a matter of minutes.

NEVER COERCE EMPLOYEES TO VOLUNTEER.

An employee who feels obligated to “volunteer” after regular work hours is a wage and hour claim waiting to happen. No individual – whether on your payroll or not – should be coerced to volunteer their time. Make certain that all supervisors at your organization are aware of the distinction between employee and volunteer status. Emphasize that strong-arming employees to work without pay is a violation of policy and may subject the supervisor to discipline.

REMEMBER THE VOLUNTEER RULE OF THREE.

“True” volunteers are those who satisfy three rules:

They work toward public service, religious, or humanitarian objectives.

They don’t expect or receive compensation for services.

Their work doesn’t displace any genuine employees.

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 (exposure to wage and hour claims, extension of protection under civil rights laws, etc.) and negative consequences to your

volunteers (such as loss of protection under the Volunteer Protection Act).

DON’T 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, www.dol.gov/whd/flsa).

NEVER BASE CLASSIFICATION SOLELY ON YOUR ORGANIZATION’S ABILITY TO PAY.

The classification of a position as a volunteer role versus a paid employee role 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:

- **don’t 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 your programs and services** (special events, seasonal work, etc.)
- **are dissimilar in scope, requirements and expectations** from paid positions in the organization.