



Classify Workers with Caution

Ignorance is no excuse. If your workers aren't classified properly, it can cost you.

BY BARBARA B. OLIVER

Opsie Daisy¹ is a start-up nonprofit that provides toys and books to children whose families can't afford to purchase them. It's a well thought out venture. The founder created a five-year business plan that included growth through public relations. Working through volunteers who collect, disinfect, and distribute the previously owned articles, the founder saw the program growing by leaps and bounds. However, there was an imbalance between donations and children who could benefit from the gifts. The list of eligible recipients was much longer than the supply of donated items. Word-of-mouth just wasn't providing enough donations.

The founder had a friend who was a public relations practitioner. The founder approached her friend, explained the mission of the nonprofit, and elicited the woman's help in putting together a communications strategy to increase donations and keep the momentum going year-round. The friend liked the concept and agreed to donate her time. She outlined a strategy that built the casual word-of-mouth promotion into a campaign that would provide story ideas for community newspapers and public service announcements for local radio and cable TV stations in order to generate community support. Her strategy also had a component that worked with local busi-

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nesses to promote donations within their employee communities. All in all, it was an ambitious endeavor that would certainly reap benefits for the nonprofit and the children it served.

The founder was overjoyed by the communications strategy. She figured she could stretch her time to oversee the project, but she needed someone to flesh out the plan, write the publicity materials, make the phone calls, and handle the follow-up. She called the PR professional and thanked her for the plan, also asking if she knew someone who might be interested in providing these services. The professional, who by this time was hooked on the nonprofit's mission, said her job situation was changing and she would be interested in following through on her plan for the organization, but she'd need to have an income.

The founder couldn't afford to hire someone with a salary and benefits but agreed to an arrangement where the woman would work 25 hours a week for the nonprofit and be paid in cash. Her hours were 9 a.m. to 3 p.m., Monday through Friday, which gave her time to look

for full-time employment. Her duties were to make the campaign a reality. The founder was able to provide office space, equipment, and supplies for her to do her job. She wasn't entitled to vacation or sick leave, nor did she have any insurance coverage. The nonprofit considered her a volunteer — after all, she was only getting a pittance for her work and it was in cash.

The Problem

Everything was going swimmingly, until the day the quick-moving PR professional turned the corner and walked full-speed into an open metal file drawer. The corner gashed her forearm to the bone, requiring a trip to the emergency room, a tetanus shot, and several stitches, followed by plastic surgery. The founder felt terrible for the woman, but wasn't worried about her medical coverage because as a volunteer she'd be covered under the nonprofit's general liability insurance.

Unfortunately for her, this wasn't the case. As the founder discovered, a volunteer isn't a volunteer just



because that term is used by the nonprofit. Nor does the matter of payment determine whether or not a person is an employee. A person is classified as an employee by the circumstances of the work. In the case of the PR professional, she was working specified times and doing specified tasks for specified hourly pay. Because she wasn't legally classified as a volunteer, her injury would not be covered under the medical expense section of the general liability policy, which specifically excludes benefits paid or payable through workers' compensation. As an employee, the PR professional should be covered under workers' compensation; thus the general liability policy doesn't offer coverage of her workplace injury.

This isn't the end of the problem (or the surprises) for the founder. Because she operated as if the PR professional was a volunteer receiving a cash donation for her services rather than an employee, the founder didn't submit required payroll taxes. She may owe taxes and penalties for this mistake. And since the founder was trying to avoid the costs associated with having an actual employee, she didn't purchase workers' compensation coverage for the employee, thus running afoul of the state's law requiring such coverage. Each state establishes a threshold at which workers' compensation is required. In many states that threshold is one employee. The nonprofit is illegally uninsured for workers' compensation and is out of options.

The injured PR professional meanwhile has a dilemma of her own. She can collect workers' compensation benefits from the state's uninsured employers' fund. The fund will then go after Oopsie Daisy for reimbursement of all benefits paid and will assess penalties for being illegally uninsured. Or she can choose to proceed against Oopsie Daisy in civil court where the

employer is defenseless, not being able to claim the benefit of workers' compensation as a remedy.

Since the general liability policy can't respond to any claim that is "paid or payable by workers compensation," Oopsie Daisy won't be afforded a defense to a civil action by its general liability carrier. This means that Oopsie Daisy will have to hire and *pay* an attorney to represent them. In addition, the organization will have to satisfy any judgment or settlement with its own money.

No matter which option the injured employee elects, Oopsie Daisy is on its own. This is a costly lesson for Oopsie Daisy and one you want to avoid.

Risk Management Lessons

- **It's important to your organization's well being** to classify employees, volunteers, and independent contractors correctly.² The classification affects insurance coverage and rates, and the legality of your operation.

- **When you write job descriptions**, make certain that you understand and define the job parameters. If the person is to be a volunteer, be sure the job description doesn't require specified tasks for specified hours for a specified amount of pay. Or conversely, if you require people to perform specified tasks for specified hours and at specified hourly pay, treat them as employees.

- **In many states, you must buy workers' compensation insurance** for all employees, even if you have only one employee, or you will be deemed illegally uninsured for workers' compensation under the law with attendant penalties and lack of defense in civil court. Check your state's law for the threshold that applies to your nonprofit.

- **Read and understand the insurance coverage** you purchase.

If you don't comprehend the insurance jargon or what the exclusions do to the main coverage, ask your insurance professional to explain it to you in terms you understand. Perhaps a chart would help you visualize what coverages the policy does and doesn't afford. You then will be making decisions based in fact, not assumptions. ■

Footnotes

¹The name of this organization is fictional, but the description is based on an actual claim at the Nonprofits' Insurance Alliance of California (NIAC).

²See Thornton in "Resources."

Resources

Herman, Melanie, "Supervise, Supervise, Supervise," *Nonprofit World*, Vol. 20, No. 2.

Muehrcke, Jill, ed., *Personnel and Human Resources Development*.

Tesdahl, D. Benson, "Does Workers' Comp Cover Unpaid Trainees?," *Nonprofit World*, Vol. 16, No. 6.

Thornton, Grant, "Employee or Independent Contractor? Don't Let the IRS Reclassify Your Workers," *Nonprofit World*, Vol. 10, No. 4.

These resources are available from the Society's Resource Center, 734-451-3582, www.snpo.org.

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