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Volunteers as employees
Considerations for nonprofit institutions

By Joseph A. Carello, Michael J. Cooney and Anita L. Pelletier

“When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’

‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’

‘The question is,’ said Humpty Dumpty, ‘which is to be master—that’s all.”

— Lewis Carroll, *Through the Looking Glass*

Volunteers are the backbone of many a nonprofit organization. Without them we would be severely limited in our impact. Certain statutes protect the actions of volunteers in the name of charity, while others impose burdens on the organizations to assure that their volunteers are not exposing the most vulnerable among us to harm.

Yet, are there circumstances when a volunteer—an individual doing good works of his or her own accord without pay or recompense at the direction of a nonprofit—may nonetheless be treated as an employee? The answer for museums (and other similar nonprofits) might surprise.

Federal standards

There is no doubt that volunteers, properly overseen, act under the control of a sponsoring museum or other nonprofit. Well-run entities will have entire programs dedicated to the involvement of volunteers, the outcome of which is set forth on the very first page of the annual information return filed with the IRS on Form 990. Employees, in contrast to independent contractors, are also under the control of the museum. So how is this distinction between employees and volunteers made in the federal law, other than the obvious lack of monetary compensation to volunteers?

The Wage and Hour Division of the U.S. Department of Labor recognizes that employment relationships are not formed when people volunteer their services to religious, charitable and nonprofit organizations and schools. The minimum wage and overtime requirements of the Fair Labor Standards Act (“FLSA”) do not apply in those circumstances, as long as the individuals volunteer their time and efforts without expectation of compensation in cash or in-kind benefits and freely without coercion.¹ Under this federal standard, volunteers can be provided payment for
expenses, reasonable benefits or a nominal fee such as “uniforms or transportation in furtherance of museum activities.” So the rubric for analysis comports rather well with current practices.

There are some limitations on the use of the volunteer classification, however. For example, a museum may staff a department with volunteers (e.g., volunteer guides as docents), but a paid driver employed by a museum may not be able to volunteer delivery services to the same museum on the weekends. This bifurcation of paid and volunteer duties may create a perception that the parties are evading unpaid overtime.

These rules for volunteers apply equally to the traditional retiree who volunteers to fill their time with meaningful pursuits as it does to recently graduated university arts students, eager to get experience in the arts and cultural world, but otherwise unable to secure paid employment doing so in this especially challenging job market. Moreover, volunteers are not to be confused with unpaid interns, which are regulated by a completely different set of rules under federal and state law.

**New York standards**

The standard in New York State is somewhat more complicated, due primarily to an opinion letter issued by the New York Department of Labor (“DOL”).

Like the relevant federal law, Labor Law § 651(5)(f) excludes volunteers from the definition of “employees” when volunteer work is performed for entities “organized and operated exclusively for religious, charitable or educational purposes.” 12 N.Y.C.R.R. § 143-3.12(c)(5) defines a volunteer as “a person who works for the nonprofitmaking institution under no contract of hire, express or implied, and with no promise of compensation, other than reimbursement for expenses as part of the conditions of work.”

So the state and federal statutory and regulatory standards are generally consistent. The fact that New York State is now auditing organizations that provide gift cards and other minimal benefits to volunteers certainly is perhaps an annoyance, but did not signal a measurably different standard than that imposed by federal law.

But the DOL’s current *administrative* position substantially complicates compliance in the charitable organization context. For example, the DOL has taken the position that volunteers cannot:

- replace or augment paid staff to do the work of paid staff;  
- do anything but tasks traditionally reserved for volunteers;  
- be required to work certain hours;  
- be required to perform duties involuntarily;  
- be under any contract to hire by any other person or business, express or implied, related to the nonprofit organization;  
- be paid for their services except reimbursement for expenses.

These standards on their face are at once odd—who would have thought that volunteers could be required to perform duties involuntarily?—and confusing. What does it mean to state that volunteers cannot accomplish tasks other than those “traditionally reserved” for volunteers? Is there some source of traditional volunteer duties that museums and other nonprofits should reference?

The DOL’s position then is that a volunteer cannot provide services that would normally be—or would reasonably be expected to be—performed by a paid employee. While the museum docent (essential, knowledgeable and historically unpaid) would not be an issue, how does one treat...
volunteers in the museum development office that recently suffered a reduction of staff? As paid staff is reduced, many museums have no choice but to rely more on volunteers. Is the DOL expecting a review of each volunteer position in the organization for compliance with this standard?

Because each analysis is very fact intensive, it is difficult for a nonprofit to have a complete mastery of these rules and whether it satisfies them. The DOL position does not take into account current market economics nor the ability of museums to be nimble and creative in their use of volunteers.

Given the DOL’s recent investigation of nonprofit organizations that provide volunteers gift cards, rewarding volunteers with nominal compensation—no matter how well-intentioned—may jeopardize the volunteer classification and subject the organization to the FLSA and New York Minimum Wage Law requirements. In fact, in one opinion letter, the DOL took the position that any compensation beyond reimbursement for expenses moves a person from the category of “volunteer” and into the category of “employee.”

What about interns?

Some museums and other nonprofits may read the above and take heart in the fact that they limit the use of volunteers and instead retain unpaid interns. However, unpaid internships must comply with yet another set of criteria in order to exempt themselves from the minimum wage and overtime requirements of federal and state wage-hour law.

The federal DOL has identified the following indicia typically found in properly unpaid internships:

- The experience must be similar to that offered in an educational setting;
- The internship must be for the intern’s benefit;
- Interns must not displace regular employees and work under close supervision;
- The employer should derive no immediate advantage from interns;
- Interns should not necessarily be entitled to jobs at the end of the program; and
- Both the employer and interns must clearly understand that the interns are not entitled to wages.

In addition to the federal guidelines, the New York DOL has identified five indicia that typically must be met in order for an unpaid internship to comply with state law:

- Clinical training must be performed under the supervision and direction of individuals knowledgeable and experienced in the activities;
- Interns should not receive employee benefits;
- Training received during the internship must be general, permitting the intern to work in any similar business in the industry;
- The screening process for the internship must not be the same as the process for hiring employees; and
- Advertisements for the program must be couched as training or educational.

Thus, the use of unpaid interns does little to avoid the issue of appropriately classifying volunteers.
What are best practices?

Given this sometimes confusing legal landscape, what can museums and other nonprofits do to ensure that their volunteer programs comply with the law? The following steps can go a long way to avoiding liability under federal and state wage-hour law:

- Put it in Writing—Document the distinct roles that both employees and volunteers play in the organization and the historical context (if any) for making the distinction.
- Create a Separate Manual for Volunteers—Do NOT consolidate policies for employees and volunteers in a single handbook or manual.
- Do Not Require Employees to “Volunteer”—Explicitly prohibit supervisors from requiring employees to “volunteer” their time for the organization.
- Be Mindful of Volunteer Reimbursement—Be sure that any reimbursement of expenses incurred on behalf of the organization takes place under a published policy on point. “Thank you” and other benefits to volunteers should be closely examined as well to avoid having them considered “compensation” by New York State.

It is challenging enough to manage a cultural institution in the current economic environment. The proper use of volunteers can help bridge the gap for many organizations. But it is important to keep these concerns in mind so that your volunteers are not considered employees.

For more information regarding employment matters or other legal issues affecting nonprofits, please contact your Nixon Peabody attorney or:

- Michael J. Cooney, partner, at 202-585-8188 or mcooney@nixonpeabody.com
- Anita L. Pelletier, counsel, at 585-263-1164 or apelletier@nixonpeabody.com
- Joseph A. Carello, associate, at 585-263-1434 or jcarello@nixonpeabody.com

2 E.g., 42 U.S.C. § 7142(c).
   It has been this department’s longstanding interpretation of the provisions relating to volunteers, to exclude from the definition of “volunteer” individuals performing work in a similar capacity to other paid individuals at that place of business, in a position customarily performed by paid employees, or where the use of volunteers would otherwise displace the employment of a paid worker.
5 Id. (“[I]ndividuals from religious organizations visiting elderly members of their church, synagogue, mosque, etc, are not likely to be under the direction and control of the employer … and are, therefore, not considered to be employees”).
6 RO-09-0118, NEW YORK STATE DEP’T OF LABOR (Nov. 25, 2009).
7 See RO-09-0126, NEW YORK STATE DEP’T OF LABOR (Dec. 11, 2009) (responding with 22 questions when asked whether children selling cookies provided to them by a nonprofit organization for fundraising purposes constituted employment).
9 Id.
Internship Programs Under the FLSA, Fact Sheet #71, U.S. Dep’t of Labor, Wage and Hour Division (April 2010).

RO-09-0189, NEW YORK STATE DEP’T OF LABOR OPINION LETTER (Dec. 21, 2010).