



Thanks, but no thanks: the risks of offering “in-kind” benefits to volunteers

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On September 26, 2017, the United States District Court for the District of Columbia issued a decision that serves as an important reminder of the dangers of providing volunteers “in-kind” benefits in return for their service.

FLSA background

The Fair Labor Standards Act defines employee as “any individual employed by an employer” and “employ” as to “suffer or permit work.” Volunteers, however, are not covered by the FLSA if they, among other factors, work without promise or expectation of compensation or other “in-kind” benefits; and instead volunteer for a civic, charitable, or humanitarian reason. Under this federal standard, volunteers can be provided payment for expenses, reasonable benefits or a nominal fee.

Case background

Rhea Lana’s is one of the largest, for-profit franchise chains dedicated to holding consignment events to sell used children’s clothing and other household items. At a consignment event, the consigners package their merchandise to sell at one of the company’s events. The consigners retain 70% of the profit, while Rhea Lana’s receives the other 30%. Rhea Lana’s provides the space, racks, and tables for displaying merchandise; performs other administrative tasks and provides a few paid managers to help oversee the events.

Consigners and non-consigners would volunteer to help staff the events. Volunteers would pick a certain shift (usually five hours) and perform tasks ranging from running the cash register, setting up display racks, assisting customers and cleaning up after the event. Consigners have an obvious interest in the sale of their own goods, and all volunteers were allowed to enter the event and shop prior to the event opening to public. Otherwise, the volunteers received no benefits or compensation.

The U.S. Department of Labor audited the company in 2013, and concluded that Rhea Lana’s consignment volunteers were, in fact, employees. The DOL based its determination on two factors. First, the consignment volunteers worked in exchange for early access to the sale events—sufficient consideration to the DOL to find employee status. Second, the DOL had a longstanding

history of not permitting for-profit businesses to use volunteers. In response to the DOL's determination, Rhea Lana's sued, seeking a declaratory judgment that the consignment volunteers were not employees under the FLSA and that the DOL acted in an arbitrary and capricious manner.

The court agreed that the DOL had a reasonable basis to reach its conclusion that the consignment volunteers were in fact employees; noting principally, that they expected to receive "in-kind" benefits, that is, the opportunity to shop early. The court also emphasized that the consignment volunteers were integral to the operation, wore company t-shirts and were subject to control by company managers over their duties.

Impact

This case is an important reminder of the dangers of providing volunteers "in-kind" benefits. While the decision involved a for-profit business, the court's analysis also potentially affects providing volunteers "in-kind" benefits in a nonprofit setting as well.

First, the court and the DOL had an expansive interpretation of what constituted an "in-kind" benefit. Traditionally, "in-kind" benefits, examined by the courts and the DOL, were benefits such as food, shelter, or the occasional gift card. However, the court's holding, that the ability to shop early at an event—a benefit with seemingly no independent value—constituted an "in-kind" benefit, means that potentially **any benefit** given to volunteers could subject the organization to the DOL's scrutiny.

Second, while a nonprofit volunteer under the FLSA may normally receive a nominal fee or reasonable benefit as a result of their service, the court's holding suggests that a benefit as small and seemingly inconsequential as the ability to shop early at an event could surpass the nominal/reasonable threshold. Note, however, that Rhea Lana's was a for-profit entity and that a court or the DOL may be more lenient in an analogous situation where a nonprofit offered a similar benefit.

Finally, in addition to the court and DOL's focus on the receipt of "in-kind" benefits, the court and DOL also seemed to place great weight on the fact that the primary reason that the consigners volunteered was to receive an "in-kind" benefit. Consequently, based on this interpretation, if a nonprofit organization does offer its volunteers an "in-kind benefit" and that benefit is significant enough that it becomes the primary reason individuals volunteer for an organization, then it runs the risk of having those volunteers classified as employees.

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