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Utilizing Employees as Volunteers

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Abstract

When employees volunteer in their own workplace, it blurs the lines (factually and perceptually) between employment and voluntary engagement. It can become very difficult to distinguish between what employees do for salary and what they do voluntarily. This article looks at the legal and management implications of allowing staff to volunteer within the same organizational structure.

Key Words:

volunteers, employees

With the advent of volunteerism in all levels of service for nonprofit organizations, the distinction between salaried employees and unpaid "workers" has begun to blur (Sixel, 2002). This issue gained national visibility in 1999 when volunteer moderators asked the U.S. Department of Labor to investigate unfair practices at AOL (Junnarkar, 1999). One volunteer in fact sued AOL for unfair labor practices. Some of these claims have been settled financially and others may still be pending.

While AOL is a for-profit company, these incidents served to heighten concerns throughout the nonprofit sector. We realized that our good intentions had potential liability implications for our organizations, didn't protect our employees as much as we thought, and could undermine the important work of our volunteers. Suddenly people were thinking about the Fair Labor Law, ADA, workers' compensation insurance, and a host of other legalities in a very different way.

Could employees feel coerced, no matter how subtly, to volunteer for us? What happens if an employee-volunteer gets hurt while volunteering and then we learn that workers' compensation doesn't apply to them because they are wearing their volunteer hat for us? How do we ensure that the work of an employee-volunteer is "substantially" different from their paid job?

And then there are the human resource management questions. Will a potential employee-volunteer resent being rejected from the volunteer program? Do we have to be careful not to single out for special treatment employees who volunteer for us? Can we ask volunteers to supervise employee-volunteers or will they resent that? If someone sues us, how will we manage the public relations and potential ill will in the community? How do we protect the organization, our employees, and our volunteers?

Conventional wisdom right now is that the best thing to do is not utilize employees

as volunteers for your own organization. The labor issues are too gray and the potential risks are not worth taking. Many organizations have taken a straightforward approach and written a policy that prevents employees from volunteering for their employer. For example, according to the HR director at a science museum in Ohio, their policy is that employees cannot volunteer for the museum. This policy was formulated to avoid any confusion or perception of an employee doing any work as a "volunteer" for which he/she would normally be paid. She also cited concerns about terminating an employee-volunteer if necessary, along with concerns related to federal discrimination laws, the Americans with Disabilities Act, and the federal Fair Labor Law.

In a personal survey of nonprofit institutions in the Washington, DC, area, colleagues revealed the following information (quotation marks indicate specific wording from respondents):

- One organization permits employees to volunteer on an "emergency" basis, e.g., when a volunteer is sick or when one is absent without notice. Employees do their "volunteer" work during regular business hours with an excused absence from their supervisor and do not volunteer on their personal time.
- Another organization does not permit employees to volunteer for it. This is based on their philosophy that "volunteers receive benefits in thanks for their work (memberships, programs, etc.) and employees receive remuneration."
- One federal institution permits employees to volunteer in other similar federal institutions for which they are not paid, e.g., an employee of one Smithsonian museum could volunteer at another Smithsonian museum. This policy was established to "keep supervisors from abusing their volunteer/staff members (by declaring someone a volunteer on certain tasks when they didn't want to or couldn't afford to pay them) and to keep the volunteer/staff person from suing the organization for back wages if he/she decided they were treated unfairly as a volunteer for their [employer] institution."
- One museum does not permit employees to volunteer for it. Occasionally, employees work during special events "beyond their usual work times," and they receive compensatory time off in these instances.

In the right circumstances it is not illegal for employees to volunteer for their employer, but it is not advisable unless an organization is willing to create policies and procedures that specifically govern employee-volunteers to avoid liability and provide protection for their employees and volunteers. And, even taking those steps does not guarantee that a dissatisfied employee won't seek redress for perceived unfair treatment.

In the absence of any statutory or regulatory exemption, the Department of Labor has utilized statutory precedent to formulate an exemption for the employees of charitable entities who wish to perform volunteer work for their nonprofit employers. The Department has drafted a set of six criteria or conditions under which not-for-profit employees can volunteer:

1. The services are entirely voluntary, with no coercion by the employer, no promise of advancement, and no penalty for not volunteering.
2. The activities are predominately for the employee's own benefit.
3. The employee does not replace another employee or impair the employment opportunities of others by performing work

that would otherwise be performed by regular employees.

4. The employee serves without contemplation of pay.
5. The activity does not take place during the employee's regular working hours or scheduled overtime hours.
6. The volunteer time is insubstantial in relation to the employee's regular hours.

In addition, although not specified above, the Department of Labor appears to require that nonprofit employee-volunteers offer their uncompensated services in activities distinct from their normal employment duties (U.S. Department of Education, 1998). Thus, the following would constitute permissible volunteer situations for the employees of a nonprofit public broadcasting television station:

- an administrative assistant or janitor who volunteers to work as a member of the production crew
- a secretary or bookkeeper who offers to do some announcing and on-air work.

Employee Or Volunteer?

Terminology often sets the stage for determining how laws may be applied. For example, the applicability of a specific labor law will depend on whether the worker in question falls under the law's definition of "volunteer" or "employee." The classification chosen by the service organization will not affect the law's applicability. Therefore, whether a charitable entity refers to its personnel as "volunteers," "participants," "gratuitous employees," or "interns," the organization's choice of appellation will not modify its obligation to afford certain protections to all personnel who meet the statutory qualifications of an "employee." Just as the characteristics of volunteers may vary, so do the classifications imposed by different laws. An individual, who may qualify as an "employee" under one law may

not meet the "employee" criteria for another. For example, the Internal Revenue Code uses different rules for distinguishing between employees and independent contractors than the federal Fair Labor Standards Act uses when determining whether someone must be paid the minimum wage. As a result, those who administer volunteer service programs must familiarize themselves with the classifications posed by both the state and federal laws that potentially affect their volunteer and salaried personnel. See Nonprofit Risk Management Center, <http://www.nonprofitrisk.org> (Johnstone, 2002).

Some additional considerations include:

- **Americans with Disabilities Act** – Because volunteers are not regarded as employees, they are not covered by some parts of the ADA. When an employee is also a volunteer, the organization may subject itself to unnecessary risk and/or liability related to volunteer recruitment procedures and decisions, how people are treated while they are employed (versus how they are treated as volunteers), or volunteer separation/termination procedures and decisions.
- **Federal Employment Discrimination Law** - Federal laws prohibiting employment discrimination based on race, color, religion, sex or national origin include Title VII of the Civil Rights Act of 1964, (1) the Age Discrimination In Employment Act of 1967 and (2) the Pregnancy Discrimination Act. Several cases under these laws have involved volunteers or prospective volunteers who claimed discrimination and sued organizations. These cases held that volunteers who receive no compensation are not protected by federal employment discrimination laws. Thus, the issue for any organization that allows employees

to volunteer for it is whether or not it is worth the risk to blur the lines between who is a volunteer and who is an employee.

- **Workers' Compensation**-Workers' compensation laws provide a means of recovery for individuals injured during the course and scope of employment. Workers' compensation benefits are commonly reserved exclusively for injured "employees" and their families. In a few states, the courts have addressed the question of whether a volunteer may receive workers' compensation benefits. Some of these decisions hinge on whether the volunteer receives any form of compensation, such as a living allowance, stipend, room and board, benefits or even reimbursement for expenses. Volunteers are not covered in most states. When employees volunteer for their employer, there may be a risk that they will not be covered by workers' compensation when they feel they should be because they are also employed by the same organization.

When employees volunteer in their own workplace, it blurs the lines (factually and perceptually) between employment and voluntary engagement. It can become very difficult to distinguish between what employees do for salary and what they do voluntarily. It can also lead to frustration and resentment among employees who work for pay and who don't volunteer in the workplace because they can't or choose not to volunteer. Also, volunteers from outside the organization can have these same

frustrations with employees who volunteer.

Negotiating the legal maze of volunteer service administration can be confusing. The laws that have been designed to protect volunteers from exploitation and employees from unfair competition often make it difficult for service organizations to offer community service in a legal and economically feasible manner. One of the key questions to answer before embarking on utilizing employees as volunteers in your organization is how to guarantee that the legal requirements for employee-volunteers are met.

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