

Nonprofits: Make distinction between ‘paid’ and ‘volunteer’

The situation is familiar for most nonprofit executives: An inspired individual walks into your office and says “I believe in your organization’s cause. How can I help?”

At this moment, any rational executive is undoubtedly appreciative of the opportunity to add another contributor for the right price (free).

But is the organization truly enlisting a volunteer, or is it unknowingly hiring an employee?

The distinction is critically important and not always easy to make.

If the volunteer turns out to be an employee under the law, the nonprofit could be required to pay the “volunteer” for all of his or her time, as well as be subject to various state and federal tax penalties and record-keeping requirements.

In addition, numerous other employment-related laws may apply such as the Americans with Disabilities Act, Family Medical Leave Act, Oregon Family Leave Act, among others.

Thus, while one should never look a gift horse in the mouth, nonprofits should ensure they’re not unintentionally employing one, either.

The first step toward identifying a volunteer is to understand what makes one.

Volunteers are individuals performing duties “for no compensation or without expectation or contemplation of compensation as the adequate consideration for the services performed for” qualifying organizations.

Assuming your nonprofit qualifies — and any organization registered as a 501(c) nonprofit will qualify — the question becomes whether the individual donating his or her time expects to receive adequate compensation for time and effort.

Unfortunately, since this definition necessarily hinges on the subjective expectations of the individual, and because no executive can ever truly know why applicants are offering their services, there will always be an inherent risk that the individual has volunteered with the expectation of receiving some form of immediate or future compensation.

While it is impossible to eliminate this risk, there are ways to minimize it. Here are a few helpful hints that may prevent a volunteer from being considered an employee.

1. Don’t pay your volunteers. This may sound like a no-brainer, but many nonprofits forget

that compensation comes in many forms. The Supreme Court, for example, has found “in-kind” compensation, such as receiving room and board or a free meal, may be considered wages and lead to a determination that the individual is an employee.



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Thus, the best way to preserve a volunteer relationship is to ensure that individuals donating services have never received any compensation from the nonprofit, and do not anticipate receiving future compensation — or future opportunities for compensation — from the organization.

This understanding should be clearly communicated in writing to the individual from the start, and reiterated periodically throughout the volunteer relationship.

2. Be wary of paid staff performing additional “volunteer” duties. Nonprofits often employ paid staff who believe strongly in the nonprofit’s underlying cause. As a result, these paid staff members may wish to contribute additional voluntary services above and beyond their paid duties.

While admirable, it is also risky. If paid staff are allowed to volunteer additional services, performance of these duties must occur outside the employee’s normal working hours and be of a different nature than those performed by the employee during his or her normal course of employment.

Finally, if an employee feels pressured to do something, then the participation is not voluntary and the employee needs to be paid for the time spent preparing for and performing the activity.

3. One-time payments may be enough to create an employment relationship. Given the flexible definition of “volunteer,” it is common for individuals to periodically transition between “volunteer” and “employee” status depending on the tasks being performed and whether compensation is received.

Take, for example, a talented performer who teaches members of a nonprofit, for no pay, how to perform a particular song. Six months later,

the individual is to perform along with his students during the nonprofit’s annual fundraiser.

Wishing to show its appreciation, the nonprofit insists on paying the individual for the performance.

Suddenly, the one-time volunteer has become an employee, and the nonprofit may be legally obligated to compensate the individual for all time spent practicing for and performing in the fundraiser.

The past “free” lessons may now be viewed differently. Were they donated services? Or should he or she have been paid for time spent rehearsing for the paid performance?

Was the performer truly volunteering, or did he believe the free lessons were necessary to ensure he would be asked to participate in the paid performance?

While this hypothetical nonprofit undoubtedly had the individual’s best interests at heart, its generosity may be viewed as having created an employment relationship.

4. Waivers are not infallible, but they can help. Because individuals cannot waive their rights under the Fair Labor Standards Act, nothing a potential volunteer signs will conclusively classify him or her as a volunteer.

However, nonprofits may wish to consider including a short provision at the end of its volunteer form attempting to clarify the individual’s expectations from the outset.

While this will not be legally bulletproof, it does help demonstrate the applicant’s intent to volunteer. A sample provision is provided directly below:

Understanding and acknowledgment of intent to volunteer.

I appreciate the charitable contributions Nonprofit X provides to the community at large, and wish to donate my time and services to further this worthwhile cause. I do not expect present or future compensation for my contributions to Nonprofit X, and look forward to helping further Nonprofit X’s cause.

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