

# Nonprofits and Volunteers: Understanding the Risks

~ Ryan P. Portugal

Volunteers are the foundation upon which many successful nonprofits are built. Properly utilized, volunteers enable a nonprofit to devote valuable capital and resources elsewhere in the organization, allowing it to have a greater impact on its desired cause. Although the work of volunteers is valuable to a nonprofit's mission, the organization's management must exercise caution in engaging volunteers to ensure the nonprofit does not inadvertently misclassify individuals as volunteers when they may be considered employees under federal law. Circumstances in which a volunteer will be treated as an employee under federal law can have costly legal ramifications for nonprofit organizations.



*Anna's Hummingbird (Calypte Anna), Wisteria (Fabaceae)*

## Governing Federal Law

Enforced by the Department of Labor (DOL), the Fair Labor Standards Act (FLSA) outlines the minimum wage and overtime requirements employers must follow based on the employment status of their employees. More specifically, the FLSA requires non-exempt employees to be paid at least minimum wage for all hours worked and time and a half for time worked in excess of 40 hours in a workweek.

Generally speaking, however, volunteers, if properly classified, will not be considered employees for the purposes of the FLSA. Knowing whether your nonprofit has properly

classified an individual as a volunteer requires an examination of the relationship between the individual and the nonprofit, looking to federal standards for guidance.

#### Definition of a Volunteer

You should know that simply labeling someone a volunteer is not enough. The DOL considers a volunteer to be someone who: (1) donates services to religious, charitable, or other similar nonprofit organizations, usually on a part-time basis, (2) without coercion, and (3) without the expectation or receipt of compensation in cash or in in-kind benefits. Generally speaking, an individual may not volunteer in the for-profit private sector. The DOL does allow payment or reimbursement to volunteers for out-of-pocket expenses, reasonable benefits, or a nominal fee for their services. However, your nonprofit must be careful not to use nominal fees to substitute for compensation or to tie the fees to productivity or hours worked; otherwise, such fees may be considered compensation, rendering the individual ineligible for the volunteer exception.

In addition, you should understand that there are some limitations regarding who may be classified as a volunteer. Generally, a person will not be considered a volunteer if she or he is providing services toward commercial activities, even if those activities are run by a nonprofit organization. For example, a person working in the gift shop of a nonprofit



organization, such as a museum, will not be considered to be a volunteer, even if that person freely offers his or her services with no expectation of compensation. Additionally, paid employees of a nonprofit cannot volunteer to provide the same type of services to their nonprofit that they are employed to perform. Similarly, a volunteer may not displace a regular employed worker or perform work that would otherwise be performed by regular employees. If a volunteer does displace a regular employed worker or performs work that would otherwise be performed by regular employees, that volunteer would likely be considered an employee under the FLSA.

## Risks

The principal concern related to the use of volunteers is the risk that such individuals will be misclassified and deemed employees for wage and tax purposes. If a volunteer is found to be misclassified and is considered an employee for purposes of the FLSA, your nonprofit organization faces potential liability for back wages and overtime, liquidated damages, and attorneys' fees. Your nonprofit may also face liability for back employment taxes, such as Social Security, Medicare, and unemployment tax, in addition to penalties and interest. The misclassified individuals may even be entitled to retroactive employee benefits, including workers' compensation.

Additionally, as employees, the misclassified individuals may also be protected by various employment laws, affording them leave time and protection against discrimination. Pay particular attention to this if your nonprofit is small, as smaller organizations may unwittingly become subject to additional laws as a result of the increase in the number of their employees. For example, Title VII and the Americans with Disabilities Act cover employers that have 15 or more employees. If you have individuals misclassified as volunteers who suddenly are classified as employees, this addition of new employees may push your organization beyond the 15-employee threshold, subjecting your nonprofit to more regulations. If such nonprofit organizations are not already in compliance with these regulations, they could open themselves to further liability and potential lawsuits.

## Best Practices

Although nonprofits face risks with substantial consequences when they utilize volunteers, your organization can take a number of actions to help reduce those risks. Nonprofits should consider taking the following steps to help minimize the potential liability of using volunteers:

1. Ensure that volunteers understand that they are volunteers, that they are not eligible for employee benefits, and that their status as a volunteer is not a step toward obtaining employment.
2. Document the distinct roles that both employees and volunteers play in the organization.
3. Do not require employees to volunteer, and consider prohibiting supervisors from requiring employees to volunteer their time for the organization.
4. Establish a volunteer handbook, separate from the employee handbook, which provides clear channels for addressing any potential issues.
5. Establish a policy addressing any reimbursement of expenses incurred by a volunteer on behalf of the organization.
6. Educate decision-makers on the nuances involved with permissible volunteer relationships.
7. Self-audit to ensure proper procedure is followed.

Taking these steps addresses a number of the common shortcomings that cause nonprofit organizations potential consequences, limiting the likelihood of inadvertently misclassifying an employee as a volunteer and becoming subject to the wage and tax requirements of the FLSA.

### Potential Risks Even If Properly Classified

Even if volunteers are properly classified, the actions of volunteers, like those of employees, may still create substantial liability for nonprofit organizations. In an attempt to promote volunteerism, the federal Volunteer Protection Act of 1997 (the VPA) generally protects volunteers for acts of ordinary negligence. Under the VPA, volunteers for a nonprofit will not be personally liable for harm caused if: (1) they acted within the scope of their responsibilities; (2) they were properly licensed or certified, if required; (3) the harm was not caused by willful or criminal misconduct; or (4) the harm was not caused by the volunteers operating a motor vehicle.

Such limitations on liability do not apply to terrorist or violent criminal acts, hate crimes, sexual offenses, misconduct in violation of civil rights laws, or offenses committed while under the influence of alcohol or any drug. The Florida Volunteer Protection Act (the FVPA) affords similar protections to volunteers. Many nonprofit managers mistakenly believe that these laws will protect their nonprofits, as well as their volunteers. Although state and federal laws may provide immunity for volunteers, the organizations they serve may still be liable for their actions.

As you can see, proper classification is not the only issue your nonprofit organization must consider when using volunteers, as it may also be liable for the negligence of volunteers. To help mitigate such risks, your organization should adopt and document internal policies that outline the proper way to conduct its operations. Additionally, all nonprofits should obtain some level of general liability insurance covering their volunteers.

### Conclusion

The importance of volunteers to the nonprofit community should not distract organizations from the inherent risks associated with their use, but they should understand that if an individual is misclassified as a volunteer, the nonprofit organization could face costly liability. Even if they are appropriately classified, volunteers may still pose many of the same risks to a nonprofit organization as employees create. But you can protect your nonprofit organization by implementing policies and procedures consistent with applicable law to limit common errors that result in costly violations.



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