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Policy Briefs

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Law and the Volunteer: The Uncertain Employment and Tort Law Implications of the Altruistic Worker


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Abstract: An individual who donates service to a nonprofit organization raises unsettled questions of that volunteer's status under tort and labor law. Cryptic legislative language and inconsistent judicial precedent undermine predictability for volunteers and nonprofit managers alike, and the standards fail to reflect a coherent balance between the legitimate expectations of altruistic workers and the realities of the nonprofit-volunteer relationship.

Keywords: volunteering

Millions of Americans volunteer each year, contributing billions of dollars in unpaid service, (Corporation for National and Community Service 2014), but this service can sometimes go horribly awry. Unpaid workers might be sexually harassed or discriminated against based on their race, sex, disability, or other duty-irrelevant characteristic. Other times, volunteers might hurt clients, other workers, or themselves, giving rise to a complicated set of rules for assigning liability between the organization and the volunteer. And sometimes, labor thought to be freely given may implicate minimum wage and maximum hour rules. How these laws apply to charitable volunteers is clouded by cryptic legislative language and inconsistent judicial precedent, undermining predictability for volunteers and nonprofit managers alike. Even worse, the standards fail to reflect policy judgment that balances the legitimate expectations of altruistic workers against the realities of the nonprofit-volunteer relationship.

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1 “Employee” Protection Laws: Should Volunteers Be Covered?

Employees in the United States enjoy a range of protections from federal and state law, including laws prohibiting discrimination, harassment, or retaliation, rules prescribing wages and hours, insurance requirements, and employer mandates to provide safe working environments. Whether a worker is covered under most of these diverse rules depends on whether that person is an “employee,” unhelpfully defined as, “an individual employed by an employer,” (29 U.S.C. § 2000e(f) (Title VII of Civil Rights Act); 29 U.S.C. § 203(e) (Fair Labor Standards Act)). The Supreme Court has criticized this definition as “completely circular and explain[ing] nothing,” (*Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992)), but it could actually be worse: the National Labor Relations Act explains, somewhat incredibly, that “[a]n ‘employee’ includes an employee,” (29 U.S.C. § 152(3)). Implementing agencies have issued informal guidance but not binding rules, leaving decisions about these laws’ application to unpaid workers to fact-specific judicial rulings.

Courts have coalesced around one of two approaches when determining whether a volunteer is an employee (Rubinstein 2006). One set of courts ask whether the volunteer is under the control of a nonprofit within the meaning of an ancient 10-factor “master-servant” test most commonly used to distinguish employees from independent contractors (*Bryson v. Middlefield Volunteer Fire Dep’t, Inc.*, 656 F.3d 348, 352 (6th Cir. 2011)). Under this test, it doesn’t matter if the worker is paid or expects to be paid (Restatement (Second) of Agency § 225). The second judicial approach uses this same master-servant test of organizational control, but only after applying a threshold requirement that the individual have the expectation of compensation (*Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431 (5th Cir. 2013); Restatement (Third) of Employment Law § 1.02 (Draft April 2014)). The threshold compensation test is easy to meet – insurance and training offered to the volunteer can be enough; even free use of a golf cart has been found to qualify – leading many decisions to hinge on the same control-based test.¹

By puzzling over whether a volunteer is “employed by an employer,” we are not asking the right question. The master-servant test of organizational control maps onto the nonprofit-volunteer relationship awkwardly and unpredictably,

¹ California, Illinois, New York, and Washington DC recently adopted legislation explicitly prohibiting discrimination against and harassment of “unpaid interns,” somewhat myopically defined. California went beyond the intern to protect all “volunteers” from sexual harassment (Cal. Govt Code 12490). Other states considered but declined to enact similar legislation. Although these debates in the state legislatures focus on the unpaid intern, they are beginning a conversation about discrimination against and rights of unpaid workers more generally.

failing to provide guidance to organizations and workers about their rights and obligations. Much worse, we are failing to ask and answer the difficult questions about whether and when the law should guarantee charitable volunteers freedom from discrimination and harassment. Volunteers might not lose a paycheck, but they do suffer real injury when they are discriminated against or harassed during their volunteering. It degrades the value of volunteering and the dignity of the volunteer to ignore this injury simply because it is not financial. On the other hand, it can be difficult to quantify the unpaid worker's injury, and worries about ensuring compliance may push some nonprofits to reduce demand for casual volunteers. More controversially, extending protections against discrimination into the realm of voluntary behavior may precipitate a clash between nonprofits' diverse religious and ideological preferences and society's interests in eradicating odious discrimination. (Nelson 2015; Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)).

2 Beyond Discrimination: Volunteer Liabilities and Immunities

The nature of the nonprofit-volunteer relationship has implications well beyond employee protection laws. Federal and state legislation provides immunity from many types of liability to volunteers, *if* they are acting within the scope of their duties to a nonprofit organization (Goble and Brudney 2015; Horwitz and Mead 2009; Martinez 2003). At the same time, state law holds the organization responsible for the misdeeds of volunteers acting within the scope of their responsibilities, and this liability is not changed by volunteer immunity laws (Kahn 1985). In fact, organizational liability and volunteer immunity are linked: if the volunteer is immune, that implies he is acting for an organization that would then be vicariously responsible (Popper 1998, 132). To decide if the nonprofit-volunteer relationship is sufficient to lead to organizational liability and volunteer immunity, courts use the master-servant test of organizational control – the identical test used in the employee context.

3 Conclusions and Implications

Consider how current standards might play out in a plausible volunteer situation, based loosely on allegations from a recent case (*Marie v. Am. Red Cross*, 771 F.3d

344, 349 (6th Cir. 2014)). For several years, a volunteer spent one day a week alongside paid staff helping the nonprofit further its mission by performing various office tasks and responding to disasters. She did not expect a paycheck, but she did receive a number of meaningful personal benefits: training, workers' compensation and life insurance, a chance to meet people in her community, and the joy that comes from helping others. Should this volunteer have a legal right to be protected from discrimination and harassment at her unpaid position? Should this volunteer be entitled to a minimum wage? Should this volunteer be immune for simple mistakes made in the course of her service under volunteer immunity legislation? Paradoxically, under existing law, the answer to all of these questions is the same, or, at least, dependent on the same inquiry into organizational control. Yet different courts will apply the test of organizational control in different ways despite similar facts, meaning the nonprofit and the volunteer will not know of their rights and duties until the matter is brought to court.

It need not be this way. First, brighter lines and clearer rules would benefit nonprofit organizations and volunteers alike. Existing legislative ambiguities and inconsistent, fact-specific judicial decisions make it difficult for nonprofits to ensure that they are complying with the law when they use volunteers, and for volunteers to accurately assess their risks.

Second, the law must decouple the extent of various volunteer protections from one another. Simply because a volunteer is covered by one set of protections, say immunity (which is explicitly dependent on the volunteer working without compensation), should not imply that the volunteer is also covered by minimum wage protections (which would inconsistently require that the volunteer receive compensation). Different interests are at stake, and each track should be developed separately without being bound to the clumsy master-servant test.

Third, the development of policy towards volunteers should be done consciously and deliberately to allow for full deliberation and balancing of the values of individual dignity, organizational autonomy, and the realities of volunteer management. The millions who volunteer each year, and the organizations and communities that they serve, deserve at least that.

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