

Interns and Other Short-Term Workers: Tax and Employment Law Issues

By Jack B. Straus, Jr.

As nonprofits establish or expand short-term programs, tax and legal questions are surfacing and former assumptions are being questioned. Questions arise related to employment and tax law issues, including whether these volunteer workers must be paid and whether they are subject to minimum wage and hour law requirements. Their status with a nonprofit may also affect worker's compensation insurance, kidnapping and ransom policies (for organizations operating internationally), and health insurance programs. It will explain how to classify workers for tax and employment law purposes, explain expense reimbursement implications, and discuss potential liability under the Volunteer Protection Acts.

I. The Not Paid or Underpaid Worker

1. Do you have to pay interns or other short-term workers? NO. There are a number of different scenarios under which these workers could fall:

a. Ordinary volunteerism. The Department Of Labor will look at a variety of factors to determine whether someone falls within this category:

- The nature of the entity that receives the services;
- The receipt by the worker (or expectation thereof) of any benefits from those for whom the services are performed;
- Whether the activity is less than a full-time occupation;
- Whether regular employees are displaced;
- Whether the services are offered freely without pressure or coercion;
- Whether the services are of the kind typically associated with volunteer work.

Note: Employees may not choose to “decline” the protections of the Fair Labor Standards Act (See more on the FLSA below) by saying that they are just volunteering – even if both employee and employer agree. (The rationale for this is the potential for coercion. The Supreme Court specifically mentions this in the *Alamo Foundation* case cited below.) Thus, along those same lines, where employees of a non-profit organization perform “volunteer” work that is the same type of work as their normal work activity, then you have to pay them for that work. You are only off the hook if they are doing something totally different from what they normally do.

FLSA Opinion Letter: 2001-18, July 31, 2001.

[Note: FLSA Opinion Letters can be found at this site:
<http://www.dol.gov/esa/whd/opinion/flsa.htm>]

b. Trainees, students, or interns (FLSA Opinion Letter 2002-8)

There is an exception for trainees, students, or interns. Whether they are considered employees under the FLSA depends on all the circumstances surrounding their activities on the premises of the employer. The FLSA says that “if all of the following criteria apply, the trainees or students are not employees:”

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. The training is for the benefit of the trainees or students;
3. The trainees or students do not displace regular employees, but work under their close observation;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees or students; and on occasion his operations may actually be impeded;
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
6. The employer and trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

Let’s look at some of these in a bit more depth. The first thing that we notice from the actual opinion letter, is that even though it says at one place that ALL of the 6 factors must be present, it also says: “If, in fact, the summer job training program is predominately for the benefit of the youth participants, we would not assert an employment relationship.” So, the FLSA seems to be putting a lot of emphasis on Factor #2 above.

The other thing that is interesting is Factor #1 – vocational school. When you see that, you usually think of trade schools or schools involved in specific job training, not a liberal arts school. The reference to vocational school goes back to a 1947 case from the US Supreme Court – *Walling v. Portland Terminal*, 330 US 148 (1947). This was one of the early cases dealing with the FLSA and specifically it asked whether a railroad company had to pay prospective yard brakemen during their time of “practical training.” This training was similar to what they could have gotten if they had taken courses in railroading at a vocational school. Thus, factor #1 came from that case and has stuck.

However, in 2004, the FLSA issued another opinion letter indicating that it would not hold to the traditional definition of “vocational.” This opinion letter (FLSA 2004-5NA) dealt with an internship program to teach “marketing, promotion, and statistical analysis to students in a real world setting.” Basically, this internship was like a college marketing course. The students worked for the company 7-10 hours per week doing all sorts of marketing tasks. The opinion letter specifically stated that this particular internship would indeed satisfy Factor #1 – even though this type of training would not typically be taught in a vocational school. They even changed the wording a bit and dropped the word vocational, stating: “The company’s training program is similar to that which would be given in a school.” But it does put the students in “real life situations and provides them with an educational experience that they could not obtain in the classroom.”

As for Factor #2, the FLSA noted that an internship inures to the benefit of a student when they receive college credit for performing the internship. Is college credit necessary? We don't know. But that is a very strong factor.

c. Trainees under the Field Operations Handbook. This is not really different from b. above but the Field Operations Handbook rephrases some of the tests and adds a new one that is interesting. This can be downloaded from the DOL website at <http://www.dol.gov/esa/whd/FOH/index.htm>. You'll want Chapter 10 and the relevant section is 10b-03. Under the FOH, an employment relationship will not be asserted when:

1. The activities are basically educational;
2. The activities are conducted primarily for the benefit of the participants;
3. The activities comprise one of the facets of the educational opportunities provided to the students;
4. The student does not displace a regular employee or impair the employment opportunities of others;
5. "As a general guide, work for a particular employer ... after 3 months will be assumed by WH [Wage & Hour] to be part of an employment relationship unless the facts indicate that the training situation has not materially changed. Thus, if the conditions which warranted the finding that the student is not considered an employee continue, he or she may remain for a period of time as a trainee rather than an employee. On the other hand, if after the 3-month period the training aspects are subordinated and the work aspects clearly predominate, the student will be considered as an employee."

The fifth factor is what's different in this list where trainees are concerned. If the relationship goes on for more than 3 months, the DOL will presume there is an employment relationship. How did they get this idea? Where could they have gotten 3 months?

In 1985, the US Supreme Court decided a case where a religious organization staffed its operations (clothing outlets, farms, construction companies, motel, candy-making company, and a recordkeeping company) with certain individuals who were coming out of rehab programs – drug addicts, criminals, etc. The workers got no cash salaries but the organization did provide them with food, clothing, shelter, etc. [*Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 US 290 (1985)]. The court ruled that these people should be paid. And one of the key parts of the ruling was based on the length of time that the associates were working with the organization. The court said that they were "entirely dependent upon the Foundation for long periods, in some cases several years." [Of course another part of it was that they were engaging in ordinary commercial activities and were competing with for-profit companies that had to pay competitive wages.] Several years does not equal 3 months. But it is clear that the longer someone stays with an organization, and the more the work looks like an "ordinary commercial activity," the more likely it is that the person would not be considered a volunteer – unless there are other factors arguing otherwise.

2. Is it permissible to pay interns and other short-term workers honorariums, stipends, or small fees? YES. But you have to be careful.

a. 29 CFR 553.106. [Title 29 relates to Labor, and it is part of the Wage and Hour Division sections.]

Subsection (a) reads: “Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any contribution thereof, for their service without losing their status as volunteers.” This is the starting point. Let’s flesh it out:

“Expenses:” could include uniforms, out-of-pocket expenses that they incur while doing volunteer service – including meals and transportation expenses, books, supplies, materials.

“Reasonable benefits:” The Code says that you can include volunteers in group insurance plans such as liability, health, life, disability, workers compensation – and they will still be considered volunteers and not employees. [Of course your health insurer may not allow you to cover them – more on that later.]

“Nominal fees.” This one is more detailed. Here are the factors mentioned in the Code:

- It must not be tied to productivity. But you can pay a nominal amount on a “per call” or similar basis to folks like volunteer firefighters.
- The distance traveled and the time expended by the volunteer may be considered in setting the fee.
- You can consider whether the volunteer has agreed to be available around the clock or only during certain specified time periods [This is designed for volunteer firefighters.]
- If it is someone who volunteers to provide periodic services on a year-round basis they can get a nominal monthly or annual stipend or fee without losing volunteer status.
- The DOL will examine the total amount of payments made (expenses, benefits, fees) in the context of the economic realities of a particular situation to determine whether paying those amounts means the person loses his volunteer status.

b. Can a student receive a nominal fee? Yes. Under the Field Operations Handbook, Section 10b-03(i)(1):

“The student may receive some payment for their work in order to have a more realistic work situation, or as an incentive to the student or to insure that the employer will treat the student as a worker.”

c. How much is a “nominal fee?” The short answer – 20%.

The long answer is in FLSA Opinion Letter 2005-51.

The law itself does not define “nominal fee.” But the Senate Committee Report to the 1985 Amendments directed the DOL to issue regulations providing guidance. That’s what they’ve done in this opinion letter. Here’s the ruling:

20% of what you would otherwise have to pay to hire a worker for the same services is appropriate in dividing between a permissible nominal fee and an impermissible payment. This 20% figure assumes the following:

- The person is freely volunteering his/her time to the organization;
- The lump sum payment or series of payments is being made without regards to any level of productivity or not tied to any sort of incentive plan. [E.g., payment of an hourly rate or piece rate is suspect.]

The opinion letter states: "...a willingness to volunteer for an activity for 20% of the prevailing wage for the job is a likely indicium of the spirit of volunteerism contemplated by the ...FLSA." In other words, if you're doing it for 20%, you aren't doing it for the money!

Note: they do say that getting the market data is the responsibility of the organization. Also note that the nominal fee can be in addition to any actual out-of-pocket expenses that are reimbursed to the volunteer.

FLSA Opinion Letter 2005-51

Caveat: Another Opinion Letter (2006-28) says that the DOL will *presume* the fee is nominal if it does not exceed 20%. Thus, it may be that you can pay more than 20% but the burden of proof will shift to you to prove that anything over 20% is still nominal.

Don't forget that the nominal fee is taxable. Payments of out-of-pocket expenses used in the business activity of the organization are not. Payment of personal expenses would be part of the nominal fee.

d. Subminimum Wage

<http://www.dol.gov/dol/topic/wages/subminimumwage.htm>

The FLSA does provide for the employment of certain individuals at wage rates below the minimum wage. (Effective July 24, 2007, the minimum wage was raised to \$5.85/hour. Also, this website - <http://www.dol.gov/esa/minwage/america.htm> - shows a state minimum wage map.)

These people include student-learners and full-time students employed by retail or service establishments, agriculture, or institutions of higher education. And included are people whose earning or productive capacity is impaired by a physical or mental disability.

I won't go into detail here because you can get more info at the DOL website. But here are a few facts on the youth minimum wage from the DOL.

What is the youth minimum wage?

The youth minimum wage is authorized by Section 6(g) of the FLSA, as amended by the 1996 FLSA Amendments. The law allows employers to pay employees under 20 years of age a lower wage for a limited period -- 90 calendar days, **not** work days -- after they are first employed. Any wage rate above \$4.25 an hour may be paid to eligible workers during this 90-day period.

Who may be paid the youth minimum wage?

Only employees under 20 years old may be paid the youth minimum wage and only during the first 90 consecutive calendar days after initial employment by their employer.

Which employers may use the youth minimum wage?

All employers covered by the FLSA may pay eligible employees the youth minimum wage, unless prohibited by State or local law. Where a State or local law requires payment of a minimum wage higher than \$4.25 an hour and makes no exception for employees under age 20, the higher State or local minimum wage standard would apply

What happens if an employee reaches 20 years of age before he or she has worked the full 90-day eligibility period for the employer? Can the employee still be paid the youth wage for the full 90-day period?

No. Eligible employees may be paid the youth wage up to the day before their 20th birthday. On and after their 20th birthday, their pay must be raised to no less than the applicable minimum wage.

Does the youth wage go up when the FLSA minimum wage goes up?

No. An eligible youth may still be paid not less than \$4.25 an hour during the 90 calendar days after initial employment by his/her employer.

e. A quick word about state law.

To some extent, state law may impact each of the areas we've talked about. I don't have time to go into this in detail but you should be aware of a couple of things:

1. States usually have their own definition of what a volunteer is and the applicability of their Labor laws to volunteers. For example, Texas Labor Code Section 62.152 – there are exemptions for people who are “engaged in the activities of a religious, educational, charitable, or nonprofit organization in which (A) the employer-employee relationship does not in fact exist; or (B) the services are rendered to the organization gratuitously.”
2. Some states also have different definitions of nominal compensation. Most of these nominal comp laws originate with volunteer firefighters. So the extent to which it would apply elsewhere may be questionable. But, for example, Indiana defines “nominal” for a firefighter as not more than \$20,000 per year. (Indiana Code 36-8-12)

II. Insurance issues where you have an unpaid or nominal fee worker.

1. Workers Compensation issues

a. Volunteers. If you look at your policy, you'll probably note that it doesn't cover volunteers. But it does not need to stay that way. Your volunteers can be covered by the Voluntary Compensation coverage extension. Check with your agent and make sure that you get this.

b. Part-time employees. They are typically included as employees and would be covered. But again, double check with your agent.

c. Foreign part-time employees and people making short-term trips. These would typically be covered under a foreign package policy. Just make sure with your agent that you have this option.

d. Extraterritorial provision. Generally, this provision extends coverage to employees working outside the U.S. and provides them with the benefits of their home state. Coming home for a vacation or short trip does not void coverage. Texas has something very unusual – if you stay overseas for more than one year you can opt out. But I'm not sure a lot of other states have this. Check with your agent.

e. Volunteers will probably not get the full benefit of workers compensation insurance. Benefits vary from state to state, along with length of time for those benefits. Generally, the maximum income benefit is 66.6% of salary. Medical expenses do not have limits except for scheduled injuries such as loss of a body part where each State has it's own specific level of benefit. The length of the benefit depends on the type of injury and the degree of the injury as well as the state.

As for permanent disabilities, this too will vary by state. For example, Texas has an income benefit level of 70% of salary but limits the benefits paid to 401 weeks. Oregon though has a benefit level of 66.6% of salary and the benefits can be paid for life. Presumably, a volunteer with no salary would get none of those disability benefits.

2. Kidnap and Ransom policy issues

Typically, a policy will read something like this:

The policy will pay for loss from a kidnapping/ransom of an insured person (includes employees, officers, and directors of ORGANIZATION), a relative, or a guest. The policy will also pay for a loss from a threat to kill, injure, or kidnap an insured person, a relative, or a guest. ...The policy will pay for personal funds surrendered by an insured person, relative, or guest as a result of a kidnap ransom demand communicated directly to an ORGANIZATION employee, relative or

guest. Thus, personal assets are considered the organization's assets for coverage purposes.

The policy will cover detention of an ORGANIZATION employee, relative, or guest. But it will not cover detention resulting from violation of the laws of a host country or failure of an employee, relative, or guest to maintain and possess the required travel documents – unless that detention was done fraudulently and done to achieve a political or coercive effect.

So, if the intern is considered a guest, then he/she is covered. But you need to make sure. Our underwriter has informed us that if interns are not considered to be employees of the mission, we should add them to the policy so that there is no question of coverage.

Bottom line: double check with your insurance agent on this to make sure that volunteers and interns are covered.

3. Health insurance issues

This is one of the more complicated issues and potentially a trap for the unwary. Why is it important? Under many group plans you are required to enroll 100% of your employees if you, the company, are paying 100% of the premiums. (But if you are paying less than 100% of the premiums, then 75% of the employees must enroll. That is the insurance industry standard.)

So, what happens if you bring on an intern and pay him a nominal amount? Is he then considered an employee? Do you have to enroll him in your health plan? If you don't, have you violated the terms of the contract that you have with your health insurer? I can't give you a definitive answer here. Check your policy first then check with your agent or underwriter.

Usually, the group coverage is intended only for full-time employees under certain age limits. Individuals who work for the organization on a part-time, casual, or temporary basis are not eligible for coverage under the group plan. Therefore, if those individuals are being covered under another insurance plan, that will have no effect on the group coverage.

If individuals going overseas with a small stipend are considered "full-time" employees by the organization, they should be offered coverage under the plan. If they are considered part-time, casual, or temporary employees, they are not eligible.

In some cases the insurance company will consider coverage for people going overseas on a voluntary non-paid basis, if they complete a standard application form and are able to prove evidence of good health.

III. Expense reimbursements

1. Withholding on payments required.

The IRS and the courts have consistently ruled that payments made to interns and volunteers, even if only nominal, are taxable. One of the earliest rulings is back in 1962 – LTR 6210242580A, October 24, 1962. Allowances of anywhere from \$20 to \$40 per month were paid to interns who were otherwise considered “volunteers” by the organization. The ruling hinged on the fact that these interns would be considered employees of the organization because it had a “sufficient degree of direction and control” over the individuals. Thus, not only were the allowances taxed, the organization was required to withhold FICA and furnish the interns with W-2’s, not 1099’s.

In addition, the organization provided some individuals with an extra \$185 per month to “cover such items as room, board, and laundry, clothing, personal, and travel allowances; health insurance; and amortization of school debt plus interest thereon.” The organization called these maintenance payments. And the IRS ruled that these payments also constitute taxable wages and all taxes must be withheld from the payments.

2. Deduction for Out-of-pocket expenses.

What if your organization doesn’t reimburse your volunteers of out-of-pocket expenses? These would then be deductible by the volunteer. Reasonable unreimbursed out-of-pocket expenses incurred by volunteers of nonprofit organizations are deductible. However, the portion of any expenses that a volunteer spends to pay for his own personal use is not deductible. For example, if you have a volunteer taking a bunch of kids out to eat at a youth group function, he can deduct the cost of their meals but not his own. In addition, no deduction is allowed for a contribution of services. See LTR 7836028, June 8, 1978, for more information on this topic.

IV. The effect of volunteers on unrelated business income.

This is an interesting side issue and one where you need to be very careful. The Code imposes a tax on the unrelated business taxable income of exempt organizations. Income is unrelated business taxable income if it is income from a trade or business, the trade or business is regularly carried on by the organization, and the conduct of the trade or business is not substantially related to the organization’s performance of its exempt function. However, “Section 513(a)(1) of the Code provides that the term unrelated trade or business does not include any trade or business in which substantially all the work in carrying on such trade or business is performed for the organization without compensation.” And this exclusion for volunteer labor “only applies for those unrelated business activities in which the performance of services is a material income-producing factor in carrying on such activity.” Now, let’s look at two letter rulings that illustrate some interesting scenarios.

In the first, an organization allowed the storage of trailers, campers, motor homes, boats, and cars in some of its buildings that were not being used at certain times of the

year. And of course they charged a fee for this. However, the process of taking the reservations for the storage spaces, assisting in preparing the units for use, cleaning the buildings after use, and providing security, was all performed by volunteer labor. This was done mostly on Saturdays during the organization's off-season. The organization calculated that about 540 work-hours of volunteer time went into these activities.

The IRS ruled that this activity was indeed a trade or business, it was regularly carried on, and it was not substantially related to the organization's performance of its exempt function. So this would potentially be taxable income. But does the volunteer labor then negate that income? The IRS said no. That exception is only "applicable when the activity performed by the volunteers is a material income-producing factor in carrying on the activity." The services provided by the volunteers here are not enough. The owners of the items being stored are primarily paying for the use of the facility over a period of time rather than for the minimal services provided by the volunteers. (LTR 9822006, January 29, 1998.)

However, another ruling brought a different result. In this one, an exempt organization that sponsored concerts and crusades used volunteers to sell merchandise during the events. One compensated staff member was assigned to supervise ten uncompensated volunteers. Sales take place for about 5 hours per concert. The total number of hours that some 80 plus volunteers worked was in excess of 400 hours, compared with the approximately 40 hours that the paid employees worked supervising the volunteers. Based on this, the IRS ruled that "substantially all the work in carrying on the sales will be performed by volunteer labor. Therefore, income earned by [the] organization will be excluded from the tax on unrelated business income." (LTR 9544029, August 5, 1995.)

So, in this case, slightly less than 10% of the work was performed by compensated employees and the volunteer exception applied. In another case, involving bingo games, the Tax Court ruled that where compensated employees were performing 21% of the work and volunteers were performing 79% of the work at the bingo games, the organization was not able to take advantage of the volunteer labor exception. They were taxed. (*Waco Lodge No. 166 v. Commissioner*, 696 F.2d 372 (1983)).

The regulations don't add too much more. Section 1.513-1(e)(1), which sets forth the volunteer exception, only offers one example:

An example of the operation of the first of the exceptions mentioned above would be an exempt orphanage operating a retail store and selling to the general public, where substantially all the work in carrying on such business is performed for the organization by volunteers without compensation.

Finally, don't forget that compensation includes noncash compensation. In one case the "volunteers" received food, clothing, shelter, and medical care. This was taxable compensation and thus the organization did not get to take advantage of the volunteer exception. (*Shiloh Youth Revival Centers v. Commissioner*, 88 U.S.T.R. 565 (1987).)

V. Volunteer Protection Acts – Are they still effective if your volunteers are receiving nominal fees?

1. The Federal Statute – 42 USC 139

a. Interaction with State Law:

The federal law preempts state law where the two are inconsistent. However, if state law provides more protection to volunteers than federal law, then state law controls.

b. Limitation on Liability:

- The volunteer must act within the scope of his responsibilities.
- If required (or appropriate) the volunteer must be properly licensed, certified, or authorized by the appropriate authorities for the activities he engages in.
- The harm must not be caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.
- The harm is not caused by the volunteer operating a motor vehicle where insurance is required.
- Civil actions can still be brought against the volunteer by the nonprofit organization.
- The liability of the organization itself is not affected.
- If a state law requires mandatory training of volunteers or other risk management procedures in order to take advantage of limited liability, then you still must comply with that aspect of state law. (TX does not require these things.)
- If a state law requires that the nonprofit hold a general liability insurance policy or other similar policy in order to limit liability, then the organization must still procure that.
- Volunteers are still responsible for any misconduct involving a hate crime or a sexual offense.
- Volunteers are also responsible for misconduct when they were under the influence of drugs or alcohol.
- Volunteers are responsible for misconduct when violating a state or Federal civil rights law.

c. Hate Crimes. This Code section applies to any 501(c)(3) organization that does not practice a hate crime. (Hate crime under the Hate Crime Statistics Act – 28 USC 534 – means “crimes that manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity.”)

d. Compensation. A volunteer under this law may receive “reasonable reimbursement or allowance for expenses actually incurred.” However, he may not receive compensation in excess of \$500 per year, including anything of value in lieu of compensation.

e. The VPA and the FLSA. One other very interesting thing about the federal VPA, one court has ruled that it also protects individuals from federal claims such as those arising

under the FLSA. A former President of an organization sued the volunteer directors personally for unpaid wages under the FLSA. The court ruled that the VPA protected them. (*Armendarez v. Glendale Youth Center, Inc.*, D. Ariz. 2003, 265 F. Supp. 2d 1136.)

2. The Texas Statute – Civil Practices and Remedies Code, Chapter 84 – Charitable Immunity and Liability

a. Summary.

A volunteer serving as an officer, director, or just a general volunteer of a nonprofit corporation (501(c)(3) or 501(c)(4) organizations only) is immune from civil liability for any act or omission resulting in death, damage, or injury if the volunteer was acting in the course and scope of his or her duties or functions. This immunity does not apply to the operation or use of a motor-driven vehicle, and to the extent that there is insurance coverage. Thus, a volunteer may be liable but only up to the amount of the insurance coverage. Intentional, willful or wantonly negligent acts are not covered by immunity.

The organization is liable but if it maintains insurance coverage of at least \$500,000 for each person and \$1,000,000 for each single occurrence for death or bodily injury and \$100,000 for each single occurrence for injury to or destruction of property, liability will be limited to the insurance.

b. Compensation. A volunteer under the Texas law may only receive a reimbursement for expenses incurred. There can be no compensation at all – no \$500 exception here.

This statute doesn't mean you can't be sued. But it does mean that absent willful acts you'll win the case. The Texas Attorney General has even noted that defamation would be an example of the kind of injury subject to this law. (Op.Atty.Gen. 1988, No. JM-951.)

NOTE: Let's look at a couple of scenarios and cases:

Scenario 1

Your organization runs a garage sale as a fundraiser. As a volunteer, you are responsible for supervising a section of miscellaneous hardware. A young boy runs into the section. A stack of hardware falls, hitting the boy in the head. He loses sight in one eye.

As a volunteer running the booth, are you liable?

Not if your organization is one described in the Charitable Immunity Statute, they have the requisite insurance, and you are a volunteer.

As a board member, are you liable?

Same answer as above. Plus, even if you didn't have immunity, it would be tough for you to be sued as a director unless you had some sort of personal involvement in the activity.

As a member of the sponsoring organization, are you liable?

No.

Is the organization liable?

Probably so. But if you have insurance you'll be protected.

Scenario 2

You drive someone on a volunteer basis to an organization meeting and then to a charitable activity sponsored by the organization. You are rear-ended. Your passenger is injured.

Is your organization liable? Probably. Should have insurance.

Are you personally liable? As a driver, to the extent that your behavior contributed to the accident, probably so. But your personal auto insurance should provide protection. No immunity under Charitable Immunity Statute since it does not provide immunity for claims involving motor vehicles.

As a board member, are you liable?

Board members must have some personal involvement in the accident that would make them responsible. For example, if you knew that the driver had a poor safety record or had lost a driver's license for poor driving.

As a member of the sponsoring organization, are you liable?

No immunity because a motor vehicle is involved. But you would need to have some sort of personal involvement in the accident.

Scenario 3

Your organization runs an after school program for adolescents. Activities are conducted by paid, adult staff. As a board member, you are contacted by a well-known personal injury attorney who says his client was sexually attacked by one of the adult staff. The lawyer says that he will sue the staff member and the organization, plus all the board members, unless he receives \$1 million in 24 hours.

Is your organization liable?

Yes.

As a volunteer board member, are you personally liable?

Probably not. At least if your conduct was not willful. (But if you hired this person knowing about a predilection for sexual misconduct, you would be liable.) You will also have indemnification from the organization but only if your organization is solvent. D & O policy may also provide some protection. That's why you get them.

Case 1

Volunteer Protection Acts do not provide blanket exemptions from liability for volunteers, as this decision from a **Florida** court indicates.

Reuben and Deanna were involved in a traffic accident in Florida. Reuben hit Deanna's car from the rear while she was stopped at a traffic light. Reuben was in uniform driving a Citizen Patrol car belonging to the Sheriff's office as a volunteer member of the Citizen Observer Patrol. Deanna sued Reuben but the trial court dismissed the suit pursuant to the Florida Volunteer Protection Act.

The Act essentially says that a volunteer for a nonprofit organization will not be liable for any acts or omissions that result in personal injury or property damage if that person was "acting

in good faith within the scope of any official duties performed under such volunteer service and such person was acting as an ordinary reasonably prudent person would have acted under the same or similar conditions.” In addition, the injury must not be caused by any “wanton or willful misconduct.”

Deanna appealed the trial court’s ruling because she thought a question remained as to whether Reuben was acting as a “reasonable, prudent person.” The appeals court bought her argument and reversed the trail court’s decision. They said that Reuben “would not be protected from his own ordinary negligence” under the language of the statute and there was evidence that he was not acting as an “ordinarily prudent person would have acted under the same or similar circumstances.”

The lesson here is that although VPA’s can provide some protection to volunteers, you still have to be careful. The VPA is not a blanket exemption for any and all acts. *Campbell v. Kessler*, Florida District Court of Appeal, 4th District, No: 4D01-5034. May 7, 2003. **Note: This involves a motor vehicle so in Texas the Act would not apply either.**

Case 2

A church or nonprofit may be liable for volunteer injuries if they fail to adequately supervise programs and activities under their control.

A California court held that a church was NOT responsible on either premises liability or negligent supervision for injuries to a volunteer worker who fell while on a ladder repainting the church building since the volunteer maintained control over the sandblasting process and because the volunteer produced no evidence that other volunteers improperly held the ladder such that they caused him to fall and sustain injuries.

The evidence showed that the volunteer was an experienced sandblaster and that the pastor who was not on the jobsite at the time of the accident, was not experienced. The volunteer injured was the only person who gave directions to the persons holding the ladder. The mere fact that the church supplied the ladder and sandblasting equipment requested by the injured volunteer is not sufficient to pursue a premises liability claim based on the volunteer’s conduct on the church worksite. Further the allegation that the church knew or should have known that the volunteers who held the ladder had poor judgment or would act recklessly, or failed to properly investigate the volunteers prior to assigning them the work, simply was without merit. In fact, the court pointed out that they had held the ladder for some time without incident before the accident and that no special skill is required to hold a ladder. While the church won this volunteer liability case, it could have been avoided by a waiver and release for such high risk activity or they should have hired an independent contractor for such obviously risky work. *Amarra v. International Church of the Foursquare Gospel*,, 2003 WL 254023 (Cal. App. 2003).

VI. The Paid Worker

1. Employee or Independent Contractor: Making the Best Decision

Since the dawn of withholding and the requirement that employers match Social Security and Medicare taxes, there has been a struggle between employers and the IRS over whether a worker should be considered an employee or an independent contractor. In the past various tests have been cobbled together by the courts and the IRS. These would often function as checklists, guiding employers on how to categorize their

workers. But the tests grew more complex. In an effort to simplify the decision-making process, the IRS changed how it will analyze the classification of workers. The change is detailed in an article from the 2003 Continuing Professional Education (CPE) text. In an article called “Employment Tax Update – Review of Current Litigation,” the authors review the state of the law. (This article can be found at <http://www.irs.gov/charities/article/0,,id=101915,00.html>.)

They begin with this comment:

To determine whether an individual is an employee or an independent contractor under the common law, the relationship of the worker and the business must be examined. All evidence of control and independence must be considered. In any employee-independent contractor determination, all information that provides evidence of the degree of control and the degree of independence must be considered.

Evidence of control and independence fall into three basic categories: behavioral control, financial control, and the type of relationship of the parties. Let’s look at each one in turn.

Behavioral Control

“Factors that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of instructions and training the business gives the worker.” Examples of types of instructions include:

- when and where to do the work,
- what tools or equipment to use,
- what workers to hire or to assist with the work,
- where to purchase supplies and services,
- what work must be performed by a specified individual, and
- what order or sequence to follow.

The key consideration here, according to the IRS, is “whether the business has retained the right to control the details of a worker’s performance or instead has given up that right.”

Financial Control

The CPE text listed six major factors to consider when looking at financial control:

1. The extent to which the worker has unreimbursed business expenses. Independent contractors are more likely to have them than are employers.
2. The extent of the worker’s investment. Independent contractors often have significant investment in the facilities they use to perform services for someone else.
3. The extent to which the worker makes services available to the relevant market. An independent contractor is usually free to seek out other business opportunities.
4. How the business pays the worker. An employee is usually guaranteed a regular wage while an independent contractor is usually paid a flat fee for a particular job performed.
5. The extent to which a worker can realize a profit or loss. An independent contractor can realize a loss.
6. The extent to which services performed by the worker are a key aspect of the regular business of the company.

Type of Relationship

Here are factors that will be considered:

- Written contracts. It helps to describe the relationship the parties are intending to create.
- Whether the business provides the worker with employee-type benefits such as insurance, pension, vacation pay, etc.
- The permanency of the relationship. If the worker is engaged with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, that is evidence that there was intent to create an employer-employee relationship.

This CPE article also goes on to look at some specific cases that may be applicable to non-profit organizations. Here are quick summaries of the more relevant ones:

- Truck drivers working for a sole proprietor were deemed employees. The owner supplied the trucks, maintained them, authorized repairs, and required the drivers to keep in touch via cell phones.
- A voice actor for radio and TV commercials was deemed to be an employer of each individual company that he worked for. The actor did not have enough control over each relationship to be considered an independent contractor.
- Workers for a business that moved vehicles were deemed employees. Although there were no training sessions or set hours for the workers, the company provided the workers with detailed written instructions about the procedures used to deliver vehicles.
- A minister was deemed an employee of a church because the church provided benefits typical to employees. These included contributions to a pension plan, continuation of salary while on vacation, disability leave, and paternity leave.

The CPE text contained a brief discussion of wages subject to tax withholding and social security. It emphasized that “payments in kind must be recognized as income and are subject to income tax withholding and social security and Medicare taxes.” Payments in kind can include goods, lodging, food, clothing, cars, and services. The fair market value of the payments at the time they are provided is subject to tax.

Who is responsible to collect the taxes and forward them to the IRS? The organization of course but there can also be personal liability on the part of certain people within the organization. If the taxes are not paid, responsible parties can be personally liable for them. Responsible parties can include officers or employees of a corporation, creditors who purchase a business, bookkeepers, consultants, and volunteer members of the board of directors. The cases discussed in the text list a number of factors to take into consideration when determining who is a responsible party.

The text also discusses the concept of an accountable plan. This is an extremely important area to understand. Payments made by an employer to an employee are not considered wages if they meet the accountable plan rules. To be an accountable plan, the reimbursement or allowance arrangement must require the employees to meet all three of the following rules (see Treas. Reg. section 1.162-2 for more details):

1. The employee must have paid or incurred deductible expenses while performing services as an employee.

2. The employee must adequately account for these expenses within a reasonable period of time.
3. The employee must return any amounts in excess of expenses within a reasonable period of time.

Most organizations, especially deputized fundraising organizations, try to categorize as much expense as possible as work funds rather than salary. In order to do that it is critical that the accountable plan rules be followed, otherwise the IRS will recharacterize the payments as salary and hit both the employee and the organization with back taxes, penalties, and interest. (By the way, what is a reasonable time for accounting for work funds and returning them? It can either be within 120 days of payment or within 120 days of receipt of a quarterly statement. Those are the “safe-harbor” provisions. Anything beyond that must be reasonable under the facts and circumstances.)

Examples From Rulings and Cases

Shortly after the IRS published its new procedures in the CPE text, it began issuing rulings illustrating the principles. In one of the first rulings, the IRS considered a teacher. (IRS Letter Ruling 200324043, March 10, 2003.)

This teacher was initially hired by a school as a contract worker, but a year later he was treated as an employee. He taught seven classes during an eight-hour work day. He taught on the premises of the school and did not teach for other schools. The school provided the worker with training and he was required to attend weekly staff meetings. If substitutes or helpers were needed, the school hired and paid them. If problems arose he was required to contact his supervisor, the principal. He was required to report student attendance and student progress to the school. All educational supplies were provided by the school and the worker was not required to incur any expenses. He was entitled to vacation and sick leave. The relationship between the worker and the school could be terminated by either party without incurring liability or penalty.

The IRS ruled that “the services performed by the Worker were sufficiently subject to the direction and control by the Firm to establish an employer-employee relationship.” The IRS reached its conclusion by referring to the three primary factors announced in the 2003 CPE text – behavioral control, financial control, and the relationship of the parties:

- Behavioral controls. These “are evidenced by facts which illustrate whether the service recipient has a right to direct or control how the worker performs the specific tasks for which he or she is hired. Facts which illustrate whether there is a right to control how a worker performs a task include the provision of training or instruction.”
- Financial controls. These “are evidenced by facts which illustrate whether the service recipient has a right to direct or control the financial aspects of the worker's activities. These factors include whether a worker has made a significant investment, has unreimbursed expenses, and makes services available to the relevant market; the method of payment; and the opportunity for profit or loss.”
- The relationship of the parties. This “is generally evidenced by the parties’ agreements and actions with respect to each other, including facts which show not only how they perceive their own relationship but also how they represent their relationship to others. Facts which illustrate how the parties perceive their

relationship include the intent of the parties as expressed in written contracts, the provision of or lack of employee benefits, the right of the parties to terminate the relationship, the permanency of the relationship, and whether the services performed are part of the service recipient's regular business activities.”

In light of these factors, the IRS “held that the Worker was an employee of the Firm and amounts paid to him for services provided were wages, subject to federal employment taxes and income tax withholding.”

In another ruling (LTR 200407014, September 30, 2003) a van driver for wheelchair passengers was ruled an employee. Here are some of the key facts in this case:

- Worker was paid an hourly wage and was subject to Firm’s control regarding hours worked and trips made.
- Worker must adhere to prices for trips of wheelchair passengers dispatched through the Firm.
- Passenger requests for transportation made directly to the Worker are not subject to approval by the Firm.
- Workers must be trained in cardiopulmonary resuscitation, first-aid, and sensitivity in helping people using wheelchairs.
- The Firm trains the Workers to safely operate specialty equipment, such as a wheelchair lift.
- The Worker pays a fixed daily or weekly fee to the Firm, in exchange for which the Worker acquires the use of the van, painted with the Firm’s colors, trademark, and logo, and equipped with a two-way radio or computer dispatch equipment.
- The Worker uses the Firm’s scheduling, dispatch, cashiering, and collection services.
- The Firm pays for all insurance and maintenance on the van.
- The Worker can keep all fares and tips from passengers if they are in excess of the lease fee paid by the Worker.
- The Worker pays the operating expenses of the van – gas, tolls, tickets, etc.
- The Worker pays for maps, seatbelts, and uniforms.
- The Firm prepares “routes” for the Worker.
- The Worker may arrange his own trips without using the Firm’s dispatch services.
- The Worker claims to make no business decisions.
- The Worker does not advertise independently since he is scheduled for 10 hours per day.
- The Worker did not provide a substitute driver when he couldn’t drive.
- According to the Firm, the Worker is an independent contractor because he pays a flat fee to the Firm to lease the van.

The IRS concluded that the Worker is an employee of the Firm. The relevant factors hinged on issues of control and generally fell into the three categories we’ve already discussed: behavioral control, financial controls, and the relationship of the parties. In sum, the IRS decided that:

1. The Firm provided training and instruction which illustrated that it had a right to direct or control how the Worker performed specific tasks (behavioral control),

2. There was little investment on the part of the Worker, his services were not available to the relevant market, and there was little opportunity for profit or loss, thus indicating financial control,
3. The substance of the relationship indicated employment (relationship of the parties).

Next, the Tax Court weighed in, affirming the IRS's position by ruling that a professional musician was indeed an employee. And, as a little bonus, the court detailed certain expenses that would not be deductible for a professional musician. (*Walz v. Commissioner*, T.C. Summary Opinion 2005-1.) In this case, John is an internationally recognized professional cellist of "exceptional ability." Like most musicians, he works in a number of venues: concert soloist, music teacher, and background music for movies and television. During 2000, he performed for 25 organizations and received 25 Forms W-2 – Wage and Tax Withholding Statement. Each organization issuing him a W-2 withheld federal, state, social security, and Medicaid taxes.

Among other organizations, John performed for the Los Angeles Opera and the Long Beach Symphony. Both select the music to perform, provide him with the music, require him to attend rehearsals, set the time and length of rehearsals, and set the dress uniform for performances. When John provided background music for motion pictures, the movie companies would tell him when to come and perform. They provided him with the music.

When John filed his Form 1040 for 2000, he attached a Schedule C – Profit or Loss from Business. He listed his profession as "Independent Professional Musician/Soloist Cellist – Classic Music." He claimed deductions on his schedule C of \$83,588 and were in these areas: auto, depreciation, insurance, interest, legal/professional, office, rent, repairs, supplies, travel, meals, utilities, other, and home office. But the IRS disallowed all of these deductions and claimed that he should have filed a Form 2106 – Employee Business Expense – instead. And because of that, the IRS determined that John was deficient in his income tax payments by \$18,468. They also imposed an additional tax of \$2,403 and penalties of \$4,181.

The two primary issues in this case are (1) whether John is an employee or an independent contractor, and (2) the extent to which he can legitimately take deductions for certain expenses. First, the Tax Court ruled that he is an employee and not an independent contractor for every musical organization he played with. John contended that no one had the right to control either the method or the means by which he played his cello. But the court said that the musical organizations "exercise control over [him] in specifying when he plays, in determining the length of his performance, when he participates in rehearsals, whether he can take breaks, which dress uniform he is required to wear, and in making him subject to the instructions of the conductor. The musical organization provides the place for rehearsals, the place for performances, and the music used."

Next is the issue of deductions. The IRS disallowed every Schedule C deduction in full. At trial both parties treated them as employee business expenses though and so did this court. Expenses which are ordinary and necessary business expenses of employment are deductible. But, "deductions are strictly a matter of legislative grace,...taxpayers must substantiate claimed deductions,... and taxpayers must keep sufficient records to establish the amounts of the deductions."

In this case, John was allowed to deduct the interest he paid on the purchase of business items. He could deduct expenses relating to his computer. He could deduct tax preparation fees. He could deduct the expenses incurred for repairing his cello, including new strings, rehairing the bow, adjustments, and a new bridge. He could deduct expenses for supplies he used in printing brochures and the postage to send them out. He could deduct expenses for purchasing CDs, books, DVDs, and sheet music which related to his profession. He could deduct the money he paid for publicity shots. And he could deduct his union dues and business-related bank fees.

There were however, certain items not as clear-cut. Part of his home office expenses were deductible but part were not. In order to deduct home office expenses, a taxpayer must “use the portion of the home *solely* for the purpose of carrying on a trade or business and that there be no personal use of that part of the home.” At his Pasadena home, he did indeed use one bedroom solely as a studio/home office. He practiced there, kept his library there, and kept his instruments there. (For those who are interested in these sorts of things, his primary instrument is a cello made in France in the late 1800s by Joseph Hel.) He also has his computer and printer there. He could deduct the expenses for his Pasadena home office. However, he could not deduct as home office expenses another studio in Idyllwild. It was not used exclusively as a studio, and as the court noted, “at a minimum he had to walk through that room to get to the upstairs.” That’s quite a stringent test for exclusivity!

His travel expenses were also not deductible. There are strict substantiation rules for travel expenses and he did not meet them. Attending various concerts was also ruled to be a nondeductible personal expense. And expenses for his meals were not deductible. As the court said: “Not everything in life is deductible.”

Finally, to show how biased the IRS is against treating workers as independent contractors, consider youth sports leagues. In what seems like a scene from the Twilight Zone, a youth soccer association was assessed \$334,441 in back taxes and fines for calling its coaches and referees independent contractors rather than employees. And they aren’t the only ones under investigation by the IRS. Many similar youth sports organizations around the country are having to confront the fact that umpires, referees, coaches, and concession stand workers could be considered employees under IRS rules. And that means withholding taxes, matching FICA and Medicare taxes, filing quarterly employment tax returns, making tax deposits, and issuing W-2’s instead of 1099’s. And it also means that the long-suffering, hard-working volunteer board members of these organizations could be held personally liable for back taxes and penalties.

The case currently getting the most publicity involves the Fairfield United Soccer Association (FUSA) in Fairfield, CT. In this case an IRS audit determined that the coaches and the referees were employees rather than independent contractors. They penalized FUSA for not filing W-2 and 1099 forms for those earning more than \$600 in 2003 and 2004. They also charged FUSA with keeping inadequate records, failure to obtain Social Security numbers for some of the individuals, and not recording some of the cash payments. The IRS claimed that because the referees were hired, scheduled, trained and paid by FUSA they were employees.

Negotiations in this case went back and forth for over a year. Then finally in the late summer of 2007, the IRS and FUSA reached a settlement. As reported by the New York Times: “Under the agreement, the Fairfield, Conn., league will begin in 2008 to

treat about half of its 30 coaches — those not employed by professional coaching associations — as employees rather than as independent contractors, and will withhold taxes from their pay. And the league will pay \$11,600 in back taxes, according to Jay Skelton, the group's president, a fraction of the \$334,441 in taxes and fines the I.R.S. had assessed it in 2004.” But the referees will still be considered independent contractors and FUSA will not have to withhold taxes on them. Also, board members will not be personally liable for the back taxes.

(Youth Soccer Group Agrees to Withhold Taxes From Coaches. *New York Times*: <http://www.nytimes.com/2007/08/02/nyregion/02soccer.html>.)

Conclusion

In determining whether a worker should be considered an employee or an independent contractor make sure that you use the three tests of behavioral control, financial control, and type of relationship. But remember, the IRS has a strong bias against treating workers as independent contractors. A good rule of thumb is that if there is any doubt as to classification, consider the workers employees and withhold the taxes.

2. Officers

Under Section 3121(d)(1) of the Internal Revenue Code, corporate officers are by definition employees.

3. Form SS-8

An employer, employee, or other worker can ask the IRS to make a determination on the proper classification of a worker as either an employee or independent contractor. Depending on the outcome of the SS-8 determination, there can be substantial risk to the employer. If the worker is being treated as an independent contractor but the IRS rules that they should be treated as employees, they will issue a determination letter to the business. If that happens, the business must start withholding and of course could be at risk for back taxes and interest.

But what if the worker is determined to be an employee but the employer still keeps giving them a 1099? The employee may have a problem – does he report income on a Schedule C and thus have to pay the full 15.3% self-employment tax?

In this case, the employee should file a Form 8919. They only would then have to pay their share of FICA and Medicare (7.65%) and the IRS goes after the employer for the rest.

In addition, if you get the classification wrong it could create problems with your health insurance, qualified plans, workers compensation, and unemployment compensation (if you pay it). If you treat someone as an independent contractor and it later turns out that they should have been treated as an employee, it could disqualify plans that have certain tests for participation. And for the individual, if he was treated as an independent contractor and established a self-employed pension plan, but subsequently discovered that he should have been an employee, he will face major penalties for over-contributing.

(Tax Talk Today – “What’s Hot in Employment Taxes: Independent Contractor or Employee? November 6, 2007. www.taxtalktoday.tv.)

4. The FLSA – exempt or non-exempt, and the consequences

When you get beyond paying volunteers nominal fees, you run into FLSA issues.

OVERVIEW

The Fair Labor Standards Act (FLSA), which prescribes standards for the basic minimum wage and overtime pay, affects most private and public employment. It requires employers to pay covered employees who are not otherwise exempt at least the federal minimum wage and overtime pay of one-and-one-half-times the regular rate of pay. For nonagricultural operations, it restricts the hours that children under age 16 can work and forbids the employment of children under age 18 in certain jobs deemed too dangerous. For agricultural operations, it prohibits the employment of children under age 16 during school hours and in certain jobs deemed too dangerous. The Act is administered by the Employment Standards Administration's Wage and Hour Division within the U.S. Department of Labor.

On May 25, 2007, the Fair Labor Standards Act (FLSA) was amended to increase the federal minimum wage in three steps: to \$5.85 per hour effective July 24, 2007; to \$6.55 per hour effective July 24, 2008; and to \$7.25 per hour effective July 24, 2009.

Two key Fact Sheets about the FLSA are reproduced below:

Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more detailed information on the specific exemptions for executive, administrative, professional, computer, and outside sales employees, and for more information on the salary basis requirement.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- A combination of the aforementioned duties, the performance of which requires the same level of skills.

Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

Blue Collar Workers

The exemptions provided by FLSA Section 13(a)(1) apply only to "white collar" employees who meet the salary and duties tests set forth in the Part 541 regulations. The exemptions do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be.

Fact Sheet #21: Recordkeeping Requirements Under the Fair Labor Standards Act (FLSA)

This fact sheet provides a summary of the FLSA's recordkeeping Regulations, 29 CFR Part 516.

Records To Be Kept By Employers.

Highlights: The FLSA sets minimum wage, overtime pay, recordkeeping and child labor standards for employment subject to its provisions. Unless exempt, covered employees must be paid at least the minimum wage and not less than one and one-half times their regular rates of pay for overtime hours worked.

Posting: Employers must display an official poster outlining the provisions of the Act, available at no cost from local offices of the Wage and Hour Division and toll-free, by calling 1-866-4USWage (1-866-487-9243). This poster is also available electronically for downloading and printing at <http://www.dol.gov/osbp/sbrefa/poster/main.htm>

What Records Are Required: Every covered employer must keep certain records for each non-exempt worker. The Act requires no particular form for the records, but does require that the records include certain identifying information about the employee and data about the hours worked and the wages earned. The law requires this information to be accurate. The following is a listing of the basic records that an employer must maintain:

1. Employee's full name and social security number.
2. Address, including zip code.
3. Birth date, if younger than 19.
4. Sex and occupation.
5. Time and day of week when employee's workweek begins.
6. Hours worked each day.
7. Total hours worked each workweek.
8. Basis on which employee's wages are paid (e.g., "\$9 per hour", "\$440 a week", "piecework")
9. Regular hourly pay rate.
10. Total daily or weekly straight-time earnings.
11. Total overtime earnings for the workweek.
12. All additions to or deductions from the employee's wages.
13. Total wages paid each pay period.
14. Date of payment and the pay period covered by the payment.

What About Timekeeping?: Employers may use any timekeeping method they choose. For example, they may use a time clock, have a timekeeper keep track of employee's work hours, or tell their workers to write their own times on the records. Any timekeeping plan is acceptable as long as it is complete and accurate.

The following is a sample timekeeping format employers may follow but are not required to do so:

| DAY | DATE | IN | OUT | TOTAL HOURS |
|----------------------|--------|------|-------|-------------|
| Employee Name: _____ | | | | |
| Sunday | 5/2/93 | | ----- | |
| Monday | 5/3/93 | 8:00 | 12:02 | |
| | | 1:00 | 5:03 | 8 |
| Tuesday | 5/4/93 | 7:57 | 11:58 | |
| | | 1:00 | 5:00 | 8 |
| Wednesday | 5/5/93 | 8:02 | 12:10 | |
| | | 1:06 | 5:05 | 8 |
| Thursday | 5/6/93 | | ----- | |
| Friday | 5/7/93 | | ----- | |
| Saturday | 5/8/93 | | ----- | |
| Total Workweek Hours | | | | 24 |

Employees on Fixed Schedules: Many employees work on a fixed schedule from which they seldom vary. The employer may keep a record showing the exact schedule of daily and weekly hours and merely indicate that the worker did follow the schedule. When a worker is on a job for a longer or shorter period of time than the schedule shows, the employer must record the number of hours the worker actually worked, on an exception basis.

How Long Should Records Be Retained: Each employer shall preserve for at least three years payroll records, collective bargaining agreements, sales and purchase records. Records on which wage computations are based should be retained for two years, i.e., time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages. These records must be open for inspection by the Division's representatives, who may ask the employer to make extensions, computations, or transcriptions. The records may be kept at the place of employment or in a central records office.

Terms Used in FLSA:

Workweek - A workweek is a period of 168 hours during 7 consecutive 24-hour periods. It may begin on any day of the week and at any hour of the day established by the employer. Generally, for purposes of minimum wage and overtime payment, each workweek stands alone; there can be no averaging of 2 or more workweeks. Employee coverage, compliance with wage payment requirements, and the application of most exemptions are determined on a workweek basis.

Hours Worked - Covered employees must be paid for all hours worked in a workweek. In general, "hours worked" includes all time an employee must be on duty, or on the employer's premises or at any other prescribed place of work, from the beginning of the first principal activity of the work day to the end of the last principal work activity of the workday. Also included is any additional time the employee is allowed (i.e., suffered or permitted) to work.

Equal Pay Provisions

The equal pay provisions of FLSA prohibit sex-based wage differentials between men and women employed in the same establishment who perform jobs that require equal skill, effort, and responsibility and which are performed under similar working conditions. These provisions, as well as other statutes prohibiting discrimination in employment, are enforced by the Equal Employment Opportunity Commission. More detailed information is available from its offices which are listed in most telephone directories under U.S. Government.

VII. Summary

1. Pay or No-Pay

Do you have to pay interns or other short-term workers? No

Volunteers, trainees, students

Can you pay interns and other short-term workers nominal fees? Yes

Remember the factors and the 20% rule

Check state law for conflicts

2. Insurance

Workers Compensation Insurance

Check with your agent to add coverage

Kidnap and Ransom Insurance

Check with your agent to add coverage

Health Insurance

If full-time, make sure they are on your plan

3. Income Tax Issues

General payments, maintenance payments, and similar payments for personal purposes are taxed and taxes must be withheld

Reasonable out-of-pocket expenses can be reimbursed by the organization or deducted by the volunteer.

4. Unrelated Business Income

Volunteer labor can negate unrelated business income

But - volunteers must be doing *substantially all* the work

5. Volunteer Protection Acts

For VPA's to be effective, the volunteer must be acting within the scope of his responsibilities

VPA doesn't cover willful misconduct

VPA doesn't cover you when operating a car

Organization usually must have insurance for VPA to shield volunteers

6. Employee v. Independent Contractor

Determining employee or independent contractor status:

Behavioral control

Financial control

Type of relationship

7. Fair Labor Standards Act

FLSA requires payment of minimum wages and overtime

Key amount: \$23,660

Hold onto your records – 2 to 3 years

Presented by:

Jack B. Straus, Jr.

CFO/General Counsel

Pioneer Bible Translators

7500 West Camp Wisdom Road

Dallas, TX 75236

Tel: 972-708-7460

Email: jack.straus@pbt.org

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