

Insights, News & Events

IS YOUR NON-PROFIT CONSIDERING EMPLOYEE VOLUNTEER OPPORTUNITIES? HERE'S WHAT DOL JUST SAID ABOUT WAGE AND HOUR COMPLIANCE

Insights
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Is Your Non-Profit Considering Employee Volunteer Opportunities? Here's What DOL Just Said About Wage and Hour Compliance

This Labor Day brought good news for puppies and non-profits nationwide. A new opinion letter from the Department of Labor (DOL) provides some clarity to the inconsistent federal case law addressing whether a non-profit employee can volunteer for the same organization that employs them. The answer is yes, so long as certain conditions are met. Here's what the DOL said on September 7 about employees who work for a non-profit that breeds and trains service dogs and how the opinion letter may impact your organization's policies on employee volunteer opportunities.

When is Volunteering Really Volunteering?

The DOL Wage and Hour Division's [September 7 opinion letter](#) addresses whether exempt employees of a non-profit that breeds and trains service dogs may volunteer outside their regular work hours to provide at-home juvenile canine-socialization services (also referred to as "puppy raising") for the organization. Notably, the opinion letter applies a similarly simple test to exempt and non-exempt employees who choose to volunteer – outside their normal work hours – for the non-profit that employs them.

The letter identifies four conditions that distinguish a volunteer from an employee:

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1. The worker freely agreed to provide the volunteer services;
2. The employer did not coerce the worker to provide those services;
3. The worker did not expect payment for the volunteer services rendered; and
4. The volunteer services provided are not the same type of services the non-profit employs the worker to perform.

If any of these conditions are not met, then the employee is not truly a volunteer and is performing additional services as part of the employment relationship. The time would be considered hours worked under the Fair Labor Standards Act (FLSA) if it otherwise qualifies as compensable time.

Key Point: A non-profit employee can't be both a paid employee and an unpaid volunteer while performing the same type of work for the same employer.

Considerations for Exempt Employees

The DOL noted that an employee's exempt status may become relevant if the "volunteer" work doesn't meet the requirements listed above. They may perform additional volunteer work, even if it is substantially similar to their existing job duties, without extra compensation so long as the employee continues to meet both the primary duty and salary tests.

✓ **Compliance Tip:** This analysis requires a fact-specific assessment. The organization must determine whether the employee's primary duty, and therefore exempt status, is affected by the volunteer services provided. Non-profits should not assume that exempt employees will remain exempt just because they receive a salary, if they engage in volunteer work that is substantially similar to the services they are employed to provide.

What This Means for Your Non-Profit

If employees are serving in substantially similar volunteer roles, you should first determine whether they are exempt or non-exempt employees. Non-exempt employees would

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need to be compensated for the additional hours worked if they do not meet the criteria to be truly “volunteer.”

For exempt employees, it may be possible for additional work to be compensated through the employee’s existing salary. But the organization should assess whether the employee continues to satisfy the applicable duty and salary tests.

For each employee interested in volunteering, consider taking the following steps:

- Review your current policies and practices.
- Compare the employees’ regular duties with the proposed volunteer work to ensure they are not the same type of services.
- Avoid incentives for volunteering, which could make the opportunity look coercive.
- Do not make continued employment contingent on volunteer service.
- Do not pay or promise to pay employees for volunteer duties.
- Reach out to your attorney with any compliance questions regarding exempt and non-exempt staff.

Quick Note on Opinion Letters: Opinion letters are formal, written guidance from DOL officials explaining how the agency would apply the law to a specific set of facts. While the letters are not binding on courts, they do serve as a powerful compliance tool and can be used as persuasive authority in defending a claim under the FLSA or to demonstrate good faith to avoid liquidated damages. The DOL issued two additional opinion letters on September 7 on tip pools and meal breaks, which you can [read about here](#).

Conclusion

If you have questions, contact the authors of this Insight, your Fisher Phillips attorney, or any member of the firm’s [Non-Profit and Tax-Exempt Organizations team](#). We will continue to monitor developments affecting non-profits and tax-exempt organizations, so make sure you are subscribed

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