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I Handed Out Water for Four Hours, Should I Be Paid?

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What Is the FLSA?

- **Employers** are required to pay **employees** minimum and overtime wages
- Employees can bring individual or “collective actions” where one person represents groups of individuals who “opt-in”
- Can be pursued by relevant agencies
- Penalties and attorneys’ fees for between 2 and 3 years
- State laws may also apply
- Claims not covered by insurance

Liebesman v. Competitor Group

- Liebesman volunteered as a bicycle escort for the 2012 St. Louis Rock 'n' Roll Marathon
- Competitor Group “employs the Official Charities to create an impression in individuals who might provide it labor and the public that its events are not-for-profit and that it is a not-for-profit organization. Instead the Official Charities are both a revenue stream and a veneer for recruiting free labor for Defendant”
- Liebesman claims that these practices violate both the FLSA and various states' minimum wage laws including Arizona, Colorado, Florida, Illinois, Missouri, Nevada, Oregon, Rhode Island, Washington and the District of Columbia
- **Big Question → Are Race Volunteers Employees?**

Are “Volunteers” Employees?

- It depends
- If the race is a not-for-profit event, probably no
 - This means that the race itself is owned and operated by a not for profit / 501(c)(3) organization, not that the race donates funds to a charity or charities
- If the race is for-profit (and is considered an employer), likely yes



Not For Profit Volunteers

- Not for profit races may use volunteers if they are engaged in “ordinary voluntarism”
 - The entity that receives the services from the volunteer is a not for profit;
 - The activity is less than a full time occupation;
 - The services are offered freely and without pressure or coercion;
 - The services are typically associated with volunteer work;
 - No regular employees have been displaced to accommodate the volunteer; and
 - The worker does not receive or expect any benefit for the services provided.
- A typical race day volunteer (staffing aid stations, course marshals, parking, registration, finish line, food, medals) likely meets all of these criteria.

Best Practices for Not for Profit Races

- Written job descriptions
- Volunteer agreements
- NEVER coerce a person to volunteer or continue to volunteer
- Limit perks or benefits to volunteers
- Be careful about long term (as opposed to race day) volunteers



Volunteers at For Profit Races

- Volunteers at for profit companies are incredibly rare
- Totality of the Circumstances Test
 - Does the person have an expectation of compensation
 - Who receives the immediate or primary benefit from the work being done?
 - Is the job being done integral to the business?
 - Is there coercion or pressure for the person to “volunteer”?
 - How long has the person been doing the activity in question?
 - Is the job being done similar to a job someone else is paid to do?

Expectation of Compensation

- Issue of “Pay for Volunteers”
- Compensation is not always measured in cash
- *Hallssey v. America Online Inc.* -- “AOL [had] used its superior bargaining power to require a certain amount of ‘volunteering’ before an individual would be considered for a paid position.”



The screenshot displays a website interface with a blue header and a white main content area. A video player is visible at the top left, showing a black screen with the time 8:30. Below the video, a yellow banner contains the text "aid for in order to participate in the race." The main content area features a section titled "Pay for Volunteers" with a text box containing the following text: "As an alternative to recruiting your own volunteers, teams may pay to have volunteers recruited for them. All net proceeds from this program will benefit a local charity. Teams have until 04/24/2015 to use the 'Pay for Volunteers' option." Below this text is a button labeled "PAY FOR VOLUNTEERS". A note below the button states: "NOTE: Volunteer payments support a local charity and are non-refundable." Below the "Pay for Volunteers" section is a section titled "Runner Finder" with a checkbox labeled "Yes, this team is looking for runners". At the bottom of the page, there is an orange banner with a silhouette of a city skyline and logos for MyID, pear, and Scott & James Jewelry.

Who Receives the Benefit of the Work?

- Many people volunteer for their own personal enjoyment, to help fellow athletes or to contribute to a sport they love
- BUT most races would not exist without volunteers



Is The Work Integral to the Business?



- Some volunteer positions may be more necessary than others
- Use of volunteers side by side with paid employees (same function)
- Question whether a race could exist without a specific volunteer or volunteer position

Is There Coercion?

- The answer here is likely no
- While many companies use incentive programs to convince people to volunteer, there are generally no repercussions for not volunteering
- This particular factor is more applicable to employees of a company who are asked to “volunteer” to do work for their regular employer

How long has the person been doing the activity ?

- It depends
- Someone who volunteers for a race once and then never again hasn't been involved in the activity too long
- Many volunteers who volunteer in the same capacity year after year. This type of repeat volunteering can lead to the existence of a long term relationship

Is the job being done similar to a job someone else is paid to do?

- Volunteers in certain positions (security, medical staff, course marshals, aid stations, water safety to name a few) do similar, if not the same, jobs as someone else is paid to do
- Organizations may pay some, but not all, people if they cannot get enough volunteers for a position



Amusement or Recreational Establishment Exception

- In the *Liebesman* case, CGI argued that it is exempt from the FLSA because it is “an amusement or recreational establishment” that “does not operate for more than seven months in any calendar year”
- Have to be BOTH an “an amusement or recreational establishment” AND “operate fewer than seven months in a year
- This is an agency regulation created 70 years ago to apply to amusement parks, carnivals, circuses, sports events and horse racing
- Question whether endurance events are more like carnivals and horse races or more like yoga studios, cross fit gyms and group fitness classes
- No court has ruled on the application of this exception to endurance events

For Profit Best Practices

- The absolute safest thing to do is to treat all volunteers as employees
- Consider whether your organization can transition to a 501(c)(3)
- Without paying all volunteers or transitioning to not for profit status there may not be a way to completely avoid liability



- Be up front with volunteers being for profit
- If you pay some people in a certain type of job, make sure you pay all people with that type of job
- NEVER coerce or strong arm a person to volunteer
- Do not promise volunteers special benefits in exchange for volunteering
- Do not require people to volunteer before offering them paid positions with the your organization
- Be careful about how you manage charitable donations
- Have volunteers sign a volunteer agreement stating that they are performing the services voluntarily and without expectation of compensation

Questions?

