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Obstacles to Progress

The Fair Labor Standards Act and Other Obstacles to Progress

By [Susan J. Ellis](#)

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The job of legal, financial and IT staff is to listen to what we need and want to do and then help us to find the best and appropriate ways in which to do it.

Unfortunately, in the real world of volunteer management, these experts too often instead are our "no" people. They tell us what we can't do rather than support our objectives. Further, they do not expect their prohibitions to be questioned, let alone challenged.

As advocates for volunteer engagement, we need to approach such specialized counselors as *equal team members*, remembering that we, too, have expertise to offer. When it comes to volunteer management, our requests and plans should not be dismissed, since we may very well be right in insisting for more than a "no" reply.

What elicited this month's Hot Topic was a cluster of e-mails and questions from workshop participants from several unrelated organizations, each asking me whether they should accept being forbidden from doing something with or for volunteers. Some examples:

I am facing the obstacle of not being allowed to have "administrative" volunteers... It has been told to me that the Dept. of Labor and Industry does not permit it because of the fact someone could be employed in the same capacity.

I've been told that under no circumstances can an employee donate their time....

I've been told we're not permitted to use volunteers in a retail store that is generating income for our organization, is that correct?

Our IT department won't allow me to post current openings for volunteer positions online.

What makes me angry about these situations is the dismissal of the fundamental issue: Does the organization want to engage volunteers in the most meaningful ways to serve clients and achieve its

mission? And, therefore, what are the consequences of NOT permitting some volunteer activity? Our job must include raising this question anytime the volunteer program is forbidden from doing something with or for volunteers. Use the advice and information below to prepare yourself for a knowledgeable discussion rather than accepting the word “no” as the “final say.”

The Fair Labor Standards Act

Most pronouncements about what volunteers can or can't do are examples of "a little knowledge is a dangerous thing." The legal or human resources staff quoted above are misinterpreting the law – they are taking what they "think" is the law and not doing any further research. And while I'm about to discuss an American law, the principles for how a volunteer program manager needs to be an in-house advocate apply to any country.

There are countless examples of nonprofit and government agencies that have volunteers handling administrative, managerial, and clerical roles – just as they have volunteers handling highly specialized professional roles. It's probably true that every single activity that someone does somewhere for pay, someone else does somewhere as a volunteer. So how can there be a fixed rule? It's situational, and therefore a legal or HR staffer ought to consider each proposed volunteer role on its own merits.

If you need further ammunition, consider:

- Surgeons spending vacation time in developing countries to donate medical care, often side-by-side with paid doctors.
- Countless thrift shops and gift stores whose purpose is, indeed, to make money, and whose staff are volunteers. Not to mention every fundraiser of any kind!
- The fact that wealthy politicians choose to refuse their salary and so “volunteer” for their jobs (currently this list includes California Governor Schwarzenegger and NYC Mayor Bloomberg, and has in the past included President Kennedy and Vice-President Rockefeller).
- Communities in which there is a paid firefighting force in place during the daytime hours, which is then relieved at night by volunteer firefighters.
- Students doing unpaid “internships” in for-profit businesses large and small.

The Fair Labor Standards Act (FLSA, <http://www.dol.gov/esa/whd/flsa/>) is designed to stop employers from obtaining unremunerated overtime work hours from employees. The guidelines actually do not speak about "outside" volunteers, but rather limit what an **employee** may do – even if truly by choice – as a volunteer in the same setting in which s/he is employed. The volunteer work must be different from the usual duties of the employee and in no way seem expected or coerced. It is definitely good advice to have separate job descriptions and titles for paid employees and volunteers. Volunteers can certainly do some of the same tasks, or help with the employee's tasks, but not have the exact same role.

However, the Department of Labor and Industry does not universally prohibit having volunteers do work simply because “someone could be employed in the same capacity.” In fact, when it comes to public agencies, the Department of Labor actually states

(http://www.dol.gov/dol/allcfr/Title_29/Part_553/29CFR553.104.htm):

"There are no limitations or restrictions imposed by the FLSA on the types of services which private individuals may volunteer to perform for public agencies."

I want to make it very clear that I am not a lawyer, but what's important here as a strategy is to **question any negative response**. Ask for the documentation on which the legal or HR person based their reply (a great way to see if they actually did any research at all). You can also talk to a Department of Labor representative directly or find examples of common practice in other organizations similar to yours.

Risk, Liability and Insurance as Smokescreens

Ten years ago, I wrote a column for *The NonProfit Times* which I titled “[Volunteering Is Inherently Risky](#)” (click to read the article). All of the points I raised continue to be applicable today.

Fear of lawsuit is not the same as a legal prohibition against doing something. The percentage of probability of a worst-case scenario occurring should not overshadow the majority of times an activity will bring positive results without danger. Everything we do in life carries some risk – we all make daily decisions about which risks we are willing to accept. For organizations, the question is not “might we be sued?” – it’s “if we were sued, can we defend our actions?” Or, again, “are the consequences of not providing this service worse than doing it and accepting the risk?”

Unfortunately, this reasonable approach is too easy to ignore when it comes to volunteers. Maybe the question regarding volunteers is: “Do we value the impact of volunteer services enough to plan safe and sound ways to do what we really feel ought to be done for our clients – even if it means paying for insurance, too?”

Again, for volunteer program managers, the best advice is to hold your ground. If you truly believe in something you want volunteers to do, don't let an initial “no” daunt you. Make your case. Browse the resources on legal issues in the Energize Online Library at https://www.energizeinc.com/how_tos_volunteer_management/risk_and_liability for other expert quotes. Keep asking: “So if you think what I've just proposed is wrong, help me find another way to accomplish these goals.”

Recalcitrant Webmasters

Finally, a word about Webmasters. They are knowledgeable about software and technology, but should not make final decisions about site content or determine communication priorities. If your Webmaster resists keeping the pages about volunteering current, or won't post an application form,

or won't do something you'd like, ask questions to discover the true reason for resistance. For example, is it technically difficult or is it mainly a lack of time and many demands? If the issue is fitting the volunteer program into the sequence of priorities, you may need to find the appropriate executive who can insist that the Webmaster devote time to searching for ways to meet your needs.

Remember that many IT professionals have developed problem-solving skills needed for translating complex computer languages into successfully running Web sites. Challenge them to use those problem-solving skills to serve your online communication needs. Also, offer to recruit a skilled volunteer who can create or maintain all the needed Web pages (following the official templates) and give them to the Webmaster for simple posting to the site. This keeps "control" of the Web site in one place, but removes all the common barriers of "this sort of updating is just too time consuming."

The Common Denominators

In all these cases, remember these approaches and strategies:

- Assume lack of education about volunteer-related issues/precedence, if not total ignorance, despite the appearance of great specialized knowledge. It's not necessarily malicious, but too few lawyers, etc. even recognize how complex the subject of volunteering is. It seems very simple. It rarely is.
- Don't be afraid to challenge a turn-down or turn-away. Ask pointed questions, both to teach the other person about the complexity of volunteering and also to learn more about how decisions are reached.
- Use outside resources. Not everyone wants to be the first to do something, but few people want to be the last, either. If the expert consultant thinks this is your own pie-in-the-sky idea, it's easy to dismiss it. But if you show how this same practice has been proven elsewhere, it's harder to say no without some clear reason.
- Involve volunteers as co-advocates. Sometimes legal and risk management experts can't envision that volunteers would be willing to do something. Prove them wrong.

So...what obstacles have been thrown in your path? How did you deal successfully with lawyers, insurance agents, accountants, and Webmasters? Inquiring minds want to know!

Related Topics: [Executive Director, Role of](#) | [Policy Development](#) | [Preparing for Volunteers](#) | [Risk and Liability](#) | [Volunteer Resources Manager, Role of](#) | [Profession of Volunteer Management](#)

Submitted 29 September 2010, Anonymously

Often times when your legal department tells you "no" it's for good reason. It is not mere misinterpretation of the law, but rather a much more extensive understanding of how the law works, and using that analysis to protect your organization from countless law suits and sanctions. Some of the examples given of "volunteerism" show your lack of understanding of the FLSa and DOL

regulations. For example, what you may think is an unpaid internship may actually be compensated in some other form, i.e. for credit, or scholarship. Staff that volunteer at a thrift shop might be exempt because the thrift shop is a non-profit organization. Furthermore, since you can't account for the character of every volunteer, that volunteer you use to do the work of a paid employee may come back and sue you for those wages when you anger them one day. Tons of cases exist that support this. Given the economic climate today, I'm sure qualified workers wouldn't agree with a volunteer filling what should be a paid position. I was about to use this site as a reference, but clearly this site isn't credible if it misleads readers.

Susan Responds: Thank you for responding to this past Hot Topic. Unfortunately, although you state your points firmly, your “warnings” and arguments are simply opinion, not law. As with every law, what is put in writing by legislators is then open to interpretations and lawsuits that set precedence. Energize has been dealing with this topic for 33 years and I stand completely behind what I said in this essay. Of course the cautions you note should be considered and there are gray areas in which FLSA might be violated. But my point in the article was not to allow a legal advisor to give a knee-jerk, don't-do-this reaction without doing some research and giving a good reason. It's been my contrary experience that legal departments often say no purely for the reason of avoiding any possible chance of a lawsuit ever, for anything. Despite your claim of “tons of lawsuits” involving disgruntled volunteers who claim wages under FLSA, there are actually mainly a handful of horror stories that poison the water for everyone. If you read into my Hot Topic that volunteers should replace paid staff, you missed the point. At any rate, the idea that you would dismiss the entire Energize website – the largest in the world for leaders of volunteers – as of any value for others because you disagreed with one 2006 opinion piece seems an overreaction.

Submitted 1 March 2006 by Jayne Cravens, Bonn Germany

The head of the IT department where I worked said it was impossible to network a Macintosh with IBM/Clones. So I posted to a discussion group for women IT workers in Austin and had a file-folder full of testimonials of how easy it is to do. But I didn't just present these to the IT head -- I presented it in a meeting with his supervisor as well. Suddenly, it was totally possible to do.

For volunteer managers who can't get their web masters to upload the information they need, I recommend documenting all conversations for future reference, AND starting their own web sites for such. Don't ask, just do it, with the help of volunteers. Once it's running, ask the web master to link to it. Either he/she will, or he/she will finally get around to uploading your information to the central web site.

Submitted 9 February 2006 by Barb Patricio, Volunteer Management Grad, Edmonton , Alberta Canada

Just a thought from Canada.

I wonder if some of the pronouncements about volunteers doing things that paid staff do stems from confusing the distinction between: 1) a volunteer doing something that a paid staff person also does (a la Susan's example of volunteer doctors working overseas along side paid staff) and 2) the volunteer management principle and union regulation that volunteers can not take away a job that a

paid person is doing. If my non-profit has 2 paid nurses, I can't fire one of them when I realize that I can find 2 halftime volunteers. I wonder how much the fear of job loss influences organizations.

Susan responds to Sam's query, 8 February 2006

I'm pleased that readers are finding this Hot Topic useful, as my goal is always to help volunteerism folks be effective and more vocal advocates.

[In her posted response](#) on 2/2, Sam Elliston asked me to "clarify" her confusion about being "told by a lawyer who works in our field that the FLSA specifically says volunteers cannot do the same work as paid staff." This is exactly the kind of thing my essay addresses – that a little knowledge is a dangerous thing. A competent lawyer would examine the implications of each specific volunteer position, not make blanket statements.

How can there be a universal prohibition that "volunteers cannot do the same work as paid staff" when it is self-evident, as I said in the Hot Topic, that every single activity done somewhere by an employee is done somewhere else by a volunteer, and vice versa? Under this lawyer's opinion, what WOULD volunteers be able to do?

The real issue is: Volunteers IN OUR setting should not do the exact same things as employees IN OUR setting. That makes sense – a blanket, generic limitation does not.

The "workers compensation" question has generally been decided by court cases and it is extremely rare for any volunteer to get such compensation, except for the legitimate case of firefighters and other emergency personnel doing quasi-government work. In a particular agency, there may also be labor union contracts in force with anti-volunteer language but, again, this is not a matter of law but of limited negotiation skills on the part of the executives who developed the contract language.

Submitted on 8 February 2006 by Hilary Roberts, PLNJ Inc., President, Keyport/NJ USA

All too often it has been my experience that non profits practice vague management styles for the sole purpose of bending rules as deemed necessary. A BIG problem for me in several job settings. I was a Volunteer Manager who attended more workshops, pursued certification and logged hundreds of hours in field experience. The value of my training left with me.

- There is plenty of criticism to go around on this hot topic.
- We can't blame the professionals who are hired if the agency calling upon their skills do not disclose the real agenda.
- We can't blame volunteers if they are given no authority to voice concerns in impactful forums.
- We can't blame staff if they fear dismissal for speaking up.

Instead of blame, instead of empowering the naysayers we each should take an active role in writing the manuals that are long overdue on the topics of legal guidelines, insurance policies, internet protocols (just to name a few). ONE guidepost that every Board Member, manager, consultant, publisher, employee and volunteer can point to for answers.

If we, representing smart nonprofits, continue to accept the current model as "best practices" we have ourselves to blame.

Submitted on 7 February 2006 by Nicolette Ryan, United Way of the Greater Dayton Area, Community Volunteer Liaison, Dayton, OH USA

Thank you so much for this article! As a volunteer management professional, I constantly work to create a better environment for volunteers in nonprofit organizations. My "why" questions to answers of "no" may not be popular, but I feel they've helped me achieve more in my two years of experience than many professionals who have been in the business for ten!

I strongly encourage other managers of volunteers to keep asking "why" and offering alternative ways of solving problems... Nothing worth doing is ever easy!

Submitted on 3 February 2006 by Martin J Cowling, People First -Total Solutions, CEO, Melbourne Australia

Bravo...Brilliant article! I take my hat off on this. There is a disturbing global trend fueled by fear and the trend of turning volunteer management into a quasi HR stream.

If I can put a blatant plug ..this is aligned to the topic we have for the Second Australasian Advanced Volunteer Management Retreat in August 2006: *Volunteer Management Have We Come Too Far*. We'd love input up to the retreat and we will be distributing the results of the discussions there. Hopefully as leaders in the region, we will make some stands on this issue.

Submitted on 2 February 2006 by Don Rhodes, Don Rhodes & Associates Limited, Advocate, Central Otago New Zealand

You are so right about 'so-called experts' basically giving you take-it-or-leave-it advice.....and then getting bitter and twisted if you do not take that advice.

If it is any consolation to volunteer organisations, this occurs in a slightly different way in big business as well. How often do we become aware of a Board of Directors agreeing to some multi-million dollar IT expense based solely on a fast talking sales pitch and backed by the accountant or whoever, yet demand a detailed cost analysis of the proposed purchase of fresh water dispensers for staff costing a couple of thousand dollars.

You are so right and I applaud your article. Let's hope everyone takes notice. Cheers. Don Rhodes.

Submitted on 2 February 2006 by Sarah (Sam) Elliston, New Thought Unity Center, Volunteer Coordinator, Cincinnati, Ohio USA

This is so timely, Susan. I have been trying to understand the issue since I was told by a lawyer who works in our field that the FLSA specifically says volunteers cannot do the same work as paid staff. She tied it into of the problems of workers compensation.

I have tried without success to have somebody show me the part of the law that actually says that volunteers can't do the work of paid staff.

Yet, I hear people say it authoritatively- so I am confused by your department of labor quote-delighted, because I have always felt that what you say is correct, but confused.

Can you clarify?

Submitted on 2 February 2006 by Debbie, Manager, Volunteer Resources, Ontario Canada

Congratulations for inspiring myself, and many other Managers in Volunteer Resources to become advocates within our organizations! I have come across many "no" people in my career and at times, have challenged them. Looking back, I gave up the fight too many times and the consequences resulted in not using volunteers to meet human resource needs and organizational mission and vision. I won't step down the next time I meet a "no" person. I'll ask questions, conduct research, identify other organizations doing what I proposed and involve volunteers as advocates. I can't wait to offer the IT staff a qualified volunteer to help them with their workload.... maybe I'll be able to realize the online orientation I've been dreaming about. Thank you!

Submitted on 2 February 2006 by CM, Volunteer Coordinator, Pennsylvania

Thank you for this article! It is wonderful. I am happy to know that I am not the only person frustrated with the "no people." Thank you again so much!

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