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Volunteers at Non-Profit Food Banks: Treatment under the Fair Labor Standards Act

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Summary

The Fair Labor Standards Act (FLSA) of 1938, as amended, provides minimum wage, overtime pay and related protections for covered workers. While setting such minimum employment standards, there may not always have been a clear distinction between regularly employed persons and those who volunteer, without expectation of compensation, to do work of a charitable or public service nature. In August 1998, in order to clarify the distinction between an *employee* and a *volunteer* with respect to work in a non-profit food bank, the 105th Congress passed the “Amy Somers Volunteers at Food Banks Act,” subsequently signed by President Clinton (P.L. 105-221).¹ This report will not likely need to be updated.

Volunteers under the FLSA

The FLSA was enacted in 1938 (the late New Deal) after several decades of effort by labor and social reform advocates.² The immediate focus of the Act was ensuring fair labor standards for workers who were largely non-union and, in many instances, employed through long hours at low wages while general unemployment remained high. Its scope of coverage was narrow, with expansion of coverage to follow into the late 1970s. As the statute came to apply to an ever larger proportion of the workforce, questions arose with respect to its application to specific groups of workers. Should all

¹P.L. 105-221 is narrowly focused. It does not address broader issues of wage and hour protections for persons engaged in various ways in charitable or public service activities. As an example of the controversy such distinctions can generate, see: U.S. Library of Congress. Congressional Research Service. *The Fair Labor Standards Act and Employment of Workers with Disabilities: The Case of The Salvation Army*. CRS Report 91-93 E, by William G. Whittaker. Washington, 1990. 23 p.

²Enactment of labor standards laws touched off extended debate over constitutionality and related issues. See: Chambers, John W. “The Big Switch: Justice Roberts and the Minimum-Wage Cases,” *Labor History* (Winter 1969). pp 44-73.

workers be treated in precisely the same manner; or, would differences in the type of work performed and the conditions under which workers were engaged require exceptions from a general standard. For example, some workers would be paid a straight cash wage, while others might work on a piece rate or commission basis. How would their hourly minimum wage be calculated and what would constitute their *regular rate* for overtime pay purposes? How should workers with “tip” income be treated? Should handicapped workers be given special consideration? Through the years, a body of exceptions came to be written into the law, providing flexibility but, also, a certain rigidity. In each of these cases, however, the persons involved were *employees*. How should persons who might not really be employees, *per se*, be treated?

Section 203(g), the Act defines the concept to “employ” in broad terms: i.e., “to suffer or permit to work.” In general, Section 203(e) of the Act defines “employee” as “any individual employed by an employer.”³ The definition of “employee” in Section 203(e) is modified with regard to persons engaged in public sector volunteer services. It provides:

(A) The term “employee” does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if —

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.⁴

As a general rule, under the FLSA, a public worker may not “volunteer” to perform services for his regular employer that are essentially the same type of services for which he would regularly be paid. These requirements suggest a number of concerns. For example, might a worker be coerced into volunteering, i.e., to curry favor with his employer? Or, might volunteering be part of an explicit or implicit *quid pro quo* arrangement leading to future paid employment?⁵

³Section 203(e) further defines an “employee” in terms of employment by public agencies and sets forth an exemption with respect to persons employed in agriculture “if such individual is the parent, spouse, child, or other member of the employer’s immediate family.”

⁴The concepts stated here are further developed in the implementing regulations. See 29 C.F.R. 533.100 and following. Defined in the regulation, for example, are such concepts as “expenses,” “reasonable benefits,” and “a nominal fee.”

⁵On this general issue, see: Jordan, Kelley. “FLSA Restrictions on Volunteerism: The Institutional and Individual Costs in a Changing Economy.” *Cornell Law Review*. v. 78, January 1993. pp. 302-335. With respect to the demographics of volunteerism, see: Freeman, Richard (continued...)

Some charitable/non-profit institutions have paid employees; some of those employees may perform the same services for which non-employees may volunteer. In an explanatory bulletin, the Department of Labor states: “Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered as employees of the religious, charitable and similar nonprofit corporations which receive their services.”⁶ As a practical matter, however, some difficulty may arise in determining when a person, engaged in work (although charitable in nature or a public service), is an actual “volunteer” and when he (or she) is an “employee.”

Volunteers at Non-Profit Food Banks

On February 4, 1998, Representative Campbell of California introduced H.R. 3152. Precisely focused, the bill proposed to exempt from the definition of “employee” under the FLSA “individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.” The bill was referred to the Committee on Education and the Workforce.⁷ No hearings were held on the bill; on June 25, Representative Ballenger asked unanimous consent that the Committee be discharged from further consideration of the bill and requested its immediate consideration by the House.⁸ There was no objection and consideration of the measure commenced.

Representative Ballenger explained that the bill focused upon “a very narrow issue” but one important to the operation of food banks. The clarification, he argued, was necessary “because of the inconsistent and conflicting interpretations given in the past by the Department of Labor.” Where the Department had advised in 1992 that food bank volunteers would not appear to be considered as employees for FLSA purposes, Mr. Ballenger stated, a later (1997) decision from the Department advised that they would be regarded as employees because “distributing organizations would be compensating needy individuals in the form of benefits, that is, food or other products, for services that the individuals performed.” The issue appeared to turn on the concept of *compensation*. Was the otherwise qualifying indigent individual, in effect, working for food? By June 1998, Mr. Ballenger continued, the Department had once again decided that such volunteers, although receiving groceries, were not really employees. These “conflicting and inconsistent statements and letters,” he concluded, indicate “a need to clarify this point in the statute.” Representative Ballenger added:

Food banks which use such volunteers and encourage such volunteerism among those who receive food assistance should be able to do so without concern that

⁵(...continued)

B. *Working For Nothing: The Supply of Volunteer Labor*. Working Paper 5435. Cambridge, Mass.: National Bureau of Economic Research, Inc., January 1996. 41 p.

⁶U.S. Department of Labor. *Employment Relationship under the Fair Labor Standards Act*. WH Publication 1297. Washington, Govt. Print. Off., August 1995. p. 6.

⁷*Congressional Record*, February 4, 1998. p. H329. On February 27, 1998, the bill was further referred to the Subcommittee on Workforce Protections, chaired by Representative Ballenger.

⁸*Congressional Record*, June 25, 1998. p. H5386.

they are triggering an employment relationship including wage and other employment liabilities.

He emphasized the narrow focus of the bill, explaining that this clarification with respect to volunteers at food banks “should not be in any way construed to mean that by doing so Congress is showing an intent that any other individual who performs community services and receives benefits is an employee.”⁹ That is to say that, just because Congress was dealing, here, with volunteers at food banks, this action did not imply that other types of volunteers, by omission, were to be regarded as employees.

Representative Owens, the ranking Minority Member of the Subcommittee, rose in support of the Campbell initiative, observing that the Fair Labor Standards Act “is flexible” and “will yield to common sense after due deliberation.”¹⁰ Representative Campbell, expressing appreciation for the expedited manner in which the bill was considered, explained the philosophy behind the measure.

... this bill is sponsored for one very important and simple purpose. It is to allow food banks to give not only food but dignity. Those individuals who are of lesser means, who volunteer their time in order to help put together bags of groceries, are sometimes given a bag of groceries for the hours that they may work, in recognition, not as a wage, but because they themselves might also be in need. It is a way for a person who has need to receive help in his or her own right in a way that confers and maintains their dignity as a human being.¹¹

Representative Ballenger then offered an amendment (with Mr. Campbell’s approval) that would honor a recently deceased food bank director by titling the bill the “Amy Somers Volunteers at Food Banks Act.” The Ballenger amendment was agreed to and the bill was passed by the House.¹²

Received in the Senate on June 25, H.R. 3152 was referred to the Committee on Education and Labor.¹³ On July 29, Senator Campbell of Colorado asked that the Committee be discharged from further consideration of the bill and, following the pattern of the House, asked that the measure receive immediate consideration. Once again, there was no objection. Without further discussion, H.R. 3152 was approved by the Senate.¹⁴

⁹*Congressional Record*, June 25, 1998. p. H5386. An October 29, 1998, telephone discussion with staff of the Wage and Hour Division, Department of Labor (DOL), suggests that DOL regards the various interpretations as consistent, resting upon particular workplace arrangements and circumstances of engagement.

¹⁰*Ibid.*

¹¹*Congressional Record*, June 25, 1998. pp. H5386-H5387. A question may arise: Would food be denied these persons if they declined to volunteer? 29 C.F.R. 553.101(c) states: “Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.”

¹²*Congressional Record*, June 25, 1998. p. H5387.

¹³*Congressional Record*, June 25, 1998. p. S7168.

¹⁴*Congressional Record*, July 29, 1998. p. S9318.

On August 7, 1998, the bill was signed by President Clinton (P.L. 105-221). In its final form, the operative portion of the legislation reads:

Section 3(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(e)) is amended by adding at the end the following:

“(5) The term ‘employee’ does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.”¹⁵

As with many of the amendments to the Fair Labor Standards Act, P.L. 105-221 deals with a single narrowly defined group. It does not offer a guide to FLSA treatment of persons generally identified as *volunteers* or to the various employment/service arrangements under which they may be engaged.

¹⁵*Congressional Record*, August 31, 1988. p. D918.