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A summary of legal issues involving volunteers

Where organisations stand

The legal position of volunteers is not a straightforward issue. Volunteers are not included in most legislation around the workplace. This means that they are not protected by the anti-discrimination legislation, and do not have access to employment rights such as that not to be unfairly dismissed. Legislation around criminal record checks when working with vulnerable people does include volunteers, as it refers to the role that a person is in rather than their employment status.

Volunteers retain rights we all share as citizens, so the Data Protection Act applies to personal information kept on them.

To confuse matters further a small number of volunteers have managed to prove that they were, in the eyes of the law employed, therefore gaining access to some or all employment rights.

What follows is a brief summary of the main legal issues and is obviously no substitute for professional legal advice. It should give you an idea of the danger areas and what to do to avoid risk however.

Health and Safety

Organisations have a duty of care towards their volunteers. In practice this means taking all reasonable steps to avoid harm coming to them, either through action or inaction. Section 3 of the Health and Safety at Work etc Act 1974 also places a duty on employers (ie an organisation that employs at least one paid member of staff) "to ensure, as far as reasonably practical, that persons not in their employment, who may be affected by their undertaking, are not exposed to risks to their health and safety" and "to give information as might as might affect their health or safety".

What these legal duties imply is that you should be aware of potential risks to volunteers, and take steps to reduce them where they are unacceptable. The Management of Health and Safety at Work Regulations 1999 compel employers to carry out risk assessments on their activities, again taking into account anyone who may be affected by their work. For organisations with 5 or more employees these risk assessments must be written. However it is sensible for any organisation to have written risk assessments.

Aside from any additional measures suggested by the risk assessment, explicitly include volunteers in your Health and Safety Policy. Make sure volunteers are aware of it, and include vital information such as what to do in the event of a fire alarm as part of the induction process.

Expenses

Organisations should ensure that they are reimbursing out of pocket expenses only. Flat rate expenses payments, or indeed any sum over and above actual expenses, are likely to be seen as income from the point of view of benefits and tax, and could change the legal status of volunteers to that of employees.

Volunteers on benefits may lose part of their benefit if they are seen to have received income, and in any case are likely to be treated as if they are in part time work rather than volunteering.

Benefits

Volunteering should not affect a person's benefits, as long as they continue to meet the requirements for their particular benefit, and that it is clearly genuine voluntary work.

Claimants on Jobseekers Allowance must be available for and actively seeking work. Volunteers must be available to attend interview at 48 hours notice and start work at one week's notice. This is actually a concession to volunteers from the normal 24 hour's notice. To be actively seeking work volunteers must continue to take steps to look for work each week (such steps are normally outlined in a Jobseeker's Agreement).

The Incapacity Benefit rules regard volunteering as an exempt category of work – this means that carrying it out should not affect their claim to be incapable of work. It is of course important to avoid volunteers carrying out activities which seem to contradict their reason for being on the benefit.

Other benefits such as Income Support, Disability Living Allowance, Housing Benefit etc should not be affected by volunteering.

Screening and CRB checks

At the time of writing most organisations working with vulnerable people are not legally obliged to carry out Criminal Record Checks on staff or volunteers. The relevant legislation is described below. However, they do have an enhanced duty of care towards them, which may well suggest that CRB checks should be carried out. A risk assessment should be made on the basis of the particular situation, which should help determine if carrying out a CRB check would be a reasonable step to take to help protect clients.

Organisations working in a statutory setting, such as schools, hospitals etc, should consult their host body, as they are likely to have their own rules on CRB checks.

The Protection of Children Act 1999 applies to "childcare organisations" (organisations who provide care to children whilst regulated under statute), who must CRB check people in "regulated positions". Regulated positions include those where volunteers would be supervising, training, caring for or being in sole charge of under 18s.

Following the Criminal Justice and Court Services Act 2000 most people convicted of a serious or sexual crime against children will have a disqualification order placed on them, making it a crime for them to apply to work or volunteer in a regulated position.

The Care Standards Act 2000 regulates healthcare organisations and those providing personal care in care homes or a persons own home. National Minimum Standards for the various settings set out the rules for mandatory checks.

The above is all subject to change when the new vetting and barring system outlined in the Safeguarding Vulnerable Groups Act 2006 comes into force. This will greatly increase the number of mandatory checks, as well as creating centralised lists of people considered unfit to be working with children or vulnerable adults. It is scheduled to be in place in 2009.

Young volunteers

While there are legal restrictions on employing young people, they do not apply to volunteers. Remember that young people have other demands on their time outside volunteering, such as home work, socialising and so on.

Many local authorities have bye-laws further restricting the work young people may do. It is also important to bear in mind that while the Children and Young Persons Act and most local bye-laws define employment as involvement 'in any trade or occupation which is carried on for profit', some local authorities have taken the definition of 'for profit' to include, for example, charity shops.

Parental permission

Parental responsibility extends to the age of 18. Parental consent should be sought when involving volunteers under 16. For volunteers aged 16-18, it may not be appropriate to ask for permission, instead you can encourage the young volunteer to discuss their activities with their parents or guardians.

Both the young person and their parent or guardian should fully understand what the voluntary work entails. Provide clear information about the organisation and the work the volunteer is expected to do, preferably a task description. Make sure that they are aware of time commitments, where the work will take place and how it will be supervised. If the volunteer will be working away from the premises where they normally volunteer, then additional permission should be sought.

Health and safety

Section 3 (5) of the Children Act 1989 states that 'An individual shall do what is reasonable for the purposes of safeguarding or promoting a child's welfare while the child is in his or her care'.

There is also an enhanced duty of care towards young volunteers, reflecting their relative maturity. This means that risk assessments cannot take responsible behaviour for granted, and are likely to imply increased supervision, more explicit instructions and so on. This needs to be well judged – 17 year olds are likely to be more mature than 14 years olds, but everyone

is an individual, and some 17 year olds are more mature than others. You should also check that your insurance policies cover young volunteers- some have a minimum age of 16 or 18.

Legal status of volunteers

While volunteers are not included in employment legislation, a small number of volunteers have in the past managed to demonstrate that they were in fact employed in the eyes of the law. This means that they would have access to some or all employment rights.

This issue typically arises where a volunteer has felt that they were discriminated against or unfairly dismissed, and attempted to bring a case to an Employment Tribunal. Before hearing the case itself, the Tribunal has to decide whether the individual meets the definition of employment in the relevant legislation.

Legal definitions of employment are based on the existence of a contract in place between the employer and employee. Although we tend to think of contracts as written documents, the contract is actually the relationship itself (the written document is in effect a description of the contract, not the contract itself). To simplify slightly, the Tribunal would be looking for two key elements in the relationship, 'consideration' and 'intent'. Consideration means something of value is being exchanged (or at least offered and accepted). It doesn't need to be of much value – that's where the idea of a peppercorn rent comes from.

Intent can be inferred from the relationship itself, even if neither party explicitly stated that they wanted to create a legal relationship. To put it simply, if it looks like someone is working in return for payment, a Tribunal may well decide that there was a contract in place. They would be looking to see if there were clear binding obligations in place.

If a 'volunteer' is found to be in a contract to provide their services (ie their work), they will meet a broad definition of employment shared by the anti-discrimination legislation and the minimum wage act. The relationship could even meet the narrower definition used by the Employment Rights Act 1996, which gives individuals full employment rights. This is harder to pin down, but a clear distinction is that there is an obligation on the organisation to provide work (and therefore payment).

Steps to take to avoid risk

Avoiding anything that could be seen as a payment for work would be a priority. Expenses payments should be a genuine reimbursement of out of pocket expenses. Training offered should be linked to the role that the person is carrying out, rather than a general perk or enticement to volunteer.

Phrase the volunteer relationship in terms of expectation rather than obligation. As an example, your volunteer agreement might say that volunteers can expect you to reimburse their expenses, support them, treat them fairly etc, and that you expect them to follow your equal opportunities policy, turn up when they're meant to and so on.

Avoid language that suggests employment – a volunteer agreement rather than contract, role rather than job description.

Make sure that volunteers are treated fairly and consistently. The reason organisations have been in trouble in the past is that volunteers have had a complaint that they felt wasn't addressed internally.

Further information/advice

Volunteering England have published a book called Volunteers and the Law, which covers the above topics in more detail. They also have a free information service and online Good Practice Bank.

Browse the online Good Practice Bank at www.volunteering.org.uk/goodpractice

or contact their information line:

Freephone/textphone: 0800 028 3304 (M-F, 9.30-5.30)

information@volunteeringengland.org

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