EMPLOYMENT LAW

DOL Clarifies When a Nonprofit's "Employee" Can Sometimes Be a "Volunteer," Too

10.20.26 | Linda J. Rosenthal, JD

> What are the boundaries between a volunteer and an employee?

That issue was the focus of an article a few years ago by Mike Bishop in *Blue Avocado,* the "online magazine … written by nonprofit leaders, for nonprofit leaders." See *Ask Rita: Can Our Paid Employees Also Do Volunteer Work for Us?* (February 23, 2021).

It's a popular query but there are no simple or definitive answers. See, for example:

- *Can Nonprofit Employees Volunteer for their Employer?* (April 5, 2021) *Charity Law Blog* [DOL enforces rules under the FLSA that limit potential manipulation or abuse of wage-and-hour laws; also to ensure that employees aren't being pressured to volunteer. Violating these rules, even unknowingly, can be costly.]
- *Employee or Volunteer: What's the Difference?* Melanie Lockwood Herman, Executive Director, Nonprofit Risk Management Center [We hear about "dedicated, paid staff eager to volunteer in the evenings and on weekends" but also about worries from employees who feel coerced to volunteer in addition to their regular paid work.]
- *Can Nonprofit Employees Volunteer for Their Employer?* (March 14, 2023) Linda Olejniczak, Association of Employers (ASE) ["So, your nonprofit employee also wants to volunteer at your nonprofit? It can be done, but employers must make sure they don't violate the law….You should always approach this situation with careful consideration to avoid costly wage and hour claims."]

The Fair Labor Standards Act (FLSA) addresses volunteering for public-sector employers, but there has been no official guidance – until recently – from the Department of Labor's Wage and Hour Division (WHD) about the rules for "employees of religious, charitable, and nonprofit organizations."

Nevertheless, WHD "has long applied the same principles applicable to public-sector workers to employees of religious, charitable, and nonprofit organizations." See, for example: *Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act* (FLSA) (August 2015) Wage and Hour Division, DOL ["[P]aid employees of a non-profit organization cannot volunteer to provide the same type of services to their non-profit organization that they are employed to provide."]

Last month, there was a significant development from the federal government: the publication of *Opinion Letter FLSA2026-12* [11 pp. PDF] (September 7, 2026). It directly addresses the issue of volunteering by employees of "private, nonprofit organizations."

New Official Federal Guidance

"Opinion letters are official DOL guidance about real-life workplace issues [that] provide official written interpretations from the department's enforcement agencies, explaining how laws apply to specific factual circumstances presented by individuals or organizations. By addressing real-world questions, they promote clarity, consistency, and transparency in the application of federal labor standards."

They can be "requested by anyone, including workers, employers, employment associations, lawyers, human resource professionals, unions and industry leaders." If the requesting party is specific and detailed enough in its guidance-request letter – (and if the disclosed facts and circumstances remain unchanged) – the government's published response can be a safe-harbor defense for that specific party later against adverse government action.

In the Department of Labor's *Opinion Letter FLSA2026-12*, the government confirms – to the extent possible within the inherent limitations of the Opinion-Letter framework – that the same FLSA rules that apply in the public-sector-employment context also apply in the nonprofit-organization context.

What are those inherent limitations? The government is instructing the public on the applicable federal wage-and-hour laws, albeit within the facts-and-circumstances scenario presented by the requesting party in its request for an Opinion Letter.

This format is quite common across the federal government, but it's better or worse depending on how well the government employee "working the case" develops the file enough to include all relevant details. I'm not sure what's going on inside the Department of Labor these days, but this case file was thin, apparently lacking even routine and simple follow-up communications. Sprinkled throughout *Opinion Letter FLSA2026-12* were exasperated comments by the authors along the lines of "…Your letter does not specify the basis for …. However, we infer that …." See, e.g., fn. 2.

Publishing this document with so many guesses and assumptions suggests that DOL was eager to get some guidance on this general issue out the door.

Opinion Letter FLSA2026-12: The Facts

The organization which requested the Opinion Letter was formed and operated by altruistic dog lovers. They breed, raise, and train service dogs for wounded veterans and other disabled people. For the first eighteen months or so of a puppy's life, the small animal is taken into the home of a volunteer (a "puppy raiser") who does the "puppy raising"; namely, providing "basic care, early training, and socialization:" At the end of that period, the pup goes to the main site for specialized training as a service dog.

The organization's staff includes "the usual assortment of workers" as well specialized personnel including: veterinarians, "directors" who supervise the dog-trainers, and the "trainers" themselves. Apparently, some of the veterinarians, "directors," and "trainers" have expressed interest in becoming volunteer "puppy raisers" in their own homes at night and on weekends.

In other words, can certain of these "employees" also be "volunteers?"

Opinion Letter FLSA2026-12: The Law

Bottom line: It is allowable under the right circumstances. But it should be undertaken carefully and thoughtfully with knowledge of the risks of not dotting all the "i's" and crossing all the "t's." Getting on the wrong side of the wage-and-hour laws can be an enormously costly mistake.

Within the eleven pages of the Department of Labor, Wage and Hour Division's September 7, 2026, Opinion Letter FLSA2026-12 , there is enough information and analysis to help you make this kind of decision.

Most particularly, the federal government confirms that, in the past, it has applied to the nonprofit sector the same rules it used to evaluate situations involving government "employees" turned "volunteers." (This Opinion Letter contains lots of earlier examples.) And it will continue to apply that standard going forward.

However, instead of asking you to wrangle the key points from that densely packed forest of employment-law principles and unwieldy jargon, let's take advantage of excellent, plain-English, and mercifully brief commentary including:

- *DOL Reminds Nonprofits: Employees Generally Cannot "Volunteer" to Perform Their Regular Job Duties* (October 19, 2026) Michael J. Crocenzi, Esq., BarleySnyder ["In the opinion letter, the DOL concluded that veterinarians and supervisory directors could generally volunteer as puppy raisers because those activities differed from their regular duties. In contrast, service dog trainers generally could not volunteer for the same activities because training and socialization closely resembled the work they were already employed to perform."]
- *DOL Offers Guidance on Employee-Volunteers at Nonprofits* (September 15, 2026) Nicole S. Mule, Esq, and Rob Pritchard, Esq., LittlerMendelson ["Although the Fair Labor Standards Act (FLSA) addresses volunteering for public employers, the WHD noted that it has long applied the same principles to employees of religious, charitable, and nonprofit organizations."]

Courtesy of LittlerMendelson's post above, this is the law in a nutshell: "[Relying on the principles it applies to public-sector volunteers], the WHD concluded that an employee may volunteer for their

nonprofit employer when the employee: – [*all three apply!]*

- Offers the services freely and without pressure or coercion, direct or implied;
- Has no expectation of compensation for the volunteer services; and
- Performs services that are not the same as, or similar to, the work the employee is employed to perform.

In this three-part legal test to determine if a paid employee of a nonprofit may also do unpaid volunteer work at the same organization, the most significant prong is the third: namely, whether the "volunteer" services performed are "the same as, or similar to" to the "paid" job duties. To be allowable, they must *not* be "the same as, or similar to"…. each other.

This Opinion Letter as well as many other sources have explored in depth this tricky question: that is, when one set of job duties is or not"the same as, or similar to" others. It's rarely an easy call.

There is also a red-herring commonly thrown into the overall analysis: namely, whether or not the employee who wants to do some after-hours volunteering for the organization-employer is an "exempt" employee or a "non-exempt" employee. (That is a techy term arising from employment law – unrelated to the word "exempt" from the Internal Revenue Code.)

This "exempt"/"non-exempt" distinction relates to the employer's duty to pay that person for overtime. In uncommon situations only, a higher-paid/no-overtime worker gets so involved with the volunteer duties that the person's "primary function" is no longer the paid work. Troublesome consequences ensue: Avoid it!

Conclusion

Here, we skipped past the first of the three prongs of the legal test, all too quickly, accepting at face value that the unpaid volunteer activities by these employees are truly voluntary.

In many cases, there is subtle coercion. After all, the employment relationship is an inherently unequal power dynamic. The employee may feel powerless to refuse even an offhand suggestion to do a little extra "volunteer" work.

A number of commentators – including some cited here – have explored this issue. We'll pick up that discussion in a later post.

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