

The National Minimum Wage Act and Volunteers

Summary

This Information Sheet covers:

- How a contract could be established with a volunteer
- Suggestions for lowering the risks of creating a contract
 - reimbursing volunteer expenses
 - providing training for volunteers
 - giving rewards and honoraria to volunteers
 - using a 'problem solving procedure'

This Information Sheet is intended to offer a simple explanation of how volunteers could be entitled to employment rights in some very specific circumstances. Please note that this document should not be taken as a substitute for legal guidance, and formal legal advice should always be sought where required.

The National Minimum Wage Act 1998 came into force in April 1999. The Act gives all workers the right to a set minimum wage. In theory, this should not affect volunteers because their activities do not come under the definition of a 'worker' in the Act.

However, there have been a small number of cases where an individual who was volunteering has been able to prove that they have been working under a contract. As a result, the individual has either been regarded as an "employee" or a "worker". Employees are entitled to full employment rights. Workers have more limited rights but are covered by anti-discrimination legislation and the National Minimum Wage Act.

The legislation behind the National Minimum Wage Act can look complex, and the safeguards that organisations need to impose may seem picky, but there are some fairly simple steps that organisations can make to ensure that their volunteers *are* volunteers, and not employees, in the eyes of the law.

'Volunteer' or working under a contract?

To prove that they are employed by an organisation rather than volunteering for it, a person would have to show that they had a contract. Although this may seem fairly straightforward, what many people do not realise is that a contract does not have to be a written document or even a verbal agreement.

What is a 'contract'?

A contract is a description of a relationship – one can be created when an individual agrees to carry out a task in return for something. So, for instance, if

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you agree to water your neighbour's garden while they are on holiday in return for £10, a contract has been set up. If your neighbour does not agree to pay you but says that if you water their garden then they will bring you back some duty-free cigarettes, a contract is still created because you have agreed to do a task in return for something with an economic value, (legally referred to as a '**consideration**').

If you apply this rule to volunteers, then by giving something of economic value to a volunteer in return for their work, it could be possible to create a contract of employment under the definition in the National Minimum Wage Act. In this situation, things of economic value could be money, gift vouchers, training unrelated to their role, or boxes of chocolates. This does not mean that volunteers cannot receive expenses and training. But it does mean that when these things are given to volunteers, it should be clear that no payment for their work or time is intended.

As well as including something with an economic value, a contract has to include an intention to make a binding agreement. Therefore, organisations should be careful that written documents do not ask volunteers to make fixed commitments or to abide by certain procedures which would usually be associated with a paid employee, (one example could be using a holiday booking form or a sickness/absence form).

Signing agreements

Sometimes volunteers sign agreements stating that they understand what the organisation expects of them and will do their best to turn up on time and follow policies and procedures etc. etc. However, it is important to make it clear to the volunteer that this is a statement of what should ideally happen and that it is not legally binding, which means that it is not a contract. In fact, it is better if neither the volunteer nor the organisation signs such an agreement, because signing it can give the wrong impression about what the document is intended for.

So, in summary, there are two key parts to creating a contract:

consideration	<i>(money or something of value)</i>
+	
intention	<i>(does it feel like a binding agreement?)</i>

What are the consequences of creating a contract with a volunteer?

Workers

If a volunteer is found to be working under a 'contract of work', the person could be entitled to workers' rights such as:

- to receive the minimum wage (if over school leaving age)
- to be covered by the worker provisions of anti-discrimination legislation
- to four weeks' paid holiday each year (pro rata)

Employees

If they are found to be working under a 'contract of employment', a volunteer could be entitled to employees' rights (in addition to the above workers' rights) such as:

- further protection under health and safety legislation
- to receive statutory sick pay
- not to be unfairly dismissed (subject to a qualifying period)

How could these rights be established, and who decides if a contract has been created?

Employment Tribunals

An employment tribunal could be asked to decide if an organisation had established a contract with a particular individual or group of individuals. This could happen if a volunteer, or another person, took a case to an employment tribunal. Before actually hearing the complaint, the tribunal would have to ascertain whether it should consider the case, ie: whether the case actually related to 'employment' or not.

National Minimum Wage Compliance Officers

HM Revenue and Customs are responsible for enforcing the National Minimum Wage Act. Minimum Wage compliance officers have the power to investigate employers if they believe that the Act is not being respected.

Better to be prepared?

The likelihood of your organisation being investigated by Minimum Wage compliance officers or being taken to an employment tribunal may seem very small. But, it is better to be prepared because it is difficult to predict what kind of situation could lead to a volunteer making a case against your organisation in a tribunal. Previous cases have been triggered by racial or disability discrimination claims, but it is also possible that a volunteer could seek redress if they feel unfairly treated or dismissed after a dispute.

Finally, from a moral point of view, any organisation which is committed to good practice in working with volunteers should hope to avoid accidentally creating a contractual situation with a volunteer. Sometimes, such situations are due to simple misunderstandings, but other cases may be due to exploitation of a volunteer's time and generosity.

Real cases

Although this isn't a frequent occurrence, there are some well known tribunal cases where a volunteer has – or has not – been found to be working under a contract. Volunteering England's free publication "**Volunteers and the Law**" gives a short description of some of these cases. For more details, please see the "Further information" section at the end of this Information Sheet.

Good practice suggestions to reduce the risk of establishing a contract

Reimbursing expenses

Reimbursement of actual out-of-pocket expenses is not a payment because you are reimbursing the volunteer for something that they have already spent. An expense is any cost that a volunteer has to pay out that they would not have incurred if they had not been volunteering for you. This could be money spent on

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travel, food bought while volunteering, care costs or special equipment. To show that any money you pay out as expenses is a reimbursement and not a payment, it is important that you ask for a receipt and reimburse the exact amount that the volunteer has paid. It is a good idea to keep receipts and records of money paid out in case there are any queries, so that you can prove that you have not been making payments. (For further information, please read Volunteering England's Information Sheet "Volunteer Expenses".)

It may be tempting to cut down on administration and just give volunteers a set amount of money each day, but if they have not spent this amount then you are making a payment and creating a contract of employment. Organisations who make flat-rate expense payments are putting themselves at risk. In one case we are aware of, the Inland Revenue ruled that an organisation paying its volunteers a flat rate of £6 a day had in fact created a contract and the organisation was ordered to pay the National Minimum Wage.

Many organisations will worry that moving from a system of flat-rate payments to a system where the volunteer has to provide receipts, and will only receive a reimbursement of what they have actually spent, will result in them losing volunteers. But this shouldn't happen as long as the changes are explained and volunteers understand why they are important. It may well be worth calling a volunteer meeting or producing a factsheet to explain why you cannot make flat-rate payments any more. If volunteers understand why the changes have to be made, and that it is not something the organisation is imposing on a whim, they may be less upset at losing flat-rate payments.

It is also important to note that even before the National Minimum Wage Act came in, paying flat-rate reimbursements to volunteers meant that volunteers on benefits were at risk of having their benefits reduced. Such payments would also be liable for income tax. It has always been good practice to give an actual, receipted reimbursement, in order to safeguard volunteers' interests, but these recent cases have highlighted that now the organisation is at risk as well as individual volunteers.

Training

Training can also be counted as a 'consideration', but this should only be a danger where you are giving a volunteer training that is in no way relevant to their role in return for the volunteering that they have done for you. For instance, if you pay for all volunteer gardeners who have been with your organisation longer than a month to go on a computer training course, even though your organisation does not own a computer, you are in effect making a payment in return for the time donated to your organisation and creating a contract of employment.

Any training that the volunteer needs in order to do their role should be fine, because it is seen as necessary training and would therefore not count as a consideration. Training should only be regarded as a consideration if it is **not** relevant to the volunteer's work. Furthermore, organisations should be aware that because training has to be 'necessary', any training offered should be open to *all* volunteers carrying out that particular role. If it were only open to people who had been with the organisation for a set amount of time, then this would suggest that the training was not strictly necessary and could imply that the volunteers were expected to 'earn' their training course place in return for their work. Lastly, it

should not matter whether the training is in-house or external or whether it leads to a qualification.

Rewards and Honoraria

Rewards and presents for volunteers can also be problematic if it can be shown that there was an expectation that the volunteer would receive something after volunteering for you. Sadly, it is probably best to avoid giving anything with an economic value unless it truly is a one-off. It is only acceptable to pay an honorarium if it is totally unexpected and there is no precedent surrounding it. If it can be proved that there was an expectation that the payment would be made in return for a certain piece of work, length of service, or on leaving the organisation, then the money would not be an honorarium but a payment. It would therefore be taxable and would give the volunteer employee status.

It is best to be extremely wary about paying honoraria. As well as the possibility of creating a contract, it may cause other problems. Jobcentre Plus offices may see honoraria as a payment and could subtract the money from an individual's benefits. Honoraria can also create bad feeling among those volunteers who do not receive them and can thus be divisive. Instead of paying out honoraria or giving volunteers individual gifts, organisations could make sure that all volunteers are able to claim expenses for meals, travel and care costs and that spare money is invested in making volunteer roles more rewarding - for example, by offering more training, social activities, extra resources, tools to make the organisation more accessible, etc. It is also fine to arrange social events and group outings to say thank you to volunteers.

Problem solving procedures

A problem solving procedure will hopefully ensure that you know how to deal with problems if they arise. Sometimes a minor complaint can escalate into a bigger issue because an organisation is unprepared to deal with it.

It is important to note that some of the previous employment tribunal cases involved a volunteer who wanted to pursue a dispute or complaint with the organisation they had volunteered for. Adopting a problem solving procedure means that organisations can offer a good way to deal with such issues internally and hopefully avoid lengthy or unresolved complaints. (For further information, please read Volunteering England's Information Sheet on "Problem Solving".)

Further information

"Volunteers and the Law". A readable guide to legal issues on volunteering. In particular, read chapter 1 on "Volunteers and Employment Rights".

This publication is free to download.

<http://www.volunteering.org.uk/law>

Volunteering England Information Sheets

"Saying 'Thank You' to Volunteers"

"Volunteer Expenses"

"Problem Solving"

<http://www.volunteering.org.uk/information>

Volunteering England Good Practice Bank

Includes a section on “legal issues and volunteering”

<http://www.volunteering.org.uk/goodpractice>

A Detailed Guide to the National Minimum Wage (revised October 2004)

Department for Business Enterprise and Regulatory Reform (BERR)

(formerly the Department for Trade and Industry, DTI)

<http://www.berr.gov.uk/files/file11671.pdf>

AdviceNow website guide called “What’s a contract?”

This independent website provides information on rights and legal issues, including a useful guide called “What’s a contract?”

<http://www.advicenow.org.uk/contracts>

Last reviewed: June 2008

We have made every effort to ensure that this Information Sheet was correct at the time of publication. It is intended as a summary of relevant issues and suggests further sources of information. This document should not be regarded as a substitute for legal guidance and formal legal advice should be sought where appropriate.

For more information on managing volunteers, please visit
The Good Practice Bank at www.volunteering.org.uk/goodpractice

All of Volunteering England’s Information Sheets are available at:
www.volunteering.org.uk/information

Or please contact Volunteering England’s Information Service
Email: Information@volunteeringengland.org
Freephone Information Line: 0800 028 3304 (M-F 10.30-12.30 & 14.00-16.00)

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