



## Working With Volunteers

Presenter: Tamara E. Jones  
CIS Pre-Loss Attorney  
October 24, 2013

  
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In 2011, 35.8 % of Oregon's residents volunteer, ranking them 8<sup>th</sup> among the 50 states (and Washington, D.C.).

Source: Corporation for National and Community Service



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Between 2009-2011, the value of time provided by volunteers in Oregon was more than \$2 million!

Source: Corporation for National and Community Service.

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*What our members say about volunteers:*

"The efforts of volunteers can be seen in every aspect of community life – the arts, education and city government . . . [they] plan an essential role in maintaining the vibrancy of the city."

(City of Forest Grove)

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**Did You Know:**

Volunteer firefighters represent nearly

**70%**

of the country's fire service.



NPR, "Volunteer Firefighters: Facing the Flames and the Mundane" (April 23, 2013)

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**AGENDA**

- Bad "Volunteer" Situations for Employers
- What is a Volunteer?
  - Exceptions
- Case Law: Lawsuits involving Volunteers
- Working with Volunteers: Best Practices and Strategies



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## You May be Asking Yourself. . .

*"I've never had a problem with my organization's volunteers. Has something changed in the law?"*



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## Bad "Volunteer" Situations for Employers

- Lawsuits for discrimination or harassment based on "volunteer" vs. "employee" status
- Lawsuits that consider whether an employer falls under federal or state law based on the number of "employees"



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## Bad "Volunteer" Situations for Employers

- Minimum wage and overtime violations
- When Oregon awards unemployment benefits to volunteers
- Tax burdens on employers



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How federal and Oregon law looks at it

## WHAT IS A “VOLUNTEER”?



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### Basic definition: “Volunteer”

*An individual employed by an employer.*

- “Employ” – to suffer or permit to act (Fair Labor Standards Act)
- The label attached to a worker’s job duties doesn’t matter much, but it can be helpful.
- Does the worker’s view of the situation matter? Depends on the law.



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### More on the definition of “volunteer”

Key factors looked at:

- Is the individual receiving payment (wages) for work performed?
- Is there a promise of future employment with your organization upon completion of volunteer assignment?
- Is volunteer work a prerequisite for future employment?



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### More on the definition of “volunteer”

- Does the organization promise or provide some other benefit in exchange for the work performed?
  - The benefits must constitute “significant remuneration” rather than merely the “inconsequential incidents of an otherwise gratuitous relationship”
    - Providing workers’ compensation insurance alone *probably* isn’t enough to establish an employer-employee relationship.



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### “Volunteer” – Key Exceptions

- **FLSA/Oregon:** Exemption for individuals who volunteer services to public employers, but only if:
  - The services are offered freely and without pressure or coercion.
  - The volunteer doesn’t receive or expect any compensation other than being paid expenses, reasonable benefits, or a nominal fee for performing the services.



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### “Volunteer” – Key Exceptions

- **FLSA/Oregon:** Exemption for individuals who volunteer services to public employers - examples:
  - A. *Cleveland v. City of Elmendorf, TX* (5<sup>th</sup> Cir 2004)
    - Unpaid police officers, whose sole benefit to volunteering was maintaining their police commissions, were volunteers



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## “Volunteer” – Key Exceptions

- **FLSA/Oregon:** Exemption for individuals who volunteer services to public employers - examples:

*B. Benshoff v. City of Virginia Beach* (4<sup>th</sup> Cir 1999)

- Municipal firefighters who had volunteered to work on private rescue squads performing emergency medical services were volunteers



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## “Volunteer” – Key Exceptions

- **Due Process Rights** – No property or liberty interest in a volunteer position.
  - BUT: Ninth Circuit Court of Appeals has also held that “dismissal from a volunteer position can constitute unconstitutional discrimination,” such as for a First Amendment claim.
- **Elected Officials** – the payment/stipend rules don’t apply.



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## Volunteer “Unknowns” (and other issues)

- **Oregon’s Whistleblower Statute** (ORS 659A.200(2)(a).
  - An employee is a “person employed by or under contract with” the public employer. No other definitions.
- **The Oregon Safe Employment Act** (ORS 654.001, et seq.)
  - “Any individual . . . whether lawfully or unlawfully employed, who engages to furnish services for remuneration, financial or otherwise . . .”



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### Volunteer “Unknowns” (and other issues)

**Oregon Tort Claims Act** – “Like a public employee, a non-employee ‘agent’ performs functions that the public entity itself would otherwise perform. In that respect, an employee and a non-employee ‘agent’ are identical.”




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Lessons From the Trenches

### EMPLOYERS AND LAWSUITS INVOLVING VOLUNTEERS



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### *Mendel v. Gibraltar* (E.D. Mich. 2012)

- Volunteer firefighters are not “employees” under FMLA because they did not work set shifts and were not required to respond to calls regarding fire emergencies, among other issues
  - Thus, the City had only 41 employees and the employee was not entitled to leave



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Best Practices, Best Strategies

## WORKING WITH VOLUNTEERS



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### First Things First!

Identify your organization's **volunteer needs** -- *before* you establish a formalized volunteer program, or if you're self-auditing your existing program.

- ☐ Which programs or departments need volunteers?
- ☐ How much volunteer time will be needed?
- ☐ What experience and skills will these volunteers need?



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### Rule #1: Process

Create and follow an established **process** for working with volunteers that includes:

- ☐ A selection system (including screening)
- ☐ A training program
- ☐ A system to control volunteer activities
- ☐ A process/procedure for removing volunteers
- ☐ A system to document all of the above



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### Rule #1.5: Process

Even if they aren't true "employees,"  
treat them like "unpaid employees."



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### Rule #1.5: Process

- Do you have volunteer **job descriptions**?
  - As with job descriptions for paid jobs, volunteer job descriptions must include the "essential functions" of the position (including, if possible, physical capabilities).
- Do you have a good **volunteer application**? What do you do to follow up on that application?



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### Rule # 1.5: Process

Do you have an established process  
for recruiting, screening  
and selecting volunteers?



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### Rule #1.5: Process

- Should I conduct **background checks** on prospective volunteers?
  - Does the position handle money? Is bonding required?
  - Does the position require driving organization-provided vehicles?
  - Will the volunteer work with “vulnerable populations” (elderly, disabled, children, etc.)?
  - Will the volunteer have the “keys to the kingdom”?



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### Rule #1.5: Process

- Do you have a volunteer “**agreement**” that isn’t permeated with “legalese”?
  - Participation is at organization’s discretion
  - Uncompensated, voluntary work
  - Indicate whether volunteer is covered by workers’ compensation



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### Rule #1.5: Process

- Do you have a **volunteer agreement** that isn’t permeated with “legalese”?
  - Volunteer agrees to hold harmless the organization if there is bodily injury, property damage or personal injury
  - Confidential information – volunteer agrees not to share any unless directed
  - Photographs?



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## Rule #1.5: Process

- Do you **train** your volunteers on safe working practices?
- What other training could you/should you offer volunteers?
  - Interacting with the public/behavior standards
  - What to report, when to report, and to whom it should be reported
  - Confidentiality



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## Rule #1.5: Process

- Do you have a harassment/discrimination **policy** for volunteers?
  - Do NOT give them your “employee” handbook.
  - Include a complaint-reporting procedure available for volunteers only.



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## Rule #2: Volunteer Resolution

Have an accurate and updated  
volunteer resolution, per ORS 657.031

**SAMPLE VOLUNTEER RESOLUTION**

Resolution No. \_\_\_\_\_  
Effective Date: \_\_\_\_\_

A resolution extending workers' compensation coverage to volunteers of CITYCOUNTY INSURANCE SERVICES shall be the following:

Pursuant to ORS 657.031, workers' compensation coverage will be provided to the classes of volunteers listed in this resolution, noted on CCI payroll schedule and verified at audit:

**1. Public Safety Volunteers**  
Applicable \_\_\_\_\_ Non-applicable \_\_\_\_\_

As required monthly wage of \_\_\_\_\_ will be used for public safety volunteers in the following volunteer positions (check all that apply):

☐ Police reserve  
☐ Sheriff and recruit  
☐ Firefighter  
☐ Emergency medical personnel  
☐ Ambulance drivers  
☐ Other \_\_\_\_\_

**2. Volunteer boards, committees and councils for the performance of administrative duties.**  
Applicable \_\_\_\_\_ Non-applicable \_\_\_\_\_



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## Rule #3: Volunteer Management

Train your employees on how best to work with volunteers.



## Rule #3: Volunteer Management

- When to provide encouragement and complements
- When to provide "corrective action"
- Encourage employees to not hesitate when deciding how to respond to a volunteer's inappropriate or misguided action
- Document volunteer problems the same way employee performance issues are documented

## Rule #4: Be Respectful

Treat your volunteers with dignity and professionalism when you don't want them working for your organization any more.



## CIS UPCOMING EVENTS

### Training

#### GHS

NOV 6<sup>th</sup> – learn.cisoregon.org for more details

#### Public Safety Defensive Driving (Police)

NOV 6<sup>th</sup> – Roseburg

#### Defensive Driving (Public Works/Parks)

NOV 7<sup>th</sup> - Roseburg

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## CIS UPCOMING EVENTS

### Webinars

November 20 (3<sup>rd</sup> Wed) – 10:00 a.m.

- When Employees Leave

December 18 (3<sup>rd</sup> Wed) – 10:00 a.m.

- Name Clearing Hearings

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**THANK YOU!**

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