Volunteers and the Law: Compliance, Human Resources & Exempt Legal Issues

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Goals for Today

To provide you with specific tools to assist you in:

• Managing a volunteer workforce
• Complying with legal requirements
• Spotting issues before problems arise
Case Study

One of your hospital’s patients sues you (the auxiliary) for various state and federal law claims including identity theft, civil rights and HIPAA violations.

What would you do?
Analysis

• Looking at this problem from the non-profit entity perspective

• Looking at this problem from the employment law perspective
Analysis

Looking at this problem from the non-profit entity perspective
Analysis

Looking at this problem from the employment law perspective
What is a Volunteer?

Employee or Volunteer?

• This is the multi-million dollar question because misclassification can result in liability for:

  - Four years of past wages
  - Benefit liability
  - Taxes
  - Penalties
“Employee”

- Any individual who is “suffered or permitted to work” by an employer
  - Mere knowledge by an employer that work is being performed on the employer’s behalf will satisfy the “suffer-or-permit-to-work” requirement
- This is a very broad definition so that an exception for unpaid interns/volunteers is very narrow
- There is a presumption is that the individual is an employee rather than a volunteer
- Burden is on the employer to prove volunteer status
- Recently development: divergences between federal and state law
“Volunteer”

- An individual who intends to donate their services to religious, charitable or similar non-profit corporations
  - without contemplation of pay and
  - for public service, religious or humanitarian objectives

- U.S. Department of Labor approves for-profit hospital use of volunteers on “rare occasions”
  - For-profit hospital may not allow employees to volunteer
The Gift Shop Issue

Wage and Hour Opinion Letter – June 28, 1996

• Working in a gift shop does not qualify as “charitable” activity
• Use of paid employees as well as volunteers in the gift shop further undermines volunteers status
• This principle not limited to “gift shop”
• NOTE: CA Labor Commissioner has adopted a similar approach


• Rejected June 28, 1996 Opinion Letter as contrary to Alamo
• However, this opinion is not binding in California, other federal courts or the DOL
• Unclear what approach current Secretary of Labor would take
Employment Laws That Apply to Volunteers

More important than ever given the trend in CA to extend employer rights and responsibilities to volunteers/interns

- FEHA now prohibits:
  - discrimination and harassment against unpaid interns
  - harassment against volunteers on the basis of any legally protected classification, e.g., race, disability (Cal. Gov’t Code sections 12940(c) and (j))
Legally Protected Categories (FEHA)

- Age (40 and over)
- Ancestry
- Color
- Religious Creed (including religious dress and grooming practices)
- Denial of Family and Medical Care Leave
- Disability (mental and physical) including HIV and AIDS
- Marital Status
- Medical Condition (cancer and genetic characteristics)
- Genetic Information
- Military and Veteran Status
- National Origin (including language use restrictions)
- Race
- Sex (which includes pregnancy, childbirth, breastfeeding and medical conditions related to pregnancy, childbirth or breastfeeding)
- Gender, Gender Identity, and Gender Expression
- Sexual Orientation
  - ALSO COVERS PERCEPTIONS AND ASSOCIATIONS
Intern – Federal Law

Courts have used the “primary beneficiary test” to determine whether an intern or student is, in fact, an employee under the FLSA. In short, this test allows courts to examine the “economic reality” of the intern-employer relationship to determine which party is the “primary beneficiary” of the relationship. Courts have identified the following seven factors as part of the test:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.
5. The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Courts have described the “primary beneficiary test” as a flexible test, and no single factor is determinative. Accordingly, whether an intern or student is an employee under the FLSA necessarily depends on the unique circumstances of each case.
Intern – CA Law

An individual who performs work as part of an educational training opportunity for his/her benefit which must be:

• an essential part of an established course of an accredited school or of an institution approved by a public agency to provide training for licensure or to qualify for a skilled vocation or profession
Intern – CA Law

• Internship is similar to training which would be given in an educational environment

• Internship is for the benefit of the intern

• Intern does not displace regular employees and works under close supervision of existing staff

• Employer providing training derives no immediate advantage from the activities of the intern and on occasion its operations may actually be impeded

• Intern is not entitled to a job at the conclusion of the internship period

• Employer and intern understand that intern is not entitled to wages for the time
Confidentiality

• California law requires hospitals to ensure patient confidentiality and to report any breach
  - Penalties for breaches and failure to report

• California law also imposes individual liability for privacy breaches
  - Penalties range from $1,000 to $250,000
Emerging Issues (Safety and Security)

- Workplace violence prevention
  - Cal/OSHA regulations will be effective April 1, 2017. Do not specifically cover volunteers

- Issues that arise due to increased community-based activity
- Tele-commuting
- On-call
Emerging Issues (Labor Relations)

• Application of hospital’s solicitation and distribution policy
• Coordinating volunteer activity with hospital labor representatives
Recommended Actions

- Detailed applications
- Background check and Health clearance
- Interview
- Recommendations
- Offer (or declination) letter
- New intern/volunteer orientation
- Ensure that the hospital’s website does not include any language that could suggest the program accepts individuals for reasons other than those allowed for by law
  - E.g., no mention that those interested in gaining experience should apply as a volunteer (educational internships are different)
Questions?
WHAT YOUR HOSPITAL AUXILIARY MUST KNOW RE §501(C)(3)

Brian Yacker, JD/CPA
PROVISIONS OF INTEREST TO EOs

Executive Compensation
- Excise tax (21%) on executive compensation over $1 million
  - Excise tax payable by the exempt organization
  - Applicable to the five highest compensated employees of the organization

Unrelated Business Income
- Lowered tax rate (down to 21%)
- UBIT silos
  - Limits usage of net operating loss carryovers against “different” activities

Colleges & Universities
- Excise tax (1.4%) on investment income of certain private universities
  - Public universities NOT subject to this excise tax

Charitable Contribution Deductions
- College event seating rights
PERMANENT DOCUMENTS

- Articles of Incorporation (CA Public Benefit Corporation)
  - Can request copy from the Secretary of State

- Bylaws
  - Make sure can locate
  - Make sure are following
  - Make sure periodically updated

- Tax Exemption Application
  - Federal (Form 1023)
    - Including responses to any follow-up inquiries
    - Exception – filed Tax Exemption Application before July 1, 1987
  - State (Form 3500)
    - Required to be filed to be considered tax-exempt in California
ESSENTIAL DOCUMENTS

PERMANENT DOCUMENTS (CONT’D)

- Determination Letter
  - Both federal and California
- Tax Returns
  - Form 990 (whichever version) for the past three years
    - Original and amended
  - Form 990-T for the past three years
    - If applicable
ESSENTIAL DOCUMENTS

PERMANENT DOCUMENTS (CONT’D)

Resources

- GuideStar
  - www.guidestar.org

- IRS Forms
  - 4506-A
    - Request many different EO documents from IRS
      » Usually, 6-month wait time
  - 13909
    - Complaint

- IRS EO Select Check

- IRS Business Master File
FINANCIAL OVERSIGHT

➢ Board Review of Form 990
  ▪ “Required” by Part VI, Line 11 of the Form 990
    • Consequences = Probably heightened risk of attention
  ▪ Final copy forwarded to voting members of Board before filed with IRS
    • Document in Board minutes
    • Should be the “full” copy of the Form 990 with nothing redacted
  ▪ Best practice = Presentation by tax preparer (unrelated)
    • At minimum, review of Form 990 by experienced practitioner if self-prepared

➢ Board Periodic Review of Financials
  ▪ Ensure proper internal controls implemented
  ▪ Undertake more than just annually, although monthly might be too often
    • Make sure financials are “readable” by Board members
    • Make sure bookkeeping is contemporaneous
FINANCIAL OVERSIGHT (CONT’D)

➢ Annual Compliance Requirements
  ▪ Federal (IRS)
    • Must file one of three versions of the Form 990 with the IRS every year
      o Form 990-N
        » Annual gross receipts less than $50,000
      o Form 990-EZ
        » Annual gross receipts less than $200,000 AND total fair market value of assets less than $500,000
      o Form 990
        » 12 Part Core Form + 16 Schedules (prepare if applicable)
    • Make sure Form 990 is filed on time
      o Late filing penalties imposed by IRS if not
    • Automatic revocation of federal tax-exemption if not file one of three versions of the Form 990 with the Internal Revenue Service for three consecutive years
      o Need to apply for reinstatement of tax-exemption by filing Tax Exemption Application (Form 1023) with the Internal Revenue Service
FINANCIAL OVERSIGHT (CONT’D)

- Annual Compliance Requirements (cont’d)
  - California
    - Franchise Tax Board
      - CA Form 199
    - California Attorney General
      - Form RRF-1
    - Secretary of State (once every two years)
      - Statement of Information (SI-100)

- Other Compliance Requirements
  - Charitable solicitation registration
    - 38 of 50 states require
      - Need to be aware of if receiving donations from residents of states other than California
Best Practice re Board Composition

- Majority of organization’s Board (voting members) should be “independent”
  - Independent = not compensated by the exempt organization
    - Covers direct and indirect compensation
    - Exception = compensation in capacity as Board member
- Recommended Board diversity
- Recommended not have advisory members of the Board

Consequences

- IRS concerns re independence
  - Perception is that non-independent Board members will generally act in their own best interests and not the best interests of the organization
    - Heightened risk of attention from the IRS and AG
INSIDER TRANSACTIONS

GENERAL OVERVIEW

- **Definition of Insiders**
  - Voting Board members | Officers | Key Employees | Related | Former
    - Officers include top management and top financial individuals

- **Insider Transactions Generally Permitted but Need to Disclose**
  - Generally, should avoid any transactions with insiders
    - Excess benefit transactions (generally, unreasonable compensation)
    - Loan transactions
    - Grants to insiders
    - Other transactions
  - Contemporaneously document why undertaking transaction with insider

- **Conflict of Interest Policy**
  - Essential that exempt organization have conflict of interest policy if undertaking transactions with insiders
    - Must annually monitor the conflict of interest policy
INSIDER TRANSACTIONS

COMPENSATION

- Insider Compensation
  - Insiders definition
    - Voting Board members / Top management / Top financial / Key employees
      - Top management / Top financial considered to be Officers by IRS
        - Bookkeeper not deemed to be an Officer
  - Reasonable compensation requirements
    - Board review and approval
      - Insider not involved in the process at all
    - Comparability analysis / Salary surveys
    - Documentation of the entire process

- Preparation of Reasonable Compensation Study
  - Determine whether DIY comparability analysis is sufficient
    - Generally will be sufficient for smaller exempt organizations
      - Gross receipts under $1 million
INSIDER TRANSACTIONS

EXPENSE REIMBURSEMENTS

 Expense Reimbursement Policy

- Contemporaneous documentation of business purpose is essential
  - Should implement written expense reimbursement policy
    - Require adherence before reimburse any expenses of any Board members or employee-insiders
      » Require submission of receipts and business purpose documentation
  - Avoid employee advances if at all possible
  - Avoid “corporate” credit card if at all possible

- Per se excess benefit transaction results when reimbursing the personal expenses of insiders
  - How does the exempt organization address cell phones?
  - Try to have all insider loans and payables cleared up by end of tax year
TRANSACTIONS WITH RELATEDS

Related Organizations

- Tread carefully when transacting with related for-profit or non-charitable organizations
  - Traps for the unwary
    - Web site references
    - Grants from the §501(c)(3) organization to a related exempt organization which conducts lobbying and/or political activities
    - Sharing of personnel and/or facilities
    - Overlapping Boards
POLICIES / PROCEDURES

“REQUIRED” POLICIES

➢ All Organizations
  ▪ Conflict of Interest Policy
    • Appendix A of the Form 1023 Instructions
  ▪ Document Retention and Destruction Policy
  ▪ Whistleblower Policy
  ▪ Expense Reimbursement Policy

➢ Applicable Organizations
  ▪ Reasonable Compensation Procedures
    • Rebuttable presumption of reasonableness
  ▪ Investment Policy
  ▪ Gift Acceptance Policy
  ▪ Joint Venture Policy
UNRELATED BUSINESS ACTIVITIES

- **Definition**
  - Trade or business
  - Regularly carried on
  - Not related to the furthering of the organization’s exempt purposes

- **Exceptions**
  - Passive income
    - Dividends / Interest / Rents / Royalties / Capital gains
  - Volunteer exception
    - Income from activity that is substantially (85%) conducted by volunteers is not subject to the unrelated business income tax
  - Donated goods exception
    - Income from selling donated goods not subject to unrelated business income tax
  - Convenience exception
    - Income from activity carried on for convenience of others not subject to the UBIT
UNRELATED BUSINESS ACTIVITIES (CONT’D)

Typical Unrelated Business Activities

- Illegal activities
  - Conducting an unregistered or unreported raffle
    - Review California laws regarding exempt organization raffles
- Provision of administrative / back office services
- Rental income
- Advertising income
  - NOT qualified sponsorships
- Flow-through income from S-Corps
LOBBYING + POLITICAL ACTIVITIES

➢ Lobbying
  ▪ Definition
    • Coming out for or against actual or pending legislation
  ▪ §501(c)(6) organizations are permitted to lobby
    • Not limited like charitable organizations are
    • Must provide notice to members re extent of lobbying undertaken during the applicable tax year

➢ Political Activities
  ▪ Definition
    • Coming out for or against a candidate for public office
  ▪ Unlike §501(c)(3) entities, political activities for a §501(c)(6) are permitted
    • Cannot be the primary purpose of the §501(c)(6) entity
PRIVATE BENEFIT

Definition
- Transaction with non-insider of the exempt organization which is not in the best interests of the exempt organization
  - Different from private inurement which involves insiders of the organization

Consequences
- Incidental private benefit permitted
- More than incidental private benefit
  - Revocation of tax-exemption

Examples
- Transactions with independent contractors
  - Notably, professional fundraisers
- Joint ventures with for-profits
OTHER CONSIDERATIONS

CALIFORNIA

- California Attorney General
  - Legal requirements for §501(c)(3) organizations
    - Cannot pay any penalty / fine / judgment
    - Majority of Board cannot be compensated
    - Must register / report all gaming activities
    - Must have audited financial statements if annual gross receipts exceed $2 million

- California Department of Tax and Fee Administration
  - Most §501(c)(3) organizations operating in California are NOT exempt from charging sales tax
  - Property tax exemptions possible
OTHER CONSIDERATIONS

IRS / AG AUDIT ACTIVITY

- Internal Revenue Service
  - Private Inurement
    - Insider transactions in absence conflict of interest policy
    - Reasonable compensation challenges
    - Expense reimbursements
  - Private Benefit
    - Relationships with professional fundraisers
    - School setting (booster clubs / PTAs)
  - Unrelated Business Activities
  - Transactions with Related Entities
  - Information Tax Returns
    - Forms 1099
    - Worker classification
OTHER CONSIDERATIONS

IRS / AG AUDIT ACTIVITY (CONT’D)

- CA Attorney General
  - Fraudulent charitable solicitation representations
    - Functional expense allocations
    - Agency transactions
    - Inflated valuation of in-kind contributions received
  - Excessive executive compensation
  - Failure to conduct required financial statement audits
  - Conducting illegal gaming activities
    - Failure to register answer/or report raffle
    - Failure to follow minimum distribution requirements
      - 50/50 raffles
    - Conduct raffle over the internet
FOR MORE INFORMATION...

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