

By Mark Restall

Volunteers and the Law:

A summary

Introduction

The majority of calls to Volunteering England's information line touch upon legal issues in one form or another. Many organisations are unclear about the legal status of their volunteers and the responsibilities they have towards them. Worries around issues such as benefits and the reimbursement of expenses are perennial concerns.

Eighteen million people make a gift of their time each year. There is increasing government attention on volunteering, with growing numbers of people being encouraged to volunteer. It is therefore vital that organisations understand both the good practice and the legal implications of volunteer involvement, in order to ensure that volunteering remains a valuable experience for all.

This leaflet is a summary of the recently published book, *Volunteers and the Law*. It is a signposting document, leading you to sources of further information. Legal advice should always be sought.

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Volunteers and employment rights

The legal status of volunteers is an interesting and complex area. People new to volunteering are often shocked to discover that volunteers are not covered by the same protections as paid staff. This means that, in theory, volunteers can be discriminated against or unfairly dismissed with impunity. However, in some cases ‘volunteers’ have claimed their status is that of worker or employee. The central issue here is whether or not there is a contract between the organisation and its volunteers; and if so, what the consequences of this are.

Organisations involving volunteers should make it their duty to keep abreast of good practice. Many local and national bodies offer training on volunteering issues, and organisations such as Volunteering England produce publications, information sheets and other guidance on working with volunteers.

What is a contract?

A contract doesn't have to be a written piece of paper signed by both parties. It doesn't even have to be a verbal agreement. A contract is a description of a relationship – even if neither party has explicitly said that they've intended a contract to be created, the actual relationship between the two may be judged to be contractual.

If a contract has arisen between an organisation and a volunteer, that person is likely to be a ‘worker’ in the eyes of the law. ‘Worker’ refers to a broad category of employment, and workers are entitled to be paid the minimum wage, protection under the anti-discrimination legislation, and four weeks’ paid holiday a year (pro rata). Full employment rights (protection from unfair dismissal, statutory sick pay, etc) are available only to employees, people working under a contract of employment. A fuller explanation of a contract of employment is in the full *Volunteers and the Law* publication, but factors that may be taken into account by a tribunal or similar body may include the degree of control the organisation has over the work, and whether or not there is an obligation to provide and carry out the work.

What are the consequences?

There have been few tribunal cases, but one famous one involving Relate was considered an employment contract because of the obligation to work a certain number of hours and pay Relate back for the training if this was not fulfilled. Another involved regular payment for expenses, even when the volunteer was off sick or on holiday and lived within walking distance. The full *Volunteers and the Law* book gives detailed examples of other tribunal cases.

The impact of the minimum wage

This issue has been given greater importance in recent years by the introduction of the National Minimum Wage Act. While volunteers are exempt, those who could be considered workers in the eyes of the law would then be eligible for it. Volunteers are not entitled to the minimum wage if the only money they receive is in respect of actual expenses. The only benefits they should receive should be training to improve their ability to do the work they are carrying out, and/or (non-monetary) subsistence or accommodation, if this is reasonable in the circumstances. The full *Volunteers and the Law* book goes into more detail on this subject.

The consequences for an organisation whose volunteers are in fact workers and therefore entitled to the minimum wage are potentially quite serious. Not only could the organisation be required to pay backdated minimum wage to its volunteers, but also there are criminal offences punishable by fines associated with wilfully neglecting to pay the minimum wage and falsification of records and similar obstructions.

Reducing risk

The full *Volunteers and the Law* book explains how to avoid some common pitfalls such as reducing obligations, perks and the language of contracts. It stresses the importance of creating a distinction between paid workers and volunteers and of treating volunteers fairly. It outlines good practice such as having volunteer agreements.

Benefits and tax

Volunteering and welfare benefits

In theory, genuine voluntary work should not affect entitlement to any benefit. But in practice this is not always the case and so it is useful to be aware of the rules and regulations. Benefits are handled by Jobcentre Plus. Where benefits legislation defines voluntary work, it is always described as unpaid and where 'volunteers' receive more than out-of-pocket expenses they will be treated as if they are in paid work. The full *Volunteers and the Law* book outlines technical information on this subject

Rules concerning some of the most common benefits are:

- Jobseeker's Allowance – claimants are fully entitled to volunteer as long as they remain available for and actively seeking work. There is no limit on the number of hours but it is likely that someone volunteering full-time may be regarded as not having time to actively seek work.
- Income support – claimants can volunteer for as many hours as they like but must not receive any income from volunteering.
- Incapacity benefit – claimants are fully entitled to volunteer and this should not call into question a person's incapacity to work. There are no limits to the number of hours.

Tax and national insurance

If volunteers receive nothing more than out-of-pocket expenses, then this reimbursement will not have tax implications. If they receive some form of payment, then this will be taxable. Simply referring to a payment as 'expenses' does not make it exempt, nor does describing it as an honorarium, pocket money or sessional payment.

Preventing problems

Organisations must be able to demonstrate that claimants receive only out-of-pocket expenses. Receipts should be sought where possible and records should be kept. It is generally helpful to have an expenses claim form for volunteers to fill out.

Safety and security

Health and safety

Although much of the health and safety legislation applies only to workers and employees, organisations do have a duty of care towards volunteers. This means that reasonable steps should be taken to reduce the probability and seriousness of injury to volunteers. This could mean giving them proper information, training, use of safety clothing, closer supervision and so on. There are also duties on employers under section 3 of the Health and Safety at Work etc Act 1974 to take account of the health and safety

of those people (other than their employees) who may be affected by their activities, and to give them relevant health and safety information. The full *Volunteers and the Law* book gives much more legal detail about health and safety legislation, but these are some of the key points:

Risk assessments

There is a duty on employers to carry out risk assessments, which must be in writing where there are five or more employees. It is hard to argue that the duty of care is being taken seriously if no effort has been made to look at what could go wrong for volunteers and how they could be protected. This means it makes sense for even volunteer-only organisations to adopt a systematic approach.

When working with volunteers it makes sense to have an overall risk assessment for the volunteer programme and smaller risk assessments for individual roles.

Health and safety policy

Organisations with five or more employees must have a written health and safety policy, setting out the organisation's commitment and clarifying procedures. Smaller organisations should also strongly consider writing such a policy. Volunteers should be included in the policy and have access to it.

Liability and insurance

Regardless of the legal structure of the organisation, it is important that volunteers are adequately insured. This means checking that existing policies extend to volunteers. Two of the most important insurances are employers' liability and public liability. Although the law does not compel organisations to insure volunteers under employers' liability, it is clearly advisable for them to do so because otherwise they may be open to negligence claims brought by volunteers. Public liability policies may vary so organisations are advised to check their cover and clarify that it covers volunteers.

Working with vulnerable clients

Organisations with vulnerable clients have an enhanced duty of care and should have a child protection policy or vulnerable adult protection policy in place. Typical measures may include:

- Taking up references.
- Training and induction.
- Adequate supervision.
- Proper channels for volunteers and others to raise concerns.

Criminal record checks

Now that it is easier to access criminal record checks, it can be argued that taking the duty of care seriously includes obtaining checks for volunteers working with vulnerable clients. Insurers are increasingly concerned to see that organisations are taking all measures to protect clients. While criminal record checks may be an important tool, they should not be regarded as the only or even the best safeguard. There is a danger they can create a false sense of security and clearly they are only ever going to provide information on people with an existing record.

Do I need to carry out a Criminal Records Bureau (CRB) check?

For most organisations the relevant legislation that requires volunteers to obtain a CRB check, known as a disclosure, are the Protection of Children Act 1999 and the Care Standards Act 2000 and subsequent related guidance. The two Acts do not cover all

circumstances where volunteers will be working with vulnerable clients. Organisations falling outside these areas are not compelled to carry out checks but they do have a duty of care towards their clients.

Statutory organisations (hospitals, schools, etc) will have their own guidance on criminal record checks.

Data protection and copyright

Data protection

If information kept on volunteers falls into the Data Protection Act 1998's definition of 'personal data', the organisation has legal duties concerning the collection, storage, use of and disclosure of such information.

Data protection principles

Under the law, personal data must be:

- Fairly and lawfully processed.
- Obtained only for specified and lawful purposes.
- Adequate, relevant and not excessive for the purposes for which it is processed.
- Accurate and up to date.
- Not kept longer than necessary.
- Processed in accordance with the rights of individuals.
- Kept secure.
- Not transferred to countries where data protection legislation is inadequate.

References

Under the Act, volunteers may claim access to their references. But disclosure will almost certainly identify the referee. The employer must decide if the worker's right to know what information is held about him or her and its source outweighs the right to privacy of the third party who can be identified through releasing the information.

Volunteer records

No clear guidelines exist for the retention of volunteer records, but organisations should follow the data protection principle that data should not be kept longer than for the purpose for which it was taken. The Criminal Records Bureau states that disclosures should not be kept for longer than six months.

Copyright

Copyright normally belongs to the person who created the work. The law says that material produced by employees belongs to their employer but makes no mention of volunteers. Therefore organisations should ask volunteers to transfer copyright to them or agree a licence whereby the organisation can use the work within agreed limits. While this may seem a trivial issue, Volunteering England has heard of cases where volunteers have been producing work for important publications such as annual reviews, but following disputes with their organisations have refused to allow them to use their work.

Specific volunteering situations

Involving young volunteers

While there are legal restrictions on employing young people, they do not in general apply to young volunteers. The full *Volunteers and the Law* book gives details to consider from The Children and Young Persons Act 1933. Both the young person and their parent or guardian should fully understand what the voluntary work entails. The Children Act 1989 states that a person who does not have parental responsibility for a child but has care of the child must do what is reasonable to promote a child's welfare.

Volunteer drivers

The full *Volunteers and the Law* book outlines specific considerations such as insurance and expenses. For example, drivers using their own vehicles should inform their insurers of their voluntary activities. To avoid confusion with commercial use of the vehicle, they should make it clear that they will receive out-of-pocket expenses only. Volunteer drivers should not accept an increase in premium, and may wish to change insurer if their current one insists on an extra charge. It is good practice for drivers' expenses to be reimbursed.

Volunteers from overseas

The rules on which people from overseas can volunteer are complex and sometimes contradictory. People from outside the European Economic Area are not allowed to take up work, paid or unpaid (which includes volunteering), without a work permit. However, the Home Office has allowed a concession to allow people from outside the EEA to volunteer for a charity if they meet certain criteria – they will still need an appropriate visa or entry clearance. Refugees and asylum seekers are allowed to volunteer. The full *Volunteers and the Law* book gives more technical detail on these matters.

Volunteer fundraisers

The Charities Act 1992 and The Charitable Institutions (Fund-Raising) Regulations 1994 define 'professional fundraisers' and the relationship they have with organisations. Organisations involving 'volunteers' who they feel may be professional fundraisers should seek guidance on their duties from the Charity Commission.

In terms of house-to-house or street collections, volunteers must be over the age of 16 and be 'fit and proper persons'. They must have a badge and certificate of authority. The full *Volunteers and the Law* book gives more detail about the House to House Collections Act 1939, the House to House Collections Regulations 1947 and 1963 and The Charitable Collections (Transitional Provisions) Order 1974. In terms of good practice, volunteers should be given sufficient information to be able to assess their own safety and avoid problems.

Involving paid staff as volunteers

The volunteer role should be substantially different to the paid role otherwise the working time directive and minimum wage legislation could be applied. Without clear distinctions there may be confusion over roles and responsibilities and possible messy disciplinary issues.

This leaflet is a summary of the recently published book, *Volunteers and the Law*. It is a signposting document, leading you to sources of further information. The full *Volunteers and the Law* book, by Mark Restall, is also published by Volunteering England. Valuable for large and small organisations alike, it clearly explains the main issues around volunteers' legal status and the responsibilities that organisations have towards their volunteers. *Volunteers and the Law* is available for £15 (inc p&p) from Volunteering England at www.volunteering.org.uk/publications or call 0845 305 6979.

Volunteering England is the national volunteer development organisation for England. It works strategically across the voluntary, public and private sectors to raise the profile of volunteering as a powerful force for change, and it provides support systems to assist anyone involved with volunteers.



London

Volunteering England
Regent's Wharf
8 All Saints Street
London N1 9RL

Birmingham

Volunteering England
New Oxford House
16 Waterloo Street
Birmingham B2 5UG

Fax: 0121 633 4043

Tel: 0845 305 6979

Further information

Contact Volunteering England's free information helpline (and textphone) 0800 028 3304, 9.30am-5.30pm Mon-Fri, or visit www.volunteering.org.uk
E-mail: information@volunteeringengland.org