



**New York State Department of Labor**  
David A. Paterson, *Governor*  
M. Patricia Smith, *Commissioner*

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July 24, 2009

[REDACTED]

Re: Request for Opinion  
Volunteers  
RO-09-0068

Dear [REDACTED]:

I have been asked to respond to your letter dated April 30, 2009 in which you inquire on behalf of your client, [REDACTED], and its subsidiary [REDACTED] (together referred to here as the "employer"), whether persons who volunteer in various capacities to help elderly persons living in a proprietary (for-profit) assisted living facility must be paid for their time. You state that your request for an opinion was prompted by an investigation by this Department's Division of Labor Standards wherein you took the position that the employer's volunteers should not be considered "employees" under the New York Wage and Hour Law. According to your letter, Investigators for the Division suggested you contact this office for a formal response to your request.

In your letter, you state that some individuals, including residents and non-residents of the facilities, volunteer for school or religious credit, to achieve a merit badge for the Girl Scouts or Boy Scouts, or for another, presumably altruistic, purpose for the above-referenced employer. The purported volunteers are required to fill out a two-page "Volunteer Application," pass a reference check, and undergo a one-hour "orientation tour" of the facility before performing volunteer services. The purported volunteers perform a number of activities including, by way of example, leading religious services, leading an Alzheimer's support group, providing musical entertainment, taking residents on walks, tending to caged birds and running bingo games. Your letter states that while many of these activities are performed exclusively by volunteers, some of the activities, such as running bingo games, are performed by both volunteers and paid employees.

Your letter asserts that the various religious, informational, educational, entertainment, physical activity, and specialized services provided by the purported volunteers could not be provided by the employer's paid employees and that the volunteers in question should be

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excluded from the New York Wage and Hour Law definition of "employee." In support of this, your letter cites a 1991 District Court opinion that describes an October 16, 1979 unpublished letter from Joseph Armer, then Director of the Division of Labor Standards, that stated, in essence, that although the New York State Labor Law clearly requires volunteers for proprietary facilities to be paid, the Division of Labor Standards will not enforce the minimum wage provisions to upon volunteers at nursing homes whose services are confined solely to tasks that are not directly the work of hospital personnel. (*Greater New York Health Care Facilities Ass'n v. Axelrod*, 770 F. Supp. 183 (S.D.N.Y. 1991).) Your letter also asserts that the New York State regulations for adult homes and for-profit assisted living residences [18 NYCRR 489.9(3) and 10 NYCRR §1001.11] contemplates the use of volunteers and provides that volunteer services "may not be substituted for services of paid employees."

As you know, Labor Law §652(1) states that every employer shall pay to each of its employees a wage of not less than the minimum wage. "Employee," for the purposes of the New York State Minimum Wage Act, includes "any individual employed or permitted to work by an employer in any occupation," while the definition of "employer" includes various organizations "acting as an employer." (NY Labor Law §§651(5); 651(6).) It is well established in New York State Law that the "determination of whether an employer/employee relationship exists rests upon evidence that the employer exercises either control over the results produced or over the means used to achieve those results." (*Bhanti v. Brookhaven Memorial Hospital Medical Center, Inc.*, 260 A.D.2d 334, 335 (2nd Dept. 1999).) The Supreme Court of the United States has phrased the "central inquiry" in applying the FLSA to this question as, "whether the alleged employer possessed the power to control the workers in question ... with an eye to the 'economic reality' presented by the facts of each case." (*Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33 (1961).) The courts have set forth five factors to determine whether the "economic realities" establish an employer/employee relationship: "(1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit and loss and their investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and (5) the extent to which the work is an integral part of the employer's business . . . No one factor is dispositive." (*Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp.2d 184, 191 (S.D.N.Y. 2003) (citations omitted).) As the Court in *Brock v. Superior Care, Inc.*, *supra*, summarized the issue, the purpose of this five-point test is to determine whether, "as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service, or are in business for themselves," (840 F.2d at 1058-1059).

Applying these factors to the circumstances described in your letter, it is apparent that, as the organization is currently operated, an employment relationship exists and that the individuals purported to be volunteers are "employees" for purposes of the New York State Minimum Wage Act. The individuals, as is clear from your letter, are under the supervision and control of the employer. To wit, the employer both exercises control over the results produced by the employee and the means by which to achieve those results by controlling when the individuals may perform services at the facilities and what service the individuals may perform. The application of the remaining four factors described above are equally persuasive, since the workers bear no opportunity for profit and loss with their investment in the business, with only the employer, and its clients, profiting from the services rendered; the degree of skill and

independent initiative required to perform the work is not particularly high as evidenced by the fact the employer both requires an orientation session and utilizes the services of school aged children<sup>1</sup>; while the average individual only performs 27.06 hours of work, many of the individuals described in your letter exceed such an average and perform work over an extended period of time on a regular basis; and the work, as your letter prominently asserts, is an integral part of the employer's business that is "essential to its care of its elderly residents." Therefore, since the application of these factors to the present situation reveals that the individuals in question are "employees" of the above described employer, they are subject to the provisions of the New York State Minimum Wage Act.

As you state in your letter, Labor Law §651(5)(f) excludes "volunteers" from the definition of "employee" when the volunteer work is performed for entities "organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual." Applying the plain language of this provision to the facts presented in your letter, the individuals described as volunteers cannot be considered such and must, as they apparently otherwise fit within the definition of "employee," be paid at a rate not less than the minimum wage. The employer, as you describe, is a for-profit organization whose earnings, by definition, inure to the benefit of private shareholders or individuals. Furthermore, nothing in your letter shows that the employer is "operated exclusively for religious, charitable, or educational purposes." Therefore, the employer you describe may not use volunteers to perform any services.

It has been this Department's longstanding interpretation of the provisions relating to volunteers, to exclude from the definition of "volunteer" individuals performing work in a similar capacity to other paid individuals at that place of business, in a position customarily performed by paid employees, or where the use of volunteers would otherwise displace the employment of a paid worker. Therefore, to the extent that the work performed by the individuals purported to be volunteers is that which is also done by paid employees, would be performed by paid employees should the individuals purported to be volunteers were not doing it, or where their conduct of such work would displace a paid employee, such individuals are further disqualified from performing unpaid services for the employer in the capacity of "volunteers."

Your letter also references an October 16, 1979 letter from Joseph Armer, then Director of Labor Standards to the Assistant Director of the New York State Department of Health, in which he reaffirms that the New York State Labor Law does not permit volunteers to work in a proprietary home or hospital but that the Division of Labor Standards would not apply the minimum wage requirements to volunteers working in such proprietary facilities *so long as the services performed by such volunteers are confined solely to individual patients and involve selected tasks that are not directly the work of other hospital personnel*. Although the Armer letter is a rational statement of the policy of the Division of Labor Standards, the majority of the activities described in your letter would not fall within the scope of the Armer letter in any case since they would be considered "directly the work" of the employer. Furthermore, reference to such activities in eliciting new clients would indicate that the activities performed by such individuals are directly related and integral to the employer's business, thereby removing them

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<sup>1</sup> A fact that may subject the employer to the child Labor Law requirements.

from the services described by Armer. Examples contained in your letter that fit within the permitted services include reading to patients, one-on-one visits, sitting and talking to residents, purchasing or borrowing books, tending to caged birds, taking residents on walks, AARP visits, and serving as a messenger for patients.

Furthermore, in 2005 the Legislature amended Labor Law 651(5) by adding subpart O, which excludes volunteers at a recreational or amusement event from the definition of "employee," since the Labor Law previously did not permit volunteers to perform services for "for profit" corporations. (*see* Sponsor's Memo, 2005 Legis. Bill Hist. NY S.B. 5774 (September 16, 2005).) While the Legislature adopted the 2005 amendment to permit certain events held throughout the state to use volunteers, the Legislature recognized that the current status of New York Law did not permit such a practice so long as the events were run by "for profit" corporations. (*Id.*) This clear recognition of the current status of the Labor Law to prohibit the use of volunteers, and the inapplicability of the narrow exception crafted for such use by the Legislature, negates any inference asserted in your letter that the Legislature "must have understood that a volunteer engaging in functions not directly the work of personnel in a for-profit facility is exempt from coverage."

With regard to the regulations referred to in your letter [18 NYCRR §489.9(3) and 10 NYCRR §1001.11(d)] that contemplate the use of volunteers at for-profit adult homes and assisted living facilities, it is undisputable that while the regulations of another administrative agency are binding upon such agency and those individuals which the legislature has given it the authority to regulate, such regulations, which were not specifically enacted by the legislature, cannot be interpreted as relieving individuals of a statutory requirement under a separate section of New York law. To permit such exclusion would give rise to the possibility that regulations adopted by an administrative agency could upset the clear intent of the legislature in an entirely separate section of law. Therefore, the fact that the regulations cited in your letter and referenced above may contemplate the use of volunteers in facilities operated by profitmaking institutions does not relieve the present employer from its obligations under the New York State Labor Law and the regulations adopted thereunder to pay such individuals.

While your letter states that the employer "should be permitted to continue its unpaid volunteer program, [sic] that is essential to its care of its elderly residents," the mere fact that the use of volunteers provides a secondary benefit to the elderly residents of the employer's facilities does not obviate the fact that the employers failure to pay such volunteers is in violation of the New York State Labor Law. The Legislature limited the use of volunteers to entities "organized and operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

It is worth noting, however, that students obtaining vocational experience are not deemed to be working so long as the student is working or is permitted to work in order to fulfill the curriculum credits of the educational institution which such student attends, and such student is required to obtain supervised and directed vocational experience in an establishment outside of the school. (12 NYCRR §142-2.11.) Therefore, students performing work in order to obtain

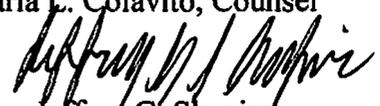
volunteer credit at their school , as described in your letter, are not considered to be employees under the Minimum Wage Act thereby removing the requirement that they be paid.

With regard to volunteers from religious organizations, priests, ordained ministers, rabbis, etc., likely fall within the meaning of the term "bona fide professional capacity," thereby removing them from the coverage of the New York State Minimum Wage Act. [12 NYCRR §142-2.14.(b)(4).] Furthermore, other individuals from religious organizations visiting elderly members of their church, synagogue, mosque, etc, are not likely to be under the direction and control of the employer as described in this letter and are, therefore, not considered to be employees.

This opinion is based on the information provided your letter dated April 30, 2009. A different opinion might result if the circumstances stated therein change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

  
By: Jeffrey G. Shapiro  
Associate Attorney

JGS:mp

cc: Carmine Ruberto