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HEADS UP!

ATTRACTIVE NUISANCE: THE TRAP OF CALLING WORKERS "VOLUNTEERS"

The problem typically arises when the working relationship sours, and a worker who has been classified as a "volunteer" files a claim for workers' compensation or unemployment benefits, back wages and/or employment discrimination.

Since the above-referenced claims require the claimant to be an "employee," the alleged employer will likely argue that, because the worker was a "volunteer," the laws upon which the claim is based have no application and are thus unenforceable.

The court or administrative agency hearing the claim will then commence the process of analyzing and determining whether the status of the claimant was properly characterized as that of a "volunteer," or an "employee." Importantly, this will be determined on the basis of highly-technical legal criteria, not how the parties decided to describe the relationship. This is true even if their understanding that the worker is a "volunteer" is in writing, and signed by the claimant.

At about this point in the exercise, the alleged employer will become painfully aware of how difficult it is to prove that a worker is a "volunteer" under California law.

First of all, the law includes a legal presumption that any person performing services for another is an "employee." This makes the defense of such a claim an uphill battle from the moment the worker disavows "volunteer" status. Once the evidence establishes that any services were provided, the burden shifts to the alleged employer to prove that the nature of the relationship was consistent with that of a "volunteer." In making this determination, the court or agency deciding the dispute will apply the following criteria to determine the nature of the relationship.

First of all, California law on this subject requires a preliminary finding of whether the worker was, in addition to performing "volunteer" work, also a current employee of the entity providing the work. This is because the law applies a different legal standard, depending on whether or not the worker had an acknowledged existing employment relationship with the alleged employer at the time the "volunteer" work was performed.

No Present Employment Relationship

In situations where the "volunteer" is not a present employee, in the event that he/she volunteers to work without any contemplation of payment (in any form) for humanitarian, religious or public service purposes, he/she will likely qualify as a "volunteer," as opposed to an "employee."

However, if the "volunteer" is provided with anything of value at reduced or no charge (free food, for example), or is provided with privileges of any kind at no charge, this can support a claim that the asserted volunteer relationship was a sham, and should not be recognized. This could defeat an "employer's" defense based on "volunteer" status.

Existing Employment Relationship

In situations where the "volunteer" is a present employee, and performing "volunteer" services in addition to his/her normal employment duties, he/she will be deemed to be performing hours worked as an employee unless the work performed as a "volunteer:"

1. Is done entirely during non-working hours; and
2. Is entirely unrelated to his/her normal duties as an employee.

In the event that the "employer's" evidence fails to prove any of the above criteria, the relationship will be deemed to be one of employment, subjecting the employer to liability exposure for:

1. Unpaid taxes and penalties for taxes that should have been withheld;
2. Daily premiums for daily meal and rest periods that should have been provided to all employees but were not;
3. Overtime compensation for any hours worked beyond eight in a day or 40 in a week; and
4. The value of any fringe benefits that were available to employees.

In addition, the claimant would be entitled to assert any legal rights that would have been available to him/her had he/she been properly classified as an employee, such as the right to sue the employer for wrongful termination, discrimination, retaliation and/or unlawful harassment, for example.

As a result of the above considerations, one can readily discern how difficult proving "volunteer" status is. This is particularly true in the context of litigation, where any verbal agreements between the parties that would be helpful to the "employer" will likely be denied.

Accordingly, if employers understood the enormous risks of misclassifying as "volunteers" workers who are actually "employees" under California law, this problem would disappear in short order. That is, employers would consider far more carefully the legal requirements, and whether they can prove "volunteer" status. If not, they would bite the bullet, and simply treat the worker as an employee. The same can be said of misclassifying employees as "trainees/interns" or "independent contractors."

Even for those employers who believe that a volunteer arrangement can be proven, they should remember the hard-learned maxim: "Being right, and being able to prove you're right (especially to the satisfaction of a jury of employees), are two entirely different things." While we're on the subject of maxims, another comes to mind: "An ounce of prevention is worth a pound of cure."

For employers who wish to utilize the services of workers in any capacity other than as "employees," the author recommends requiring signed agreements for all such workers, whether they are treated as volunteers, trainees/interns or independent contractors.

However, apart from simply stating that the parties agree the worker is a "volunteer," "trainee" or "independent contractor," for example (which a court will likely ignore), the agreement should include a detailed description of how the relationship satisfies each element of the legal test applicable to the relationship in question. For "volunteers," this would include the elements summarized above, depending on whether the worker is or is not a present employee.

It is imperative that this information be accurate, as the Courts are adept at determining "substance over form," and rendering their rulings accordingly.