

**EMPLOYMENT LAW UPDATE FOR CHARITIES SEMINAR
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SECONDMENTS AND VOLUNTEERS

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If someone works for you, in any capacity, it is important to be clear about what that working relationship actually is, yet many organisations that recruit and use secondees or volunteers are unclear about their status or what responsibilities they have towards them.

Similarly, many organisations send or accept employees on secondment without giving sufficient thought to the employment relationship.

Secondments

A secondment is where an employee temporarily transfers to another job, either within an organisation or from one organisation to another usually for a defined period of time or for a specific purpose. The arrangement usually benefits all parties.

Not only does the host organisation acquire an additional member of staff for a fixed term without the usual burdens of a direct employment relationship but secondees often bring to the job (and share with their host colleagues) skills and experience which the host could not otherwise have accessed. In many cases, the host gains the skills and experiences of someone that another organisation is paying for to assist their organisation's development.

Secondment can provide opportunities for secondees to experience levels of authority that their own employer simply could not permit them, given the particular nature of the work involved, or their line management structure. It can therefore be a valuable way to train and develop staff and, in some cases, to strengthen relations between two organisations and gain insights into other ways of working.

First Steps

An organisation that wants to send one of its employees on secondment to another organisation needs to establish at the outset whether it is contractually entitled to do so. The first step should be to consult with the employee to determine whether the employee would object and to consider the employee's contract of employment to ascertain whether it entitles the employer to second the employee. Most standard contracts will not have anything within them that specifically deals with secondment. Of particular relevance will be:

- the employee's job description;

- the place of work and any mobility clause;
- any restrictive covenants and confidentiality clauses; and
- any provisions which deal with ownership and exploitation of intellectual property.

If the employee's contract does not permit secondment, or if the job description or normal duties as specified in the employment contract will not cover the type of work the host organisation will want the employee to do, the employer will need to vary the employee's contract. As with any change to an employment contract, this will entail formal consultation with the employee concerned.

Who is the employer?

When one organisation sends an employee on secondment to another organisation (the host), there is no underlying change to the contractual relationship between the original employer and the secondee. The employee might be doing the work of the host and working at the host's site, but responsibility for performing the employer's side of the employment contract remains with the original employer.

It is important for the employer to give careful consideration as to how the continuing employment relationship will be managed. Common mistakes by employers in secondment situations include leaving employees out of communications, negotiations and consultations; neglecting to invite them to social events; or forgetting to conduct appraisals or performance reviews. Such omissions, however unintentional, are potentially breaches of the employment contract. Grievances, or even Tribunal claims may result.

Employers who send staff on secondment must ensure that line managers are made aware of their responsibility to include those seconded staff members and should remind them that 'out of sight' must not be 'out of mind'. In particular they should:

- Keep the employee on relevant group mailing lists;
- Send the employee information regarding team or substantive role changes;
- Include the employee in any consultation process;
- Meet and communicate with the employee on a regular basis, including informally; and
- Remember to invite the employee to work related social events.

Deemed employment

The danger for a host organisation is always that by its actions it will be deemed to have assumed the role of employer. Disciplining a secondee or assuming direct responsibility for authorising holidays or refunding expenses are common mistakes. The distinction is

important to maintain, because if the secondee does become the host's employee, then the secondee could potentially enforce a number of statutory employment rights against the host. This does not necessarily undermine the relationship between the original employer and the secondee. It is always possible for an individual to have more than one employer.

It is important for the host organisation to have a clear agreement with the original employer on issues such as:

- pay and benefits;
- discipline and grievance; and
- cancellation of the secondment.

Vicarious liability

Vicarious liability is a separate issue from the question of 'who is the employer'. Under normal circumstances, employers are vicariously liable for the tortious acts of their employees. In principle, this remains the case when employees are on secondment. However, it is not unusual for host organisations to be held vicariously liable for the actions of secondees, even in cases where a court has agreed that they were not the employer.

Hawley -v- Luminar Leisure Ltd CA 2006

This case involved a door supervisor who assaulted a member of the public. The door supervisor was employed by a security firm and he had been supplied to work at a nightclub. The victim, who sustained brain damage, brought negligence proceedings against both the security firm and the club. The Court of Appeal said that it is possible for both an original employer and a host organisation to be vicariously liable for the negligent acts of a secondee and the determining issue was: who had control of the individual's work at the time that the negligent act was committed. In this case the club was held responsible.

Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd (1947) AC1, HL

In this case the Court of Appeal set out guidance for courts to follow when considering cases of vicarious liability in relation to secondees. It is basically a checklist of factors which courts can use to help them determine whether the host organisation or the seconding organisation should be held liable for the actions of the secondee in a given situation.

An organisation that is considering entering into any kind of secondment arrangement should consult the following checklist when negotiating the terms of the secondment. It

goes without saying that it should continue to bear it in mind throughout the period of secondment.

1. Who engaged the secondee?
2. Who pays the secondee?

Usually the organisation that pays the secondee's wages and other associated costs will be deemed to be the employer. It is usual for wages etc to be paid by the original employer, i.e. the seconder organisation. In a commercial arrangement, the host organisation may pay a secondment fee to the seconder, if so, VAT will be payable if the seconder is VAT registered.

3. Who has the power to discipline the secondee?

Disciplining an employee is usually the preserve of the employer. In a secondment arrangement, the host organisation should not discipline the secondee and should have some arrangement with the seconder whereby it can require the seconder to institute its own disciplinary procedures, or as a minimum to remove or relocate the secondee.

4. Who has the immediate direction and control of the secondee's work?
5. Who is entitled to tell the secondee the way in which he is to do the work upon which he is engaged?
6. Who is entitled to give the orders as to how the work should be done?

Using a Secondment Agreement

By entering into a written secondment agreement, the seconder and the host organisation can remove a lot of uncertainty from the arrangement, by agreeing contractually what their respective liabilities will be, regardless of the legal position.

Most secondment agreements include:

- details of if and how the seconder will charge for the secondee's services;
- indemnities from the seconder;
- insurance, for example a requirement for the seconder to take out insurance in relation to the negligence or other actions of the secondee;
- monitoring arrangements;
- start and end dates for the secondment, including provisions for its early termination;

- arrangements for maintaining communication between the parties;
- arrangements for substituting a new secondee if necessary; and
- the division of statutory obligations and liabilities

Volunteering

It is easy to assume that because volunteers provide free labour there are no downsides to using them. No working relationship is risk free from a legal point of view and arrangements that don't work out can end up doing more harm than good.

Volunteering can be a rewarding way to give something back to society. Many people are looking for opportunities to use their skills and fill their personal time in a productive and useful way, and volunteering offers them challenges and rewards without the inflexibility of paid employment and with a greater breadth of opportunity. Volunteering can also be a first step on the career ladder, as it allows people to make contacts and develop transferable skills.

For an organisation, volunteers can free up paid staff for training or to focus on other tasks. The additional hands on deck mean that more work can be done in less time, removing some of the barriers to expansion and helping the organisation reach a wide audience. Sometimes the novel and social rewards of volunteering are enough to attract volunteers with skills and experience that the organisation cannot afford on the market.

If volunteer relationships are poorly managed, volunteers can easily feel undervalued. Organisations that use volunteers should make sure they are not pressured to commit more time than they can reasonably spare, ensure that volunteers feel like part of the team, understand their role, feel supported and are consulted about changes.

Getting rid of unsuitable volunteers and recruiting suitable ones can be extremely difficult. Organisations should be aware of hidden costs, such as additional training needs, the cost of managing volunteers, and the cost of any legal issues that arise. They should also consider the effect on paid staff of bringing in volunteers, particularly if there will be a knock on effect on the availability of overtime and other opportunities.

Although volunteers do not have many legal rights, if you want to hang on to them and recruit more, you should treat your existing volunteers well.

Organisations should remember that they cannot afford to be complacent about the status of their volunteers; they need to be careful. In some situations, people who look very much like volunteers can be found by Tribunals to have the status of workers, or even employees, and then of course their situation becomes very different.

Volunteer, Worker or Employee?

The distinction between employees, workers and volunteers is by no means clear and, although there are many established indicators of employment status, there are few statutory definitions to guide us.

Workers

Two definitions of a "worker" appear in employment legislation¹.

Section 230(3) of the *Employment Rights Act 1996* defines a "worker" as:

"an individual who has entered into or works under (or, where the employment has ceased, worked under):

- (a) a contract of employment; or
- (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

The definition at section 296 of TULRCA 1992 includes (in addition to the above) "an individual who works, normally works or seeks to work... in employment under or for the purposes of a government department (not including as a member of the" [armed forces]).

Workers are entitled to rights such as minimum wage, protection under the Working Time Regulations, paid holiday, statutory sick pay, maternity, paternity and adoption pay and protection from discrimination.

Employees

An "employee"² is an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

The key legal components of a contract are:

- agreement between two or more parties;
- consideration (payment); and

¹ One is in TULRCA 1992 s.296 and the other in Employment Rights Act 1996 s.230, the WT regs 1998, reg 2 and the National Minimum Wage Act 1998 s.54(3)

² see for example ERA 1996 s.230(1), TULRCA 1992, s.295, National Minimum Wage Act 1998 s.54(1), Maternity & Parental Leave etc Regs 1999 reg 2 and the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, SI 2002/3236, the Paternity and Adoption Leave Regulations 2002 SI 2002/2788 and Emp'tAct 2002 s.40)

- the intention to contract.

A contract does not have to be written down and, as it can be construed from the behaviour of the parties, does not even have to take the form of a verbal agreement. Statutory employment rights are equally available to employees who have no written contract.

An employment contract can arise whenever a payment (which does not need to be money) is made in return for work and there is an intention to create a legally binding relationship.

Employees have all the minimum statutory employment rights workers enjoy. In addition, once an employment relationship has been created an employee:

1. has protection against unfair dismissal;
2. is entitled to a redundancy payment if made redundant;

Volunteers

It is very important for an employer to get the distinction between a volunteer and a worker or employee right because the consequences of creating a contract for services or a contract of employment can be very costly. Volunteers have very few legal rights in the workplace. As a result, when treated badly, they sometimes seek to challenge their status in the Tribunals.

In most situations, it will be obvious whether or not an individual is a volunteer. However, the distinction between volunteers, employees and workers having arisen through case law over many years, there is occasionally some uncertainty as to whether someone is a volunteer, a worker or an employee.

For example, although they may not get paid a wage, volunteers usually get something in return for the time they donate, for example they may receive training, gain valuable experience or transferable skills. The voluntary work may in some cases lead on to paid work. Giving something in exchange for something else is the basis of a contract. If what volunteers get out of volunteering has value and if that benefit is more than merely incidental to their voluntary role, it could be seen as consideration. Would this be enough to create a worker relationship, or provide the final ingredient for an employment contract?

Although this question is one that an organisation's managers should always have at the back of their minds, it is worth noting that the cases where individuals have successfully argued that they are workers or employees have usually concerned some kind of exceptional working relationship or arrangement.

There is no legal definition of a volunteer, so our understanding of what a 'volunteer' is comes from cases that have been decided by the Courts. Although we can take guidance

from decided cases it is important to remember that cases turn on the particular facts and no two cases are ever exactly the same.

Armitage v Relate IT Case Number: 43538/94, 11 October, 1994

Relate sought an agreement with its volunteers that if they left without completing a minimum of six hundred voluntary hours, they would have to repay their training costs. An Employment Tribunal found that, even though Mrs Armitage received no salary or pay in her role, the offer of training in return for the provision of a minimum counselling service, together with the other terms, amounted to a contract of employment.

South East Sheffield Citizen's Advice Bureau v Grayson [2004] IRLR 353

Mrs Grayson brought a disability discrimination claim against the Bureau who sought to rely upon the small employer's exemption which existed at that time. Mrs Grayson sought to argue that the Bureau's volunteers were in fact employees (which would have meant the Bureau would have exceeded the small employer exception) on the basis that the volunteers had to agree to work at least six hours a week in return for training, reimbursement of expenses and an indemnity if a negligence claim was brought against them by a client.

The Employment Appeal Tribunal held that there was no obligation on the volunteers to actually do any work at all so there was no contract for services or for employment on that basis. Furthermore they held that the training was necessary in order to enable the volunteers could do the work and did not therefore constitute consideration. They were therefore volunteers, not employees.

Risk Management

Unfortunately, it is not possible to devise a checklist of points, which, if followed, will guarantee that a person will or will not be considered an employee. How then can an organisation reduce the risk of creating an employment relationship where none is intended?

1. Avoid paying volunteers income.
2. Reduce any benefits. If they are not necessary or discretionary, Tribunals are likely to see them as consideration for work done.
3. Refrain from placing onerous obligations on volunteers. If an organisation can avoid asking volunteers to make time commitments, it should do so. It is fine to outline "reasonable expectations".
4. Avoid "employment language", for example, do not have "job" descriptions; have "role" descriptions.
5. Do not use your disciplinary procedure for volunteers.

6. Make it very clear that you do not intend to create a contract or an employment relationship. Emphasise the voluntary nature of the arrangement as strongly as you can (in particular that there is no commitment to offer work or expectation that the individual will be available for work), but bear in mind that however strongly any written agreement is worded, a disclaimer will be ignored by a Tribunal if a contractual relationship was either intended or has come into existence by the parties conduct.
7. Maintain a distinction between paid workers and volunteers. Have separate policies and procedures.
8. Treat volunteers well. A good way for organisations to avoid a challenge to volunteers' status is to look after them well so they have no grounds to bring a claim in the first place.

Volunteer Agreements

This leads us naturally on to the question of whether then it is a good or bad idea for an organisation to have a Volunteer Agreement in place.

It doesn't seem to make sense to document a relationship that you're trying hard to show is non-contractual, but while with more simple voluntary arrangements organisations can get along without any paperwork, anything more complicated needs to be written down, for practicality's sake as much as anything. Assuming it is well drafted, a volunteer agreement is generally a good thing.

In Grayson, the claimant pointed to a written agreement as evidence of a contractual relationship. The Tribunal rejected this argument and said that the CAB was just setting out its reasonable expectations.

Grayson remains the principal case for volunteer status. If you use volunteers for anything other than to perform basic or short-term activities, you will need to ensure that they are suitably qualified or experienced to undertake the tasks assigned to them. This involves some level of training and support. It is also important to be clear what your expectations are and to communicate how the organisation works, its mission and ethos as well as matters such as health and safety policies and management structure. All of this will involve some degree of written instructions. It is much harder to do this properly or meaningfully if you are living in fear of inadvertently creating a contractual relationship that neither party intends.

Thanks to the Grayson case we can be reasonably sure that volunteer agreements are safe to use, as long as it is made clear within them that they are not intended to impose a contractual obligation either on the organisation to provide work for the volunteer or on the volunteer personally to do any work that is offered. Incidentally, one thing organisations must be particularly careful about is 'senior' volunteers such as charity shop

managers and trustees, where it can be very easy for an expectation of availability to develop.

A typical agreement might contain a commitment from the organisation to:

1. train and supervise the volunteer;
2. treat the volunteer in line with its equal opportunities policy;
3. reimburse out-of-pocket-expenses;
4. make sure that appropriate insurance cover is in place; and
5. implement good health and safety practice

together with a statement that there is an expectation that the volunteer will:

1. follow the spirit of the organisation's policies and procedures; and
2. meet agreed time commitments, or give notice if that is not going to be possible.

It is quite important to note that in the Grayson case the agreement was not signed and this was one reason the Tribunal gave for ruling that it did not evidence a contractual relationship. If an organisation does ask volunteers to sign agreements, it will need to make doubly sure that all parties are aware that they are signing to confirm that they have received the information, not that they are in any way contractually bound by it.

An Organisation's Legal Duties

1. Common law duty of care

All people owe a common law duty of care to others: we must not place, or contribute to placing, other people at risk. Unless you have created or contributed to a situation that has placed somebody else at risk, or have entered into a special relationship with someone giving rise to more onerous duties, the common law duty of care does not require you to take any positive steps to protect others from injury.

If you *have* created or contributed to the risk to somebody, either by acting negligently or by negligently failing to carry out a duty or obligation, you will owe that person a special duty of care, and must take all reasonable steps to prevent loss or harm resulting.

Similarly, if you have entered into a special relationship with another person, which is likely to include an organisation taking on a volunteer, that relationship will give rise to more onerous duties.

Because of this duty, even organisations with no employees should take reasonable steps to ensure the safety of their volunteers. If a volunteer suffers personal injury while engaged on a task on behalf of an organisation, and it is established that the organisation failed to take reasonable care of the volunteer, the organisation will be legally responsible for the injury.

A duty of care can arise in ways that are not always obvious, for example in loaning equipment to other organisations; organising sponsored events; holding fêtes; or selling food.

Organisations should be aware that, even though their volunteers do not enjoy the same statutory protection as employees, they must still take reasonable steps to ensure that they are kept safe.

2. Vicarious Liability

Although the general rule is that organisations are not vicariously liable for the negligent acts of their volunteers, liability could arise if a court found that the volunteer was legally an employee, or felt that the relationship between the organisation and the volunteer was such that liability should be imposed.

Even in the absence of vicarious liability it might be possible for someone to successfully claim against an organisation as a result of the actions of one of its volunteers, for example if it were found not to have properly trained or supervised the volunteer. Organisations should check that their liability insurance covers their volunteers.

3. Occupier's Liability

Any organisation that occupies non-domestic premises must take reasonable steps to make them safe for anyone who may reasonably be on those premises, including volunteers and customers/clients.

4. Compliance with Health and Safety Legislation

Much of Health and Safety legislation is not legally binding on organisations without employees. Volunteer only organisations do not need to meet Health and Safety standards, have a Health and Safety policy or carry out risk assessments. This does not mean that the health and safety of volunteers can be disregarded; as discussed above, the special 'duty of care' an organisation owes to its volunteers means it must take reasonable steps to protect volunteers from harm and maintain a safe working environment.

Section 3 of the Health and Safety at Work etc Act 1974 imposes a duty on every employer "to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety" and " to give to

persons (not being his employees) who may be affected by the way in which he conducts his undertaking the prescribed information about such aspects of the way in which he conducts his undertaking might affect their health or safety." This clearly includes volunteers.

5. Insurance

Although there is no legal duty to insure volunteers, it is clearly important to do so, as volunteers who suffer injury or loss due to an organisation's negligence are likely to sue. Either Employers' Liability Insurance or Public Liability Insurance can be extended to cover them but won't automatically do so, so organisations need to check the terms of their cover. Some policies only cover volunteers while they are actually engaged in voluntary activities.

Organisations that provide information, advice or other professional services will need to provide their volunteers with appropriate professional indemnity insurance.

Motor insurance policies will be required for all vehicles used by volunteers and organisations should specifically check whether volunteers are covered. Some policies exclude the under 25's and the over 75's. Volunteers who drive their own vehicles should check their own policies cover that type of travel and may be reimbursed by the organisation if any additional premium is payable.

Information about motor insurance for voluntary organisations is available from the Royal Society for the Prevention of Accidents, who have published the document 'Managing Occupational Road Risk in Voluntary Organisations'. This may be downloaded at www.rosopa.com/morr/information/voluntary.htm.

6. Criminal Records Bureau Checks

If a volunteer is to work in any situation that will involve contact with either children or vulnerable adults, he or she must undergo a CRB check, just like a paid member of staff. Volunteers should also receive proper training on child protection issues and should be adequately supervised when working with children or vulnerable adults. Significant changes to the existing CRB check regime are in the pipeline and are discussed below.

The Independent Safeguarding Authority Scheme

When the Safeguarding Vulnerable Groups Act 2006 is implemented (which is now expected to be in 2009), the resulting "Independent Safeguarding Authority Scheme" will be the most stringent vetting and barring service yet. Its stated purpose is to protect children and vulnerable adults by preventing those who are known to pose a risk of harm accessing these groups through their work.

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There will be two barred lists - one for children and one for vulnerable adults.

Any individual who is included in the children's barred list will not be permitted to engage in regulated activity (see below) in relation to children and any individual who is included in the adults' barred list will not be permitted to engage in regulated activity in relation to vulnerable adults.

Anyone who wants to work with children or vulnerable adults - either as an employee or as a volunteer - will need to apply to the Secretary of State (acting by the Criminal Records Bureau (CRB)) to become "subject to monitoring". Eventually, existing members of the workforce will also need to apply.

On application, candidates will be assessed by a new statutory body known as the Independent Safeguarding Authority (ISA) (this has previously been called the "Vetting and Barring Scheme" but it is no longer being referred to by this name) that will make a decision about the candidates' suitability for work with children and/or vulnerable adults using data gathered by the CRB from the Police National Computer (such as cautions and convictions) and other relevant information obtained from local police forces. It will also be able to consider information from employers, local authorities, professional bodies and supervisory authorities.

If the CRB find that a person satisfies one of the criteria that lead to automatic inclusion in either or both of the barred lists, it will notify the ISA so that that person's details can be added to the relevant barred list and will supply the ISA with details of the relevant cautions and convictions etc.

Except in the most serious cases, individuals will have the opportunity to make representations about why they should not be barred. Consideration is currently being given to what time period must elapse before a barring decision may be reviewed and when a person may no longer pose a risk. Permission to apply for a review will be given only if an individual's circumstances have changed since they were included in the list or last applied for permission.

A person who has been included in a barred list will cease to be subject to monitoring (if they were previously) and will no longer be permitted to engage in regulated activity.

At appropriate intervals, the CRB will repeat the searches and enquiries referred to above.

There are four types of entry onto the barring lists:-

1. Automatic inclusion on one or both of the barred lists with no right to make representations nor a right of appeal.
2. Automatic inclusion on one or both of the barred lists with a right to make representations and a right of appeal following inclusion.

3. Specified behaviour (the term "relevant conduct" is also used) that leads to consideration for inclusion on one or both of the barred lists.
4. Risk of harm: where evidence suggests that an individual may present a risk of harm to children or vulnerable adults, this will lead to consideration for inclusion on the appropriate list.

Automatic Barring Offences

There is as yet no definitive list of automatic barring offences. The Barring Consultation Document, which contains the proposed list, is attached and available via the link below.

Which activities will be affected?

Any activity that is defined as a "regulated activity" or a "controlled activity".

The term "regulated activity" will cover a range of specified activities, including:

1. activities that provide an opportunity for close contact with children or vulnerable adults;
2. other activities in key settings such as schools and care homes which provide an opportunity for contact; and
3. key positions of responsibility such as the Children's Commissioner and the Director of Adult Social Services.

Broadly speaking, the term "controlled activity" covers support work in general health settings, further education settings and adult social care settings. It also covers work which gives a person the opportunity for access to sensitive records about children and vulnerable adults, including education and social services records.

The Secretary of State has powers to regulate "controlled activities". Although there is currently no intention to prevent barred individuals from engaging in controlled activities, employers (and others with responsibility for managing controlled activity) will be required to put in place appropriate safeguards to manage the risks posed by barred individuals.

How will this affect employers and voluntary organisations?

The ISA will store information about people's ISA status for employers and voluntary organisations to use when they are recruiting.

It will be possible for employees and volunteers to be tracked so that, if information comes to light, or if an employee or volunteer's registration status changes, the employer or voluntary organisation will be notified.

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Employers and voluntary organisations that work with vulnerable people will only be allowed to recruit people who are ISA registered and there will be criminal sanctions for those who do not check a volunteer or potential employee before they begin working or volunteering in a regulated activity.

It will also be an offence for an employer or organisation to take on an employee or volunteer for a controlled activity without checking their status. However, with controlled activities, even if the individual is on one of the barred lists, if the employer or voluntary organisation can show that there are sufficient safeguards in place, the individual may work or volunteer in a controlled activity.

In most cases, employers will be entitled to seek an Enhanced Disclosure from the CRB, which will contain criminal records information (although parents, individuals, or their carers will not have this option). Some volunteer-involving organisations will continue to be required to obtain Enhanced Disclosures.

Employers and voluntary organisations will be under an increased duty to disclose to the ISA or a relevant statutory agency (such as the local Council or the Police) any information they receive about employees or volunteers, even if their employment has terminated or the volunteer has left.

Organisations that have a duty to refer information to the ISA

- Adult/child protection teams in local authorities;
- Named professional bodies and supervisory authorities in the Act;
- Employers and service providers of regulated and controlled activities; and
- Personnel suppliers

Organisations that may refer relevant information to a statutory agency

All other employers of those working with children and/or vulnerable adults and parents/private employers should refer information to a statutory agency (e.g. social services or the police), who can investigate and refer information to the ISA if appropriate.

The circumstances in which information must be referred

Employers and voluntary organisations must refer information where they have 'dismissed' an employee or volunteer, or the employee or volunteer 'resigned', because they harmed, or may harm, a child or vulnerable adult.

Local Authorities (in their social services capacity), professional bodies and supervisory authorities must refer information where an employee or volunteer has harmed, or may, harm a child or vulnerable adult, where they are working closely with vulnerable groups

(or there is an expectation that they will do so in the future) and where they think the ISA may consider it appropriate to bar the employee or volunteer.

Relevant information should be referred to the Independent Barring Board as soon as it becomes available, to minimise the time between an individual becoming a known risk and the individual being barred from work with children and/or vulnerable adults.

What steps should employers/organisations take?

- Update Child and/or Adult Protection Policies;
- Update policies on involving ex-offenders as volunteers;
- Consider who within the organisation should take responsibility for ensuring that the organisation complies with the scheme;
- Offer potential employees and volunteers additional help and support if they have any concerns about being checked; and
- Continue to carry out CRB checks.

Engaging Young Volunteers

The law limits what kind of work children under 16 years old can participate in. For example, if you are under 14, you are not allowed to offer your services, whether paid or unpaid, to a profit-making organisation.

Employment legislation does not apply to volunteering, as volunteers do not have the legal status of employees. There is therefore no minimum or maximum legal age that people can give their time as volunteers. However, as discussed above, organisations should remember that they are under the common law duty of care and all adults should bear this in mind when working with and appointing children and young people under 16 to voluntary positions in the community and volunteer-involving organisations.

When taking on volunteers it is a very good idea to obtain a parental/guardian consent form for anyone under the age of 16. This will show that that the volunteer's parent or guardian understands what the organisation does, what the young person will be doing, when and where they will be working and consents to this. If the volunteer will be working away from the premises where they normally volunteer then additional permission should be sought. Parental responsibility continues until the age of 18, although the nature and extent of this responsibility is less clear between 16 and 18 when the individual is more likely to have legal capacity in their own right, ie an ability to enter into binding contractual commitments as a reflection of their individual maturity.

Organisations targeting or likely to attract young volunteers should make sure they have adequate child protection policies in place setting out adequate safeguards around working practices, complaints procedures and recruitment procedures for staff who will work with young volunteers. Organisations should be aware that staff who are 'caring

for, training, supervising or in sole charge of children’ as part of their normal duties will be in ‘regulated positions’ under the Criminal Justice and Court Services Act 2000, even where the children in question are working alongside them as part of the team.

The effect of volunteering on participants' benefits

Organisations must take particular care when paying allowances not only to avoid establishing an employment relationship but also to avoid having any unwelcome effect on volunteers' benefits entitlement or bringing them under the definition of workers for the purposes of the Minimum Wage Regulations.

The basic rule to bear in mind is that when volunteers are performing unpaid work their Jobseeker's Allowance should not be affected provided they are:

1. available for an interview within 48 hours of being asked;
2. available and able to start work within 1 week; and
3. actively seeking work;

There is technically no limit on the number of hours someone can volunteer while claiming incapacity benefit, jobseekers allowance and income support. However it is likely that someone volunteering full time would be considered too busy to be actively seeking work.

Volunteers' benefits, including Job Seeker's Allowance, carer's allowance, child tax credit, council tax benefit, disability living allowance, housing benefit, income support or pensions credit should not be affected by volunteering, unless Jobcentre Plus considers that the service they are providing is not suitable for performance by a volunteer and in fact is a role that a salaried worker would normally fulfil. In that case, benefits could be deducted by an amount corresponding to the pay Jobcentre Plus believes the claimant should receive.

To protect their benefit entitlements, it is important that volunteers do not receive any income other than to reimburse them for any out-of pocket expenses.

Organisations should ensure that they can evidence this by collecting copies of receipts, travel tickets, etc from their volunteers. Note that it is permissible to give volunteers money in advance to use as expenses.

National Minimum Wage and Volunteers

Section 44 of the National Minimum Wage Act deals specifically with voluntary workers. It excludes from the scope of the National Minimum Wage any worker that is:

“employed by a charity, a voluntary organisation, an associated fundraising body or a statutory body” if he or she receives:

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- (a) no monetary payments of any description, or no monetary payments except in respect of expenses:
 - (i) actually incurred in the performance of his duties; or
 - (ii) reasonably estimated as likely to be or to have been so incurred; and
- (b) no benefits in kind of any description, or no benefits in kind other than the provision of some or all of his subsistence or of such accommodation as is reasonable in the circumstances of the employment."

The National Minimum Wage will not apply to most volunteers because they will not be "workers", due to the absence of any intention to enter into legal relations and the absence of a contract. Making sure that volunteers are properly trained and equipped for their work and don't end up out-of-pocket can nonetheless be a bit of a minefield. Even small benefits can lead a Tribunal to adjudge a "volunteer" a de facto worker.

However, even if your volunteers *are* deemed to be workers, that does not automatically qualify them for national minimum wage. Section 44 of the Act creates a category of "voluntary workers" who may receive a very limited range of expenses, benefits in kind, and/or subsistence payments, without becoming entitled to National Minimum Wage, provided that the following conditions are satisfied:

1. Your organisation must be a charity, voluntary organisation, charity shop, hospital, school, or a similar body;
2. The 'volunteer workers' must be working for you on a voluntary basis;
3. The payments or benefits must be limited to the reimbursement of reasonable expenses; necessary training; and/or subsistence (but not money for subsistence). A genuine "honorarium" (a gift with no obligation and of a reasonable amount) may also be paid.

Penalties for non-payment of national minimum wage

Anyone who is refused national minimum wage by the organisation they work for can complain to HMRC. HMRC will investigate the situation and, if the person is found to be a worker and entitled to the national minimum wage, HMRC may serve an enforcement notice on the organisation concerned, requiring it to start paying the national minimum wage and to make up for any previous underpayments.

If the arrears are not paid and payments do not start within 7 days of the enforcement notice being served, the organisation will be issued with a penalty notice. From the date that notice is issued until the arrears are paid and wage payments commence, the organisation will daily incur a fine equal to twice the minimum hourly rate of each affected worker.

If the organisation continues to fail to comply, HMRC can bring a case to a tribunal or county court on behalf of the worker, or prosecute the organisation. Deliberate refusal to pay national minimum wage is a criminal offence.

When the 2007-2008 Employment Bill is implemented next year, it will increase these penalties. Employers will be forced to pay higher rates for outstanding arrears, and a new civil penalty will be introduced for underpayment (payable to the government). The criminal penalty will also increase for certain national minimum wage offences, making them triable for the first time in the Crown Court.

Non UK nationals

Even though voluntary work, where it is clearly undertaken as such, is not normally prohibited by the Immigration Rules, due to the very strict penalties for employing anyone who is subject to immigration control and who does not have permission to work in the UK, or who is working in breach of their conditions of stay in the UK, if you are going to engage non UK nationals as volunteers, you would be strongly advised to check their status just as you would that of a prospective employee. If you are in any doubt about whether they can legally volunteer with your organisation in this country, you should seek independent legal advice, including to ensure that you do not inadvertently create an employment relationship with them.

As an example of how complicated the law in this area can be, the Immigration Rules permit asylum seekers who are legally residing in the UK to work as volunteers for registered charities, voluntary organisations or bodies that raise funds for either, as long as the voluntary activity undertaken does not amount to either employment, or job substitution. However, visitors and au pairs are prohibited from engaging in voluntary work or voluntary activities.

Although there is no specific legal power to prevent a failed asylum seeker from volunteering, it is likely that the Border and Immigration Agency would issue removal directions and discourage further voluntary activity.

Data Protection

Volunteers are protected by the data protection legislation. Their details should only be stored if the organisation has a legitimate reason to do so, and then only for as long as is necessary. Subject to the usual exemptions, volunteers have a right to know what information you hold on them and must be told what it will be used for.

Copyright

The copyright for plans, photographs, drawings, music, data, etc created or made by an employee during working hours automatically passes to his employer under his contract of employment. This is not the case for the copyright in anything created by a volunteer: there is no implied transfer of copyright.

Organisations should therefore be aware that, if their relationship with the volunteer goes sour, the volunteer could withdraw his consent to the organisation using the material, which could cause significant problems for the organisation if the material was either valuable or just about to be published.

It is therefore recommended that an organisation in this situation enters into an agreement with its volunteers transferring the copyright in any material they produce to the organisation. This is intended to be a contractual obligation and should therefore be dealt with separately from any Volunteers Agreement.

Anti-Discrimination Legislation

In the majority of circumstances, anti-discriminatory legislation will not apply to volunteers. Discrimination legislation does apply to workers. Volunteers will only be protected if they fall within one of the following categories:

1. volunteers whose volunteering is being used as a way to assess their suitability for work (an arrangement for determining to whom employment is offered);
2. volunteers who are taking part in voluntary work experience for the purposes of vocational training; or
3. volunteers who hold some public posts, including school governors and members of NHS trust boards.

The good news for volunteers is that the Race Relations (Amendment) Act 2000, the Disability Discrimination Act 1995 and the Employment Equality (Sexual Orientation) Regulations 2003 give 'public bodies' (bodies which provide a public service) a general duty to promote equality. The services provided by some voluntary organisations will fall within this definition.

Organisations that regularly contract with public bodies, should take careful note of the obligations often inserted in contracts which oblige them to comply with such legislation, or as a minimum to assist the public body in complying with its legal obligations, even though not strictly applicable to that organisation's volunteers..

Even if volunteers are not protected by anti-discrimination law, the legislation is something which every effectively-run charity should be working towards, because organisations that meet the standards set out in the legislation will be better regarded by other organisations with and for which they may wish to work. Voluntary compliance may assist when organisations apply for grants from funding bodies.

Organisations should also bear in mind that if they treat paid and unpaid staff equally when applying their anti-discrimination policies and procedures, they will reduce both the likelihood and impact of any claim by a volunteer that they are really an employee.

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Summary

Employment law is one of the most expensive areas in which a voluntary organisation can make mistakes.

In most situations volunteers will not turn out to be employees or workers by another name, but the risk is always there to be managed, especially in organisations that rely on volunteers to deliver important services. When an organisation is under pressure to make commitments and deliver under contracts, retaining and controlling volunteers becomes more important and it can be all too easy to stray too far into the employment relationship realm.

Organisations that over-document their relationships with volunteers or are over-generous with perks and benefits can find that they have inadvertently created employment contracts or have given good consideration for the "volunteer's" services.

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