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Litigator Q&A

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Laura Ho Provides a Reminder That For-Profit Employers Can't Use Volunteers for Profit

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BLOOMBERG BNA: [Editor's note: The U.S. District Court for the Eastern District of Missouri is currently presiding over a case where volunteers for marathon events are suing the primary corporate sponsor for failure to pay minimum wages in *Liebesman v. Competitor Group, Inc.* (No. 4:14-cv-01653). In this case, the plaintiffs served as ''volunteers'' who staffed marathon and half-marathon events nationwide for the defendant corporation. They claim that they were fraudulently recruited to serve as volunteers under the assumption that they were performing a community service for various charity groups. All of these groups, however, pay the defendant for the privilege of being listed as an ''official charity'' of the particular race. In addition, the plaintiffs are claiming that they were performing services that were so vital that the race could not have been held without them. All of these factors, according to the plaintiffs, allow the defendant to profit from the revenues generated from each race and warrant them receiving payment from the defendant for their services. The defendant, however, is arguing that the marathon events are FLSA-exempt amusement and recreational establishments and that the plaintiffs are non-employees because they volunteered their services without expectation of compensation.]

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What elements compose the Fair Labor Standards Act's amusement or recreational exemption?

Ho: Section 13(a)(3) provides an exemption from the minimum wage and overtime provisions of the FLSA for ″any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-1/3 percent of its average receipts for the other six months of such year.

Whether an amusement or recreational establishment ''operates'' during a particular month depends on whether it operates as an amusement or recreational establishment in that month. If an establishment engages only in such activities as maintenance operations or ordering supplies during the ''off season'' it is not considered to be operating for purposes of the exemption.

Because the language of the statute refers to receipts for any six months (not necessarily consecutive months), the monthly average based on total receipts for the six individual months in which the receipts were smallest should be tested against the monthly average

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for six individual months when the receipts were largest to determine whether this test is met.

To illustrate: An amusement or recreational establishment operated for nine months in the preceding calendar year. The establishment was closed during December, January and February. The total receipts for May, June, July, August, September and October (the six months in which the receipts were largest) totaled $260,000, a monthly average of $43,333; the total receipts for the other six months totaled $75,000, a monthly average of $12,500. Because the average receipts of the latter six months were not more than 33-1/3% of the average receipts for the other six months of the year, the Section 13(a)(3) exemption would apply.

An employee, to be exempt, must be ''employed by'' the exempt establishment. Central functions of an organization operating more than one such establishment, as in the case of employees of a central office, warehouse, garage, or commissary which serves a chain of exempt ''amusement or recreational'' establishments would not be within the exemption under Section 13(a)(3).

BLOOMBERG BNA: Why is this exemption included in the FLSA?

Ho: The exemption is generally thought to have been provided to allow recreational facilities to employ young people on a seasonal basis and not have to pay minimum wage and overtime. The idea is that seasonal amusement and recreational enterprises have sharp peak and slack seasons requiring longer hours in a shorter season, where higher wages are impractical, or they may offer non-monetary rewards.

BLOOMBERG BNA: What legal protections exist for volunteer workers under the FLSA?

Ho: The first question is whether a person is really a ''volunteer.'' The DOL takes the position that there is no such thing as a ''volunteer'' for a for-profit private sector company. Although the FLSA and regulations define ''volunteer'' only with respect to public sector agencies, the DOL says that volunteers are allowed at non-profits as well as at public agencies.

Volunteers are usually donating their services on a part-time basis for public service, religious, or humanitarian objectives and are not paid. They can, however, receive expense payments, benefits, or a nominal fee. For example, paid uniforms, meals and transportation costs can be covered without fear of losing ''volunteer'' status.

BLOOMBERG BNA: What would an employer need to show in order to prove that a person should be considered a volunteer worker?

Ho: The ''employer'' would need to show it is a non-profit or public agency. If the ''volunteer'' is also an employee of the non-profit or public agency, then he or she could not be performing the same type of service that he or she would normally provide as an employee of that non-profit or public agency.

For instance, a nurse employed by a state hospital who proposes to volunteer to perform nursing services at a State-operated health clinic which is not a separate agency could not be a volunteer. Similarly, a firefighter cannot volunteer as a firefighter for the same public agency. However, a policy officer could be a volunteer as a part-time referee in a city-sponsored basketball league, a city parks department employee could volunteer as a city firefighter, and an office employee of a city hospital could volunteer to spend time with a disabled or elderly person in the same institution during off duty hours.

BLOOMBERG BNA: What (in actuality or potentially) is at stake for corporations and non-profit organizations in this case should the court ultimately find in favor of the ''volunteers'' in *Liebesman*?

Ho: Corporations would need to pay their ''volunteers'' minimum wage and overtime. This is nothing new and falls squarely within minimum labor standards the FLSA is meant to protect. The plaintiffs in *Liebesman* have not alleged that any of the non-profits should be paying them pursuant to the FLSA, so there would likely be no direct effect on non-profits from the *Liebesman* case.

BLOOMBERG BNA: Regardless of the outcome of the *Liebesman* case, what should attorneys representing both for-profit corporations and non-profit organizations keep in mind as they organize and sponsor future community and charity events?

Ho: Attorneys should be aware of the DOL's position that there is *no* volunteer exemption for a for-profit, so for-profit corporations in general should be paying their workers minimum wage and overtime.

Non-profits that participate in events organized by for-profit organizations should make sure that they are following the rules for volunteers applicable to them. For example, a fundraiser for a non-profit cannot ''volunteer'' to raise funds at a fundraising event run by that non-profit. However, the non-profit could recruit outside individuals to help with fundraising at that event.

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