MAY 17, 2018

VOLUNTEERS ARE REALLY VOLUNTEERS!

A recent decision by the U.S. Court of Appeals for the Sixth Circuit held that volunteers, who do not expect compensation, are not employees under the Fair Labor Standards Act ("FLSA"). In the past, the Sixth Circuit has declined to employ such a bright line test.

In *Acosta v. Cathedral Buffet, Inc.,* a church based in Akron, Ohio operated a buffet restaurant. The church was a nonprofit corporation, but the restaurant was a registered for-profit corporation (the sole shareholder of which was the church). The restaurant operated with 35 full-time, paid employees. However, much of the work was also performed by volunteers from the church.

The U.S. Department of Labor ("DOL") initiated a lawsuit against the restaurant under the FLSA. The agency claimed that, under the longstanding "economic realities" test and the church founder's allegedly "coercive" methods, the individuals were not truly volunteers. As a result, the agency argued, the individuals were entitled to minimum wage and overtime. The district court agreed with the DOL and awarded nearly $400,000 in back pay and liquidated damages.

The Sixth Circuit reversed that judgment and stated for the first time that "a volunteer's expectation of compensation is a threshold inquiry that must be satisfied before we assess the economic realities of the working relationship" (emphasis added). In the past, regardless of whether the worker expected compensation, the court would traditionally consider factors such as whether the organization has substantial control over the terms and conditions of the work, whether it has the authority to hire or fire the worker and whether it maintains records of employment that establish the rate and method of payment. The court recognized that, in certain circumstances, coercion could overcome a volunteer's lack of expected compensation and therefore bring the employee within the FLSA's protections. However, the court explained that such coercion must be economic rather than "societal or spiritual."

The Sixth Circuit's decision breaks new ground under the FLSA and should give hope to employers (at least in Michigan, Tennessee, Ohio and Kentucky) that they can engage volunteers without fear of a federal wage and hour compliance problem. Volunteers who have no expectation for compensation are just that – volunteers. They are not entitled, in the Sixth Circuit at least, to minimum wage and overtime.

As noted, economic coercion for "volunteers" might cause one to become protected under the FLSA, but such circumstances are not often present.

Please remember to consult with your counsel on how this decision may be affected by other applicable federal or state law. Other governing statutes or rules could be more generous to your workers.

If you have questions about this recent decision or other wage and hour matters, please contact Jon Rabin at jrabin@hallrender.com or (248) 457-7835 or your regular Hall Render attorney.

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