

08/09/02 - Applicability of M.G.L. c. 151 to Volunteer Work

Opinion Letter
MW-2002-021
August 9, 2002

I am writing in response to your request for this Office's written opinion regarding the applicability of M.G.L. c. 151 to "volunteer" work. Specifically, you have asked how this Office would determine whether a person is an employee, subject to the protections of the Massachusetts Minimum Fair Wage Law, M.G.L. c. 151 (the "Minimum Wage Law"), or a bona fide volunteer. ^[1]

For purposes of illustration, you have described the following situation: Jane Doe was asked by a local rehabilitation services organization to volunteer as a full-time vocational case manager while her work visa petition was being processed by the U.S. Immigration and Naturalization Services. Ms. Doe worked 40 hours a week alongside other case managers performing essentially the same work. She was not allowed time off for holidays without management approval. In all aspects, other than the receipt of wages and benefits, she was treated like an employee of the organization. Ms. Doe was told that she had to continue the volunteer work or the organization would withdraw the visa petition that it had filed on her behalf. Ms. Doe continued this work for nine months, the final three months on a four-day work week, at her request. After nine months, Ms. Doe was "let go" and the work visa petition was withdrawn. Ms. Doe received no compensation for her services.

The Minimum Wage Law, and Regulations promulgated thereunder, do not define "employ" or "employee," nor do they directly address the question of how to distinguish volunteer work from employment status. This Office is also unaware of any Massachusetts case law on point. Therefore, it is left to this Office to give a reasonable interpretation of the statute, taking into consideration the purposes and intent of the law. ^[2]

The Minimum Wage Law provides that employers may not employ persons in any occupation, as defined by M.G.L. c. 151, s. 2, at a wage of less than \$6.75 per hour, and any agreement to do so shall be null and void. M.G.L. c. 151, s. 1. Section 2 defines "occupation," in pertinent part, as:

an industry, trade or business or branch thereof or class of work therein, whether operated for profit or otherwise, and any other class of work in which persons are *gainfully* employed, but shall not include professional service, agricultural and farm work, work by persons being rehabilitated or trained under rehabilitation or training programs in charitable, educational or religious institutions, or work by members of religious orders.

M.G.L. c. 151, s. 2 (emphasis added). ^[3]

While at first blush, this definition would appear to limit coverage of the Minimum Wage Law to only compensated employees, such an interpretation would lend itself to an irrational result. An employer could avoid having to pay a worker the statutory minimum wage simply by not paying the worker at all. This Office will not adopt a literal construction of a statute if the consequences of such an interpretation are unreasonable and inconsistent with legislative intent. See e.g. Attorney Gen. v. School Comm. of Essex, 387 Mass. 326 (1982). Rather, the logical conclusion is that the language "gainfully employed" was meant to convey that the Minimum Wage Law extends to all who are compensated, or have some expectation of a return for their services; and it was meant to exclude bona fide volunteer work from the reach of the statute. Such an interpretation is consistent

with the intent of the Minimum Wage Law and also with court decisions under analogous federal law, the Fair Labor Standards Act (FLSA) and regulations promulgated thereunder. See Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985); Walling v. Portland Terminal Co., 330 U.S. 148 (1947).

Whether or not an individual may be considered a bona fide volunteer must necessarily be determined on a case-by-case basis. The line between employee and volunteer status is often a thin one. As we have for other wage and hour issues, this Office will look to federal law for guidance in making such a determination. See Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 170 (2000). Therefore, to determine volunteer status in a situation like the one you described, this Office would employ factors used by the U.S. Department of Labor to determine volunteer status under the FLSA. We would consider: 1) the nature of the entity receiving the services; 2) the receipt by the worker of any benefits, or expectation of any benefits, from their work; 3) whether the activity is less than a full-time occupation; 4) whether regular employees are displaced by the "volunteer," 5) whether the services are offered freely without pressure or coercion, and 6) whether the services are of the kind typically associated with volunteer work. See e.g. U.S. Department of Labor, Wage and Hour Opinion Letter, July 31, 2001. Based on the facts you have presented, Ms. Doe might be considered an employee subject to the protections of the Minimum Wage Law. Please be advised that individuals may file a wage complaint with the Office of the Attorney General.

I hope this information has been helpful. Please note that this opinion is based solely on the information provided with your request. The existence of other facts not contained in your request might require a different conclusion. If you have any further questions, please feel free to contact me.

Sincerely,
Lisa C. Price
Legal Counsel

[1] This letter addresses only the question of who is considered an employee under M.G.L. c. 151. Please note that, for purposes of M.G.L. c. 149, which includes the timely payment of wage statute, M.G.L. c. 149, s. 148B creates a rebuttable presumption of employment whenever an individual performs services for another.

[2] Please note that employers are also subject to the federal minimum wage and hour law, found in the Fair Labor Standards Act (FLSA) and regulations promulgated thereunder. For information about applicable federal wage and hour laws, you should contact the U.S. Department of Labor. The telephone number for the Boston Office is (617) 624-6700.

[3] The Minimum Wage Regulations also define "employer" as "[a]ny individual, corporation, partnership or other entity, including any agent thereof, that engages the services of an employee or employees for wages, remuneration or other compensation." 455 C.M.R. s. 2.01.

= Names have been Omitted