

STATE OF MONTANA
DEPARTMENT OF JUSTICE
AGENCY LEGAL SERVICES BUREAU
444-2026

MEMORANDUM

CONFIDENTIAL
ATTORNEY-CLIENT PRIVILEGED

TO: KAREN STREGE
Montana State Librarian

FROM: JIM SCHEIER JS
Assistant Attorney General

RE: Volunteers

DATE: April 30, 1998

This memo responds to your April 22 memo regarding the Fair Labor Standards Act and the Volunteer Protection Act of 1997.

- 1. (a) Is it true that the Fair Labor Standards Act prohibits library employees from volunteering their services in the same capacity to their library?**
(b) What is the penalty for noncompliance with this standard?

(a) The Federal Fair Labor Standards Act of 1938 (FLSA) regulates wages and hours of employment. It covers all "employees," as defined in the act, and establishes standards for minimum wage, maximum hours of employment, and overtime compensation. A provision of that act, 29 U.S.C. § 203(e)(A), states:

The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if --

- (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
- (ii) such services are not the same type of services which the individual is employed to perform for such public agency.

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Regulations have been adopted to implement the provisions of the FLSA. 29 C.F.R. § 553.100 provides, in part:

The purpose of this subpart is to define the circumstances under which individuals may perform hours of volunteer service for units of state and local government without being considered to be their employees during such hours for purposes of FLSA.

29 C.F.R. § 553.102(a) states:

[29 U.S.C. § 203(e)(4)(A)(ii)] of the FLSA does not permit an individual to perform hours of volunteer service for a public agency when such hours involve the same type of services which the individual is employed to perform for the same public agency.

While I have not found any cases that construe these provisions, their meaning appears plain to me. If a library employee also performs volunteer services for the same library, and those volunteer services are of the same type as his or her employment duties, then that person is considered an employee for purposes of FLSA even while performing the volunteer services. The result, in my opinion, is that all of the pertinent provisions of the FLSA apply during the time the person is "volunteering" his or her time. In other words, he or she is not really a volunteer, but is an employee for FLSA purposes.

(b) The "penalty" that may result from these circumstances is that the provisions of the FLSA may be enforced against the employer, the library. A suit can be initiated to recover unpaid wages and/or overtime compensation, and an injunction can be issued by the Department of Labor. In addition, a willful violation of the FLSA is a criminal offense.

2. Some of Montana's public libraries are open and provide service to the public using only volunteers with no staff present. Although Congress passed the Volunteer Protection Act in 1997, which applies to volunteers in governmental entities, what legal questions or problems does this situation pose for library boards?

The Volunteer Protection Act of 1997 is codified at 42 U.S.C. §§ 14501 to 14505. State laws that are inconsistent with the act are preempted by the provisions of the act. 42 U.S.C. § 14502.

42 U.S.C. § 14503 states that, except as provided in subsections (b) and (d) of that section, volunteers are not liable for harm caused by their acts or omissions on behalf of

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the governmental entity (with exceptions discussed below). Subsection (d), referred to above, provides:

Exceptions to volunteer liability protection. If the laws of a State limit volunteer liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

.....

(2) A State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees.

Montana has a law like the one described directly above. Montana Code Annotated § 2-9-102 states that governmental entities are liable for their torts and those of their employees, with certain exceptions are not relevant to this discussion. The definition of "employee" includes those acting "in any official capacity temporarily or permanently in the service of the governmental entity whether with or without compensation, . . . [emphasis added]." Montana Code Annotated § 2-9-101. Montana Code Annotated § 2-9-305 provides for the indemnification, defense, and immunization of employees civilly sued for actions taken with the course and scope of their employment, with certain exceptions discussed below.

What all this means is that because Montana requires its governmental entities to defend and indemnify their volunteer workers to the same extent as their paid workers, the provisions of the Volunteer Protection Act do not preempt Montana's laws. Both laws apply.

Under Montana's laws volunteers are entitled to defense and indemnification unless their acts fall within the exceptions set forth in Montana Code Annotated § 2-9-305. No defense or indemnification is permitted if the employee's (volunteer's) conduct constitutes oppression, fraud or malice, does not arise out of the course and scope of employment, constitutes a criminal offense, the employee settled the claim without the governmental entity's consent, or the employee fails to cooperate in the defense. Montana Code Annotated § 2-9-305(6).

The Volunteer Protection Act has some similar exceptions. A volunteer is only subject to protection from liability exposure if acting within the scope of the volunteer's responsibilities, if the volunteer was properly licensed or certified (if required), if the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct or flagrant indifference, or if the harm resulted from the volunteer's use of a vehicle. 42 U.S.C. § 14503(a).

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Under both the federal and state laws, the governmental entity does not enjoy the liability protection granted to the volunteer worker. 42 U.S.C. § 14503(c); Montana Code Annotated §§ 2-9-102 and -305. Thus, libraries are still subject to liability for the torts of their volunteers, even if they have all-volunteer staffs.

Give me a call if you have additional questions.

jms/alh