**Fact sheet 2c:**

**Avoiding the pitfall of creating employment contracts**

**What’s at stake?**

In some circumstances, if organisations or groups are not clear in their agreements with volunteers, they can inadvertently grant employment rights to volunteers. Whilst a rare occurrence, over the years there have been claims made to employment tribunals from volunteers. These individuals have tried to establish that, as volunteers, they have employment rights, which entitle them to some of the statutory benefits with which employees are provided under Employment Law, including:

* Payment of the National Minimum Wage
* Protection under anti-discrimination legislation
* Holiday entitlement and pay (28 days for a full-time employee)
* Statutory Sick Pay.

The law around volunteering has been established through interpretations by employment tribunals over a number of years. If it is decided that a volunteer fits the description of an ‘employee’, they become entitled to all of the statutory rights accessed by employees, which include the national minimum wage, sick pay, maternity/paternity leave, trade union activity, protection from unlawful discrimination and protection from unfair dismissal and redundancy. Additionally, if a volunteer is able to establish worker or employee status, they might also be able to claim arrears of unpaid wages at the national minimum wage rates.

As previously stated, litigation is a rare occurrence, but we recommend that you safeguard your organisation from this eventuality by following the good practice recommendations in this guide. These will help to ensure you strike the appropriate balance between managing volunteers well and not straying into employer/employee territory.

**Make sure you understand the difference between employees and volunteers**

1. Contracts of employment: Employees are paid to carry out work *under contract.* A contract of employment can exist without a written document however.

Legally speaking, the two following conditions simply need to coexist:

* *Consideration* (the individual and the organisation exchange something of material value)
* *Intention* (the individual and the organisation intend to enter into a legally binding contract).

2. Employee characteristics: As well as expecting to be paid, employees are characterised by the following:

* They are required to work regularly unless they are on leave (e.g. holiday, sick leave or maternity/paternity/parental leave)
* A manager or supervisor is responsible for their workload, saying when a piece of work should be finished and how it should be done
* They cannot send someone else to do their work.

3. Terminology: The statement of written particulars, employment handbook of terms and offer letter (which can be described as the employment contract) have terms like ‘employer’ and ‘employee’.

**Practical steps you should follow**

While it is necessary to avoid entering into a contract situation with volunteers, it is important that organisations manage volunteers well. Here are some practical ways to minimise the risk of contract situation:

1. **Documentation:** create policies, procedures and paperwork specific to volunteers that use the term ‘volunteer’, rather than using existing employee-related policies, procedures and documentation. This includes:
   * Disciplinary procedures
   * Holiday booking forms
   * Sickness/absence reporting forms.
2. **Volunteer agreement:** ensure that you write your volunteer agreement to show that it gives the volunteer autonomy over their involvement. It should also avoid any form of contractual language. Be careful therefore that written documents relating to volunteers do not include fixed commitments, overt or implied (an agreement to volunteer for a specific fixed period, e.g. six months). Take a look at our Sample Volunteer Agreement which will give you two examples of recommended wording.
3. **Expenses:** volunteers should only receive out of pocket expenses, ideally with a receipt to prove the costs so that they cannot be construed as having been paid for their work. Please take care around the following specific situations:
   * **Training:** if a volunteer is provided with training beyond the skills and knowledge required for the volunteering role, it could be considered to be a payment, thus fulfilling the requirements for a contract of employment. We therefore recommend you keep training for volunteers within the limits of the duties and responsibilities of their role.
   * **Mileage**: If the volunteer is receiving payments in excess of reimbursement for expenses and the HMRC mileage allowance, they could be classed as an employee and their driving is likely to be classified as business use.

Section 44 of the National Minimum Wage Act 1998 explains the conditions under which volunteers can receive money, which is summarised in the following Government document: [The National Minimum Wage: volunteers and interns](http://researchbriefings.files.parliament.uk/documents/SN00697/SN00697.pdf).

**For more information**

[National Council for Voluntary Organisations (NCVO)](http://www.ncvo.org.uk)

NCVO champions the voluntary sector and volunteering across Britain by connecting, representing and supporting voluntary organisations. It has a reputation as an authoritative voice for the sector.

* [www.ncvo.org.uk](https://www.ncvo.org.uk/) Phone: 020 7713 6161 Email: ncvo@ncvo.org.uk

NCVO Knowhow Nonprofit

Knowledge and e-learning for charities, social enterprises and community groups. Learn from experts and peers, and share your experiences.

* [www.knowhownonprofit.org](https://knowhownonprofit.org/)

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