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A volunteer or employee? What's the difference?

California has a two-part test that nonprofits must meet to be exempt from compensating their volunteers

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San Diegans volunteer in various nonprofit enterprises. In Spilman v. The Salvation Army, a San Francisco-based panel of the California Court of Appeal announced a two-part test that nonprofits must meet to be exempt from compensating their volunteers.

Background

John Spilman participated in a six-month Salvation Army drug and alcohol rehabilitation program. Program participants receive dormitory housing, three meals per day, clothing, gratuities, and one-on-one counseling and other rehabilitation services.

Participants must participate in what the Salvation Army calls "work therapy," generally full-time work in the Salvation Army's warehouse and thrift stores performing such tasks as loading trucks and sorting donations. The Salvation Army maintains that work therapy teaches participants life skills needed to reenter the workforce.

Upon enrollment, participants sign documents saying they are not Salvation Army employees.

Spilman sued, claiming he and other program participants were Salvation Army employees entitled to the minimum wage and related rights under California employment law. The trial judge summarily ruled in the Salvation Army's favor. The judge concluded program participants could not be Salvation Army employees because there was no express or implied agreement they would be compensated. Spilman appealed.

Employee defined

The wage orders governing employment in California generally define "employ" "to engage" or to "suffer or permit" a person to work. The court of appeal focused on whether the Salvation Army suffers or permits program participants to work.

The court noted the California Supreme Court's observation in its 2018 ruling in Dynamex Operations West, Inc. v. Superior Court that "if interpreted literally, the plain language of

'suffer or permit to work' – the wage order's broadest definition of 'employ' — would cover independent contractors, making them all employees."

The state high court adopted the now-familiar ABC test hiring entities generally must meet to classify a worker as an independent contractor. The state legislature subsequently enacted statutes adopting the ABC test with exceptions.

Distinguishing volunteers from employees

The court of appeal found the classification of independent contractors and volunteers analytically similar. "If applied literally, the suffer or permit to work standard would make all nonprofit volunteers employees. Like independent contractors, however, volunteers for nonprofit organizations comprise a traditional category of worker that cannot reasonably be viewed as employees … The wage orders could not have been intended to categorically eliminate volunteer work in California, which would cripple the ability of many humanitarian, charitable, and other nonprofit organizations to carry out their important missions."

Guided by the Dynamex approach, the court of appeal ruled that a nonprofit may classify a worker as a bona fide volunteer if the nonprofit shows: "(1) the worker freely agreed to work for the nonprofit to obtain a personal or charitable benefit, rather than for compensation, and (2) overall, the nonprofit organization's use of the volunteer labor is not a subterfuge to evade the wage laws." The exemption extends to volunteers working in the commercial functions of a nonprofit's operations.

The court continued: "The essential distinction between a volunteer and an employee … is that a volunteer agrees to work for a personal or charitable reason or benefit, rather than to earn money. (Citations). In the classic case, a person is motivated to perform uncompensated work by a desire to advance a cause championed by the nonprofit. In other instances, as in this one, the person works to obtain a benefit, like drug rehabilitation." A written agreement is neither necessary nor sufficient to show the worker freely chose to work for personal benefit.

Where the nonprofit demonstrates that the worker freely chose to work for personal benefit alone, the organization then must show that it is not "exploiting the situation to evade the wage laws." In deciding whether this part of the test is satisfied, a court may consider whether volunteers are replacing employees whom the nonprofit previously paid to perform substantially similar functions.

The trial court now will have to resolve whether the Salvation Army's work therapy satisfies this two-part test.

Motive of worker, nonprofit key

The court underscored that the motive of both the worker and the organization is critical. "So long as the individual freely, without coercion, volunteers to perform work for a charity for personal, nonremunerative reasons and the organization is not improperly misclassifying the worker to circumvent the law, a volunteer exception (to wage and hour rules) harmonizes with our Legislature's goal of eradicating substandard conditions for vulnerable workers."

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