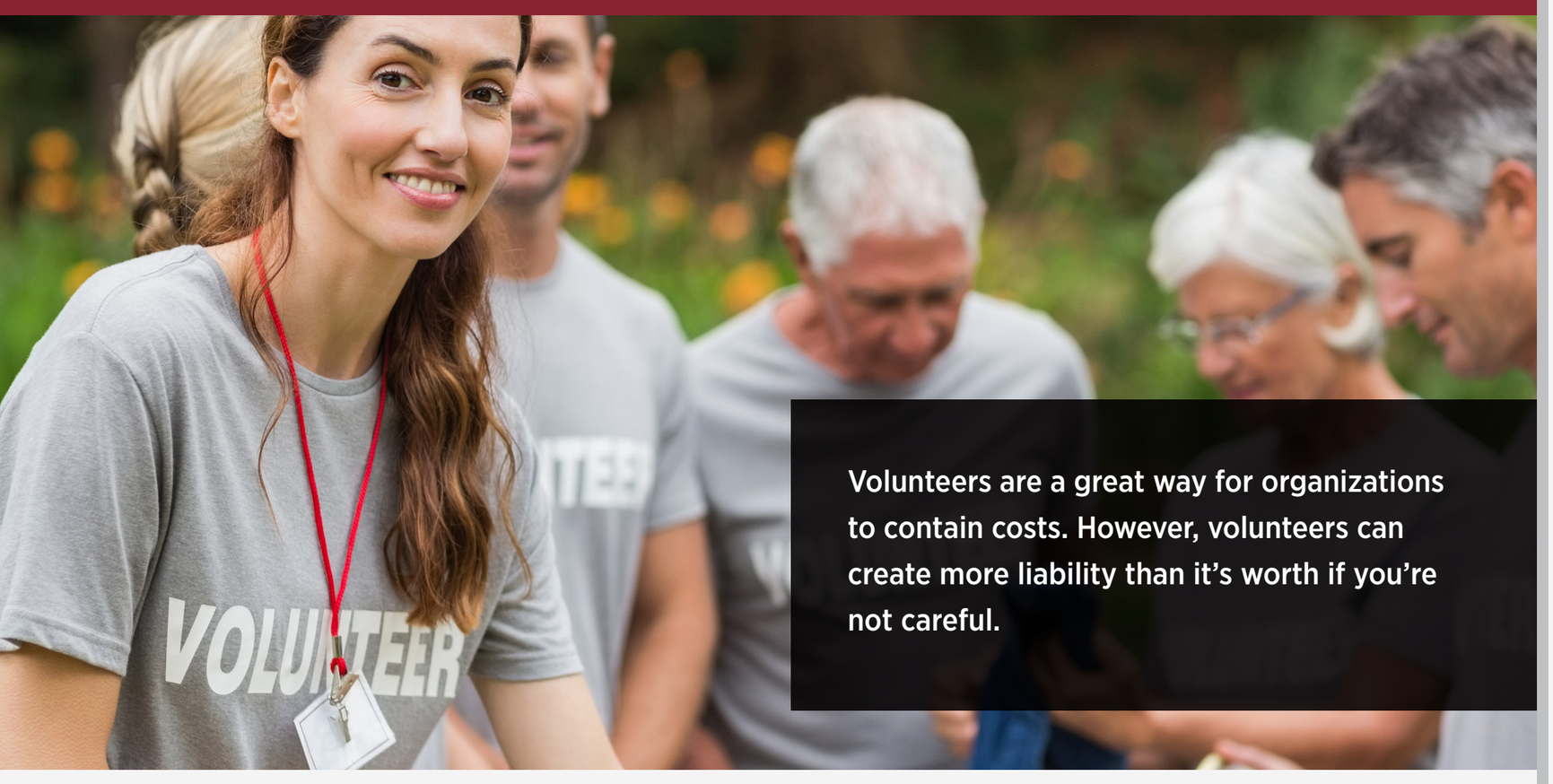
EMPLOYMENT LAW BULLETIN

Mazanec, Raskin & Ryder June 2019 Newsletter

Understanding Volunteers



Volunteers are a great way for organizations to contain costs. However, volunteers can create more liability than it's worth if you're not careful.

Wage Claims

Under the FLSA, in the public sector and in non-profit agencies (non-profit agencies that are covered under the FLSA), employees can volunteer their time so long as they are not performing the same or similar services that they are compensated for as an employee. Non-employees can volunteer for public and non-profit entities so long as there is not an expectation that they perform the work. In the private sector, employees cannot volunteer their services, even if the volunteer work is not the same or similar to their compensated work.

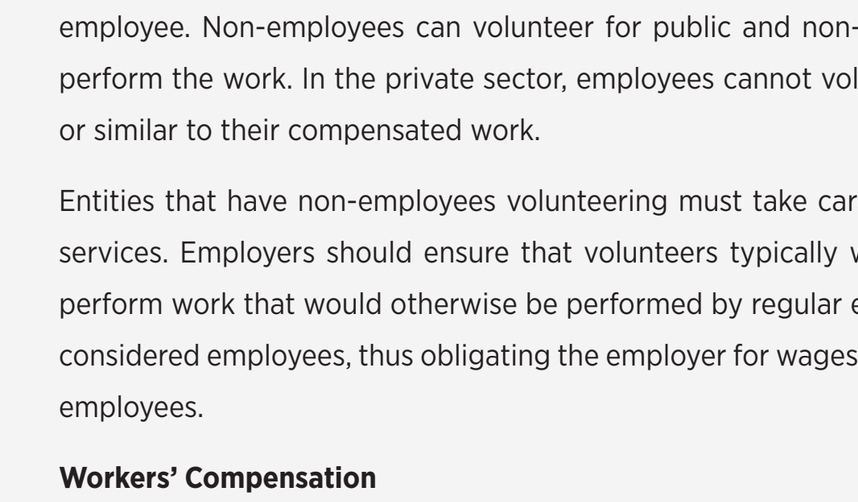
Entities that have non-employees volunteering must take care to ensure that the individuals do not feel pressure to provide services. Employers should ensure that volunteers typically work part-time hours and do not replace regular employees or perform work that would otherwise be performed by regular employees. Doing so will run the risk that your volunteers will be considered employees, thus obligating the employer for wages, penalties and other liabilities created by not properly classifying employees.

Workers' Compensation

Volunteers are not covered under workers' compensation, with one exception. Emergency service providers for public employers (i.e. volunteer firefighters, volunteer EMTs and volunteer police officers) are covered. Employers who have volunteers working may purchase coverage under their general liability insurance policy, although this policy would not make them eligible for workers' compensation benefits.

General Liability Coverage

Check your insurance policy. Employers will want to ensure that two bases are covered: (1) there is coverage to defend a volunteer if named in a covered claim or lawsuit, and (2) there is coverage if a volunteer is injured, since workers' compensation will likely not be available. Also be sure to check the policy's endorsements, if any, for limiting language on volunteers.



Public entities are well aware that they cannot randomly test employees who are not in safety sensitive positions. Doing so would run afoul of the U.S. Constitution's 4th Amendment, which prohibits the government from conducting warrantless searches. Thus, a governmental entity cannot "search" an employee without drugs without cause. However, there is an exception for employees in safety sensitive positions. In these positions, the government's need to know if an employee is under the influence outweighs the employee's right to privacy.

What is a safety sensitive position? These positions include responsibilities that, if there is a moment's lapse in judgment, catastrophic results are possible. There is no specific definition or all-encompassing list of positions. Teachers, firefighters, police officers, safety services dispatchers and water treatment plant operators (who handle chemicals) are all in safety sensitive positions. However, safety sensitive does not include employees authorized to drive public-entity owned vehicles (other than CDL holders or those subject to 49 CFR 382).

Are Your Websites ADA Compliant?

Employer websites may very well be the next magnet for disability-related claims under the Americans with Disabilities Act. All employers understand they cannot discriminate against employees and potential employees because of disabilities. However when enacted, the ADA only contemplated barriers created by physical spaces and personal interactions. Like other archaic laws, the ADA has not been updated to address issues raised by 21st Century technology. As such, most employers likely do not consider the potential ADA liability created by their online employment applications.

The Northern District of Ohio recently held that a lawsuit against an employer could proceed in litigation as a class-action lawsuit based on allegations that the employer's online application process was not accessible to those with disabilities. Kasper v. Ford Motor Co., N.D Ohio Case No. 1:18-cv-2895 (Mar. 22, 2019). The Kasper case is likely far from resolution, but the case is a reminder for employers that they should consider their online presence when ensuring compliance with various laws including the ADA.

One legal question raised in Kasper is whether Ford Motor Company website that directs applicants for employment to call the company's hotline if an accommodation is needed complies with the ADA. Without the benefit of guidance from courts or other legal agencies, employers are left guessing whether their websites are legal. Until solid guidance is issued, employers are encouraged to take steps to reasonably make its websites accessible to those with disabilities. If challenged, employers would at least be able to show a good faith effort to accommodate. The following considerations are likely issues that will be raised in the near future in civil rights commissions and courts:

- *Is the website/mobile application compatible with screen-reading software (software that individuals with visual impairments use to audibly relay information on a computer screen)?*
- *Are users with color blindness issues able to fully use the website/mobile application?*
- *Are users able to submit data on the website/mobile application using screen-reading software or other software designed to make the website/mobile application accessible?*
- *If alternate reasonable accommodations are used to make websites accessible, are the accommodations as effective and easy to use as the website?*

These considerations expand beyond an employer's online application and likely will be considered in the ADA's requirement that all places of public accommodation be accessible by those with disabilities. Regardless of any guidance we may see, these considerations will force those within an employer who are familiar with the ADA to work closely with those responsible for the organization's technology. The earlier employers start in building that relationship, the better off they will be.

Start Gathering Your EEO-1 Component 2 Data!

The EEOC announced that it expects to begin collecting the EEO-1 Component 2 data (the new payroll data) for calendar years 2017 and 2018 in mid-July 2019. Employers should be on the lookout for notices from the EEOC about when the portal will open. This data must be submitted no later than September 30, 2019.

DID YOU KNOW?

Employers should maintain payroll records for at least six (6) years. While records reflecting hours worked and wages paid are required under Ohio unemployment laws to be kept for five (5) years, and the FLSA/Ohio wage laws require payroll records, CBAs, and sales and purchase records to be maintained for three (3) years (records such as time cards, work tickets and work schedules must be maintained for two (2) years), Ohio has a six (6) year statute of limitations for some employment claims. Wages are a critical element in analyzing employment claims.

ATTORNEY SPOTLIGHT

Cynthia L. Sands is a Senior Attorney at MRR and has concentrated her practice on employment and civil rights law. She is a recent transplant from Los Angeles, California, having lived there for over 20 years. Ms. Sands was born in Columbus, Ohio, where she practiced law for five years before moving to LA. She now resides in Cleveland Heights, OH. In her spare time, Cynthia creates pottery and cares for her pets Fifi and Zoe (dogs), and Louis and Cleo (cats). When not doing pottery, Cynthia enjoys bike riding, playing the flute, and decorating her house.

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