

When a volunteer is a volunteer and not an unpaid worker

What can volunteers do in your organisation?

Volunteers can do anything in any organisation as long as they know what they're doing and what's expected and it is not 'job substitution'

The only things you really must not ask volunteers to do are

- Skilled roles for which they are not qualified or trained
- Replacing a role that has been made redundant (this is different from if you've just run out of money)

Who can volunteer?

Anyone who wants to can volunteer, provided they are not in one of the excluded groups below. However, there is always something for everyone.

- No one is barred from volunteering entirely
- Some people may be barred from volunteering with children or vulnerable adults – CRB check would reveal this
- Asylum seekers and refugees are barred from volunteering within statutory services (local/national government or NHS)

There are a lot of myths around excluded groups. Below are some of the most common myths 'busted'

- People on benefits or JSA *can* volunteer so long as they can prove that they are also actively looking for work and able to start work in a timely fashion if they find it
- People with criminal convictions can volunteer, even if the nature of their conviction limits the things they can do
- Under 18s can volunteer, as can under 16s with proper structures in place for support and supervision
- Not every volunteer needs to be CRB-checked even in organisations which work with vulnerable adults or children. Use a risk-based approach

How not to create a contract of employment with a volunteer

Why is this a problem? Surely calling someone a volunteer is sufficient to make it clear that they aren't an employee or worker? Sadly not. It is possible to entirely unknowingly form a contractual relationship with a volunteer, which would result in them becoming a 'worker'. If you do this, however well-meaning you might have been, you open up your organisation to risks including

- National Minimum Wage Enforcement.
 - If you are inspected and found to have 'volunteers' who are actually 'workers' then you can be required to pay them the National Minimum Wage for all the hours they have worked for you in that position. Plus interest and Employers' NICs and a possible fine
- Employment Tribunal
 - If a 'volunteer' wins their case to be a 'worker' then you may be liable for backdated wages, plus compensation
 - If a 'volunteer' claims bullying or other grievance and can prove that they are a 'worker' then you are liable to compensation (and bad publicity)
- Employment rights

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- Workers have rights which volunteers don't, including four weeks' paid leave (plus statutory holidays) per year, pension rights, and rights to protection. Some of these get very, very expensive if they have to be enforced and/or backdated to the time the volunteer started
- Some legislation is limited and doesn't apply to employers with a lower number of employees. If your volunteers turn out to be workers they will count towards your head count and may cost you money in complying with legislation

Some basic things to remember to help you not form a contract with any of your volunteers.

- Contracts do not have to be written or even verbal agreements – they can simply be based in 'custom and practice' or mutual expectations.
- Contracts lay obligations on both parties eg 'If you agree to volunteer three days per week we will put you through an NVQ'
- Contracts usually involve sanctions or consequences if one or both sides fail to fulfil their obligations eg 'If you don't consistently turn up for your three days per week we will remove our support for your NVQ'.

There are lots of things that we do all the time with our volunteers that might cause us to worry about the formation of contracts. There is some advice below which will help you avoid many of the common pitfalls.

- Asking volunteers to sign a written agreement of expectations
 - It is best not to sign an agreement but you can have something in writing as long as it is clear that the written agreement is a set of 'minimum expectations' or an informal agreement. The key test is whether it would be enforceable in a court of law as an illustration of a contract. In an Employment Tribunal decision in 2004 it was held that an agreement (albeit not one that was signed) that was designed to 'clarify the reasonable expectations' of the organisation and the volunteer could not be used as evidence of the formation of a contract. However, it would depend on what was in it, and just calling it something does not mean that it isn't that thing.
 - The key element in this is that any agreement must not form an obligation on either side. That is there must be no obligation on the organisation to provide volunteering and no obligation on the volunteer to do it. So nothing that says 'we will definitely give you X hours per week of work for X months' or 'we will make sure you have enough hours to pass your qualification' but equally no 'we expect you to do exactly these hours at this time'
- Asking volunteers to volunteer at specific times
 - Again, it was held that an organisation which is reliant on volunteers for delivery of its services can reasonably specify when it needs its volunteers to be there for rota-planning purposes etc. However, the organisation has no recourse to sanction if the volunteer can't make those times – there can be no warning or consequence
- Reimbursement of expenses
 - As long as it is reimbursement of genuine expenses which would not have been incurred were they not volunteering there is absolutely no problem with this. Keep receipts and records and it is perfectly legitimate. What is not OK is paying a flat daily rate or an honorarium because that could be seen as being payment for services. Again though, be careful to avoid saying, 'you must volunteer for four hours minimum for us to reimburse your lunch expenses'. It is better to say 'If your volunteering covers a normal meal time we will reimburse a reasonable amount to cover this cost'.
- Providing training for volunteers

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- As long as the training is relevant to the role and is open to all volunteers, this is also fine. What is not allowed is to offer people training providing they stay for a certain period of time, as that is a reward explicitly linked to their service and might create a contract. So, for example, you can't say 'if you volunteer with us for six months we'll put you through an NVQ' but you can say 'we offer training to our volunteers and if any of it interests you you are welcome to take part in it'
- Rewards for volunteers
 - You must not create an expectation of a reward or you are potentially forming a contract. Any rewards must be unexpected and available to all volunteers. So, for example, a party or social event is good, but M&S vouchers for a particular volunteer for a particular thing are potentially bad.
- Supervising or assessing performance of volunteers
 - This is generally fine, and is recommended by us as part of good volunteer management. Again the key is that there can be no sanctions or punishments for things not going well. You can't have a three-stage warning system like you would have for a staff member.
- Using staff policies (eg disciplinary) on volunteers
 - This isn't ideal as it suggests that you see them in the same way that you see your paid staff. However, you must have a clear process by which problems can be addressed. This can usually be done as part of supervision and it's OK to have something written down so volunteers know who to take their concerns to
- Asking for notification of holidays etc
 - It's reasonable to ask to be given notice if someone is not going to be there. However, you shouldn't specify how much notice they must give, nor how much time they can take off. The best way to get them to give you loads of notice is to treat them well and support them in their volunteering. That way they'll feel loyalty to you.
- Asking for notification of leaving
 - Again, this is a no-no. It's nice if they tell you but one of the key things about being a volunteer is that you can walk away at any time for any reason. Again, treat them well and you should find that they will tell you if they are considering leaving and/or looking for paid work
- Inviting volunteers to staff meetings or staff socials
 - Perfectly fine as long as it isn't compulsory. And compulsory can be determined by phrases like 'you won't know what's going on if you don't come'

The key things to remember are

1. Avoid giving anything of economic value to a volunteer in return for their volunteering. This is known as a 'consideration' and creates a contract of service. Reimbursement of expenses and training necessary for the role eg IAG training for CAB advisers is perfectly fine.
2. Best to avoid signing an agreement. Fine to provide a 'clarification of expectations' but better not to make it binding. Signing something might give rise to the impression that it was intended to be binding and therefore might form a contract

Exit strategies if things go wrong

Volunteers are not protected by employment law, so why not just ask them to go when things aren't working? Or even just tell them? In practice this is perfectly legal, but it's best avoided if you can, simply because of the potential damage to your reputation and the loss of goodwill and useful skills.

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Key things to remember

- Wherever possible, try to end the relationship on good terms.
- Find a way to thank and recognise the volunteer for the contribution they have made
- Don't allude to the recent troubles if they are being given a 'leaving do'
- Help them form a plan for what they will do now – try very hard not simply to pull the rug from under their feet

Conclusion

If you have any questions or concerns about your relationship with your volunteers, then get in touch with us. We are able to offer telephone advice as and when needed. If you feel you need more support or training, then we may be able to offer a bespoke session for the people in your organisation who need it. We do levy a charge for this service but rates are negotiable so please ask us about it.

DISCLAIMER

The contents of this document are intended as guidance only and do not represent legally-binding advice on the part of the Volunteer Centre Kensington & Chelsea. For specific points of law organisations are advised to contact a specialist legal adviser.