

### **Ask Margaret**

Margaret L. Byrnes, Attorney at Law  
NH Municipal Association (NHMA), Concord, NH

#### ***Our library uses volunteers. What legal issues do we need to be aware of?***

To start, it's important to realize that "volunteer" is a more than a title; it is a legal status, distinct from that of "employee." Employees are legally entitled to various protections and benefits, while volunteers are not. Failure to properly recognize the status of your employee or volunteer can lead to liability issues for a library and municipality.

In general, an individual is a volunteer if she performs work for public, charitable, or religious facilities and does not receive compensation—or have an expectation that she will receive compensation—in return for the services she provides. That's the part most of us know. But, in addition, under New Hampshire law, a *bona fide volunteer* also (1) cannot displace a paid employee and (2) have duties do not necessarily or traditionally lead to paid employment. N.H. Admin. Lab. 803.05(a). Clearly, volunteers should not be brought on with the expectation that they will become—or are training to become—employees of the library. In addition, whether a volunteer displaces a paid employee is a highly fact sensitive inquiry, depending on the nature and extent of the volunteer's duties. In an advisory fact sheet, the U.S. Department of Labor Wage and Hour Division said that this can occur when the employer uses volunteers to "substitut[e] for regular workers or to augment its existing workforce during specific time periods." (Fact Sheet #71, August 2010).

Reimbursement for expenses, reasonable benefits, a nominal fee, or any combination is permitted, but you must use caution. Compensation for hours worked or that is tied in any way to productivity is never permitted because that serves as evidence that the individual is being treated like—and therefore should be categorized as—an employee. Therefore, a small stipend, a nominal fee, an honorarium, or other gifts and gratuities will generally be permitted and not counted as compensation. The Code of Federal Regulations says that "the total amount of payments made (expenses, benefits, fees)" must be examined "in the context of the economic realities of the particular situation" to determine whether an individual loses volunteer status. 29 C.F.R. § 553.106(f).

Finally, an employee cannot volunteer to perform the "same type of services" he is paid to perform as an employee. 29 U.S.C.A. § 203. In other words, an employee can't perform some of his duties or similar duties "off the clock" as a "volunteer" to save the library money.