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Second Circuit Upholds Volunteer Finding Vis a Vis Former Student Turned School Aid

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In *December 2012*, we discussed a lower court's ruling that a young man who volunteered his time at his old high school working with at risk youths was not an "employee" within the meaning of the Fair Labor Standards Act entitled to minimum wage protection. On appeal, the Court of Appeals for the Second Circuit affirmed that decision. , 2014 U.S. App. LEXIS 11412 (2d Cir. June 18, 2014).

In its affirmance, the Circuit court focused on the specific DOL regulation relating to public sector volunteering, analyzing whether Plaintiff in volunteering:

1) ha[d] a civic, charitable, or humanitarian purpose,

(2) ha[d] not been promised or expect[ed] or receive[d] compensation for the services rendered,

(3) perform[ed] such work freely and without pressure or coercion, direct or implied, from the employer, and

(4) [was] not . . . otherwise employed by the same public agency to perform the same type of services.

29 C.F.R. § 553.101. The Court also analyzed whether certain payments to Plaintiff by school administrators were of the type authorized for volunteers by 29 C.F.R. § 553.106.

Based on the record below, the Court was satisfied that the tests were met, and that Plaintiff accepted the volunteer role to help students with the understanding that he would not be paid. The Court reached this conclusion notwithstanding the fact that school administrators occasionally gave Plaintiff Brown small sums of money or transit reimbursement, and indicated at various times that they would search for the funds necessary to provide him with a paid position.

Minimum wage claims based on the failure to treat a remain a source of liability and a . Employers must analyze their relationship with such providers, and in consultation with counsel utilizing appropriate written documentation.

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