

Farmers Market LEGAL TOOLKIT

Volunteers at Farmers Markets: Managing Legal Risks

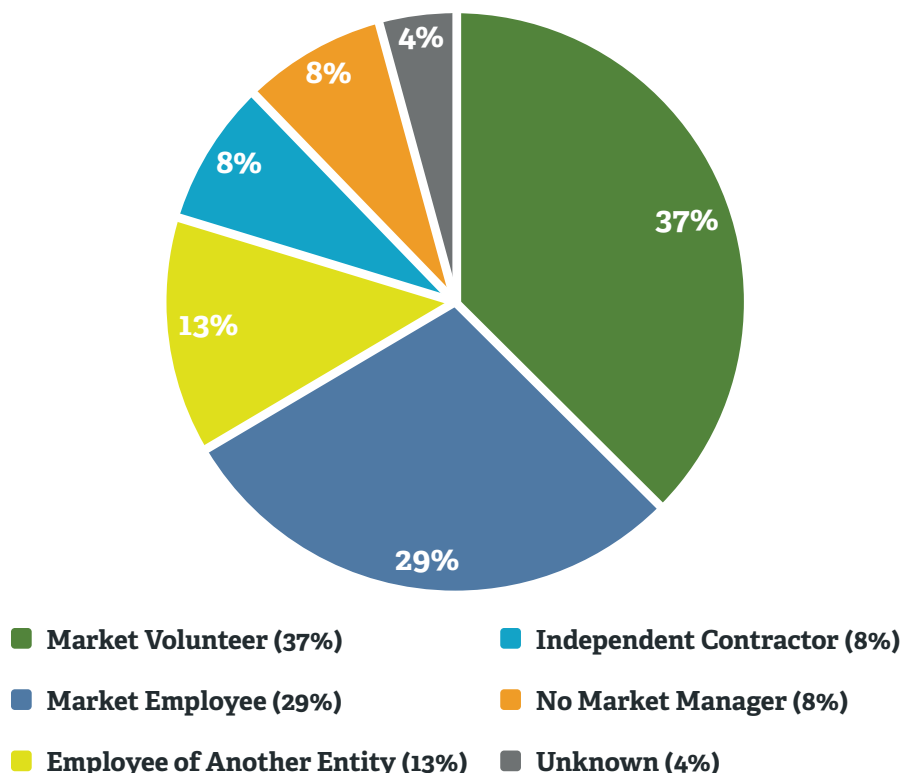


The Role of Volunteers at Farmers Markets

Volunteers are critical to the success of many farmers markets. They can connect markets with their local communities. They can maximize limited market resources. They can also perform work that is impractical or inefficient for employees to perform.

The USDA's [2019 National Farmers Market Managers Survey](https://www.ams.usda.gov/sites/default/files/media/GeneralCharacteristicsandMarketPractices.pdf) demonstrated the significant role volunteers play in farmers markets — 62.4% of farmers markets have at least one volunteer working at the market, and 31,609 people volunteered at farmers markets in 2019.¹

Farmers Market Managers in 2019



The survey results showed that farmers markets most commonly considered their market manager a volunteer. Nationally, 37% of markets relied on a volunteer market manager. Markets in rural communities (50%) and suburban communities (49%) used a volunteer manager more than markets in urban communities (32%). Other markets, particularly those in the western United States (48%), paid an employee or independent contractor to manage their market, and a minority of markets (13%) relied on another entity's paid employee to manage their market.²

AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., 2019 National Farmers Market Manager Survey 5, <https://www.ams.usda.gov/sites/default/files/media/GeneralCharacteristicsandMarketPractices.pdf> (last visited May 10, 2024).



Most markets operate under a board of directors or similar decision-making group.³ Members of market boards, steering committees, or other decision-making groups are also often volunteers.

Employment Classification for Farmers Markets

To understand and manage their legal risks, farmers markets should understand employment classification and properly classify their workers as employees, independent contractors, volunteers, or interns.⁴ Properly classifying market workers has many benefits, including:

- reducing the risk of non-compliance with employment and labor laws;
- managing the risk of liability for personal injury and property damage;
- creating suitable opportunities for employment, business, and community involvement; and
- promoting a fair and equitable work environment.



Who Counts as a Volunteer under Federal Law?

To determine the proper classification for a worker, a farmers market must understand how the law defines a bona fide volunteer and the particular facts and circumstances surrounding the market, the worker, and their relationship. A worker's title does not determine proper classification, and an agreement or understanding between the market and the worker does not determine proper classification.⁵



A volunteer is an individual who provides services to a public agency or a religious, charitable, civic, humanitarian, or similar non-profit organization as a public service and without the promise, expectation, or receipt of compensation for their services.

See 29 C.F.R. § 553.101(a); Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act, U.S. DEP'T OF LAB., WAGE AND HOUR DIV. (Aug. 2015), <https://www.dol.gov/agencies/whd/fact-sheets/14a-flsa-non-profits>; Fair Labor Standards Act Advisor, Volunteers, U.S. DEP'T OF LAB., <https://webapps.dol.gov/elaws/whd/flsa/docs/volunteers.asp> (last visited May 10, 2024).

The primary and relevant federal law for determining whether a worker is an employee or a volunteer is the Fair Labor Standards Act (FLSA). This federal law established minimum wage, overtime, and other standards for employees. Under the FLSA, individuals may volunteer for government agencies.⁶ Individuals may also “volunteer time to religious, charitable, civic, humanitarian, or similar non-profit organizations as a public service and not be covered by the FLSA” standards that apply to employees.⁷ The FLSA does not distinguish between nonprofit organizations that have or have not been recognized as tax-exempt by the IRS in its treatment of volunteers, but **federal law clearly prohibits individuals from volunteering services to for-profit businesses**,⁸ which include sole proprietorships, partnerships, limited liability companies, for-profit corporations, and cooperatives.

Under the FLSA, a volunteer is narrowly defined as “an individual who performs hours of service . . . for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered.”⁹ On the other hand, an employee is broadly defined as an “individual employed by an employer,” and “employ” is broadly defined as “to suffer or permit to work.”¹⁰

Volunteer: “An individual who performs hours of service . . . for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered.”

Employee: An individual “employed by an employer,” where “employ” is defined as “to suffer or permit to work.”

29 C.F.R. § 553.101(a); 29 U.S.C. § 203(e)(1) & (g).

These definitions were designed to prevent employers from avoiding FLSA requirements by pressuring workers to volunteer their services.¹¹ To further guard against coercion, a worker employed by a nonprofit organization or government entity cannot perform work that is similar to their regular work duties as an unpaid volunteer for the same entity.¹² To guard against unfair competition, a worker cannot volunteer for the commercial activities of a nonprofit organization or government entity, such as operating a gift shop.¹³



To determine whether a worker is a bona fide volunteer, the U.S. Dept. of Labor considers several factors:

- Is the employer a nonprofit organization or a government entity?
- Does the worker offer their services freely without pressure or coercion?
- Does the worker expect to receive or receive any compensation for their services?
- Does the worker perform services on a part-time basis?
- Does the worker displace any of the employer's regular employees?
- Does the worker perform services that are typically associated with volunteer work?

U.S. Dep't of Lab., Wage and Hour Div., Opinion Letter FLSA2001-18 (July 31, 2001); see also *Tony and Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290, 303 (1985); 29 C.F.R. § 553.101(c).

What Counts as Compensation under Federal Law?

Volunteers cannot receive compensation for their services.¹⁴ Compensation includes money in addition to anything of value¹⁵ (such as free produce or waiver of vendor fees). On the other hand, federal law allows volunteers to receive "expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers."¹⁶ Whether the amounts associated with these expenses, fees, or nominal benefits would compromise a volunteer's status as a bona fide volunteer under the FLSA is determined by looking at the total amount of payments made "in the context of the economic realities of the particular situation."¹⁷ A court considering this issue would use a test called the "economic reality test," which weighs a set of factors to determine the worker's economic dependence on the employer.¹⁸

Generally, volunteers are allowed to receive reimbursement for costs related to their volunteering¹⁹ (such as mileage reimbursement for travel). A nominal fee cannot be a substitute for compensation and cannot be tied to productivity²⁰ (such as hours of work). In some situations, the U.S. Department of Labor has found that a fee is nominal if it is not more than 20% of what an employer would otherwise pay an employee for the same services.²¹ It is also important to know that volunteers are not protected under the Volunteer Protection Act (discussed in more detail below) if they receive benefits valued at more than \$500 a year.²²

What About State Laws?

If federal and state laws differ in how they define "volunteer," farmers markets must follow whichever law provides greater employment protections to workers. Therefore, markets need to understand both federal and state employment laws. State departments of labor are a good resource to find out about a state's laws.²³

State laws vary in how they define the employment relationship and/or volunteer. However, many states' employment standards laws were modeled after the FLSA and are interpreted similarly to the FLSA. In addition to employment standards laws, state unemployment insurance and workers' compensation laws sometimes define the employment relationship for purposes of those laws.²⁴



Hypothetical Examples

1 Manager is likely a volunteer.

- Farmers Market is a nonprofit charitable organization that operates a small weekly farmers market.
- Vendor, a farmer who sold at Farmers Market's market and voluntarily worked about five hours/week managing the market without compensation, retires.
- Daughter, Vendor's adult daughter, offers to take over for Vendor because Daughter wants the community to continue having access to fresh, local food.
- Daughter spends about 20 hours/week for eight weeks preparing for the new market season and recruits 10 new market vendors.
- As a gesture of appreciation, Farmers Market gives Daughter a gift certificate to purchase \$250 in produce from market vendors throughout the season.

Daughter is likely a bona fide volunteer. Farmers Market was a nonprofit charitable organization. Daughter offered their services freely without pressure or coercion. Daughter did not expect or receive compensation beyond a nominal fee of \$250. Daughter worked part-time. Daughter performed services that were previously performed by another volunteer.



2 Manager is likely an employee.

- Farmers Market is a nonprofit charitable organization that operated a small weekly farmers market.
- Farmers Market's long-time employee, who worked 15 hours/week at \$15/hour to manage the market, retired.
- Vendor, a farmer who sold at Farmers Market's market, offered to manage the market for its 20-week season. All Vendor asked in return was for Farmers Market to waive the \$100/week vendor fee.
- Farmers Market readily agreed, as it would not have to hire and pay for a new part-time employee.

Vendor is likely an employee. Although Farmers Market was a nonprofit charitable organization, and Vendor offered their services freely without pressure or coercion and worked part time, Vendor expected to and did receive \$100/week in compensation for their services and eliminated a part-time employment position.



Legal Risks and Risk Management

What Are Some of the Legal Risks of Misclassifying Employees as Volunteers?

- A federal or state agency could order a market to pay back taxes, including payroll and unemployment taxes, with interest.
- A federal or state agency could order a market to pay penalties for failure to pay wages, pay unemployment taxes, or purchase workers' compensation insurance.
- A federal or state agency could prohibit a market from accessing government contracts for a specified period of time.
- A misclassified employee could sue a market for unpaid wages and benefits. Liability for these costs could fall on the market itself, as well as any individual director or officer who played a role in the misclassification or failure to pay wages and benefits.
- Insurance, including commercial general liability (CGL), directors and officers liability (D&O), and even employment practices liability (EPL), generally does not cover a market's misclassification-related penalties, back taxes, or unpaid wages and benefits.

Employment-related taxes, interest, and penalties; back wages; attorney fees; and court costs can add up and pose a serious threat to the success of a farmers market. The best way to manage this risk is by understanding employment classification and properly classifying farmers market workers.

What Are Some of the Legal Risks of Using Volunteers?

- A market could be liable (i.e., can be sued) for damages if a volunteer who is not covered by the market's workers' compensation, CGL, or other insurance gets ill or injured or their property is damaged.
- A market could be liable for damages if a volunteer whose actions are not covered by the market's CGL or other insurance negligently causes a vendor or customer injury or property damage.

Are There Legal Risks for Volunteers?

Farmers markets and their leaders should be aware of the risks they bear, but they, in addition to the volunteers themselves, should be aware of the legal risks volunteers assume when they volunteer, whether as board members, market managers, or day-of-market workers.

The federal Volunteer Protection Act (VPA) defines a volunteer as an individual performing services for a nonprofit organization or government entity as a director, officer, trustee, or direct-service volunteer who does not receive any compensation other than reasonable expenses or any "thing of value in lieu of compensation in excess of \$500 per year."²⁵



Under federal law, a nonprofit organization or government entity's volunteers are not liable for harm they cause third parties (like vendors and customers) while they are acting within the scope of their responsibilities for the entity, but there are limitations:

- If volunteers don't have a required license, certification, or authorization for what they are doing, they are not protected against liability.
- If volunteers cause harm "by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the [victim's] rights or safety," they are not protected.
- If volunteers cause harm when they are operating a motor vehicle, vessel, aircraft, or other vehicle that requires an operator's license or insurance, they are not protected.²⁶

The VPA does not protect nonprofit organizations or government entities—only volunteers themselves,²⁷ and it does not protect volunteers from liability to the nonprofit organizations or government entities they work for—only to third parties.²⁸

How Can Farmers Markets Manage Their Legal Risks?

- Understand employment classification, and properly classify your market's workers.
- Avoid using volunteers if your market is a sole proprietorship, partnership, limited liability company, for-profit corporation, or cooperative.
- Limit the amount and type of services volunteers provide your market.
- Require volunteers to sign a waiver that releases your market from liability.
- Obtain appropriate insurance to protect your market, its leaders, and its volunteers.
- Implement volunteer application and screening procedures.
- Conduct volunteer orientation and training and create a volunteer handbook.
- Maintain records for each volunteer and their hours worked.²⁹

Disclaimer

This resource provides general legal information for educational purposes only. It is not meant to substitute, and should not be relied upon, for legal advice. Each farmers market's circumstances are unique, state laws vary, and the information in this resource is specific to the time of publication. For legal advice, please consult an attorney licensed in your state.



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Endnotes

- 1 NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., NATIONAL FARMERS MARKET MANAGERS 2019 SUMMARY 20 (Aug. 17, 2020) <https://downloads.usda.library.cornell.edu/usda-esmis/files/pz50hd694/gx41n598k/jd473j98z/nfar0820.pdf>.
- 2 AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., 2019 NATIONAL FARMERS MARKET MANAGER SURVEY 5, <https://www.ams.usda.gov/sites/default/files/media/GeneralCharacteristicsandMarketPractices.pdf> (last visited May 10, 2024).
- 3 *Id.* at 4 (In 2019, 70% of farmers markets operated under a board or other group collectively making decisions).
- 4 See *Fact Sheet #71: Internship Programs under the Fair Labor Standards Act*, WAGE AND HOUR DIVISION, U.S. DEP'T OF LABOR (Jan. 2018), <https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships> (Volunteers at non-profit organizations and government entities include unpaid interns. Interns at for-profit businesses are properly classified as employees, unless they meet seven specific criteria).
- 5 See *Tony and Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290, 301 (1985).
- 6 *Fair Labor Standards Act Advisor, Volunteers*, U.S. DEP'T OF LAB., <https://webapps.dol.gov/elaws/whd/flsa/docs/volunteers.asp> (last visited May 10, 2024).
- 7 *Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act*, U.S. DEP'T OF LAB., WAGE AND HOUR DIV. (Aug. 2015), <https://www.dol.gov/agencies/whd/fact-sheets/14a-flsa-non-profits>.
- 8 Fair Labor Standards Act Advisor, *supra* note 6.
- 9 29 C.F.R. § 553.101(a).
- 10 29 U.S.C. § 203(e)(1) & (g).
- 11 29 C.F.R. § 553.101(b).
- 12 29 C.F.R. § 553.101(c).
- 13 29 C.F.R. § 779.214; *Fact Sheet #14A*, *supra* note 7.
- 14 29 C.F.R. § 553.106(d).
- 15 471 U.S. at 301.
- 16 29 C.F.R. § 553.106(d).
- 17 29 C.F.R. § 553.106(f); see also *Tony and Susan Alamo Found.*, 471 U.S. at 301 (citing *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961)).



Endnotes (continued)

- 18** See Fact Sheet 13: *Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB., WAGE AND HOUR DIV. (Mar. 2024), <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>; see also FARMERS MARKET LEGAL TOOLKIT, EMPLOYMENT CLASSIFICATION FOR FARMERS MARKET MANAGERS 4, CTR. FOR AGRIC. & FOOD SYSTEMS (Nov. 2023), https://farmersmarketlegaltoolkit.org/wp-content/uploads/2023/11/Employment-Classification-for-Farmers-Market-Staff_FINAL_color.pdf.
- 19** 29 C.F.R. § 553.106(b).
- 20** 29 C.F.R. § 553.106(e).
- 21** U.S. Dep't of Lab., Wage and Hour Div., Opinion Letter FLSA2006-28 (Aug. 7, 2006), https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/2006_08_07_28_FLSA.pdf; U.S. Dep't of Lab., Wage and Hour Div., Opinion Letter FLSA2005-51 (Nov. 10, 2005), https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/2005_11_10_51_FLSA.pdf.
- 22** 42 U.S.C. § 14505(6).
- 23** *State Labor Offices*, U.S. DEP'T OF LAB., WAGE AND HOUR DIV., <https://www.dol.gov/agencies/whd/state/contacts> (last visited May 20, 2024).
- 24** See, e.g., VA. CODE ANN. § 60.2-101(2)(l) (“[N]oncompensated employees and noncompensated directors” of 501(c)(3) nonprofit corporations are not employees for purposes of Virginia’s workers compensation law).
- 25** 42 U.S.C. § 14505(6) (States must provide at least as much liability protection to volunteers as the VPA does, but they are allowed to place additional requirements on entities, such as adhering to risk management procedures like mandatory volunteer training, before their volunteers can enjoy liability protections); 42 U.S.C. §§ 14502, 14503(e).
- 26** 42 U.S.C. § 14503.
- 27** 42 U.S.C. § 14503(d).
- 28** 42 U.S.C. § 14503(c).
- 29** See, Fact Sheet #21: *Recordkeeping Requirements under the Fair Labor Standards Act*, U.S. DEP'T OF LAB., WAGE AND HOUR DIV. (July 2008), <https://www.dol.gov/agencies/whd/fact-sheets/21-flsa-recordkeeping>.

