

3 Wage-Hour Tips For Employers Providing Volunteer Time Off

By [Mike LaSusa](#) · June 28, 2021, 4:54 PM EDT

A recent Fourth Circuit ruling could spur some employers to revisit policies providing paid leave for volunteering, after the appeals court found workers aren't necessarily entitled to include hours spent volunteering in overtime calculations.

The ruling was consistent with the intentions of federal policymakers, who have tended to avoid placing additional burdens on employers that set up volunteer time programs as a way to give back to communities where they operate, said Suzanne Newcomb, a partner who represents employers at SmithAmundsen LLC.

"There's an incentive to encourage employers to have these programs," Newcomb said. "They don't want to punish employers for doing good things."

Here, Law360 looks at how the ruling can inform best practices surrounding volunteer time programs.

Check Your Math

The Fourth Circuit ruled [June 17](#) that Lowe's was allowed under federal labor law to exclude volunteer-time pay from overtime compensation calculations, rejecting a proposed class and collective's claims that the home improvement retailer should have counted those payments toward the workers' regular rate.

The appeals court's ruling followed the logic laid out in a March 2019 [opinion letter](#) from the U.S. Department of Labor, which said hours volunteered through such programs don't count as work under the Fair Labor Standards Act because they are "charitable and voluntary."

"This Fourth Circuit decision affirms that this is treated like any other paid time off — that this is not work time," Newcomb said.

While volunteer time programs typically give each worker only a few hours of paid leave, Newcomb cautioned that those hours can add up to serious liability for employers if employees are paid improperly across the workforce.

"It's certainly low stakes from the employee's perspective," she said, "but it could turn into pretty big stakes from the employer's perspective if they cross the line and get it wrong."

Stay Hands Off

Volunteer time programs that are truly voluntary aren't likely to have wage and hour implications, said Michael Palmer, who represents workers as co-chair of Sanford Heisler Sharp LLP's wage and hour practice group. But if employees feel like they could suffer some kind of adverse action for not participating, those hours may need to be counted as work time that factors into employees' regular rate, Palmer said.

"If this truly is voluntary, you need to not be thinking of it as part of your job," Palmer said.

"Even if the employer called it voluntary, but if it was the case that really it was not something

that the employee could choose to avoid doing, at that point it certainly would [count as work time]."

Employers can look to the Fourth Circuit decision as a road map for setting up volunteer time programs that aren't compulsory and won't impact the regular rate calculation, said David Dubberly, a member of Nexsen Pruet LLC who represents employers.

"Lowe's did a good job of setting up a program where it was totally up to the employees whether they participate or not, and if they did, they got to choose the nonprofit, they got to choose how many hours they put in, and the nonprofit gave direction to the employees during the volunteer time," Dubberly said.

Make Sure You're Not the 'Primary Beneficiary'

Even when participation in volunteer time programs is truly voluntary, employers could expose themselves to wage and hour liability if they exert too much control over when and where employees volunteer and what they do during their volunteer time.

"If they don't require it, but they control how you do it, then I think it can be turned into work at that point," Palmer said.

The Fourth Circuit examined whether Lowe's gained more from the volunteer time programs than the charitable organizations where employees volunteered, finding that the charities were the primary beneficiaries.

Palmer said the primary beneficiary question relates to whether workers really have a choice about participating in volunteer time programs.

"It's another way to look at whether the employee is being controlled," he said. "The more it benefits the company, the more likely it is that the company may be expecting it to be done."

Dubberly echoed those comments, advising employers to avoid directing or exerting control over workers' volunteer activities.

"The court uses that term, 'primary beneficiary,' twice in one paragraph, which shows you that the main takeaway for employers ... is to make sure the primary beneficiary is the charitable organization and not the employer," he said.