

VOLUNTEERING VS EMPLOYMENT | FREQUENTLY ASKED QUESTIONS

1. What are the definitions of employer and employee?

Under the immigration regulations, the term “employer” means a person or entity, including an agent, who engages an employee to perform services or labor in the United States for wages **or other remuneration**. The term “employee” means an individual who provides services or labor for an employer for wages **or other remuneration**. Please note that the definition of employer and employee in immigration law may be stricter than the definition of employer and employee in a particular state’s employment law.

2. Is volunteering considered employment?

The “legacy” (former) INS (Immigration & Naturalization Service) has indicated in guidance memos that volunteers are people who provide their services without any reasonable expectation of wages or other remuneration, including but not limited to room and board, gifts or other benefits, as described by Internal Revenue Service guidelines. The current USCIS (Citizenship & Immigration Services) has indicated that prior INS guidance remains valid until it is superseded. Even if these types of compensation are not provided, it is possible that USCIS could consider holding a future job offer open to constitute compensation. Thus, performing activities for which there would be a reasonable expectation of wages or other remuneration (e.g., performing substantive duties as an intern at a private company) would likely be deemed unauthorized employment, even if no salary were paid to you. Conversely, performing activities for a nonprofit charity or religious organization would not likely be deemed employment, if occasional gifts were provided to the volunteer as a consequence, as long as no expectation of such gifts existed at the time the volunteer activity was performed.

Please note this information highlights immigration aspects of volunteering and there may be additional restrictions on volunteering under federal employment law and a particular state’s employment law. For example, it may not be permissible for a volunteer to perform duties that are typically performed by an employee. Employment law refers to the intent of the parties; therefore if the individual intends to volunteer for public service, religious or humanitarian objectives, and without contemplation of any form of compensation, he or she may not be an employee. However, if an individual offers to work for the purpose of gaining experience, he or she may be considered an employee.

3. What about independent contractors?

The term “independent contractor” includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, is determined on a case-by-case basis. Typically the individual or entity is an independent contractor if he or she:

- supplies the tools or materials
- makes services available to the general public
- works for a number of clients at the same time
- has an opportunity for profit or loss as a result of labor or services provided
- invests in the facilities for work
- directs the order or sequence in which the work is to be done, and
- determines the hours during which the work is to be done

Federal requirements for independent contractor status are outlined at www.irs.ustreas.gov; and a particular state’s requirements, which may vary from the federal requirements, may be on the state department of labor’s website (e.g. in California, at www.edd.cahwnet.gov). Although the tax status of these two types of workers is different, the immigration penalties for the knowing hire of an “unauthorized” independent contractor are the same as for the knowing hire of an employee.

4. What are the penalties?

Immigration law penalties for employment of an unauthorized alien can range from monetary fines of at least \$250 for the first violation, to injunctions, cease and desist orders, and criminal penalties and imprisonment for “pattern and practice” violations. There may be additional penalties under federal employment law and a particular state’s employment law.