Memorandum of Law

TO: The Mayor's Office
FROM: Krishan Thakker, All
DATE: Thursday, April 16th 2009
RE: The Present Need for a Definitional Legislative Enactment of 'Volunteer Worker(s)' under Local New York City Labor Law, and the Protection of Volunteer Workers via the Granting of Rights under New York City Anti-Discrimination Law

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RECOMMENDATION

The position to be taken is that there is a demanding need in today's economic environment for voluntary workers and applicants for voluntary positions to receive, by way of a separate legislative enactment/amendment under New York City Law, the same anti-discrimination & sexual harassment employment rights granted to their paid employee counter-parts.

SUMMARY

It is proposed that the City should adopt a separate legal definition of 'volunteer workers' by utilizing precedential US State and Federal case-law, inferences from existing statutes, as well as practical dilemmas related to the current economic climate, all to serve as a foundation. The legislative enactment could occur by way of amendment to either New York Labor Law ss. 200, 240(1), 241(6) et seq., or New York Human Rights Law, N.Y. Admin Code 8-102 et seq, thus providing a definition of a volunteer worker under these employment statutes. Currently, statutes and the common law governing this area are silent on the matter. Presently, public and private employers and recruitment agencies have no clarification on which characteristics of the

employer-employee relationship, or actions by the employer, render a 'volunteer' relationship into an 'employment' one, and vice-versa. Courts and employers constantly have to engage in statutory and common law construction in making non-definitive inferences as to what a volunteer's characteristics are composed of. This has led to much uncertainty and confusion pertaining to the recruitment of volunteer workers across the City, as well as discrimination and sexual harassment claims of the same. Employers also need to know how to avoid risking liability, especially in light of our economic environment whereby we are faced with an increasing number of workers being laid off as a result of the recession; demand for volunteers or indeed relocating already existing employees to 'volunteer' status, thus too has grown since firms and public organizations have an abundance of work relevant to volunteers, and they wish to obviously cut their costs so as to achieve market efficiency. Further, professional unemployed or redundant workers such as lawyers want to find vocations where they can offer their services *pro bono* so as not to diminish their working capacity, skills and overall employability rate. Henceforth, due to the popularity, significance and reliance of and upon volunteer staff today, a social and business need exists to define the limits and boundaries of their duties, responsibilities and rights.

It is ascertained that by having a legal definition of 'volunteer worker' as set out above, it would thence be required to determine those circumstances where volunteer workers would and would not have the same anti-discrimination rights of an employee. Thus, the second section of the legal memoranda is responding to the invitation to comment on anti-discrimination legislation of the City of New York, and overall it submits that provisions of the local municipal anti-discrimination legislation should extend to volunteers. There are four key reasons why

volunteer work deserves legal protection. Firstly, it is a fact that discrimination against volunteers does occur and is now more likely to occur. Secondly, older, racially diverse and varying sexually orientated New York City citizens will represent an increasing proportion of volunteers or indeed potential volunteers to come. Thirdly, the contribution of volunteers should be recognized in tangible ways that are valued by volunteers themselves, such as via the grant of legal protections. Fourthly and finally, the inclusion of volunteer work would support other government policy objectives that promote community participation and social engagement. Therefore, this part of the memoranda shall advocate for the position of volunteer workers being granted identical discrimination/harassment employment rights as employees.

DISCUSSION

Volunteers play an important role in our communities and often interact with employees in the workplace. While paid workers generally do not volunteer their time for an employer's benefit in the private workplace, a trainee or intern may be part of a company or an organization's staff force. A public employer, such as a municipality, may rely on a volunteer fire-fighting crew for instance to provide fire services, or other humanitarian, charitable, or civic assistance. In addition, community volunteers may involve themselves in the workplace to implement a fund-raising campaign or to organize a blood drive. Although there are important legal distinctions among trainees and volunteers under New York City wage and hour laws, for simplicity's sake, trainees, community volunteers, and municipal volunteers will all be referred to collectively as 'volunteers' hereafter. The question lies - what is an employer to do if a volunteer complains he or she is being sexually harassed or otherwise discriminated against in the workplace? Alternatively, is the organization responsible when an employee complains that a

volunteer is harassing or discriminating against workers? Currently, there is no clear nor certain indication of the answers to these significant questions under City law. The resolution solely lies in various state and federal-level case-law and legislation. Moreover, after having analyzed the law pertaining to this subject, it seems to be true that there are limitations as to when a volunteer can bring such actions or have actions brought against them. These limitations will now be portrayed through the analysis to follow. First, we shall explore the current position of the law in this respect as it is today, and second, we shall examine and debate the proposals for reform in this grey area.

Current Legal Position

Federal employment discrimination statutes, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination In Employment Act of 1967, and the Pregnancy Discrimination Act, consistently use the word "employee," but do not specify what characteristics make an individual an employee. Consequently, courts have been forced to make this determination on a case by case basis. The courts have addressed the issue of whether a volunteer is an employee in two contexts. The first has arisen when a volunteer alleges discrimination. The second is when an organization claims that it is not subject to federal employment discrimination laws because it does not employ the minimum number of employees necessary to trigger application of the laws. In this context, the courts have had to decide whether volunteer workers should be counted as employees. In both contexts, federal courts have uniformly concluded that uncompensated volunteers are not "employees" and, therefore, are not entitled to the laws' protections.

In a recent case, though, a federal court of appeals ruled that a volunteer fire fighter who receives benefits from her membership in a fire company *may* be covered if those benefits represent

"significant remuneration." (Haavistola v. Community Fire Co. of Rising Sun, Inc., 6 F.3d 211, 222 (4th Cir. 1993)). Haavistola holds that the label of "volunteer" will not automatically exempt an individual from being considered as an employee under federal employment laws. Haavistola is important because it is the first appeals court case to address these issues. According to Haavistola, courts must examine whether the benefits a volunteer receives represent "indirect but significant remuneration" rather than merely "inconsequential incidents of an otherwise gratuitous relationship." A volunteer who receives significant remuneration in exchange for services may qualify as an employee.

Therefore, in reaching their decisions, the federal courts have found that compensation is an essential element of employee status. In Pietras v. Board of Fire Commissioners 180 F.3d 468 C.A.2 (N.Y.),1999, the Second Circuit also held that volunteer firefighters may be considered employees for Title VII claims. The Court held that "An employment relationship within the scope of Title VII can exist even when the putative employee receives no salary so long as he or she gets numerous job-related benefits." The Court found that the firefighter received similar, if not better benefits than the plaintiff in Haavistola, supra, and thus found that the firefighter was an employee for purposes of Title VII claims. Prior to Haavistola two district court Title VII cases were considered to be the most important in this area. Both of these cases concerned whether "volunteers" were to be counted as employees when determining if an entity employed 15 individuals and was covered by Title VII. Thus, the court in each case did not directly address the issue of discrimination against a volunteer as a violation of Title VII.

The case of Smith v. Berks Community Television 657 F.Supp. 794 (E.D.Pa.1987) illustrates the federal courts' approach in this area. In that case, the court reviewed the distinction between paid and unpaid services and found no protection for volunteers under Title VII. According to the

court, "in enacting Title VII, Congress sought to eliminate a pervasive, objectionable history of denying or limiting one's livelihood simply because of one's race, color, sex, religion or national origin." It then held that "reading the term 'employee' in light of the mischief to be corrected and the end to be attained... unpaid volunteers are not employees within the meaning of the Act." The court, therefore, held that employee status requires an economic relationship between the individual and the employer. Because volunteers, being unpaid, are not subject to the economic injuries due to discrimination which the statute was designed to prevent, the court reasoned that volunteers are not denied access to a means of livelihood, and thus are not protected by the statute.

The second case was Hall v. Delaware Council of Crime and Justice, 780 F. Supp. 241 (D. Del. 1992). The defendant in Hall had less than fifteen employees if volunteers were excluded. The plaintiff in Hall alleged that the volunteers should be included as employees since they received certain fringe benefits--in particular, free admittance to an annual luncheon. The court in Hall rejected this argument, reasoning that "even if Plaintiff's factual contentions are correct, the Court concludes that the 'remuneration' received by DCCJ volunteers is insufficient to consider these volunteers employees for purposes of Title VII." A third case, Graves v. Women's Professional Rodeo Association, 907 F.2d 71 (8th Cir. 1990), dealt with the analogous question of whether the denial of membership in a non-profit organization based upon the applicant's sex could be challenged under Title VII. In Graves, the United States Court of Appeals for the Eighth Circuit held that the relationship between an association and its members is not one of employer-employee and therefore Title VII did not apply.

Consequently, from the above discussion, the following question arises - what kind of benefits

can be classified as "significant remuneration"? The benefits Haavistola received include a state-funded disability pension, survivors' benefits for dependents, scholarships for dependents upon disability or death, bestowal of a state flag to family upon death in the line of duty, benefits under the Federal Public Safety Officers' Benefits Act when on duty, group life insurance, tuition reimbursement for courses in emergency service techniques, tax-exemptions for reimbursed travel expenses, ability to purchase a special commemorative registration plate for private vehicles without paying extra fees, and access to a method by which she may obtain certification as a paramedic. The court did not in that case, however, indicate how these should be weighed. The holding is significant because it suggests that whether a volunteer will be covered by the federal employment laws will almost always be a jury question. Interestingly, on remand, the District Court in Haavistola once again determined that Haavistola was not an employee.

New York State Human Rights Law (N.Y. Exec Law sec 292 et seq.) is silent on the issue of volunteer's rights and protection from discrimination. There have been no reported cases discussing volunteers under this statute; nevertheless, it can be deemed possible to still infer a reasonable outcome based upon statutory construction and related common law. The answer can be said hence to be that generally there is no coverage for volunteers. Executive Law § 296(1)(a) incorporates the well-established common law definition of 'employee', predicated on the degree of control that the employer has over the means of reaching a particular result. N.Y. Exec. Law § 297(9) provides a right of action against unlawful discriminatory practices. Section 297(9) applies, inter alia, to both employment discrimination and discrimination in places of public accommodation. N.Y. Exec. Law § 291(1), (2). The CHRL (below) provides a similar

right. As the district court in York v. Ass'n of the Bar of the City of New York No. 00-5961, 2001 WL 776944 (S.D.N.Y. July 9, 2001) (citing N.Y.C. Admin. Code § 8-502(a)) recognized, "the language of the CHRL is nearly identical to that of § 297(9)", and discussion of the latter applies equally to the former.

However, Scott v. Massachusetts Mut. Life Ins. Co., 86 N.Y.2d 429 (October 19, 1995) explicitly extends to Executive Law § 296(1)(a) the well-established common law definition of "employee." The case provides an important clarification of the scope of 296(1)(a). Like Title VII of the 1964 Civil Rights Act, the scope of New York Executive Law § 296(1)(a) is limited to the common law definition of "employee," predicated on the degree of control that the employer has over the means of reaching a particular result. This view is confirmed after having examined other states' common law. While most state courts that have considered the question have followed the federal courts' trend in concluding that employment discrimination laws do not presumptively apply to volunteers, some have taken a different approach and a few have reached a different result. The following cases analyze the degree of control that the organization has over the individual instead of focusing on the economic relationship between the volunteer and organization.

Harmony Volunteer Fire Company & Relief Association v. Pennsylvania Human Relations Commission 34 Pa. Super. Ct. 595, 459 A.2d 439 (1983) illustrates this "control" analysis. In Harmony, the court held that the Pennsylvania Human Relations Act, which prohibits discrimination against employees, applies to volunteer fire companies which rejected women applicants. In determining whether the fire company was an employer under the Act, the court bypassed a compensation analysis, stating that "although the duty to pay a salary is often coincident with the status of employer, it is not an absolute prerequisite". Instead the court ruled

that the key to the relationship is the employer's power to control the details of the employee's activities. The court concluded that the fire company qualified as an employer because it had tight control over such employment-related matters as hiring, firing, training, and assignments. Other states have looked to the federal courts for guidance in applying their employment discrimination laws and have found that uncompensated volunteers are not protected under state law. For example, in City of Fort Calhoun v. Collins 500 N.W.2d 822, 825 (Neb. 1993), the Nebraska Supreme Court held that because the Nebraska Fair Employment Practice Act is patterned after Title VII of the Civil Rights Act of 1964, its interpretation should be similar. The court held that volunteer fire fighters are not employees within the meaning of the Nebraska statute because they receive insufficient compensation.

Under New York City Human Rights Law ("CHRL") (N.Y. Admin Code 8-102 et seq), the statute provides a right of action against unlawful discriminatory practices. The CHRL provides a similar right to that of State Human Rights Law (above). As case-law has recently recognized, the language of the CHRL is nearly identical to that of N.Y. Exec Law § 297(9), and thus discussion of the latter applies equally to the former.

Under New York Labor Law §§ 200, 240(1), 241(6) et seq, protection is not afforded to "[a] volunteer who offers his [or her] services gratuitously" (Whelen v. Warwick Val. Civic & Social Club, 47 N.Y.2d 970, 971, 419 N.Y.S.2d 959, 393 N.E.2d 1032; see § 2[5], [7]; Schwab v. Campbell, 266 A.D.2d 840, 697 N.Y.S.2d 424; Yearke v. Zarcone, 57 A.D.2d 457, 460-461, 395 N.Y.S.2d 322). Although the Labor Law defines an individual "employed" as including one who is "permitted or suffered to work" (s 2, subd. 7), this definition must be read in conjunction with

that of "employee", which is defined as "a mechanic, workingman or laborer working for another for Hire" (s 2, subd. 5). Generally, recovery under the Labor Law has been barred in actions where the plaintiff has been a volunteer (see Chabot v Barr, 82 AD2d 928; see also Attanasio v Attanasio, 126 AD2d 812; Alver v Duarte, 80 AD2d 182). Although there is an absence of judicial authority directly on the issue of what characteristics define a "volunteer" under New York Labor Law, it can be inferred from the statutory wording as well as related case-law that in order for a person to be classified as an "employee" for the purposes of the Labor Law provisions, s/he must be an authorized and hired worker in receipt of compensation for their services.

At present, a City volunteer may lodge a complaint of discriminatory harassment resulting from misconduct in the workplace. The alleged harassment may be based on that individual's sex, disability, age or other protected class. In such circumstances, the complaining party often takes the position that his or her role in the workplace has sufficient indicia of employment such that he or she should be protected by federal and state employment laws prohibiting discrimination. However, in order to bring a valid claim against an employer under these laws, the 'volunteer' must successfully establish (i) that he or she received or expected to receive remuneration from the employer, and (ii) that the employer controlled, to some degree, his or her duties. Importantly, the volunteer need not necessarily be paid a salary to fall within the scope of the law. Provision of certain benefits, such as disability, pension, vacation, health insurance or other substantial rewards, may suffice. Providing a volunteer such benefits is not uncommon in the public sector and may indeed be a creature of state law.

To avoid liability under state and federal employment discrimination laws, employers should

take care not to jeopardize the status of volunteers by promising the payment of wages or other benefits. If such benefits are promised, expected or paid, volunteers may successfully argue, depending upon their role in the workplace, that they are protected by state and federal employment discrimination laws. Additional liability under state and federal wage and hour laws may also ensue if a person is compensated like an employee. Even if a volunteer does not fall within the protection of federal and state employment discrimination laws, organizations taking in volunteers should still act carefully and proactively in this area when faced with discriminate complaints. Employers should make an effort to ensure that volunteers, particularly those who are regularly in the workplace, are fully informed of how to report harassment claims. Harassment and discrimination involving volunteers should be investigated and any problems promptly corrected. Liability may ensue under alternative anti-discrimination laws that are not limited in application to employees, including the Constitution and public accommodation statutes, as well as under the common law for claims of emotional distress, invasion of privacy, and assault and battery. Most importantly, as with any harassment, elimination of the misconduct in the workplace will likely result in a more productive environment, improved morale, and better public relations.[1]

Yet recent trends in litigation, as we have witnessed above in the discussion, reflects that social realism is far departed from this ideology. This alleviation of misconduct does not seem likely to speedily occur without statutory intervention by the City of New York.

Nonetheless, we are seeing a change towards greater legal protection and a valid status of

[1] Volunteers in the Workplace and Employment Discrimination Law, 'The applicability of employment discrimination laws to unpaid workers', by Anne N. Walker.

volunteers in other states. Recently, the Appeals Court of Massachusetts recently ruled that even volunteer workers, who are neither compensated nor "employees" covered by the state's anti-discrimination statute, Mass. Gen. Laws ch. 151B, nonetheless are entitled to protection against sexual harassment and may bring a civil action pursuant to Mass. Gen. Laws. ch. 214, § 1C to remedy on-the-job harassment. In *Lowery v. Klemm*, 63 Mass. App.Ct. 307 (2005), a volunteer worker at a town swap shop brought suit against a co-worker for sexual harassment pursuant to

Mass. Gen. Laws. ch. 214, § 1C, which states that "a person shall have the right to be free from sexual harassment." The Superior Court granted the defendant co-worker summary judgment because the plaintiff was not an employee. However, because the Appeals Court found that ch. 214, § 1C extended beyond "employees" to protect "persons" against sexual harassment, it reversed the trial court's decision and remanded the case back to the Superior Court for further proceedings. The Appeals Court, however, did not define how damages permitted under ch. 214, § 1C would be calculated for a volunteer worker. Presumably, wage-based damages would be inapplicable, leaving the plaintiff to seek only emotional distress damages[2].

This decision seems to be in coherence with a strict literal textualist interpretation of Title VII because, *prima facie,* the wording of the statute dictates that volunteers can be included within the definition of 'individual' since 'individual' is not defined exhaustively. Pursuant to Title VII of the Civil Rights Act, Section 703 (d), one can see how it might be possible for volunteer workers to bring potential Title VII discrimination claims against their 'employers', so to speak. Hence, on the face of it, it reasonably appears as though volunteers are covered by federal

[2] 'Volunteer Workers May Bring Suit For Sexual Harassment In Massachusetts' by Windy L. Rosebush, Client Update for Edwards & Angell LLP, May 2005.

discrimination law. There is no mention of 'employee' in s703, and case-law has even suggested that 'employee' can be defined and interpreted quite broadly; though some cases have taken the position that 'volunteer' is not part of 'individual', the discussion to follow suit argues for the originalist meaning of the Constitutional anti-discrimination provision.

Proposed Legal Position - Changes to Local Law by a Separate Definition of 'Voluntary Worker' and Granting Concurrent Anti-Discrimination Rights

The current volunteer movement that is taking place in the United States as a result of the global downturn can be said to have expressed a diverse body of views and needs since the activity of volunteering is one of enduring social, cultural and economic value. The elements of the definition of volunteerism as outlined already make the activity unique that is distinguishable from other forms of unpaid work. For instance, community service orders, though a form of uncompensated work, are court imposed penalties and hence are not undertaken of free will and without coercion; work experience is an institutionalized method of giving secondary or tertiary students an opportunity to experience working conditions but does not take place in not-for-profit organizations only; and caring usually describes the situation of caring for a relative so does not take place through non-profit organizations or in a designated volunteer position only, and the question of whether the caring that takes place is entirely of the carer's free will also arises.

There are four key reasons why volunteer work should be included in the current City anti-discrimination legislation as an area in which, for example, age, sexual orientation, gender, race, ethnicity or national origin discrimination should be prohibited. These are:

1. Discrimination against volunteers does occur and is predicted to occur in the future;
2. Older, racially diverse and/or varying sexually oriented New York City residents will represent an increasing proportion of volunteers or potential volunteers;
3. The contribution of volunteers should be recognized in tangible ways that are valued by volunteers themselves i.e. via the use of legal protections; and
4. The inclusion of volunteer work would support other government policy objectives that promote community participation and social engagement.

<u>Discrimination against volunteers does occur and is predicted to occur in the future</u>

Among the rights that volunteers should have is the right to be interviewed and employed in accordance with equal opportunity and anti-discrimination legislation. Unfortunately, currently there is limited legal application of the relevant legislation in respect of volunteers. There is a consensual awareness amongst national peak bodies for volunteers and networks of regional volunteer resource centers that some organizations do discriminate against volunteers for reasons of, for instance, age alone. For example, a member of a lawn bowls club in the City recently contacted their local trade union, concerned that the club constitution requires the President and Vice President, both volunteer board positions, to step down when they reach a certain age – and no rationale was provided for such age limit.

Discrimination against volunteers by a particular organization can have the effect of

discouraging the volunteer or potential volunteer from offering their services elsewhere, effectively removing an individual's right to make a valid contribution to their community and denying the community the benefit of this contribution.

A Diversifying Population and Our Future of Volunteers

New York City is known for its rich mix of ethnic diversity, manifesting itself in scores of communities representing virtually every nation on earth, each preserving its identity. Since the 1980s New York City has undergone substantial population growth, primarily due to new immigration from Latin America (especially the Dominican Republic), Asia, Jamaica, Haiti, the Soviet Union and Russia, and Africa. 36% of the city's population is foreign-born[3]. With a total population of over 8 million residents, 45% are White, 17% are Hispanic, 17% are Black, 10% are Asian and 11% are European.

Furthermore, 13.2% of the total population are aged over 65, 51.5% are female, and 3,606,147 residents have been reported to have a disability[4]. The Department of City Planning have also projected that in the next 30 years, New York City will see dramatic increases in its elderly population. The number of persons aged 65 and over is projected to rise 44.2% (from 938,000 in 2000) to 1.35 million in 2030[5]. Hence, it can be asserted that New York City's population is

[3] New York City Department of City Planning (2005). "The Newest New Yorkers: 2000" (PDF). http://www.nyc.gov/html/dcp/pdf/census/nny_briefing_booklet.pdf. Retrieved on 2007-03-27

[4] US Census Bureau, http://quickfacts.census.gov/qfd/states/36000.html

[5] Briefing Booklet, New York City Populations Projections by Age/Sex & Borough, http://www.nyc.gov/html/dcp/pdf/census/projections_briefing_booklet.pdf

ageing. In 2000, over 30% of people in the 65-74 years of age group and 17% of those in the 75 and over age group volunteered, constituting a large proportion of New York City's total number of volunteers[6]. More so, the U.S. city with the largest gay population is New York, with an estimated 272,493 gay residents[7].

With this borne in mind, it should be taken note of that New York City has an average annual volunteer rate of 17.1%, with 2.5 million volunteers serving 314.8 million hours per year. By donating time to serve, New York City's volunteers make an estimated annual economic contribution of $6.1 billion, and the average volunteer hours rate per resident is 21.3 hours[8]. Given these demographic trends that shows an increasingly large number of people in the suspect class groups, the City simply cannot afford to allow a situation where volunteers can be discriminated against on the basis of arbitrary distinctions. It is these groups of New Yorkers who will potentially comprise our biggest group of volunteers and largest contributors of volunteer time in the future.

Value of Volunteer Contribution

As mentioned above, approximately 2.5 million New Yorkers undertake voluntary work per year, contributing 314.8 million hours in unpaid work each year. The contribution that volunteers

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6 Voluntary Work Survey 2000, New York City Bureau of Statistics, 2001

7 Gary J. Gates Same-sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey PDF (2.07 MiB). The Williams Institute on Sexual Orientation Law and Public Policy, UCLA School of Law October, 2006. Retrieved April 20, 2007.

8 http://www.volunteeringinamerica.gov/city.cfm?cityId=98

make to the New York City social and economic environment, whether during community support activities, major sporting events, emergencies or City-wide functions, is invaluable and deserves tangible recognition and better legal protection. While volunteers value the individual, communal and societal appraisals and acknowledgments received, consultations to develop certain agendas on volunteering have highlighted that these volunteers also want tangible recognition of their contribution and increased protections. Therefore, this is one reason why it is specifically sought to have anti-discrimination laws explicitly mention volunteers via extensions to them. In addition, nonprofits unprepared for what appears to be a historic influx of volunteers by not having this essential rights-empowerment, risk sending those volunteers back home, under appreciated, consequently losing them indefinitely - not just as volunteers, but also as cash donors when the economy revives. Hence, it is important for volunteers to feel important and appreciated in their workplace via this necessary statutory enactment which ultimately would result in the enforcement of the same rights as other employees performing the same tasks as them.

Supporting Current Local Governmental Policy Objectives

A number of current City Government policies incorporate strategies that promote volunteering and community contribution as important factors in individual and community well being. Recently the New York Law Journal cited and commented upon the Law Department's volunteer attorneys. The Public Service Program, brings attorneys who have been laid off to the Law Department to try cases and take depositions. The Corporation Counsel, Michael Cardozo, mentioned to large law firms in the City in a recently issued letter that the 'program not only allows an associate to polish his/her skills and gain valuable deposition experience, but at the

same time provide an important contribution to the City'[9]. This new local governmental initiative can be said to be an incremental part of a larger, broader federal regime. Volunteers are stepping forward as never before. For instance, applications through the AmeriCorps online system for volunteer service in February 2009 were up 208% compared with the same month last year.[10] It is mainly the predominance of cash-poor and time-rich volunteers who have caused this new movement to emerge. It can be said that such people believe that what they are doing is just as valuable as earning monetary gains. Indeed, this psyche has been so fundamentally common that the charity world has put a value on the volunteers' time I.e. $19.51 per hour as estimated by the Independent Sector, a think-tank for charities. President Barack Obama during his election campaign stated that community service is going to be a central issue. In a more recent article in *TIME* magazine, President Barack Obama is shown to have said during an interview that during the economic crisis, the need for an army of volunteers is more urgent than ever, 'through service, I also found a community that embraced me, a church to belong to and the direction I'd be seeking. Through service, I found that my own story fit into a larger American story.'[11] Additionally, the U.S. Congress currently is reviewing bipartisan legislation the Obama Administration has sent them i.e. the Serve America and GIVE Acts, which if passed, will 'usher in a new era of service in this new century.'[12] The legislation is aimed to establish 250,000 Americans a year who are willing to serve part or full time working to meet America's most

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[9] 'Laid Off Lawyers Offered (Unpaid) Work, Ego Boost' by G. Walder, New York Law Journal, 03/13/09.

[10] 'The Nonprofit Squeeze' by Dan Kadlec,TIME magazine, 03/30/09.

[11] 'A New Era of Service', Viewpoint, TIME magazine, by Barack Obama. 03/30/09.

[12] Id.

pressing challenges, from modernizing schools to building homes for those in need. The law, if enacted, will provide new support for social entrepreneurship, identifying and nurturing promising new service programs around the country. At a time where the healthcare system needs urgent reform, volunteers can be said to be needed in hospitals and communities to care for the sick and aid people lead healthier lives. Military service too needs to be widely promoted in order to sustain its reputation of the finest military service in the world. Obama ends the interview by calling upon the American people to do their part and 'get involved'.[13]

Legislative recognition of the role of volunteers thus reinforces the Government's view of the importance of volunteering and the benefits that it provides to individuals and communities. Explicit inclusion in appropriate legislation provides volunteers with a tangible recognition of the value of their work and demonstrates a commitment to affording them some important rights. On the other hand, omitting volunteer work from the anti-discrimination legislation would leave it open for organizations to make arbitrary decisions about the involvement of volunteers based solely on factors such as age, race, sex, and so on. This potentially denies some people the opportunity to contribute to their communities and conveys unacceptable messages to the community at large about the value of the contribution offered by those whom are young, old, and ethnically, racially, nationally and sexually diversified, who are habituating in New York City.

[13] Id.

REMEDIES

Since volunteers are unpaid workers, upon a successful legal action, they obviously would not be ordered the same monetary awards as paid employees would i.e. front pay, back pay, loss of wages, loss of profits, etc. However, a Court of law can however issue various other remedies via either a writ of mandamus or indeed through the payment of damages; because these are numerous, a non-exhaustive list of such is provided below:

- Hiring an applicant for a voluntary position or re-hiring;
- Promotion;
- Reinstatement;
- 'Reasonable Accommodation';
- Other actions that would make the volunteer 'whole' i.e. the condition s/he would have been in but for the discrimination;
- Payment of attorney's fees, expert witness fees and court costs;
- Compensatory and punitive damages if intentional/aggravated discrimination found i.e. where an employer has acted with malice/reckless indifference (NB. Punitive damages are not be available in an action against the local NYC government);
- Damages for mental anguish, emotional distress and/or inconvenience;
- Nominal damages for a mere violation of volunteers' rights.

ISSUES

Clearly, there is never a new right without a new obligation nor a new consequence. It is recognized that the inclusion of volunteer work raises some additional issues and questions that must be addressed if the proposed legislative amendment is to have its intended effect.

In particular, the following issues emerge:

- Impact of either extending the definition of 'employment' on the distinction between paid and volunteer work, or creating a new definition of 'voluntary worker'.
- Impact of the proposed 'exemption for insurance provision' on volunteer involving organizations.
- Impact of 'exemption for inherent requirements of the job' on volunteer involving organizations.
- Risk of excessive litigation in NYC.

These issues are addressed on the following pages.

Impact of extending the definition of 'employment' or creating a new definition of 'voluntary worker'

Volunteer work should be included in the proposed legislation as an area in which discrimination of all aforementioned characteristics such as age, gender, race, sexual orientation, etc, is prohibited. However, the question of whether the definition of 'employment' for the purposes of the proposed legislation should be extended to include volunteer work, or whether volunteer work could be provided for separately elsewhere in the legislation by way of amendment, is perhaps more a matter of statutory drafting. It is recommended by the author of this memorandum that 'voluntary worker' be provided for separately as a definition.

It is correct to assume that 'employment' is usually understood to mean work done for remuneration and that volunteer work is undertaken for no financial reward. Therefore if volunteer work is to be included in the definition of employment it must be explicit that this is not interpreted to mean that volunteers should be remunerated for their services.

It would be a matter of serious concern if the situation were to arise in which a person who genuinely undertakes 'volunteer work', that is, the work meets all of the elements of the definition outlined previously, could later claim (and a court would agree) that they were actually 'employed' (in the remunerated sense of the word) and therefore entitled to remuneration for past activities.

This would have an immediate impact on the capacities of not-for-profit organizations, and would significantly distort the lines between paid and volunteer work.

The legislation would hence need to be clearly drafted to ensure that there is a distinction between paid employment and volunteer work.

Impact of the 'exemption for insurance provision' on Volunteer Involving Organizations

The author of this memoranda promotes the right of volunteers to be adequately covered by insurance and identifies this as an element of best practice in the City of New York's Standards for volunteer workers. This right extends to all volunteers – regardless of age, sex, or other characteristics.

Unfortunately, a number of insurance policies that provide personal accident cover for volunteers contain exclusion clauses for volunteers under or over specified ages.

The effect on volunteer organizations of this exemption for the provision of insurance is that they will not always be able to offer adequate protection (in the form of personal accident insurance cover) to potential volunteers. Organizations will be faced with the choice of permitting volunteers to work without adequate insurance or excluding volunteers in the affected age range.

The option of permitting volunteers to work without insurance is a position which is wholly not supported by the author of this project as this would be a direct contravention of the volunteers' rights. The option of excluding volunteers within the affected age ranges, has two possible 'flow on', as it were, effects:

1) Volunteer organizations with a genuine desire to protect volunteers through the provision of relevant insurance cover could become the subject of legal action by an aggrieved volunteer (or potential volunteer) on the ground of age discrimination.

2) 'Lack of insurance' is cited as a generic reason for non-involvement of volunteers by some organizations and effectively becomes a *de facto* means of discriminating on the basis of age by any organization with a reluctance to involve volunteers within certain age ranges.

Both of these potential effects would be unacceptable and would serve to undermine the intent of the proposed legislative enactment/amendment.

Organizations that, despite their best efforts, are legitimately unable to obtain adequate (or affordable) insurance for volunteers of all age ranges should not be penalized for excluding those affected volunteers from working within the organisation in the interests of protecting those volunteers. However, on the flip-side 'lack of insurance' should not be allowed to develop as a generic 'catch all' for the non-involvement of volunteer within certain age ranges. The onus for demonstrating that adequate and affordable insurance coverage is unavailable must rest with the volunteer organizations.

Impact of the 'exemption for inherent requirements of the job' on Volunteer Involving Organizations

We support the inclusion of exemptions where a person is unable to carry out inherent requirements of the particular employment (in the case of volunteers, the volunteer work) or lacks a genuine qualification needed to carry out the job.

In respect of volunteer work, this exemption should also take account of the operational needs of volunteer organizations. For example, an organization may be unable to involve younger volunteers if the particular activities require supervision by another person and the organization does not have the available resources in order to provide the necessary supervision. Organizations in situations such as these should not be subject to legal action on the grounds of, say, age discrimination.

Risk of excessive litigation in New York City

As mentioned before, there is never a new right without a risk of an obligation. Nonetheless, it

can be reasonably predicted that by granting volunteers with these new anti-discrimination rights would indeed prevent discrimination of volunteer workers occurring in the first place. This would be because employers would be provided with much clearer guidance when hiring, firing, promoting, relocating and generally treating volunteers.

Further, it is anticipated that such new rights would deter frivolous lawsuits brought by non-aggrieved volunteer workers, purely as a result of the new clarity. Again, volunteers would know the limits and boundaries of their rights, and they simply would not want to run the risk of incurring litigation related costs when they know what their precise legal grounds are from the commencement. There would also be less of an incentive to sue unless a real 'identifiable harm' done to a specific volunteer could be shown, the definition of which would additionally be laid out under the relevant statutory provision. Finally, it can be said that settlements would appear easier to reach in light of the fact that both parties to a suit would know through the new legislative amendment their rights, duties, remedies, and extent of the alleged violations.

CONCLUSION

It is advocated here in this memorandum for the specific inclusion of volunteer work in the proposed legislative enactment. Providing protection for volunteers against discrimination

would bring clarity to an area currently marked by confusion and would bring a greater recognition of the importance of voluntary work to communities. The concerns and opinions of the voluntary sector and employers of volunteers would need to be taken into account. However, clear guidance on the legal status of volunteers may be welcomed by these affected groups if it simplifies current processes, reduces risks of litigation, and avoids the pitfalls that are currently of concern to voluntary organisations.

It must be noted that the enactment will need to be carefully drafted to ensure that:

• The distinction between paid work and volunteer is clear and terminology is used correctly.

• Volunteer involving organizations are not subject to legal action if they are unable to provide adequate insurance cover for volunteers in all age ranges, but the onus of demonstrating that adequate insurance cover is not available rests with the organization concerned.

• The exemption for 'inherent requirements of the job' takes account of the operational needs of volunteer involving organizations.

Volunteer work accounts for a significant amount of economic activity in New York City and is an area in which discrimination of certain vulnerable characteristics is known to occur. The inclusion of 'volunteer work' as an area in which such discrimination is prohibited will assist in meeting the legislation's aim of changing negative stereotypes of these related workers and enable all New Yorkers to fully engage and participate in society, whether young or old, homosexual, heterosexual or transsexual, male or female, or black or white.