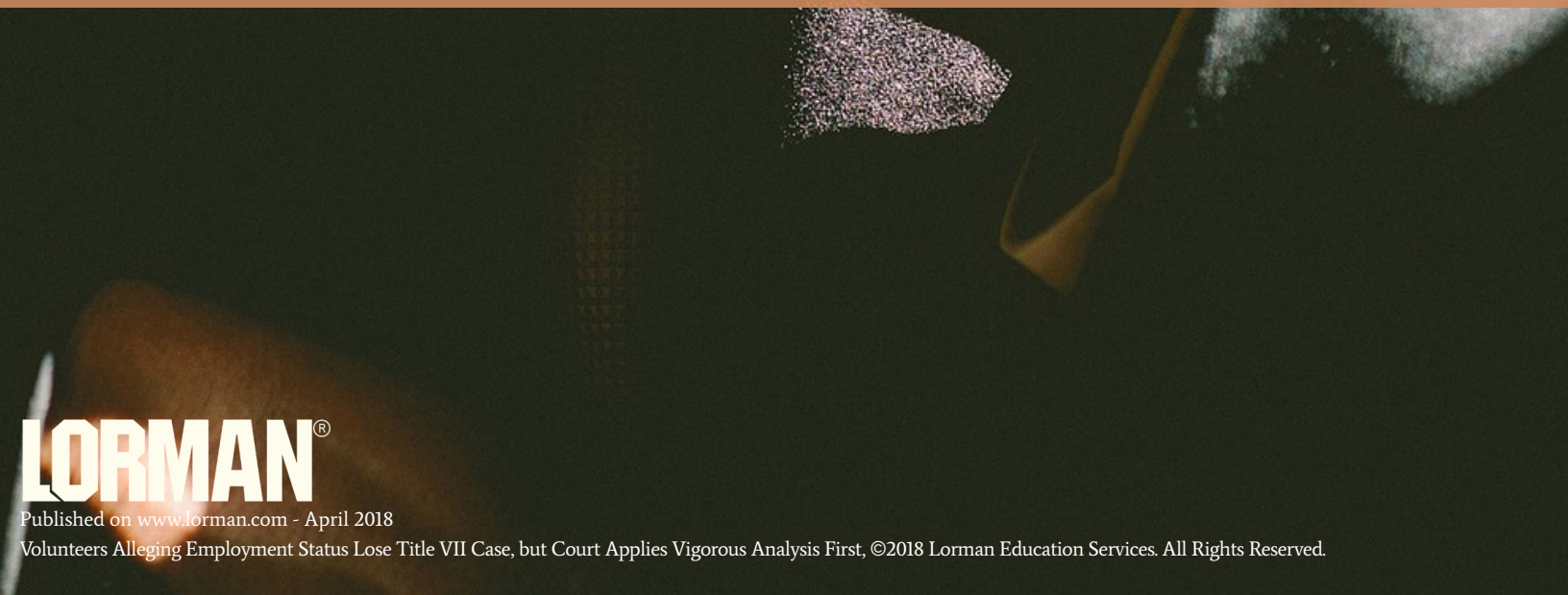
Volunteers Alleging Employment Status Lose Title VII Case, but Court Applies Vigorous Analysis First

Prepared by:
Todd Lebowitz, Baker Hostetler



LORMAN®

Published on www.lorman.com - April 2018

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you UNLIMITED access to Lorman's ever-growing library of training resources:

- ☑ **Unlimited Live Webinars** - 120 live webinars added every month
- ☑ **Unlimited OnDemand and MP3 Downloads** - Over 1,500 courses available
- ☑ **Videos -** More than 1300 available
- ☑ **Slide Decks -** More than 2300 available
- ☑ White Papers
- ☑ Reports
- ☑ Articles
- ☑ ... and much more!

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.

Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

Volunteers Alleging Employment Status Lose Title VII Case, but Court Applies Vigorous Analysis First

Everyone's looking for volunteers. The Salvation Army recruits helpers with the promise of "Doing the most good." Volunteers of America invites participation by reminding the public "There are no limits to caring." Even Disney's Haunted Mansion seeks new recruits, reminding guests at the end of the doom buggy tour, "We have 999 happy haunts here, but there's room for 1,000. Any volunteers, hmmm?"

But what happens when unpaid volunteers claim that their services more closely resemble employment? None of the Grim Grinning Ghosts appear to have made this claim, but two Catholic nuns who volunteered for disaster relief with the American Red Cross and Ross County Emergency Management Agency (also named as a defendant in the lawsuit) recently did. *Sister Michael Marie, et al. v. American Red Cross, et al.* (6th Cir. Nov. 14, 2014).

Sister Michael Marie and Sister Mary Cabrini filed a Title VII lawsuit alleging that the Red Cross and the Ross County Emergency Management Agency unlawfully terminated their volunteer status. The sisters alleged religious discrimination, retaliation and harassment, claiming that a local executive director was spooked by their religious beliefs, which deviated from traditional Roman Catholic teachings.

The threshold legal issue was whether the sisters could file a Title VII claim at all. Title VII prohibits discrimination on the basis of religion, but only in the context of an employment relationship.

As we have cautioned in many previous blog posts, the appropriate test for determining whether someone is an employee varies depending on the law being applied. Courts generally do not defer to the parties' characterization of their relationship. The facts, not the labels, are what matter.

In Title VII cases, the question of whether a worker is an employee is analyzed under a right-to-control test, which applies several factors to determine whether a master-servant relationship exists. When applying this test to volunteers, however, the legal landscape gets foggy.

At least six of the 11 federal courts of appeal have ruled that when a volunteer provides services to a nonprofit and receives no pay, the person is not an employee and the analysis ends. The Sixth Circuit, however, looks at the question differently.

In the Sixth Circuit, the fact that volunteers are unpaid is not determinative. In 2011, for example, the Sixth Circuit ruled that volunteer firefighters could be considered employees of a fire department. In the Sixth Circuit, lack of pay is just one of the many right-to-control factors to be analyzed. In the sisters' case, the court considered the nature of their assignments, the amount of discretion they had in scheduling and a long list of other factors.

The court noted that some factors indeed weighed in favor of employment. For example, the sisters had workers' compensation coverage, received reimbursement for expenses and performed services that directly related to the mission of the organization. But the majority of economic and control factors tilted in favor of true volunteer status. The sisters received no pay, received no benefits,

made their own schedules and had the discretion to turn down assignments.

Ultimately, the court ruled that the sisters were volunteers and not employees and Title VII therefore did not apply. The sisters' case was dismissed.

The question of *who is an employee* continues to haunt employers, the courts, and state and federal agencies. Different standards apply under different laws, and those standards can be further modified depending on whether the relationship being tested is arguably an independent contractor relationship, an unpaid internship or a volunteer position.

By **Todd Lebowitz** on December 17, 2014
POSTED IN **INDEPENDENT CONTRACTOR**