Updating Food Cooperative Member Labor Issues

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This article is an update to two prior articles in *Cooperative Grocer* that have addressed the issue of whether there are legal barriers that prevent retail food cooperatives ("food co-ops") from allowing members to perform work for the cooperative without treating them as employees. To put this update in context, we first provide a brief background summary and recall some of the conclusions reached in those articles.

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Background

When food co-ops first emerged, many of them relied on their members to perform necessary tasks such as bagging groceries, stocking shelves and ringing up customers. The common approach of such member-worker programs was to provide member-workers with discounts on goods, rather than wages. These programs benefitted both the food co-ops, which especially in their early years were not in a position to hire employees to perform such tasks, and their members, who aside from receiving discounts, enjoyed helping their co-ops grow. A further benefit remarked upon by many such member-workers was the resulting strength of community among the members and their cooperative.

As explained by Nancy Moore in her article in the September-October 1992 issue of *Cooperative Grocer*, beginning in the 1980s, awareness arose among food co-ops of three legal issues that could negatively impact member-worker programs: the potential applicability of workers' compensation requirements, employee tax withholding requirements, and Fair Labor Standards Act requirements (payment of minimum wage and overtime). Nancy Moore explored these issues in depth in her article, and all three issues were re-examined by Thane Joyal in her article in the January-February 2012 issue of *Cooperative Grocer*.

FLSA requirements: minimum wage and overtime

As outlined in the prior articles, beginning in the 1980s the U.S. Department of Labor (DOL) began sporadically bringing enforcement actions against food co-ops, claiming that their member-worker programs violated the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA). The food co-ops subjected to these actions chose to restructure their programs and reach settlements with the DOL rather than litigate, in large part because of the expense of litigation and the potentially large fines and penalties that could be imposed. The small number of DOL enforcement actions received a large amount of publicity among food co-ops, and as a result, over time many co-ops have redesigned such programs or discontinued them altogether.

Member-worker programs traditionally viewed workers as volunteers, rather than employees. While not all volunteers are deemed employees under the FSLA, the exceptions are relatively limited and do not include the types of activities that member-workers normally perform for cooperatives. Viewed on a spectrum of possibilities, under the FLSA a person performing work for a nonprofit and tax-exemptcharitable or religious organization is most likely to be deemed a volunteer rather than an employee, while a person performing work for a for-profit business serving the general public is most likely to be deemed an employee rather than a volunteer. While co-ops are permitted to have intern programs under the FLSA, the restrictions applicable to this type of program would not allow interns to perform the types of activities historically performed by food co-op member-workers.

The fact that many food co-ops continue to have internal debates over continuing (or reinstituting) member-worker programs—with some co-ops facing internal conflict among members, management, and directors as a result—springs from the lack of definitive court cases or administrative decisions that address the issue. The closest thing we have to an official pronouncement on the issue is a 1997 opinion letter from the U.S. Department of Labor which, in response to an inquiry from a food co-op, stated that co-op members who performed activities such as stocking shelves, sweeping floors, slicing meat, and operating cash registers, all in exchange for discounts on purchases, would be considered employees and thus subject to minimum wage and overtime provisions of the FLSA. Some food co-ops have consciously chosen to retain their programs in light of the absence of court cases or administrative decisions and the relatively paucity of DOL enforcement actions. In contrast, other food co-ops construe the available sources and the history of enforcement actions as confirming that member-worker programs are illegal and put food co-ops at substantial economic risk.

The concepts of risk and risk avoidance drive many business decisions, and because of the lack of definitive guidance on this issue, we turn to risk analysis as well. First, we think it is worthwhile to re-examine the effect of the 1997 opinion letter. The DOL clearly concludes in the opinion letter that members participating as member-workers are employees, but what is the strength of such an opinion letter from twenty years ago?

It is clear that such opinion letters are not binding authority in the same way as statutes, regulations, or court decisions. On the other hand, our non-exhaustive survey of federal court cases shows that courts often defer to the positions taken by the DOL in its opinion letters, especially where such positions are legally supportable and do not run contrary to statutes or regulations.

We have also had the opportunity to hear Department of Labor representatives speak about this topic in an informal setting at the 2017 Co-op IMPACT sponsored by the National Cooperative Business Association. While such informal statements and answers to inquiries are of course not binding on the DOL or on food co-ops, they are instructional from a risk perspective. The position of these DOL representatives was the same as that taken by the DOL in the 1997 opinion letter: that member workers performing the activities traditionally performed in food co-op programs (bagging, cashiering, etc.) would be considered employees covered by the FLSA. While seminar participants offered creative suggestions for excluding member-workers from FLSA requirements, our perception was that all of these suggestions were rejected.

The prior articles, referenced earlier, reached essentially the same conclusions regarding the FLSA issue: (1) that the legal concerns related to the FLSA made it advisable for food co-ops to take a hard look at their member-worker programs; and (2) even if creative approaches were used (for example, not giving discounts to workers at all, or making discounts equivalent over time to minimum wage), such programs could still be in violation of the FLSA. Our conclusion is essentially the same.

On the basis of our analysis above, we conclude that a food co-op using a traditional member-worker program runs a risk that its program will be found in violation of the FLSA by the DOL, with the further risk that if the co-op chose to litigate the issue through the administrative process, ultimately a court would rule against it. While the chances of any food co-op actually being subjected to an enforcement action may be very small, the possible economic consequences could be sizeable—and consequently from that perspective we would recommend against food co-ops using the traditional member-worker program.

It is also worth mentioning that while food co-ops may not be on the radar of the DOL (or for that matter of the IRS or state agencies), the issue of whether a volunteer is actually an employee can also arise in situations where a member volunteer is injured while performing work at the co-op and seeks coverage, or files for unemployment compensation, or attempts to file a discrimination claim.

Of course, ultimately the decision on these question is up to the cooperative. In light of the risks involved, if a cooperative's board does decide to continue the cooperative's member-worker program, we recommend that the board obtain written opinions from the cooperative's consultants (such as its counsel and accounting firm) supporting its decision and carefully document the reasons for its decision. If, subsequent to the board's decision, the cooperative faces a DOL enforcement action and is required to pay back wages or fines and penalties, disgruntled members might choose to bring an action against the board. Board members could find themselves on the defensive if they acted contrary to advice provided by the cooperative's consultants, or made the decision to continue the program without seeking advice.

Workers' Compensation Insurance

Workers' compensation insurance requirements are based on state law and thus vary from state to state. However, as noted in the two prior articles, workers' compensation insurance statutes are intended to have a broad reach, and as a result member-workers, even if unpaid, would likely be considered "employees" for the purposes of such statutes—employees for whom coverage is required. We reach the same conclusion reached in the prior articles: food co-ops that still have member-worker programs should check with their insurance agents and carriers to make sure such member-workers are covered by the food co-op's workers' compensation insurance policy.

Employee tax withholding

If members are performing work for the food co-op as part of a member-worker program, and these members are considered "employees" for purposes of federal and state tax laws, then the food co-op is required to withhold payroll taxes from whatever form of compensation is given to the members. Since state tax laws generally track federal tax laws on this issue, the relevant authority would be the regulations and guidance provided by the U.S. Internal Revenue Service.

The prior articles concluded that while this issue had not received the same degree of attention from food co-ops as the FLSA issues (largely because of the lack of publicized enforcement actions), it was likely that members performing tasks typically performed by employees, such as bagging, stocking, etc., could be viewed as employees for purposes of the IRS, and taxes should thus be withheld on any form of compensation provided. We reach the same conclusion. As with the FLSA issues, although the likelihood of action by the IRS may be very small, the financial consequences (including fines and penalties) to the food co-op could be sizeable.

Conclusion

Food co-ops that maintain traditional member worker programs will continue to face uncertainty due to the issues discussed here. Ultimately, the decision on whether to continue or restructure such programs is up to the cooperative; however, directors making such decisions need to be well-informed and should carefully document the resources and guidance they rely upon in making such decisions.

For those food co-ops that evaluate the risks and determine that change is necessary, the goal will be to minimize risk while at the same time keeping members involved with their cooperative in a way that maintains their sense of community and avoids the cooperative being seen as just another business. For example, some food co-ops have developed volunteer programs that give discounts to members who volunteer at certain nonprofit organizations. As for those food co-ops that chose to maintain a traditional member-worker program, we recommend they seek advice, if they have not already done so, from their legal and tax advisers to structure such programs to minimize risk to the extent possible. •