

# SPECIAL COMPLIANCE ALERT

December 7, 2007

## OREGON COURT RULES INCIDENTAL GIFTS TO VOLUNTEERS CONSTITUTE WAGES

In a recent decision, the Oregon Court of Appeals declared that a volunteer of a nonprofit foundation was actually an employee and incidental payments she received for volunteering were wages subject to employment tax. Recruiting volunteers is a tough job to start with, but recharacterizing incidental gifts or perks to volunteers and the increased scrutiny by state agencies will only make the job harder for many Oregon nonprofits, including credit unions.

In *Mt. Bachelor Ski Education Foundation v. Employment Department*, the Oregon court concluded that a season ski pass that the Foundation gave one of its volunteers in return for assistance with its ski races constituted \$910 in wages that were subject to unemployment taxes. The ski race volunteer had completed an application that stated among other things “I am aware I am not an employee” and she did not otherwise receive wages or other payments for her services. The Court looked to the unemployment statutes regarding the definition of “employee” and an exception for volunteers. Oregon unemployment statutes recognize the volunteer exception to the term “employee” as follows:

“‘Employee’ does not include a person who volunteers or donates services performed for no remuneration or without expectation or contemplation of remuneration as the adequate consideration for the services performed for a religious or charitable institution or government entity.” ORS 657.015.

The Court determined the volunteer exception did not apply in this case as the ski volunteer did receive a ski pass as remuneration for her service. The downfall for the Foundation was its very public recruiting promises. The Court found that the Foundation recruiting statements such as “work all race days to earn a full ski pass” relevant to distinguish between a true volunteer and an employee. While the Foundation argued the season pass simply provided the volunteer access to the ski slopes to enable her to perform her volunteer services and were not wages, the Court recognized the season pass allowed more than access to lifts on race days. As such, the ski pass constituted “remuneration for employment.”

In light of the *Mt. Bachelor* decision and the increased agency scrutiny, credit unions should carefully review their volunteer gift giving and expense reimbursement practices to avoid similar treatment.

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## GIFTS TO VOLUNTEERS (CONT.)

Given the facts in this case and a literal reading of the statute, we do not think the Oregon Court of Appeal's opinion is necessarily incorrect. However, from a policy standpoint, the ruling is troublesome for all nonprofit organizations to recruit volunteers. Furthermore, Oregon nonprofits are now under a closer scrutiny. Last week, Oregon Department of Revenue officials confirmed that the agency will expect taxes to be paid by volunteers and charities in situations when gifts are contingent upon volunteer services rendered.

Representative Chuck Burley, R-Bend, feels a fix is necessary and is seeking legislation to at least carve out an exception for ski passes for volunteers. Legislation is expected to be taken up by the House Business and Labor Committee in the Oregon Legislature's upcoming February special session. We have discussed this case with the Credit Union Association of Oregon and they will be carefully reviewing any legislation that might have a broader application to credit unions.

In light of the *Mt. Bachelor* decision and increased agency scrutiny, credit unions should carefully review their volunteer gift giving and expense reimbursement practices to avoid similar treatment. For credit unions, the unemployment tax treatment is the least of the risks. Paying wages or a similar payment to volunteer credit union directors or supervisory committee members is illegal compensation. Although the Department of Revenue's treatment of gifts or expense reimbursements as wages is not necessarily binding on interpretations of the state or federal credit union act, it does raise troubling questions.



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## SEASONS GREETINGS FROM FARLEIGH WITT

On behalf of the attorneys, paralegals, legal assistants and staff at Farleigh Witt, we thank you for your business and for allowing us to be your trusted partner. We feel truly blessed to serve such great clients as our Credit Union clients. We hope our Credit Union Executive Newsletter and this compliance alert have been a valuable resource to you and your staff this year and will continue to provide insights and helpful guidance in 2008.

**Merry Christmas and Happy New Year!**