Who's Watching Member Labor in Retail Food Cooperatives?

So much history, so many considerations

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When many retail food cooperatives were formed in the 1970s, the distinctions among worker cooperatives, consumer cooperatives and not-for-profit corporations were not considered to be barriers to doing business in a culture of cooperation. Regardless of the legal form used to organize the business, in retail food co-ops across the country, members commonly worked, carrying out a wide variety of tasks such as stocking shelves, unloading deliveries, or providing customer service (including, in some cases, staffing cash registers). In exchange, these members were given discounts on their purchases. The market for natural-food grocery products was small, with minimal competition, and the cost of doing business was relatively low in comparison to present costs.

Over time, the retail food cooperative sector and the natural-foods market grew in size and sophistication. At the same time, social and economic changes resulted an overall decrease in leisure time for food co-op owners, with more people working full-time and multiple jobs. In the early 1990s and more recently, some well-publicized enforcement actions by the U.S. Department of Labor (DOL) against retail consumer-owned stores caused many food co-ops, particularly those not organized as worker cooperatives, to reevaluate their use of owner labor. (In this article we use "owner labor" interchangeably with "member labor.") While the total number of DOL actions has been very small, the cost to the individual co-ops has been significant.

The history of La Montañita Cooperative in Albuquerque, N.M., is instructive and is summarized on the co-op's website: "La Montañita relied on member/owners as volunteer help for many years. These volunteers were the backbone of the co-op, repacking bulk items, stocking shelves, unloading trucks, bagging groceries, and in general providing the energy to keep our co-op going. In the early 1990s, the DOL decreed that we could no longer utilize the help of our member volunteers in any position it deemed a 'wage labor' job. Members could, however, participate in the co-op as volunteers in areas supervised by the board of directors, or in what the DOL called 'outreach programs.'"

In recent years, some retail food co-ops have modified or abandoned their owner work programs due to a lack of owner participation and concerns about violations of the Fair Labor Standards Act. Shifting to patronage allocation instead of point-of-purchase discounts has also impacted the cooperative's owner labor programs. Some cooperatives have changed their programs in light of concerns about how to equitably allocate limited work opportunities among interested owners. Others reduced or eliminated member work programs because they felt the net cost of these programs caused nonworking members to unfairly subsidize the cost of the discounts.

The elimination of member work programs has left lingering concerns in some co-ops. Many people in the co-op community have a strongly held belief that owner labor programs are important to the identity of a consumer food cooperative—developing leaders, building loyalty, and engaging (some) owners in their co-op. The question remains: can these programs be successfully implemented under current conditions and laws? If so, how? The table at the end of this article gives examples of some creative approaches retail food co-ops have used to preserve their culture of working owners and offers some guidance about the potential issues.

In the September-October 1992 issue of *Cooperative Grocer* [cooperativegrocer.coop/articles/2004-01-09/member-labor-issues-retail-food-co-ops], Nancy Moore analyzed the primary liabilities presented by owner labor programs: workers' compensation, minimum-wage laws, and payroll taxes. She concluded that workers' compensation claims posed the most significant risk and advised cooperatives to include worker owners in their workers' compensation policies and to explore with their attorneys ways to address the minimum-wage and taxation issues.

Workers' compensation insurance

While there may be an important distinction between worker-owned cooperatives and consumer-owned cooperatives for tax and minimum-wage purposes, the workers' compensation issues are the same for cooperatives organized under either business forms. State workers' compensation laws generally define covered workers very broadly. As a result, Moore's advice from 1992 is still current. Co-ops should work closely with their

insurance carriers to be sure that they have broad coverage for workers associated with the organization.

Fair Labor Standards Act (FLSA)

According to the website for the U.S. DOL, "the FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments. Covered nonexempt workers are entitled to a minimum wage of not less than $7.25 per hour effective July 24, 2009. Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek." (www.dol.gov/whd/flsa/index.htm)

The FLSA applies to any situation where an employer "suffers or permits" an individual to work; it is interpreted broadly by courts because, in adopting it, Congress intended to protect as many workers as it could. The early history of the FLSA illustrates some of the issues that have arisen when it has been applied to food co-ops. There is significant case law concerning agricultural cooperatives that were formed to evade the provisions of the FLSA; in that culture, workers were forced to collude with unscrupulous employers to keep their jobs. Thus, when a working cooperative owner tells the DOL that he or she doesn't want to be paid or doesn't consider themselves a worker, those facts are irrelevant. (Those interested in this history and in worker cooperatives may enjoy a well-researched argument for change by Neil Helfman, Esq., in his 1992 article, "The Application of the FLSA to Workers' Cooperatives," published by the University of California, Davis at www.sfp.ucdavis.edu/cooperatives/reports/LaborLawWorkerCoops.pdf).

Although the U.S. Supreme Court has interpreted the FLSA to exclude part-time uncompensated volunteers for public service, religious or humanitarian organizations, this exemption is extremely narrow. Even some cooperatives organized on a worker-ownership basis have been found by courts to fall within the scope of the Fair Labor Standards Act, despite strong arguments by such cooperatives to the contrary.

What about using clever mathematics to calculate the average "wage" received by a co-op member in the form of discounts and demonstrating that it meets or exceeds the minimum wage? Unfortunately this argument does not hold water. The FLSA requires that workers be paid the applicable minimum wage for every hour worked.

Small cooperatives should be aware that although on its face it may appear that the FLSA contains an exemption from the wages and hours requirements for businesses with an annual dollar volume of sales or receipts under $500,000, this provision of the law does not come into play where workers are "engaged in commerce." It seems likely that a court using a typically liberal interpretation of the FLSA's applicability provisions would find a retail food co-op worker to be so engaged. (See www.dol.gov/whd/regs/compliance/whdfs9.htm; see also www.dol.gov/elaws/esa/flsa/scope/ee2.asp.)

If the DOL finds a violation of the wages and hours provisions, the common remedy is to require payment of back wages and taxes, which can be costly and time consuming even if additional fines are not imposed. This leaves relatively little that co-ops can do to preserve in-store owner labor programs, short of ensuring that the compensation paid corresponds ▶

◀ to the applicable minimum wage and complying with all other applicable legal and tax requirements.

Employment taxes

The U.S. Internal Revenue Service provides detailed guidance for determining whether an individual is an "employee" and therefore subject to withholding of employment taxes, or an "independent contractor" (www.irs.gov/businesses/small/article/0,,id=99921,00.html). The decision rests on the nature of the relationship between the employer and the individual. State tax laws often closely track the federal law. A good rule of thumb is that if a cooperative has employees on the payroll doing duties similar to those performed by the working owner, there is a good chance that payroll taxes should be withheld (and appropriate forms issued, i.e. W-2 and 1099) for whatever compensation is provided, whether it is in the form of a discount, a stipend, salary, or hourly wage.

Other considerations

Other state and federal laws may also apply to the relationship between a working owner and a cooperative, including state Department of Health regulations, occupational health and safety standards, and laws applicable to collective bargaining and organized labor. It's important to take these matters into account when deciding on a working owner program.

Along with all these cautions, some cooperatives may decide to use owner labor anyway. This is a matter for the board of each individual cooperative to assess and to decide. How important is member labor to the identity of our cooperative? How many working owners do we have? What are the risks of using owner labor in light of the FLSA and applicable laws in our state? Is enforcement action likely by state or federal regulators? Do we have adequate insurance to protect working owners? Is our board willing to take the risks on behalf of the co-op's owners? Would our Directors and Officers Insurance cover us if we continue a member worker program despite knowing the risks?

Some lawyers may make creative interpretations and arguments to defend a member labor program in the event of litigation. What would such litigation cost? Could a co-op actually win a case based on creative application of precedents? And what would the cost be of losing—including the potential cost of back wages and employment taxes? Each co-op has to assess its tolerance for taking that kind of risk.

In her 1992 article, Moore didn't hold out much hope for legislative or regulatory change. But as the importance of cooperatives in our economy continues to grow, and the number of retail food cooperatives in the formation phase continues to rise, it is critically important that employment law issues applicable to retail food cooperatives be clarified. In a recent survey of startup co-ops conducted by CDS Consulting Co-op, a striking number of respondents indicated an intention to use owner labor. While it is unclear whether this is because these startups have not yet evaluated the risks and responsibilities of being employers, it highlights the need for concerted attention to these legal issues.

Unfortunately, short of a rigorous effort to amend the FLSA, a clearly written decision on a disputed enforcement matter would offer the best opportunity for clarification of these issues. To the best of my knowledge, to date, all of the retail food cooperatives that have been subject to or threatened with enforcement action regarding their member labor programs avoided the cost and risk of litigation by entering into settlement agreements.

Should there be exemptions in the FLSA for compensation to working member-owners of retail food co-ops? Do the special circumstances presented by retail food cooperatives warrant consideration in the regulatory scheme? Until these questions are answered, consumer-owned food co-ops are advised to proceed with caution. ■

The author is grateful for assistance on this article from Marilyn Scholl of CDS Consulting Co-op. Any errors are the author's responsibility.

SUMMARIZING OWNER LABOR ISSUES

APPROACH	OK?	ISSUES
Require all owners to provide labor, sell only to those owners at same prices.	Maybe	If organized as worker co-op, arguments are stronger for FLSA exemption; Workers' Compensation Insurance recommended; payroll tax issues should be addressed.
Create three classes of owners: workers, super workers, non-workers with different discount structures for the working members.	Probably not	FLSA may apply; Workers' Compensation Insurance recommended, payroll tax issues should be addressed.
Owners volunteer for community nonprofit organizations and receive store discount.	Probably/ maybe	Likely no FLSA or payroll tax issues; Workers' Compensation Insurance is the responsibility of the nonprofit.
Put all worker owners on payroll at hourly (minimum) wage.	Looks good	FLSA compliance; Workers' Compensation Insurance required; payroll tax issues should be addressed.
Offer store credit/coupons as a "thank you" in exchange for "volunteer" work provided.	Maybe not	Form of compensation not determinative of employee relationship for FLSA purposes; Workers' Compensation insurance recommended; payroll tax issues should also be addressed.
Offer discounts for member help with outreach activities only, no in-store work.	Maybe, maybe not	Further research needed; location of work not determinative of employee relationship for FLSA; Workers' Compensation or payroll taxation issues; some activities may be characterized as independent contractor rather than employment.