# MANAGING VOLUNTEER FIREFIGHTERS FOR FLSA COMPLIANCE:

## A GUIDE FOR FIRE CHIEFS AND COMMUNITY LEADERS

Volunteer & Combination Officers Section

Est. 1994

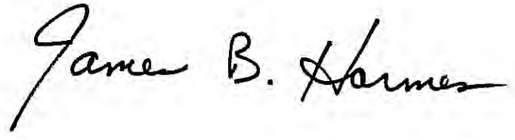
# Letter from the IAFC

Dear Colleagues:

For nearly two decades, fire chiefs have been confused by differing interpretations of the Fair Labor Standards Act (FLSA). To bring order to this issue, the IAFC sought for and gained from the Department of Labor (DOL) a series of letter rulings to clearly define the requirements that individuals must meet to qualify as a volunteer firefighter under FLSA regulations.

The IAFC has published this brochure as a guide for fire chiefs and community leaders to better manage volunteer firefighters for FLSA compliance. The IAFC believes this will be helpful for the leaders of America's fire service.

Sincerely,



Chief James B. Harmes

President (2006-2007)

# Letter from the VCOS

For 10 years, the Volunteer and Combination Officers Section (VCOS) has been actively involved with our parent organization, the International Association of Fire Chiefs, in working with the U.S. Department of Labor to clear up a number of issues that have caused the American volunteer fire service concern. Over that time, a genuine need surfaced to obtain administrative changes and clarifications to the Fair Labor Standards Act (FLSA) of 1938 at the federal level because of conflicting regional and local interpretations and how these provisions affected the use of volunteers in local fire departments. Often, local administrators and legal counsel decided to allow or not allow certain groups of individuals to volunteer based upon community opinion or restrictive actions, constantly mindful of potential litigation.

The FLSA situations were complicated with the introduction of pay per call, stipends and other forms of reimbursement to individual volunteer firefighters. It became clear that the definition of "volunteer firefighter" 20 years ago is not the same as it is today. Times have changed, the demand on the volunteer has changed and—in a way—the definition of the new "volunteer firefighter" has changed as well.

The changes outlined in this document will allow you to better manage your departments and will improve your ability to provide quality service to your communities. With these changes comes the responsibility for fire chiefs to ensure that their departments are FLSA-compliant and are accurately accounting for volunteer reimbursement within the 20-percent bright line.

During the last 10 years, our board and legislative members handled many concerns about local volunteer restrictions and their impact on community fire protection. A number of those situations were emotionally difficult for the individuals forced to resign as volunteers because of the conflicting interpretations. For those individuals, this information could not come fast enough. I hope this effort will allow you to return as a viable and productive community volunteer.

This decade of hard work by VCOS and the IAFC is an example of the VCOS commitment to improving the national atmosphere for volunteers through federal legislation, interpretation and initiatives; educational opportunities for fire department managers who lead volunteer organizations; enhanced educational requirements for volunteers; and a renewed emphasis on the safety and survival of those who dedicate themselves to the well-being of others. We understand that local community protection depends on the experience, expertise and tenure of your emergency providers and know these changes will enhance your efforts to retain quality volunteers.

Chief Tim Wall, Chairman
Volunteer and Combination Officers Section (VCOS) of the
International Association of Fire Chiefs



# Letter from the Author

## MANAGING VOLUNTEER FIREFIGHTERS FOR FLSA COMPLIANCE: A GUIDE FOR FIRE CHIEFS AND COMMUNITY LEADERS

**By Garen E. Dodge, Esq. and Maria L. Mullarkey, Esq.**

*Managing Volunteer Firefighters for FLSA Compliance: A Guide for Fire Chiefs and Community Leaders* is a joint publication of the International Association of Fire Chiefs (IAFC), and its Volunteer Chief Officers Section, and the law firm of Wiley Rein & Fielding LLP.

The International Association of Fire Chiefs, organized in 1873, is dedicated to the advancement of the fire service. The IAFC's mission statement is:

> To provide career and volunteer chiefs, chief fire officers and managers of emergency service organizations throughout the international community with information, education, services and representation to enhance their professionalism and capabilities to protect citizens from the devastation of fire, environmental, natural and man-made emergencies.

This analysis is designed to provide accurate and authoritative information regarding compliance issues under the FLSA that are of concern to IAFC's members. It is distributed with the understanding that neither the authors, nor IAFC, is engaged in rendering legal or other professional advice, and that the topics discussed herein are subject to legislative, judicial, or regulatory change. If legal advice is required based on particularized facts, IAFC members should seek guidance from their jurisdiction or fire department's attorney. If you have any suggestions or comments regarding this analysis, please contact:

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# MANAGING VOLUNTEER FIREFIGHTERS FOR FLSA COMPLIANCE: A GUIDE FOR FIRE CHIEFS AND COMMUNITY LEADERS

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# INTRODUCTION

Recognizing the value of public volunteer efforts, Congress sought to define the requirements that an individual must meet to qualify as a *bona fide* volunteer in the 1985 amendments to the Fair Labor Standards Act (FLSA). Although Congress desired to promote volunteerism, it also incorporated safeguards to help prevent abuse of FLSA minimum wage and overtime requirements. Specifically, Section 3(e)(4)(A) of the FLSA provides that an individual cannot "volunteer" during off-hours to perform the same services he or she performs during regular employment for the same public agency.

The International Association of Fire Chiefs (IAFC) recognized - over a decade ago - that there was confusion across the land about the application of the FLSA rules as they apply to volunteer firefighters. Chief fire officers have struggled with the FLSA since the law's application to public agencies in 1985, and some of the main points of contention have been in the area of volunteerism. The FLSA proved difficult to apply to the realities faced by public safety employers who use volunteer firefighters and law enforcement personnel to deliver services to their communities.

Fire departments have been given conflicting interpretations from different Department of Labor (DOL) administrators and field offices when applying the FLSA standards to volunteers. To make matters worse, fire chiefs often sought advice from their city or county attorney only to find that the advice was so conservative and risk averse as to make it difficult or impossible to retain the number of volunteers needed for service to that community. Simply put, because they did not wish to trigger a costly lawsuit over murky and inconsistent rules, many city and county attorneys said "no, chief, you can't do that."

To address this issue, we pleaded our case to Congress. In 1998, a subcommittee in the House of Representatives' Labor Committee held a hearing to air the problems that existed with the Department of Labor rules and regulations that implement the FLSA regarding volunteer firefighters. After the hearing, the subcommittee, working closely with the IAFC, sought clarification on numerous interpretations dealing with issues such as the use of paid and compensatory leave, the "two-hatter" issue, and when fees or other payments to volunteers qualify as a "nominal fee." This latter nominal fee question took considerable time to answer. What amount of fees can a jurisdiction provide a volunteer firefighter without endangering his or her volunteer status?

After three years of reviewing this specific question, DOL has just released a bright line test that states: generally an amount not exceeding 20 percent of the total compensation that the employer would pay to employ a full-time firefighter would be deemed a "nominal fee," and therefore would not endanger the firefighter's volunteer status. Although DOL did not clarify whether fire departments must use the compensation for a specified level of firefighter (for example, entry level or senior) when calculating fees based on the 20 percent rule, DOL stated that fire departments should make a good faith determination based on their own payroll information.

Needless to say, we are extremely pleased – first that we finally got the ruling we requested and that it is favorable for the volunteer fire service. To ensure that all fire chiefs who manage volunteer firefighters will be aware of these (and other) DOL rulings, the IAFC, working with the Volunteer and Combination Chief Officers Section (VCOS), published this manual for fire chiefs and community leaders that explain the new rulings in the context of managing a fire department. In an effort to ease some of the confusion in applying the FLSA volunteer exemption, this manual summarizes applicable DOL guidance on FLSA requirements for volunteer firefighters.



# CHAPTER 1.

## THE FLSA VOLUNTEER EXEMPTION

Under the FLSA, public employers are obligated to pay employees at least the minimum wage and overtime compensation. The FLSA, however, exempts public employers from paying minimum wage and overtime to individuals who qualify as "volunteers" motivated to contribute services for civic, charitable or humanitarian reasons. An individual who performs services for a public agency qualifies as a volunteer, if:

- the individual receives no compensation or is paid **expenses, reasonable benefits,** or a **nominal fee** to perform the services for which the individual volunteered; and
- such services are **not the same type of services** which the individual is employed to perform for **the same public agency**. [2]

If an individual meets the above criteria for volunteer status, he or she will not be considered an employee covered by FLSA minimum wage and overtime provisions, and the public employer is not obligated to compensate the individual for hours of volunteer services performed.

A *bona fide* volunteer may perform, without compensation:

- Different work for the same agency
- Same or similar work for a separate and independent agency
- Different work for a separate and independent agency

[2] 29 U.S.C. § 203(e)(4)(A) (2006).

# CHAPTER 2.

## PAYMENTS TO VOLUNTEERS

In accordance with DOL regulations, public employers may pay volunteers expenses, reasonable benefits, a nominal fee, or any combination thereof, without jeopardizing their volunteer status.[3] Public employers must be careful, however, to not exceed these permissible payments to volunteers. If payments to volunteers rise to the level of "compensation" for services rendered, the individual will no longer qualify as a *bona fide* volunteer, but will be deemed an employee for purposes of FLSA minimum wage and overtime liability. Ultimately, DOL will evaluate "the total amount of payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation" to determine whether the individual loses volunteer status by virtue of payments made by the public agency. [4]

### EXPENSES

Public employers can reimburse volunteers for approximate, out-of-pocket expenses incurred by volunteers incidental to providing services for the public agency,[5] which include the following:

- Meals
- Transportation
- Uniforms and Related Equipment
- Tuition and Other Costs Involved in Attending Classes Related to Volunteer Services
- Books, Supplies or Other Materials for Training

### REASONABLE BENEFITS

A public employer does not risk the status of volunteers by providing reasonable benefits to volunteers,[6] including:

- Liability Insurance
- Health Insurance
- Life Insurance
- Disability Insurance
- Workers' Compensation
- Pension Plans
- Length of Service Awards
- Personal Property Tax Relief [7]

### NOMINAL FEE

Although public employers can pay a nominal fee to volunteers, the fee must not be a substitute for wages and must not be tied to productivity. [8] Public employers who compensate volunteers with more than a nominal fee likely will create an employment relationship, thereby destroying the volunteer status of the individuals. DOL has indicated that fire departments may consider the following factors when providing nominal fees to *bona fide* volunteers:

- Distance traveled
- Time and effort expended
- Whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods
- Whether the volunteer provides services as needed or throughout the year [9]



In addition, DOL provided the following additional guidance in various opinion letters:

- **Per Call Basis –** Although generally the amount of a nominal fee may not be tied to productivity and may not vary based on time spent on the activity, DOL's regulations specify that the payment of a nominal amount on a per-call basis to volunteer firefighters is acceptable. In its most recent letter, DOL noted that "compensation 'per call' or other similar bases may be acceptable so long as they may fairly be characterized as tied to the volunteer's sacrifice rather than productivity-based compensation."[10]
- **Monthly or Annual Stipend –** DOL has stated that the payment of a nominal monthly or annual stipend to an individual who volunteers on a year-round basis is allowed.[11]
- **Hourly Rate –** DOL has determined that payment to volunteer firefighters on a per hour basis destroys *bona fide* volunteer status and creates an employment relationship. This type of payment is akin to hourly wages based on productivity. [12]

### THE 20 PERCENT RULE

In the August 7, 2006 opinion letter, DOL finally provided definitive clarification as to what amounts will qualify as a nominal fee. IAFC sought this opinion letter to elicit a bright-line test to assist fire departments in defining the line between what constitutes a nominal fee to volunteers and what amounts to compensation.

In its November 10, 2005 opinion letter, DOL stated that a public school employee could receive a nominal fee to volunteer as a coach or advisor for extracurricular activities so long as the fee does not exceed 20 percent of what the public school would otherwise pay to hire a full-time coach or advisor.[13]

Extending application of the 20 percent rule to volunteer firefighters, in the August 7, 2006 opinion letter, DOL explained that "generally, **an amount not exceeding 20 percent** of the total compensation that the employer would pay to a full-time firefighter for performing comparable services **would be deemed nominal**."[14] Further, DOL indicated that – so long as the fee is 20 percent or less of total compensation for comparable services – DOL will be less likely to focus on whether the fee is paid on an annual, monthly or daily basis.

Fire departments can apply the 20 percent rule to evaluate whether a fee paid to a volunteer firefighters is a nominal amount based on market information, including:

- Compensation paid to a full-time firefighter on the fire department's payroll
- Information from neighboring jurisdictions, the state or the nation (including data from DOL's Bureau of Labor Statistics, www.bls.gov)

DOL did not clarify whether fire departments must use the compensation for a specified level of firefighter (for example, entry level or advanced) when calculating fees based on the 20 percent rule. DOL explained that the information necessary to make this calculation generally is within the knowledge and control of fire departments, and thus, the actual determination should be made by fire departments in good faith based on "[a]ny full-time firefighter a particular fire department has on its payroll." Although DOL's guidance on this issue is unclear, it is possible that fire departments may vary the level of the firefighter used as the benchmark for the 20 percent rule to correspond to the level of the volunteer firefighter receiving the fee. For example, a fire department may use

the salary paid to a full-time beginner firefighter as a benchmark to determine whether a fee paid to a volunteer firefighter for his first year of service is nominal.

Under the 20 percent rule, for example, if a volunteer firefighter staffs four shifts during a month, a nominal fee should not exceed 20 percent of what it would cost to employ a full-time firefighter to staff the equivalent of four shifts.

**EXAMPLES:**

A county fire department pays $50,000 to hire a full-time firefighter for one year. The fire department pays an annual stipend of $9,500 to a volunteer firefighter to perform the same services. This payment would constitute a nominal fee under the 20 percent rule.

A county fire department pays $50,000 to hire a full-time firefighter for one year. The fire department pays an annual stipend of $15,000 and life insurance to a volunteer firefighter to perform the same services. This payment would not constitute a nominal fee under the 20 percent rule.

Responding to a series of hypotheticals posed by IAFC, DOL found that the following payments may qualify as nominal fees:

| AMOUNT OF PAYMENT | REQUIREMENTS | ADDITIONAL PAYMENTS | AVERAGE WORKED (MINIMUM) |
|---|---|---|---|
| **1) $1,200 per year** | Regardless of number of shifts or amount of time spent responding to calls | n/a | 24 shifts and/or 60 hours responding to calls per year |
| **2) $100 per month** | Regardless of number of shifts or amount of time spent responding to calls | n/a | 4 shifts and/or 8 hours responding to calls per month |
| **3) $100 per month** | Minimum of 2 shifts and/or 5 hours responding to calls | $25 for each additional shift over 4 and/or each additional 2.5 hours responding to calls over 12 hours | n/a |
| **4) $25 per 4-hour block of time** | Regardless of the amount of time spent at the station house or responding to calls | n/a | n/a |
| **5) $20 per shift** | Regardless of the length of shift or amount of time spent responding to calls | n/a | 6 hour shift and/or 2 hours responding to calls per shift |
| **6) $25** | Minimum of 8 hours per shift and/or 2.5 hours responding to calls | $15 per shift that exceeds 8 hours and/or 5 or more hours responding to calls | n/a |
| **7) $15,000 annual fee** | n/a | n/a | 3,000 hours waiting and responding to calls per year* |
| **8) $20 per shift** | Regardless of the length of shift or amount of time spent responding to calls | Fee increases by $1 per shift for each year with a minimum of 12 shifts** | n/a |



* Although DOL found that a $15,000 annual payment may qualify as nominal under the 20 percent rule, DOL also observed that "it is unlikely that 3,000 hours of service (50+ hours per week) is 'volunteering' rather than employment." [15] If a volunteer is compensated annually for a comparable, high level of hours, DOL likely will determine that a full-time employment relationship exists.

* * DOL reminded public employers that a nominal fee must not vary depending on the productivity of the volunteer or the amount of time spent on volunteer activities. Although it did not definitively answer whether a fire department can increase the yearly, monthly or per shift payment to volunteers for every year the volunteer staffs a requisite number of shifts, DOL noted that this may constitute impermissible "compensation via a seniority or productivity system based on services rendered." [16]

Fire departments should use the 20 percent rule to determine if a payment to volunteer firefighters constitutes a nominal fee. Remember that the 20 percent rule does not apply to expenses and reasonable benefits. Even if a payment constitutes a nominal fee under the 20 percent rule, however, this payment must be considered in totality with other expenses or benefits received by volunteer firefighters to determine if the entire amount of payments precludes volunteer status under the "economic realities" test.

**EXAMPLE:**

A volunteer firefighter receives an annual stipend of $8,000, reimbursement for the cost of transportation, uniforms and training, and payments by the fire department for health and life insurance. The fire department should determine whether the $8,000 stipend exceeds 20 percent of what it would cost to employ a full-time firefighter to perform the same services. The fire department does not have to evaluate whether the reimbursement of expenses or provision of insurance benefits are 20 percent of the amount of expenses and insurance received by full-time firefighters performing similar services.

**CONCLUSION: TOTAL PAYMENTS**

**Step 1:** Evaluate whether each specific payment to volunteers qualify as either (1) expenses; (2) reasonable benefit; or (2) a nominal fee.

**Step 2:** The nominal fee cannot exceed the total compensation paid to a full-time firefighter for performing comparable services.

**Step 3:** Analyze the entire package of payments made to volunteers "in the context of the economic realities of the particular situation" to determine whether furnishing these payments results in loss of volunteer status.

[3] 29 C.F.R. § 553.104(a) (2006)., [4] Id. at § 553.106(f)., [5] Id. at § 553.106(b)-(c)., [6] Id. at § 553.106(d)., [7] DOL has found that provision of personal property tax relief in the amount of $1,500 annually during the term of volunteer service constitutes a permissible reasonable benefit. DOL, Wage and Hour Division Opinion Letter (Aug. 7, 2006)., [8] 29 C.F.R. § 553.106(e) (2006)., [9] Id., [10] DOL, Wage and Hour Division Opinion Letter (Aug. 7, 2006)., [11] Id., [12] DOL, Wage and Hour Division Opinion Letter (July 7, 1999)., [13] DOL, Wage and Hour Division Opinion Letter (Nov. 10, 2005)., [14] DOL, Wage and Hour Division Opinion Letter (Aug. 7, 2006)., [15] Id., [16] Id.

# CHAPTER 3.

## DO VOLUNTEER SERVICES CONSTITUTE THE "SAME TYPE OF SERVICES"?

The FLSA "does not permit an individual to perform hours of volunteer service for a public agency when such hours involve the same type of services which the individual is employed to perform for the same public agency."[17] DOL regulations define "same type of services" as "similar or identical services."[18] Whether volunteer services constitute the same type of services is determined on a case-by-case basis, considering:

- The occupational classification of the employee's paid position in comparison to his or her volunteer position in the *Dictionary of Occupational Titles* or on DOL's O*NET system, www.doleta.gov/Programs/onet/.
- Whether the volunteer services are closely related to the actual duties performed by and responsibilities assigned to the employee during regular employment[19]

### CROSS-TRAINED FIREFIGHTER/EMT

In its most recent opinion letter, DOL did not provide a definitive answer in response to whether a firefighter cross-trained and licensed as an EMT/Paramedic can qualify as a *bona fide* volunteer EMT/Paramedic for the same agency.[20] In an August 19, 1999 opinion letter, however, DOL concluded that a city firefighter cannot volunteer as a firefighter/EMS provider for the same city.[21]

### FIREFIGHTER/POLICE

In its most recent opinion letter, DOL confirmed that police and firefighters perform a different type of service, and thus, a police officer employed by a county police department can also volunteer as a firefighter for the same county's fire and rescue department.[22] In a statement favorable to the chiefs, DOL indicated that "merely responding to the same emergencies, such as traffic accidents and fire calls, or acting as a medical first responder on occasion will typically not change the inherent differences in the two occupations." [23]

### FIRE MARSHALL/FIREFIGHTER

DOL concluded that a full-time paid Fire Marshall cannot be a volunteer firefighter with the city because the volunteer service is the "same type of service" for which he is paid by the same employer and is closely related to the actual duties of the Fire Marshall. [24]

### MECHANIC/FIREFIGHTER

DOL determined that "serving as a mechanic and serving as a firefighter do not involve the same type of services, absent evidence to the contrary," and thus, an individual employed as mechanic could serve as a volunteer firefighter for the same agency. [25]

### DETENTION DEPUTY/LAW ENFORCEMENT DEPUTY

DOL decided that employees of a county sheriff's office in the detention department could not volunteer off-duty in the law enforcement department because the work involves the "same type of services."[26]

### CIVILIAN COMMUNICATIONS SPECIALIST/FIREFIGHTER

DOL concluded that an individual employed as a civilian communications specialist with a city fire and rescue department may volunteer as a firefighter for the same agency. DOL stated that employees who engage in civilian support activities, such as dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, clerks and stenographers, do not perform the same type of services as firefighters.[27]

[17] 29 C.F.R. § 553.102(a) (2006)., [18] Id. at § 553.103(a)., [19] Id., [20] DOL, Wage and Hour Division Opinion Letter (Aug. 7, 2006)., [21] DOL, Wage and Hour Division Opinion Letter (Aug. 19, 1999). [22] DOL, Wage and Hour Division Opinion Letter (Aug. 7, 2006)., [23] Id., [24] DOL, Wage and Hour Division Opinion Letter (Sept. 3, 1999)., [25] DOL, Wage and Hour Division Opinion Letter (Apr. 14, 2003). See Chapter 5 for discussion on leave and overtime issues for other governmental employees., [26] DOL, Wage and Hour Division Opinion Letter (Oct. 29, 2004)., [27] DOL, Wage and Hour Division Opinion Letter (Jul. 7, 1999).



# CHAPTER 4.

## DO TWO ENTITIES CONSTITUTE THE "SAME PUBLIC AGENCY"?

An individual who is a paid employee of a public agency cannot also be an unpaid volunteer for the same agency while performing the same type of services that he is employed to perform. DOL determines whether two entities constitute the "same public agency" on a case-by-case basis by examining whether the two entities:[28]

- Have separate payroll and retirement systems
- Have the authority to sue and be sued in their own name
- Have separate hiring and other employment practices
- Are treated separately under State law
- Are treated separately by the Census Bureau
- Have separate budget and funding authorities
- Have independent authority to make employment decisions
- Have authority to hire and compensate personnel
- Have limited integration and day-to-day control of operations over each other

### SEPARATE PUBLIC AGENCY

If analysis of these factors indicates that the public agencies are separate entities, then an employee of one agency can volunteer to provide the same or similar services as performed in their regular employment for the separate agency.

### SAME PUBLIC AGENCY

If analysis of these factors indicates that the public agencies are not separate entities, then an employee of one agency cannot volunteer to provide the same or similar services as performed for in their regular employment for the other entity. Such an arrangement would create a joint employment situation.

### MUTUAL AID AGREEMENTS

DOL regulations state that an agreement between two agencies for mutual aid does not change the otherwise volunteer character of services performed by employees of such agencies.[29] For example: An individual employed as a paid firefighter with County A may volunteer as a firefighter with County B, where County A and County B have a mutual aid agreement (even though the firefighter may be called upon to respond to a call in County A while volunteering with County B).

[28] 29 C.F.R. § 553.102(b) (2006)., [29] Id. at § 553.105.

# CHAPTER 5.

## USE OF PAID LEAVE AND COMPENSATORY LEAVE

### IF A *BONA FIDE* VOLUNTEER FOR A SEPARATE AGENCY

If the employee is a *bona fide* volunteer for a separate public agency, the employing agency may provide paid personal leave or dock the employee's compensatory time during volunteer calls without jeopardizing the individual's volunteer status with the separate agency.[30] Further, the volunteer hours worked for the separate agency would not be compensable time worked for the employer and, thus, would not be counted by the employer when computing overtime.

For example, if a firefighter in County A is required to use paid personal leave or accrued compensatory time for his volunteer work as a firefighter with City B, a separate agency, his status as a *bona fide* volunteer with City B is not jeopardized. Further, the volunteer hours worked for City B would not be compensable time worked for County A.

A *bona fide* volunteer firefighter can also be paid wages by his "non firefighter" employer while serving as a volunteer firefighter for a separate public agency during normal work hours, as long as such pay does not come from the separate public agency receiving the volunteer services. If the employer pays wages for time volunteered during normal work hours, however, the volunteer hours would be compensable hours that must be counted by the employer for purposes of computing overtime.

### IF A *BONA FIDE* VOLUNTEER FOR THE SAME AGENCY

If an employee is a *bona fide* volunteer for the same agency, the employee may substitute paid personal leave earned—which the employee may use as he sees fit—for time spent performing volunteer activities without jeopardizing his status as a *bona fide* volunteer.[31] Further, the time spent outside the employee's regular work day performing volunteer services would not be compensable time worked for the employer and would not be counted when computing overtime. [32]

For example, if a mechanic employed by County A fire department uses paid personal leave for his volunteer work as a firefighter with County A fire department, his status as a *bona fide* volunteer firefighter is not jeopardized. The time spent by the mechanic on volunteer fire calls outside the regular work day would not be compensable time worked for County A.

An employee who volunteers different services for the same public agency cannot be paid wages by the agency for the volunteer services, however, as this will prevent the employee from qualifying as a *bona fide* volunteer. For example, if County A pays a full-time mechanic wages for hours worked as a firefighter for the same county, the county employs the individual as both a full-time mechanic and a part-time firefighter. Therefore, the individual would not be allowed to volunteer additional hours as a firefighter because of FLSA's prohibition on volunteering for the same agency to perform the same type of services he is employed to perform.

### IF NOT A *BONA FIDE* VOLUNTEER

If the employee is not a *bona fide* volunteer because he is performing the same type of services for the same public agency, the hours spent performing the same services for which he is employed are not "time off," but instead are compensable and should be counted when computing overtime. [33] In such case, the public employer may not dock the employee's compensatory time to cover the wages due.

[30] DOL, Wage and Hour Division Opinion Letter (Aug. 7, 2006); DOL, Wage and Hour Division Opinion Letter (Apr. 14, 2003)., [31] DOL, Wage and Hour Division Opinion Letter (Aug. 7, 2006)., [32] DOL, Wage and Hour Division Opinion Letter (Apr. 14, 2003)., [33] Id.



# CHAPTER 6.

## PAYMENT OF WAGES BY SEPARATE AGENCY

DOL indicated that a public employer can pay wages to an employee for volunteer hours with a separate agency.[34] For example, if a firefighter in County A is allowed to cease his usual duties during the workday to respond as a volunteer firefighter to City B's call, the firefighter can be paid for his normal work hours by County A without losing his volunteer status with City B. As explained in Chapter 5, the employee's use of paid personal leave or accrued compensatory time does not transform the volunteer hours into compensable time. If the public employer pays wages for time volunteered **during normal work hours,** however, the volunteer hours are considered compensable hours for that employer that must be counted for purposes of overtime compensation.[35] Time spent volunteering outside regular work hours is not compensable time.

[34] DOL, Wage and Hour Division Opinion Letter (Aug. 7, 2006); DOL, Wage and Hour Division Opinion Letter (Apr. 14, 2003)., [35] Id.

# CHAPTER 7.

## SPECIAL DETAIL EXCEPTION

Although not applicable to volunteers, the "special detail" exception applies to public fire protection and law enforcement employees who, at their own option, work special detail for a separate and independent employer performing related duties. If a public employee voluntarily agrees to work special detail "by a separate or independent employer in fire protection, law enforcement, or related activities," the public agency can exclude these hours when calculating hours worked for purposes of overtime compensation. [36]

In an April 28, 2006 opinion letter, DOL responded to an inquiry by a city regarding its law enforcement officers who perform off-duty security detail at a municipal coliseum for a third-party. DOL concluded that because the public employees perform the off-duty work at their own option and because the city and third-party contractors are separate employers, the off-duty work hours should not be counted for the city's overtime obligation, and the fact that the city pays workers' compensation for the third-party work does not alter this conclusion. [37]

DOL considers similar factors to determine whether the employers are separate and independent as applied to determine whether a volunteer provides services for the same agency, including whether the agencies operate a separate payroll system, maintain a separate retirement system, have a separate budget and have the authority to sue and be sued in their own name.

[36] 29 C.F.R. § 553.227 (2006)., [37] DOL, Wage and Hour Division Opinion Letter (Apr. 28, 2006).



# CHAPTER 8.

## WORKING WITH THE UNION TO ENSURE GOOD RELATIONS

If a union is present, it is important to:

- ❍ Review your state/local laws on volunteers if any
- ❍ Check the union contract to see if volunteers are covered
- ❍ Meet with union representative to discuss the use of volunteers
- ❍ Make sure volunteers are not provided more than 20% provided to career firefighters
- ❍ If a new approach is needed, see if union contract can be reopened on the issue of volunteers
- ❍ If contract cannot be reopened, propose changes when contract expires

# CHAPTER 9.

## TAXATION OF PAYMENTS AND BENEFITS

Fire departments may have questions about the taxation of payments made to volunteer firefighters that are not addressed in the FLSA guidance, for example, whether compensation paid to volunteers is subject to FICA (Social Security and Medicare) withholding. The attached tax supplement provides a discussion of FICA taxation of volunteer firefighters and tax treatment of amounts applied to dependent care and medical accounts. Comprehensive treatment of tax issues are beyond the scope of this analysis. If you have tax questions, it is important to seek out the advice of qualified tax counsel.



# CHAPTER 10.

## CHECKLIST FOR MANAGING VOLUNTEER FIREFIGHTERS

As a reminder:

- ❑ Does the collective bargaining agreement have restrictions on career firefighters from volunteering during off-duty hours?
- ❑ Does the volunteer firefighter perform the same type of services for another agency?
- ❑ Does the volunteer firefighter perform work for the same public agency?
- ❑ Does the volunteer firefighter receive any payments?
    - ❍ Does the payment qualify as expenses?
    - ❍ Does the payment qualify as a reasonable benefit?
    - ❍ Does the payment qualify as a nominal fee? Is it 20 percent or less of what a full-time firefighter would be paid to perform comparable services?

# CHAPTER 11.

## CONCLUSION

- ❑ Volunteer firefighters must not be paid compensation, but can be paid expenses, reasonable benefits and a nominal fee that does not exceed 20 percent of what it would cost to otherwise provide the volunteer services rendered.

- ❑ Paid firefighters cannot volunteer the same services for the same public agency for which they are employed.

- ❑ Paid firefighters can volunteer the same services for a separate and independent public agency.

- ❑ Paid firefighters can be paid by their employer for personal time off or docked compensatory time for volunteer hours worked for a separate and independent public agency without jeopardizing volunteer status with the separate agency. The employer should not count these hours as compensable time.

- ❑ Paid firefighters can be paid wages for by their employer for volunteer hours worked during the regular workday for a separate and independent public agency without jeopardizing volunteer status with the separate agency. The employer should count these hours as compensable time.



# CHAPTER 12.

## SOURCES OF ADDITIONAL INFORMATION

We hope this brochure is a helpful resource for managing volunteer firefighters in compliance with FLSA standards. If further questions arise as you assess your volunteer programs, the following resources may be of help to you.

**Department of Labor Web Site.** The Department of Labor's home page is located at: http://www.dol.gov. This web site includes a link to DOL's guidance information on the Fair Labor Standards Act, including the text of the statute and regulations.

**Department of Labor Wage and Hour Opinion Letters.** The Department of Labor's Wage and Hour opinion letters responding to FLSA issues can be accessed at: http://www.dol.gov/esa/whd/opinion/opinion.htm.

**Employment & Labor Legal Counsel.** If you are unsure of how the FLSA volunteer standards apply in your particular situation, you may want to contact legal counsel to assist in ensuring that your volunteer program meets the legal requirements discussed in this brochure. If you would like assistance, please contact Garen E. Dodge, Esq. at (202) 719-7388 or gdodge@wrf.com.

# Appendix



## THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED
(29 U.S.C. 201, *et seq.*)

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Fair Labor Standards Act of 1938."

### Finding and Declaration of Policy

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. ***The Congress further finds that the employment of persons in domestic service in households affects commerce.***

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.[1]

### Definitions

SEC. 3. As used in this Act —

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.[2]

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

[1] As amended by section 2 of the Fair Labor Standards Amendments of 1949.
[2] As amended by section 3(a) of the Fair Labor Standards Amendments of 1949.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee ***and includes a public agency,***[3] ***but does not include*** any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

***(e) (1) Except as provided in paragraphs (2), (3),*** **and (4),** ***the term*** "employee" ***means*** any individual employed by an employer.

***(2) In the case of an individual employed by a public agency, such term means —***

***(A) any individual employed by the Government of the United States —***

***(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),***

***(ii) in any executive agency (as defined in section 105 of such title),***

***(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,***

***(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,***

***(v) in the Library of Congress, or***

***(vi) the Government Printing Office;***

***(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and***

***(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual —***

***(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and***

***(ii) who —***

***(I) holds a public elective office of that State, political subdivision, or agency,***

***(II) is selected by the holder of such an office to be a member of his personal staff,***

[3] Public agencies were specifically excluded from the Act's coverage until the Fair Labor Standards Amendments of 1966, when Congress extended coverage to "employees of a State or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence * * *."





***(III) is appointed by such an office holder to serve on a policymaking level,***

***(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office,*** **or**

**(V)[4] is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.**

***(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.***[5]

**(4)[6] (A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if —**

**(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and**

**(ii) such services are not the same type of services which the individual is employed to perform for such public agency.**

**(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.**

**(5)[7] The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private nonprofit food banks and who receive from the food banks groceries.**

[4] As added by section 5 of the Fair Labor Standards Amendments of 1985, effective April 15, 1986.
[5] Similar language was added to the Act by the Fair Labor Standards Amendments of 1966. Those amendments also excluded from the definition of employee "any individual who is employed by an employer engaged in agriculture if such individual (A) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (B) commutes daily from his permanent residence to the farm on which he is so employed, and (C) has been employed in agriculture less than thirteen weeks during the preceding calendar year." These individuals are now included.
[6] As added by section 4(a) of the Fair Labor Standards Amendments of 1985, effective April 15, 1986.
[7] As amended August 7, 1998, Pub. L. 105–221, § 2.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section **1141j(g) of U.S.C. Title 12**), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, ***or other activity, or branch or group thereof,*** in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.[8]

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation,[9] or (2) any employee between the ages of sixteen and

[8] As amended by section 3(b) of the Fair Labor Standards Amendments of 1949.
[9] As amended by section 3(c) of the Fair Labor Standards Amendments of 1949.

# Appendix



**§ 553.102 Employment by the same public agency.**

(a) Section 3(e)(4)(A)(ii) of the FLSA does not permit an individual to perform hours of volunteer service for a public agency when such hours involve the same type of services which the individual is employed to perform for the same public agency.

(b) Whether two agencies of the same State or local government constitute the same public agency can only be determined on a case-by-case basis. One factor that would support a conclusion that two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce.

**§ 553.103 "Same type of services" defined.**

(a) The 1985 Amendments provide that employees may volunteer hours of service to their public employer or agency provided "such services are not the same type of services which the individual is employed to perform for such public agency." Employees may volunteer their services in one capacity or another without contemplation of pay for services rendered. The phrase "same type of services" means similar or identical services. In general, the Administrator will consider, but not as the only criteria, the duties and other factors contained in the definitions of the 3-digit categories of occupations in the *Dictionary of Occupational Titles* in determining whether the volunteer activities constitute the "same type of services" as the employment activities. Equally important in such a determination will be the consideration of all the facts and circumstances in a particular case, including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee.

(b) An example of an individual performing services which constitute the "same type of services" is a nurse employed by a State hospital who proposes to volunteer to perform nursing services at a State-operated health clinic which does not qualify as a separate public agency as discussed in § 553.102. Similarly, a firefighter cannot volunteer as a firefighter for the same public agency.

(c) Examples of volunteer services which do not constitute the "same type of services" include: A city police officer who volunteers as a part-time referee in a basketball league sponsored by the city; an employee of the city parks department who serves as a volunteer city firefighter; and an office employee of a city hospital or other health care institution who volunteers to spend time with a disabled or elderly person in the same institution during off duty hours as an act of charity.

**§ 553.104 Private individuals who volunteer services to public agencies.**

(a) Individuals who are not employed in any capacity by State or local government agencies often donate hours of service to a public agency for civic or humanitarian reasons. Such individuals are considered volunteers and not employees of such public agencies if their hours of service are provided with no promise expectation, or receipt of compensation for the services rendered, except for reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof, as discussed in § 553.106. There are no limitations or restrictions imposed by the FLSA on the types of services which private individuals may volunteer to perform for public agencies.

(b) Examples of services which might be performed on a volunteer basis when so motivated include helping out in a sheltered workshop or providing personal services to the sick or the elderly in hospitals or nursing homes; assisting in a school library or cafeteria; or driving a school bus to carry a football team or band on a trip. Similarly, individuals may volunteer as firefighters or auxiliary police, or volunteer to perform such tasks as working with retarded or handicapped children or disadvantaged youth, helping in youth programs as camp counselors, soliciting contributions or participating in civic or charitable benefit programs and volunteering other services needed to carry out charitable or educational programs.

[52 FR 2032, Jan. 16, 1987; 52 FR 2648, Jan. 23, 1987]







**§ 553.105 Mutual aid agreements.**

An agreement between two or more States, political subdivisions, or interstate governmental agencies for mutual aid does not change the otherwise volunteer character of services performed by employees of such agencies pursuant to said agreement. For example, where Town A and Town B have entered into a mutual aid agreement related to fire protection, a firefighter employed by Town A who also is a volunteer firefighter for Town B will not have his or her hours of volunteer service for Town B counted as part of his or her hours of employment with Town A. The mere fact that services volunteered to Town B may in some instances involve performance in Town A's geographic jurisdiction does not require that the volunteer's hours are to be counted as hours of employment with Town A.

**§ 553.106 Payment of expenses, benefits, or fees.**

(a) Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers.

(b) An individual who performs hours of service as a volunteer for a public agency may receive payment for expenses without being deemed an employee for purposes of the FLSA. A school guard does not become an employee because he or she receives a uniform allowance, or reimbursement for reasonable cleaning expenses or for wear and tear on personal clothing worn while performing hours of volunteer service. (A uniform allowance must be reasonably limited to relieving the volunteer of the cost of providing or maintaining a required uniform from personal resources.) Such individuals would not lose their volunteer status because they are reimbursed for the approximate out-of-pocket expenses incurred incidental to providing volunteer services, for example, payment for the cost of meals and transportation expenses.

(c) Individuals do not lose their status as volunteers because they are reimbursed for tuition, transportation and meal costs involved in their attending classes intended to teach them to perform efficiently the services they provide or will provide as volunteers. Likewise, the volunteer status of such individuals is not lost if they are provided books, supplies, or other materials essential to their volunteer training or reimbursement for the cost thereof.

(d) Individuals do not lose their volunteer status if they are provided reasonable benefits by a public agency for whom they perform volunteer services. Benefits would be considered reasonable, for example, when they involve inclusion of individual volunteers in group insurance plans (such as liability, health, life, disability, workers' compensation) or pension plans or "length of service" awards, commonly or traditionally provided to volunteers of State and local government agencies, which meet the additional test in paragraph (f) of this section.

(e) Individuals do not lose their volunteer status if they receive a nominal fee from a public agency. A nominal fee is not a substitute for compensation and must not be tied to productivity. However, this does not preclude the payment of a nominal amount on a "per call" or similar basis to volunteer firefighters. The following factors will be among those examined in determining whether a given amount is nominal: The distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year. An individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status.

(f) Whether the furnishing of expenses, benefits, or fees would result in individuals' losing their status as volunteers under the FLSA can only be determined by examining the total amount of payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation.

# Appendix

**U.S. Department of Labor**

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

Chief Robert A. DiPoli, Ret.
President
International Association of Fire Chiefs
4025 Fair Ridge Drive
Fairfax, Virginia 22033-2868

AUG 7 2006

Dear Chief DiPoli:

I am writing in reply to your Association's letter requesting guidance under the Fair Labor Standards Act (FLSA) on numerous hypothetical questions concerning "same type of services," "same public agency," and "nominal fee," as applied to individuals volunteering for, or employed by, a public agency.

The FLSA recognizes the generosity and public benefits of volunteering, and does not seek to pose unnecessary obstacles to *bona fide* volunteer efforts for charitable and public purposes. In this spirit, in enacting the 1985 FLSA Amendments, Congress sought to ensure that true volunteer activities are neither impeded nor discouraged. Congress, however, also wanted to minimize the potential for abuse or manipulation of the FLSA's minimum wage and overtime requirements in "volunteer" situations.

Section 3(e)(4)(A) of the FLSA and 29 C.F.R. §§ 553.101 and 553.103 (copies enclosed) indicate that an individual is a volunteer, not an employee of a public agency, when the individual meets the following criteria:

1. Performs hours of service for a public agency for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered. Although a volunteer can receive no compensation, a volunteer can be paid expenses, reasonable benefits or a nominal fee to perform such services;

2. Offers services freely and without pressure or coercion, direct or implied, from an employer; and

3. Is not otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.

Please be assured that this Administration fully supports volunteerism and is committed to working with organizations like yours to ensure that citizens are able to volunteer freely their services for charitable and public purposes consistent with the law.

Your letter posits factual circumstances that test whether volunteer status is jeopardized. The first series of questions -- questions 1 through 9 -- concerns payments that a public agency may provide a volunteer. We will address these questions under Scenario 1, below. The second





series of questions -- questions 11, 14 and 15 -- goes to the issue of providing the "same type of services" to the "same public agency."[1] We will address these questions under Scenario 2, below.

**Scenario 1**

1. An individual serves as a volunteer firefighter for County A.

2. County A provides the volunteer with some monetary payment (or tax relief) calculated on a yearly, monthly, shift, or on-call basis.

3. The payment (or tax relief) varies based on factors such as the amount of time spent on the activities, length of service, number of calls, and number of shifts, but is not linked to expenses incurred by the volunteer.

Each question asks whether the particular payment negates volunteer status.

Section 3(e)(4)(A)(i) and the implementing regulations at 29 C.F.R. § 553.106 (copy enclosed) provide that a volunteer may only be paid expenses, reasonable benefits, or a nominal fee, or any combination thereof, without losing volunteer status. Examples of permissible expenses or benefit payments are described as a payment for expenses, such as dry cleaning; an allowance for a requirement, such as a uniform; reimbursement for an out-of-pocket expense, such as transportation; a payment to provide materials, such as supplies; or a payment for benefits, such as participation in group insurance plans. *See* 29 C.F.R. § 553.106(a)-(d).

Section 553.106(e) discusses what constitutes a nominal fee and the various factors to consider in determining whether a stipend is nominal. In the preamble to this provision of the regulation, the Department stated, "whether a specific amount is 'nominal' depends on the economic realities of the situation and that no guidelines on specific amounts applicable to all (or even most) possible situations can be provided." *See* 52 Fed. Reg. 2012, at 2021 (Jan. 16, 1987) (copy enclosed).

While the statute and the implementing regulations do not define what constitutes a "nominal fee," the regulations provide guidance for determining whether a fee is nominal and permissible. If a fee is not nominal, then the individual does not qualify as a volunteer and is considered an employee who is covered by the FLSA minimum wage and overtime provisions. The factors to examine in making a determination of whether an amount is nominal include, but are not limited to: (1) the distance traveled and the time or effort required of a volunteer; (2)

[1] In a conversation with our staff subsequent to your letter, you withdrew original questions 7, 8, 10, 12, and 13 and replaced them with two new questions. These new questions are reproduced here as new questions 7 and 8. There are no longer any questions 10, 12, or 13.

the availability -- limited or unlimited -- of a volunteer to provide services; and (3) the basis -- as needed or throughout the year -- on which a volunteer agrees to perform services. *See* 29 C.F.R. § 553.106(e). These factors focus upon whether the fee is actually more analogous to a payment for services or recompense for something performed and, hence, not nominal. Thus, to the extent that payments are tied to productivity (*e.g.*, payment of hourly wages for services rendered), are similar to "piece rates" or are comparable to "production bonuses," there is a greater likelihood that such fees are not nominal. However, as noted in the preamble to section 553.106(e), almost 30 percent of all volunteer firefighters are paid a small fee for each fire call to which they respond, and the rule was not intended to invalidate that model. *See* 52 Fed. Reg. 2012, at 2021. Moreover, consistent with the discussion of factors to be considered (*e.g.*, distance traveled, time and effort expended, around-the-clock versus limited availability, throughout the year versus upon request), compensation "per call" or other similar bases may be acceptable so long as they may fairly be characterized as tied to the volunteer's sacrifice rather than productivity-based compensation. Accordingly, nothing in the statutory language would directly preclude the payment of nominal per call or even per shift fees to volunteer firefighters as section 553.106(e) specifically provides that a nominal fee can be paid on a "per call" or similar basis for volunteer firefighters.

Please also see Wage and Hour Opinion Letter FLSA2005-51 (Nov. 10, 2005) (copy enclosed) that contains a recent discussion of the Department's consideration of what payment constitutes a nominal fee for determining an individual's volunteer status. That opinion letter expounds upon the "economic realities" test in the context of school systems and those volunteering by assisting with extra-curricular activities, such as coaching sports or sponsoring various clubs. Specifically, this letter states that when a public agency employee volunteers as a coach or extracurricular advisor, the Department will presume the fee paid is nominal as long as the fee does not exceed 20 percent of what the public agency would otherwise pay to hire a full-time coach or extracurricular advisor for the same services. This 20 percent rule is derived from the FLSA and implementing regulations. *See* Wage and Hour Opinion Letter FLSA2005-51 ("The FLSA and the implementing regulations use a 20 percent test to assess whether something is insubstantial with regard to prohibited driving on public roadways by employees who are 17 years of age."). A willingness to volunteer for 20 percent of the prevailing wage for the job is also a likely indication of the spirit of volunteerism contemplated by the 1985 amendments to the FLSA. We believe this interpretation of "nominal fee" applies equally in the context of firefighters.

Finally, the regulations instruct that any nominal fees must be considered in the context of any other benefits or expenses paid and the economic reality of the particular situation. Indeed, section 553.106(f) sets forth the "economic realities" test, which specifically provides that the determination of whether the expenses, benefits or fees would preclude an individual from qualifying as a volunteer under the FLSA must be made by examining the total amount of payments in the context of the economic realities of a particular situation. As your letter is





silent on whether any other expenses and/or benefits are paid, the Department assumes there are no other benefits or expenses beyond the payments described in the questions.

The probative facts as we see them for each hypothetical question are set out below:

**Q.1** The volunteer is paid $1,200 per year regardless of the number of shifts or amount of time spent responding to calls. On average the volunteer staffs a minimum of 24 shifts and/or spends a minimum of 60 hours responding to calls annually.

**Q.2** The volunteer is paid $100.00 per month regardless of the number of shifts or amount of time spent responding to calls. On average the volunteer staffs a minimum of 4 shifts and/or spends a minimum of 8 hours responding to calls monthly.

**Q.3** The volunteer is paid $100.00 per month so long as the volunteer staffs a minimum of 2 shifts and/or spends a minimum of 5 hours responding to calls during the month. Additional payments of $25.00 are made for each additional shift over 4 during the month and/or for every 2.5 hours spent responding to calls exceeding 12 hours during the month.

**Q.4** The volunteer is paid $25.00 (or $30.00 or $40.00) for each four-hour block of time regardless of the actual amount of time below four hours spent at the station house or responding to calls.

**Q.5** The volunteer is paid $20.00 for each shift regardless of the length of the shift or the time spent responding to calls. On average, the volunteer works a 6 hour shift and/or spends 2 hours per shift responding to calls.

**Q.6** The volunteer is paid $25.00 if the volunteer staffs a shift of at least 8 hours and/or spends 2.5 hours responding to calls. An additional $15.00 per shift is paid if the shift exceeds 8 hours or responds to calls over 5 hours during a single shift.

**Q.7** An individual serves as a volunteer firefighter in Indiana. Indiana Code 36-8-12 defines "nominal" as an annual payment of not more than twenty thousand dollars ($20,000). The volunteer is paid an annual fee of $15,000. On average, the volunteer spends at least 3,000 hours per year waiting and responding to calls.[2]

**Q.8** The volunteer is paid a stipend of $20.00 per shift regardless of the length of the shift or the amount of time spent responding to calls during the shift. For every consecutive year of volunteer service in which the volunteer has staffed not less than 12 shifts per year, the volunteer is granted an additional stipend of $1.00 per shift regardless of the time spent

[2] In a conversation with our staff subsequent to your letter, you withdrew questions 7, 8, 10, 12, and 13 and replaced them with two new questions. These new questions are reproduced here as new questions 7 and 8.

responding to calls.

**Q.9** The volunteer is provided with $1,500.00 personal property tax relief annually during the term of their volunteer service.

These questions, with the exception of question 9, specify payments to be made to the volunteer per shift, month, or year and the average number of shifts, calls, and/or hours worked by the volunteer. In some instances, additional payments are made if additional time above the required minimum is spent on shift or responding to calls. In other instances, payment increases depending on the number of years volunteered. Assuming there are no other payments or benefits provided and no other facts that bear on the question (out-of-pocket expenses, travel costs, uniform maintenance, etc.), these payments may qualify as nominal fees under § 553.106.

Generally, a key factor in determining if a payment is "substitute for compensation" or "tied to productivity" is "whether the amount of the fee varies as the particular individual spends more or less time engaged in the volunteer activities." Wage and Hour Opinion Letter FLSA2005-51. If the amount varies, it may be indicative of a substitute for compensation or tied to productivity and therefore not nominal. *See id.*; *see also* 29 C.F.R. § 553.106(e). However, as noted above, there is a specific allowance for volunteer firefighters to be paid on a "per call" or similar basis consistent with certain factors denoting the relative sacrifice of the volunteer. *See* 29 C.F.R. § 553.106(e). Due to this specific allowance, and assuming there are no other facts showing that the payments in your hypothetical situations are a substitute for compensation or tied to productivity, it still must be determined if the payments are nominal amounts.

Applying the recent interpretation of "nominal fee" in Wage and Hour Opinion Letter FLSA2005-51, generally an amount not exceeding 20 percent of the total compensation that the employer would pay to employ a full-time firefighter for performing comparable services would be deemed nominal. Thus, in questions 1 through 6, a nominal fee could be 20 percent or less of the total compensation that County A would pay for the same services. Assuming the fee is determined to be nominal, it is less relevant whether it is paid on an annual, monthly or daily basis.[3] As was stated in Wage and Hour Opinion Letter FLSA2005-51, the market information necessary to complete this good faith determination is generally within your members' knowledge and control. Any full-time firefighter a particular fire department has on its payroll would be a good benchmark for this calculation. Absent such information, a fire department or similar entity may look to information from neighboring jurisdictions, the state, or ultimately, the nation, including data from the Department of Labor, Bureau of Labor Statistics. Thus, for example, if a volunteer staffs three shifts during a month, a nominal fee should not exceed 20 percent of what it would cost to employ a full-time firefighter to staff a period to cover the

[3] The Department has withdrawn Wage and Hour Opinion Letters September 17, 1999, April 2, 1992, and July 15, 1988 to the extent they are inconsistent with the interpretation of nominal fee in this opinion.





equivalent of the three shifts.

Question 7 involves $15,000 per year for volunteers who on average spend at least 3,000 hours waiting for or responding to calls. Assuming the payment does not vary depending on the productivity of the volunteer or whether the volunteer spends more or less time on volunteer activities, the payment of $15,000 might qualify as "nominal" under the 20 percent rule if County A would otherwise need to pay $75,000 or more to hire a full-time firefighter to perform the same services. However, it is unlikely that 3,000 hours of service (50+ hours per week) is "volunteering" rather than employment. Indeed, without knowing additional facts and circumstances about the economic realities of the locality, a payment of $15,000 for 3,000 hours of volunteer services arguably constitutes compensation for a full-time job rather than a "nominal fee" for volunteering.

Similarly, Question 8 involves increased payment for every year the volunteer staffs a requisite number of shifts. Without additional facts, we are unable to say definitively whether this increased payment represents compensation via a seniority or productivity system based on services rendered, and is thus not permitted, or, applying the test described above, is a "nominal fee" for volunteerism.

Question 9, involving tax relief of $1,500 on personal property taxes, would appear to constitute a permissible "reasonable benefit" and thus need not be evaluated as a "nominal fee." Provision of such a benefit will not, in and of itself, preclude bona fide volunteer status.

**Scenario 2**

You have also posed questions similar to those raised in your letter of September 16, 2002, which we responded to in April 2003, that concern whether the volunteer services are for the same public agency and/or are the same type of services the volunteer is employed by that public agency to provide. *See* Wage and Hour Opinion Letter FLSA2003-2 (Apr. 14, 2003) (copy enclosed). Questions 11, 14, and 15 all concern these issues. We assume for each Question that the person is providing volunteer services for civic, charitable or humanitarian purposes and without any expectation or receipt of compensation and the services are volunteered without any pressure or coercion from an employer. You posit the following facts:

1. The individual in question is employed by County A, a public agency.

2. The individual seeks to volunteer either for County A, a public agency, or a joint powers board funded by both City A and County A.

In order to determine whether a person is a bona fide volunteer under section 3(e) of the FLSA (copy enclosed), if the volunteer is employed by a public agency it is necessary to assess

# Appendix



whether the volunteer is employed by the same agency for whom the services are provided **and** the services provided are the same services the volunteer is employed to provide. As noted in Wage and Hour Opinion Letter FLSA2003-2, if an individual is not employed by the **same public agency** (what you call the "who is an employer" question), then it is not necessary to examine the nature of the services provided (what you call the "what are the same type of services" question). Similarly, if the individual does not perform the **same type of services** for the public agency, there is no need to examine the relationship of the agency receiving the individual's volunteer services to the individual's employer.

As stated in our prior opinion letter, whether two entities of a local government constitute the same public agency can only be determined on a case-by-case basis. Among the factors to be considered is whether the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce, treats the two agencies separately for statistical purposes. *See* 29 C.F.R. § 553.102 (copy enclosed). In addition to the Census of Governments, the attached Wage and Hour Opinion Letter FLSA2002-3 (June 7, 2002) provides a framework for making such a determination and identifies factors that are relevant to the determination. As indicated in Wage and Hour Opinion Letter FLSA2003-2, there are a number of relevant factors to consider, such as: whether the two agencies have separate payroll and retirement systems; whether they both have the authority to sue and be sued in their own names; whether they have separate hiring and other employment practices; and how they are treated under state law. *See also* Wage and Hour Opinion Letter FLSA2006-13 (Apr. 28, 2006) (City firefighters may volunteer to County Fire Protection District that has separately elected Board; separate funding sources; separate payroll, benefits and retirement systems; can levy taxes and exercise eminent domain; can sue and be sued; and is treated separately by the Census) (copy enclosed).

If those other factors demonstrate that the agencies should be treated as separate entities, or if the Census of Governments treats the agencies described in questions 11, 14 and 15 as separate agencies, then our opinion is that they are not the same employer and an employee of one could volunteer to provide services of any nature for the other public agency.

Even if the public agency for which the person seeks to volunteer is the volunteer's employer, volunteer services may still be provided so long as the services are not the same type of services the volunteer is employed to provide. For instance, a firefighter may not volunteer as a firefighter for the same public agency. On the other hand, an employee of the city parks department may offer to volunteer as a firefighter, or a police officer may volunteer to referee in a basketball league sponsored by his employing city. *See* 29 C.F.R. § 553.103.

Much like the determination of "same public agency," whether the service the volunteer seeks to provide is the "same type of services" the individual is employed to perform can only be determined after "consideration of all the facts and circumstances in a particular case[.]" *See* 29 C.F.R. § 553.103(a). The regulations define "same type of services" to mean similar or





identical services. *Id.* Among the facts considered is how the volunteered services and the services that the volunteer is employed to provide are classified by the three digit categories of occupations in the *Dictionary of Occupational Titles*. Further, in addition to the *Dictionary of Occupational Titles*, one must also consider whether the volunteer services are "closely related to the actual duties performed by or responsibilities assigned to the employee." *Id.* An additional source of information about occupational categories is found in O*NET, available at http://www.doleta.gov/programs/onet/. The O*NET system, created and maintained by the Department of Labor's Employment and Training Administration, is a unique, powerful source for continually updated information on skill requirements and occupational characteristics.

With these qualifications in mind, we will now address in turn each question under Scenario 2.

**Q.11** An individual is employed as a mechanic by the County A Parks Department. He also volunteers as a firefighter for the County Fire and Rescue Department, a joint powers board funded by County A and City A. He is granted paid leave while responding to calls as a volunteer.

**A.11** This scenario resembles that outlined in your September 16, 2002, letter which the Department answered in Wage and Hour Opinion Letter FLSA2003-2. As discussed more fully therein, the determination of whether the mechanic is a bona fide volunteer turns in part on whether the County A Parks Department and the County A Fire and Rescue Department are the same public agency. We refer you to the discussion of the factors to consider in making this determination as outlined in Wage and Hour Opinion Letter FLSA2003-2.

Assuming the County A Parks Department and the Fire and Rescue Department are separate agencies, the fact that the Parks Department allowed its employee to cease his usual duties to respond to fire calls and paid the employee for his normal work hours spent on such calls, would not make the mechanic an employee of the Fire and Rescue Department. However, such special leave would be compensable hours worked for the Parks Department and would have to be counted when computing total hours worked for the Parks Department for purposes of overtime. If the employee substitutes paid personal leave earned with the Parks Department -- which the employee may use as the employee sees fit, including for time spent as a volunteer firefighter -- for the time off spent in volunteer activities, then the individual's status as a bona fide volunteer to the Fire and Rescue Department is not jeopardized and the hours would not be compensable hours worked for the Parks Department for overtime purposes.

Conversely, as explained in Wage and Hour Opinion Letter FLSA2003-2, if the County Parks Department and the Fire and Rescue Department are part of the same public agency, and the County grants special leave for the hours the employee works as a firefighter without requiring him to use his personal accrued leave (which would be considered compensable hours worked for the County as discussed above), then the County employs him as both a mechanic and as a

firefighter. In essence, because the County releases him from his normal mechanic duties and shift only if he spends the specified time performing alternative firefighting duties and pays him wages for the time worked, he is employed by the County as both a full-time mechanic and as a part-time firefighter. Therefore, such time would be compensable hours worked for the County Parks Department and would have to be counted when computing total hours worked for purposes of overtime. Moreover, he would not be able to serve additional hours as a "volunteer" firefighter for the County because of the statutory prohibition against an employee volunteering to his own agency to perform the same type of services he is employed to perform. However, even if the Park Department and Fire and Rescue Department are not separate agencies, if the employee substitutes paid personal leave earned – which the employee may use as the employee sees fit, including for time spent as a volunteer firefighter – for the time off spent in volunteer activities that are not the "same type of service," then the individual's status as a bona fide volunteer is not jeopardized and the hours would not be compensable hours worked for the Parks Department for overtime purposes.

**Q.14** Firefighter, cross-trained and licensed as an EMT/paramedic, is employed by County A Fire and Rescue Department. The Fire and Rescue Department is not licensed to nor does it provide advanced life support, although it does respond to medical emergencies, accidents, and fires as first responders. The County A Department of Emergency Medical Services is licensed and required to provide advanced life support services as first responders. Firefighter serves as a volunteer EMT/Paramedic for the County A Department of Emergency Medical Services.

**A.14** Similar to question 11, the determination of whether the firefighter, who is cross-trained and licensed as an EMT/Paramedic, is a bona fide volunteer turns in part on whether the County A Fire and Rescue Department and the County A Department of Emergency Medical Services are the same public agency. Again, we refer you to the discussion of this question in Wage and Hour Opinion Letter FLSA2003-2. Generally, "the government of a political subdivision, e.g., county, city, etc., with all of its departments and agencies, constitutes a single employer under the Act." Field Operations Handbook § 10c11(a) (copy enclosed). Although somewhat limited, it appears likely that the regulations provide that "[p]ublic safety employees taking on any kind of security or safety function within the same local government are never considered to be employed in a *different capacity*." 29 C.F.R. § 553.30(c)(3) (copy enclosed). This is based on the 1985 legislative history instructing the Department to interpret the phrase working in a different capacity "in the strictest sense" with regard to public safety employees. *See* House Report No. 99-391, October 24, 1985, p. 25; Wage and Hour Opinion Letters FLSA2004-26NA (Oct. 29, 2004) and FLSA2004-25NA (Oct. 22, 2004) (copies enclosed). Therefore, we have previously concluded that an individual employed as a fire marshal could not volunteer as a firefighter for the same employer (Wage and Hour Opinion Letter September 3, 1999) (copy enclosed), and that firefighter/EMS employees could not volunteer as tactical EMS medics for their employer's police department SWAT team (*see* Wage and Hour Opinion Letter August 19, 1999) (copy enclosed).





Your letter provides no specific information regarding whether state law and the Census treat the County A Department of Emergency Medical Services as a separate public agency, including whether its payroll retirement and other personnel systems are separate, and whether it may sue and be sued in its own name. Additionally, you provide no evidence concerning the extent to which the County A Fire and Rescue Department exercises day-to-day control, if at all, over the volunteer services provided to the County A Department of Emergency Medical Services. Consequently, we are unable to determine if the entities should be considered the same public agency. If the agencies are determined to be separate public agencies under the FLSA, it is not necessary to determine if the individuals perform the same type of services.

However, in the event the agencies were not separate, while your scenario provides that there are some differences in the type of services provided in each role, there is insufficient information on the total scope of services in each role to make a "same type of services" determination, and, consequently, we are unable to provide a definite response to this question for that reason also.

**Q.15** Police Officer is employed by County A Bureau of Police, where he responds to medical emergencies, accidents, and fires as a first responder but provides no medical or life support. The Police Officer also volunteers for County A Fire and Rescue Department (a joint powers board of County A and City A) where he responds to medical emergencies, accidents and fires and provides medical and other life support.

**A.15** Again, the determination of whether the police officer, who is a first responder, is a bona fide volunteer turns in part on whether the person is volunteering for the same public agency that employs the individual as a police officer and, if so, whether the volunteered services are the same as those the person is employed to provide. We refer you to the discussion of the factors to consider in making this determination as outlined in Wage and Hour Opinion Letter FLSA2003-2. Again, a "same type of services" determination can be made only after an examination of all the facts and circumstances of a particular case. We assume that, even though both agencies respond to the same types of emergencies, the Bureau of Police does not provide medical or life support services that the Fire and Rescue Department provides. It is our general position that the definition of "same type of services" typically allows for a determination that police and firefighters provide a different type of service, consistent with their different *Dictionary of Occupational Titles* categories. As explained in Wage and Hour Opinion Letter FLSA2003-2, merely responding to the same emergencies, such as traffic accidents and fire calls, or acting as a medical first responder on occasion will typically not change the inherent difference in the two occupations. Accordingly, while we believe, for the reasons cited, that the police officer described in your scenario probably may volunteer as a firefighter without incurring FLSA wage liability, without more information on the relationship of the agencies, we are constrained in providing a definitive answer on this question.

# Appendix



We are also enclosing a copy of Wage and Hour Opinion Letter July 7, 1999 that addresses issues very similar to those raised in this and your September 16, 2002 letter. This letter may provide further guidance to you and your members concerning the volunteer issue.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust you will find the above discussion and analysis responsive to your request.

Sincerely,

Alfred B. Robinson Jr.

Alfred B. Robinson Jr.
Acting Administrator

Enclosures:

FLSA section 3(e)
29 C.F.R. §§ 553.30, 553.100-.106
52 Fed. Reg. at 2018, 2021 (Jan. 16, 1987)
Wage and Hour Opinion Letters FLSA2006-13 (Apr. 28, 2006); FLSA2005-51 (Nov. 10, 2005); FLSA2004-26NA (Oct. 29, 2004); FLSA2004-25NA (Oct. 22, 2004); FLSA2003-2 (Apr. 14, 2003); FLSA2002-3 (June 7, 2002); September 3, 1999; August 19, 1999; and July 7, 1999
Field Operations Handbook § 10c11(a)



**U.S. Department of Labor**

Employment Standards Administration
Wage and Hour Division

JUL - 7 1999

Dear

I am pleased to respond to your request to the Department of Labor to explain how the Fair Labor Standards Act (FLSA) would apply in several hypothetical situations.

The FLSA contains only one specific provision regarding volunteers which prohibits an employee of a public agency from "volunteering" additional time to perform the same type of services which the individual is employed to perform for such public agency. This provision is found in the statutory definition of "employee," in section 3(e)(4) of the FLSA (29 U.S.C. Sec. 203(e)(4)). This provision was the result of carefully-constructed, bipartisan, consensus legislation enacted in the 1985 Amendments to the FLSA, which garnered the support of the U.S. Conference of Mayors, the National League of Cities, the National Association of Counties, the National Conference of State Legislators, the AFL-CIO and the Fraternal Order of Police.

The FLSA recognizes the generosity and public benefits of volunteering, and does not pose obstacles to *bona fide* volunteer efforts for charitable and public purposes except in very limited circumstances. In this spirit, in enacting the 1985 FLSA Amendments, the Congress sought to ensure that true volunteer activities were neither impeded nor discouraged. Congress was equally clear, however, that it recognized and wanted to minimize the very real potential for abuse or manipulation of the FLSA's minimum wage and overtime requirements, which has not diminished since Congress first debated this issue. To this end, Congress narrowly constrained the circumstances in which individuals may volunteer services to a public agency by which they are employed: (1) the individual may receive no compensation, or is paid only expenses, reasonable benefits or a nominal fee, and (2) the volunteer services may not be the same services as those which the individual is employed to perform for his or her employer.

These narrow constraints offer public sector employees a vast array of opportunities to serve their communities as volunteers. A county sheriff, for example, may volunteer in a search and rescue capacity for surrounding jurisdictions or for neighboring cities or counties. A fire fighter may volunteer his or her services to a church, hospital, civic or

charitable organization in any capacity, or to any other public agency or even – in some circumstances – to the fire department. In situations where the Department has found certain volunteer activities to be compensable work activities, the duties being performed were essentially the same as or directly related to the employees' official duties and were being performed for the same employer in direct violation of the FLSA. For example, emergency medical technicians (EMTs) employed by a county may not volunteer in their off-duty hours as EMTs for the same county's rescue squad without compensation. Professional fire fighters are not permitted to perform volunteer fire fighting duties without pay for the same city or county which employs them.

This is not to say, however, that every volunteer activity, however remotely related to an employee's official duties, falls into the category of compensable work activity. For example, a police officer who volunteers as a referee for city-league basketball games or who helps out in clean-up after a flood or hurricane, or who takes a child to a ball game in his or her off-duty time or who serves as a trip chaperone for school activities is performing an activity outside of the constraints of the law. The narrow limitation of the FLSA on public employees volunteering additional hours of service to their employer in the same capacity as they are employed to do is a wise and appropriate policy to protect against the real potential for abuse, which is not present in the examples just discussed, and should be retained.

Any determination of volunteer status (as opposed to "hours worked") depends on the specific facts of the situation. Many of the scenarios presented in your letter did not contain sufficient detail to render an opinion as to the status of the individual. In such instances, in order to provide a full response, we have made certain additional factual assumptions as reflected in our responses in the enclosure.

The responses provided in the enclosure are based exclusively on the facts and circumstances described in your request. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

If you have further questions or need additional information in this matter, please do not hesitate to contact me.

Sincerely,

John R. Fraser
Deputy Administrator

Enclosure



Enclosure to the response to the Subcommittee on Workforce Protections, Committee on Education and the Workforce

Q1. An individual is employed by the City A Parks Department in a non-fire fighting position. The individual also serves as a volunteer fire fighter with the City A Volunteer Fire Department. Is the individual a *bona fide* volunteer?

A1. An individual employed by a City Parks department in a non-fire fighting position who volunteers to the same City's Volunteer Fire Department as a fire fighter may qualify as a *bona fide* volunteer. The volunteer activities are not in the same capacity as the individual's employment. The individual may only receive payment for expenses, reasonable benefits, a nominal fee, or any combination without jeopardizing his or her status as a volunteer.

Q2. An individual is employed as a professional paid fire fighter with the City A Fire and Rescue Department, a combination department which utilizes both professional paid and professional volunteer fire fighters. The individual also serves as volunteer fire fighter with the City A Fire and Rescue Department. Is the individual a *bona fide* volunteer?

A2. An individual employed as a paid professional fire fighter with a City Fire and Rescue Department may not volunteer his or her services as a fire fighter to the City Fire and Rescue Department. Pursuant to §203(e)(4)(A), public sector employers may not allow their employees to volunteer to them, without appropriate compensation, additional time to do the same work for which they are employed.

Q3. An individual is employed as a professional paid fire fighter of Fire District No. 1, in County A. Fire District No. 1 has a mutual aid agreement with Fire District No. 2, in County B. The individual also serves as a volunteer fire fighter with Fire District No. 2. Is the individual a *bona fide* volunteer?

A3. A professional paid fire fighter employed by Fire District No. 1 in County A may volunteer as a fire fighter to Fire District No. 2 in County B, a separate employer or public agency. The existence of a mutual aid agreement between the Fire Districts would not change the volunteer nature of the service.

Q4. An individual is a professional paid fire fighter with the County A Fire and Rescue Department. County A staffs the apparatus at fifteen separate, independently chartered fire and rescue departments with professional paid fire fighters. The separate, independently chartered fire and rescue departments are not "public agencies" under the FLSA. The separate, independently chartered fire and rescue departments each have their own *bona fide* volunteers who staff additional apparatus, and supplement the professional paid staff on the main apparatus. The individual also serves as a volunteer fire fighter with one of the separate, independently chartered fire and rescue departments. Is the individual a *bona fide* volunteer?

A4. This question, as well as questions 5 and 13, raise the same general issue of whether a professional public agency fire fighter may volunteer his or her time to perform the same fire fighter/EMT services for a private, non-profit fire corporation or rescue squad that serves the same geographic area. In a recent decision in Benshoff v. City of Virginia Beach, 1999 WL 371592 (4th Cir. 1999), the court addressed facts similar to those presented in question 13. The court ruled, under the facts of that particular case, that City fire fighters who were cross trained as EMTs were not employees of the City entitled to compensation when they voluntarily performed additional hours as EMTs within the City's jurisdiction for non-profit, separately incorporated rescue squads.

The court recognized, however, that the analysis of whether an individual is an employee or a volunteer must be made on a case-by-case basis, due to the very fact dependent nature of each situation. In cases where there is sufficient integration of operations and control of the operations of the non-profit fire corporation or rescue squad by the public agency, so that a joint employment relationship exists, the court acknowledged that the fire fighters would be performing the same services for their public agency employer as they are hired to perform. In such a situation, the fire fighter/EMT activities would not be recognized as *bona fide* volunteer activities under the FLSA.

The Benshoff decision was issued on June 8, 1999, and we are still analyzing the court's opinion. In addition, the decision may still be subject to a request for further review by the Supreme Court. Thus, we are still evaluating the circumstances in which professional public agency fire fighters may volunteer their services to a non-profit fire corporation serving the same jurisdiction, where there is a significant level of integration of operations and control of the operations of the non-profit by the public agency.

Q5. An individual is a professional paid fire fighter with the County A Fire and Rescue Department. The County A Fire and Rescue Department operates 20 stations, 10 owned by County A and 10 owned by independently incorporated volunteer fire and rescue departments. County A contributes funds to all 10 independently incorporated volunteer fire and rescue departments, and professional paid County A fire fighters staff apparatus at all 20 stations. The 10 independently incorporated volunteer fire and rescue departments own the buildings and the apparatus at their stations. The independently incorporated volunteer fire and rescue departments each have their own *bona fide* volunteers who staff additional apparatus, and supplement the professional paid staff on the main apparatus. The individual also serves as a volunteer fire fighter with one of the independently incorporated volunteer fire and rescue departments. Is the individual a *bona fide* volunteer?

A5. See A4 above.

Q6. An individual is employed as a deputy sheriff with the County A Sheriff's Department. The County A Fire and Rescue Department, a combination department, is a joint powers board which is funded by both City A and County A. As a result, County A and the joint powers board share the same tax base. The individual also serves as a volunteer fire fighter with the County A Fire and Rescue Department. Is the individual a *bona fide* volunteer?

A6. Employees may volunteer hours of service to their public employer or agency provided such services are not the same type of services which the individual is employed to perform for such public agency. A police officer, whose job does not involve fire fighting training or skills, may volunteer as a fire fighter to fight fires for the same public employer. Similarly, a fire fighter whose duties do not include law enforcement functions may volunteer as a police reservist to his or her same public agency employer.

Q7. An individual is employed as a professional paid fire fighter with the County A Fire and Rescue Department. The County A Fire and Rescue Department, a combination department, is a joint powers board which is funded by both City A and County A. As a result, County A and the joint powers board share the same tax base. The individual also serves as a volunteer deputy sheriff on the County A Sheriff's Department Search and Rescue Team. Is the individual a *bona fide* volunteer?

A7. See A6 above.

Q8. An individual is employed as a professional paid fire fighter, cross-trained for fire fighting and emergency medical services, with the County A Fire and Rescue Department. The County A Fire and Rescue Department, a combination department, is a joint powers board which is funded by both City A and County A. As a result, County A and the joint powers board share the same tax base. The individual also serves as a volunteer emergency medical technician with the City A Volunteer Ambulance Squad. Is the individual a *bona fide* volunteer?

A8. A paid professional fire fighter, who is cross-trained for fire fighting and emergency medical services, is employed by a County Fire and Rescue Department. The individual wishes to volunteer as an emergency medical technician (EMT) with a City Fire and Rescue Squad. The County's Fire and Rescue Department is a joint powers board which is funded by both the City and County. As a result, the County and the joint powers board share the same tax base. EMT services performed for the City Fire and Rescue Squad by the County's fire fighter/emergency medical services employee would be permissible volunteer activities, provided that the County Fire and Rescue Department and the City Fire and Rescue Squad are separate public agencies (assuming that the joint powers board serves merely a financial function and does not coordinate or control the activities of either the County Fire and Rescue Department or the City Fire and Rescue Squad).

Q9. An individual is employed as a mechanic by the County A Parks Department. The County A Fire and Rescue Department, a combination department, is a joint powers board which is funded by both City A and County A. As a result, County A and the joint powers board share the same tax base. The individual also serves as a volunteer fire fighter with the County A Fire and Rescue Department. The individual is granted paid

leave from his job in order to respond as a volunteer fire fighter. However, the individual is not paid for services as a volunteer fire fighter with the County A Fire and Rescue Department at any time. Is the individual a *bona fide* volunteer?

A9. An individual employed as a mechanic by the County Parks Department wishes to serve as a volunteer fire fighter with the County Fire and Rescue Department. The individual receives no compensation from the County Fire and Rescue Department but is granted leave from his job with the County Parks Department to volunteer as a fire fighter. Assuming that the granting of leave by the County Parks Department means the employee is able to use his or her personal leave or time off, in such a situation the individual would be considered a *bona fide* volunteer because his volunteer service is in a different capacity than his normal job, and he is not paid for his volunteer service.

Q10. An individual is employed as a junior high school teacher at County A Junior High School. The County A Fire and Rescue Department, a combination department, is a joint powers board which is funded by both City A and County A. As a result, County A and the joint powers board share the same tax base. The individual also serves as a volunteer fire fighter with the County A Fire and Rescue Department. In addition, the individual serves as volunteer coordinator of the County A Fire and Rescue Department's Cadet Program, which is made up of student volunteers from County A High School. Is the individual a *bona fide* volunteer?

A10. A junior high school teacher employed by the County serves as a volunteer fire fighter with the County Fire and Rescue Department. In addition, the junior high school teacher serves as volunteer coordinator of the County Fire and Rescue Department's Cadet Program, which is made up of student volunteers from the County high school. It appears that the junior high school teacher is volunteering in a capacity different than that in which he is employed, which would be permissible under the FLSA.

Q11. An individual is employed as a professional paid fire fighter for the City A Fire Department. City A and County A are both supported by County A's tax base, and County A tax revenues fund the City A Fire Department, even though City A is incorporated independently of County A. The individual also serves as a volunteer fire fighter with the Wildcat Volunteer Fire and Rescue Department, a County A-supported independent all-volunteer fire department located in County A but outside City A. Is the individual a *bona fide* volunteer?

A11. A paid professional fire fighter employed by the City Fire Department seeks to serve as a volunteer fire fighter to a Volunteer Fire and Rescue Department, which is an independent, all volunteer department supported by the County. The City and County are both supported by County's tax base, and County tax revenues fund the City Fire Department even though the City is incorporated independently of the County. Assuming that the entities are in fact separate and independent employers and that there is no integrated command and/or control between the entities, a City fire fighter may serve as a volunteer fire fighter to a County Fire and Rescue Department or to an independent Fire and Rescue Department operating outside the City.





Q12. An individual is employed as a police officer with the County A Bureau of Police. The County A Bureau of Police and the County A Bureau of Fire and Rescue, a combination department, are both part of the County A Public Safety Department. Police officers respond to fires, accidents, and medical emergencies as first responders, but do not perform basic or advanced life support. Volunteer fire fighters respond to accidents, crime scenes, and police actions, but have no law enforcement role. The individual also serves as a volunteer fire fighter with the County A Bureau of Fire and Rescue. Is the individual a *bona fide* volunteer?

A12. A police officer employed by the County Bureau of Police wishes to volunteer to the County Bureau of Fire and Rescue as a fire fighter. Both the County Bureau of Police and County Bureau of Fire and Rescue are part of the County Public Safety Department. Due to the shared responsibilities of the County Bureau of Police and the County Bureau of Fire and Rescue, it appears that the police officer would be performing the same type of services to his or her employer, which is contrary to Section 203(e)(4)(A) of the statute.

Q13. An individual is employed as a professional paid fire fighter-paramedic with the City A Fire and Rescue Department. In addition to the Fire and Rescue Department, City A maintains a Department of Emergency Medical Services which interacts with the City A Fire and Rescue Department and the 10 private rescue squads that serve City A residents. City A does not maintain a license to provide advanced life support, but each of the 10 private rescue squads do. City A fire fighters are not required to provide advanced life support while serving as a City A fire fighter, but may if they are also a paramedic with one of the 10 private rescue squads. Both City A fire fighters and private rescue squad personnel are often dispatched to medical emergencies, accidents, and fires. The activities of the 10 private rescue squads are coordinated by the City A Department of Emergency Medical Services, but the 10 private rescue squads are not governed or controlled by City A. Each private rescue squad has its own elected board, and City A maintains no control over those boards. The individual also serves as a volunteer paramedic with one of the 10 private rescue squads. Is the individual a *bona fide* volunteer?

A13. See A4 above.

Q14. An individual is employed as a professional paid paramedic with the County A Emergency Medical Service. City A is within County A. The City A Volunteer Rescue Squad provides first response, but not advanced life support, on emergency calls until an ambulance from the County A Emergency Medical Service arrives. The City A Volunteer Rescue Squad is supported by City A. City A is a city government for statistical purposes in the census of governments. The County A Emergency Medical Service is supported by County A. County A is a county government for.statistical purposes in the census of governments. The individual is also a volunteer first responder for the City A Volunteer Rescue Squad. Is the individual a *bona fide* volunteer?

A14. An individual employed as a professional paid paramedic with the County Emergency Medical Service wishes to serve as a volunteer first responder for a City Volunteer Rescue Squad. The City is a city government listed in the census of governments, is within the County, which is a county government in the census of governments. If, as we have assumed the Volunteer Rescue Squad is a public agency (i.e., an agency of the City government), the City and County are separate public agencies and the individual may volunteer without compensation in these circumstances.

Q15. An individual is employed as a professional paid fire fighter with the Independent Fire and Rescue Department. State law established the County A Fire Protection Authority, and empowered it to provide fire protection to all areas within County A. City A is within County A. The County A Fire Protection Authority may cause the establishment of fire and rescue departments and ensure their operating levels, but may not abolish fire and rescue departments. City A designated the Independent Fire and Rescue Department, a nonprofit organization, as its fire department. City A and the County A Fire Protection Authority determine the compensation to be paid to the Independent Fire and Rescue Department. The Independent Fire and Rescue Department owns five fire stations and all of its apparatus and equipment, and has entered into contracts with City A and County A to provide fire and rescue services. The individual also serves as a volunteer fire fighter for the Wildcat Volunteer Fire and Rescue Department, a County A-supported independent all-volunteer fire department in County A. Is the individual a *bona fide* volunteer?

A15. The City, within the County, has designated a non-profit Independent Fire and Rescue Department as its fire department. Both the County and City determine the compensation to be paid to Independent Fire and Rescue Department. The Independent Fire and Rescue Department has entered into contracts with the County and City to provide fire and rescue services. Another Volunteer Fire and Rescue Department is an independent all-volunteer fire department located in and supported by the County. The question posed is whether a professional paid fire fighter employed by Independent Fire and Rescue Department may volunteer as a fire fighter to the Volunteer Fire and Rescue Department in the County. Assuming that the Independent Fire and Rescue Department and the Volunteer Fire and Rescue Department in the County are separate and independent employers with minimal integration of command and control (and that the professional fire fighters are not all, in fact, employed by the Authority), the individual would be a *bona fide* volunteer when performing fire fighting activities for the Volunteer Fire and Rescue Department in the County.

Q16. An individual is employed as a professional paid fire fighter with the County A Fire and Rescue Department. The County A Fire and Rescue Department maintains a Swiftwater Rescue Team, which is staffed completely by volunteers and is led by a professional paid fire fighter with the rank of Captain. The individual also serves as a volunteer on the County A Fire and Rescue Department Swiftwater Rescue Team. Is the individual a *bona fide* volunteer?





A16. An individual employed as a professional paid fire fighter with the County Fire and Rescue Department wishes to serve as a volunteer to the County's Fire and Rescue Department Swiftwater Rescue Team. Because, it appears that the employee would be performing for his or her same employer the same services which he or she is employed to perform, the employee would have to be paid appropriate additional compensation when performing services for the Swiftwater Rescue Team.

Q17. An individual is employed as a civilian communications specialist with the City A Fire and Rescue Department, a combination department. The individual also serves as a volunteer fire fighter with the City A Fire and Rescue Department. Is the individual a *bona fide* volunteer?

A17. An individual employed as a civilian communications specialist with a City Fire and Rescue Department may volunteer as a fire fighter to the City Fire and Rescue Department. As defined in the Regulations, 29 CFR §553.210(c), fire protection activities do not to include the so-called "civilian" employees of a fire department who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, clerks, stenographers, etc. Therefore, the fire fighting activities are not the same type of services which the individual is employed to perform.

Q18. An individual serves as a volunteer fire fighter for the County A Fire and Rescue Department. The County A Fire and Rescue Department pays its volunteer fire fighters $7.50 for the first hour of service and $5.00 for all subsequent hours. Is the individual a *bona fide* volunteer?

A18. A County Fire and Rescue Department pays its volunteers $7.50 for the first hour of service and $5.00 for all subsequent hours. The payments are compensation for services, rather than payment for expenses, benefits or fees. Therefore, an individual receiving such payments in exchange for performing fire and rescue services would be an employee entitled to appropriate compensation.

Q19. An individual serves as a volunteer fire fighter for the County A Fire and Rescue Department. County A Fire and Rescue Department volunteer fire fighters are granted benefits by the Department and the County. Is the individual a *bona fide* volunteer if granted:

a. A monthly "pension plan" based upon a $10. 00 per year credit for each year of credited service?
b. Life insurance?
c. Disability insurance?
d. Tax relief with respect to county vehicle licenses?
e. Tax relief with respect to personal property taxes?
f. A monthly payment of $100, regardless of the number of calls received?
g. No reimbursement for waiting time but $5.00 per hour for each hour spent responding to a call?

h. $5.00 per hour for each hour on shift at a fire station, regardless of the number of calls received?

A19. Volunteers may be paid expenses, reasonable benefits, a nominal fee, *or any combination thereof*, without losing their status as volunteers (see 29 CFR §553.106). Whether such payments would result in individuals losing their status as volunteers can only be determined by examining the total amount of payments made (expenses, benefits, fees) in the context of each particular situation.

Based on the information provided, we believe that, standing alone, payment into a monthly "pension plan" based on a $10.00 per year credit for each year of credited service, life insurance and disability insurance are within the scope of allowable payments for expenses, benefits or fees. Such payments would not affect the otherwise *bona fide* status of a volunteer. To the extent the tax relief with respect to county vehicle licenses is limited to the licensing fees such payment would not affect the otherwise *bona fide* status of a volunteer. There is not enough information to determine the impact of tax relief with respect to personal property taxes.

Without more facts, we are unable to render an opinion with respect to a monthly payment of $100.00, regardless of the number of calls received, because we have no information on the typical number of hours involved. We are also unable to render an opinion on the payment of $5.00 for each hour spent responding to a call with no reimbursement for waiting time or a payment of $5.00 per hour for each hour on shift at the station, regardless of the number of calls received, because we do not know the total time involved in the activity for which the payments are made.

When evaluating any particular set of facts, we must first determine whether a payment to an individual for services rendered is actually compensation, which is prohibited by the FLSA, or whether it is a payment of expenses, reasonable benefits, or a nominal fee (or a combination thereof), which is allowed by the FLSA without the individual losing his or her status as a volunteer. We evaluate expenses, benefits and fees both individually and collectively in the context of the total amount of payments made in each particular situation. Payments for expenses must reasonably approximate actual or out-of-pocket expenses incurred by an individual as an incident to providing the hours of volunteer services – for example, payment for the cost of meals and transportation expenses, uniform cleaning or equipment, or tuition to attend classes intended to teach the individual to perform the volunteer services efficiently. Payment of reasonable benefits might include group insurance plans (such as health, life, disability, workers' compensation, or liability) or pension or retirement/investment funds or "length of service" awards traditionally provided to volunteers of State and local government agencies. A fee would not be considered nominal if it is, in fact, a substitute for compensation, or tied to productivity (*e.g.*, payment of hourly wages for services rendered). This would not prevent, however, payment of a nominal amount on a per call or per assignment basis, for example, to volunteer fire fighters. Among the factors we examine to determine whether any given amount is nominal include the distance traveled and time and effort expended by the volunteer, whether the volunteer has agreed to be





available only during certain periods of time or around the clock, and whether he or she provides the services as needed or throughout the year. An individual who provides volunteer services periodically on a year-round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status.

Q20. An individual was employed as a non-career fire fighter with the County A Fire and Rescue Department. The County A Fire and Rescue Department employed both career and non-career fire fighters. Career fire fighters staffed most shifts. Non-career fire fighters staffed shifts during the evenings, and on weekend days. The County A Fire and Rescue Department compensated non-career fire fighters at a rate of $8.00 per hour. The County A Fire and Rescue Department then eliminated the non-career fire fighter position, and instead associated volunteer fire fighters who it paid $20.00 per shift. The individual became a volunteer fire fighter. Is the individual a *bona fide* volunteer?

A20. We are unable to determine from the limited information provided regarding the number of hours involved whether the payments would disqualify the individual from being considered a *bona fide* volunteer based on the criteria discussed in A19 above.

Q21. An individual holds no regular employment. The individual also serves as a volunteer fire fighter with the County A Fire and Rescue Department, a combination department. The County A Fire and Rescue Department compensates its volunteer fire fighters on a pay on-call basis, and pays the volunteer fire fighters for a minimum of four hours per shift at a level based on the volunteer's training and years of service. Is the individual a *bona fide* volunteer?

A21. We are unable to determine from the limited information provided regarding the amount of payment and the number of hours involved whether the payments would disqualify the individual from being considered a *bona fide* volunteer based on the criteria discussed in A19 above.

Q22. An individual is a full-time college student, and holds no employment. The individual also serves as a volunteer fire fighter with the County A Fire and Rescue Department, a combination department. The County A Fire and Rescue Department compensates its volunteer fire fighters on a pay on-call basis, and pays the volunteer fire fighters for a minimum of four hours per shift at a level based on the volunteer's training and years of service. Is the individual a *bona fide* volunteer?

A22. As in A20 and A21, we are unable to determine from the limited information provided whether the payments would disqualify the individual from being considered a *bona fide* volunteer based on the criteria discussed in A19 above .

Q23. An individual serves as a volunteer fire fighter for the County A Fire and Rescue Department, a combination department. The individual serves without promise, expectation, or receipt of compensation. However, the individual is not motivated by civic, charitable, or humanitarian reasons, but rather serves as a volunteer in an effort to

acquire employment contacts, gain experience, or obtain school credit. Is that individual a *bona fide* volunteer?

A23. An individual serving as a volunteer to the County Fire and Rescue Department does so for the purpose of acquiring employment contacts, gaining experience or obtaining school credit. Assuming the individual is not otherwise employed by the public agency in the same capacity or volunteering because it is necessary in order to obtain gainful employment with the public agency, the individual would be considered a *bona fide* volunteer.

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U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

**November 10, 2005** **FLSA2005-51**

Dear ***Name****,

This is in response to your letter of September 23, 2004 written on behalf of your client school district. You request guidance as to whether certain stipends the school district provides to non-teaching, nonexempt school employees who volunteer as coaches or advisors for the school's sports teams and clubs constitute "nominal fees" as described in 29 C.F.R. § 553.106(e) and (f).

You state that all such employees are nonexempt staff, such as secretaries or custodians. They volunteer for roles as coach, assistant coach, club advisor, or staff for athletic events. You further state that based on their specific duties as school district employees such employees' volunteer services are different from the services for which the school employs them.

Your letter mentions a specific example of a nonexempt school custodian who has coached the Varsity Track team for a number of years. The school provides the individual with a stipend of $3,675 for a season of volunteer coaching. You indicate the custodian is not required to coach any team as a condition of employment, and that the stipend, which the school provides regardless of the performance of the team or number of hours the coach spends in team-related activities, is not intended or provided as a substitute for wages. Nor is the stipend based on the amount of time spent on coaching or the productivity of the team. For example, there is no extra payment for participation in play-offs, regional or state championships, or tournaments. In addition, the school does not base the stipend on the length of the season or the number of meets the team attends. You also state that the custodian spends his own money to provide certain extra benefits to the students, *e.g.*, hamburgers, pizza, ice cream, an end of season party, plaques or trophies, and commemorative booklets. This practice is common among coaches. You state that the coaches provide these "extras" due to their love of coaching and because it enriches the experience for the students, and that the school does not separately reimburse the coaches for these expenses.

The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, recognizes the generosity and public benefits of volunteering, and does not seek to pose unnecessary obstacles to *bona fide* volunteer efforts for charitable and public purposes. The Department of Labor is committed to ensuring that citizens are able to freely volunteer their services for charitable and public purposes within the legal constraints established by Congress.

As you may be aware, in enacting the 1985 FLSA Amendments, Congress sought to ensure that true volunteer activities were neither impeded nor discouraged. Congress was explicit in its 1985 Amendments that a "volunteer" may receive "no compensation," but may be paid "expenses, reasonable benefits, or a nominal fee." 29 U.S.C. § 203(e)(4)(A); *see also* 29 C.F.R. § 553.106(a) ("Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers."); 29 C.F.R. § 553.106(e) ("Individuals do not lose their volunteer status if they receive a nominal fee from a public agency."). Neither the FLSA nor the Senate Committee Report to the 1985 Amendments further defines the term "nominal fee." Rather, the Committee Report directed the Department to issue regulations providing guidance in this area. Employees of a public agency are permitted to provide volunteer services in certain circumstances, and the FLSA regulations governing this issue are found at 29 C.F.R. §§ 553.100-.106 (copy enclosed).

Under the Department's regulations, the term "employee" does not include individuals who volunteer for a public agency if the volunteer:

1. Performs hours of service for a public agency for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation for services

rendered. Although a volunteer can receive no compensation, a volunteer can be paid expenses, reasonable benefits or a nominal fee to perform such services;

2. Offers services freely and without pressure or coercion, direct or implied, from an employer; and

3. Is not otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.

*See* 29 C.F.R. §§ 553.101, 553.106. Your inquiry assumes a full-time, nonexempt school employee who agrees to volunteer, without pressure or coercion from the school, as a sports coach for a season and that there is a humanitarian nature to the volunteer service. The specific question you ask is whether this type of arrangement constitutes a permissible "nominal fee."

There are regulations that address the nominal fee issue which are relevant in the high school coaching context. Specifically, "[a] nominal fee is not a substitute for compensation and must not be tied to productivity." 29 C.F.R. § 553.106(e). In determining whether a fee constitutes "a substitute for compensation" or whether it is "tied to productivity," the Department looks at the "economic realities of the particular situation." 29 C.F.R. § 553.106(f). A key factor in the context of school coaching or advising a club is whether the amount of the fee *varies* as the particular individual spends more or less time engaged in the volunteer activities, or *varies* depending upon the success or failure of a particular team or school activity. For example, if the fee does not vary based upon the win-loss record of a team, or the degree of student involvement in a particular club, or other similar factors relevant to the quality or quantity of the team, club, or activity, the Department generally would not find that the fee was a "substitute for compensation" or "tied to productivity." *See* 29 C.F.R. § 553.106(e). The regulations also list several factors the Department will examine in determining whether a given amount is nominal. Specifically, the Department looks at "the distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year." *Id.* With respect to the factors listed in 29 C.F.R. § 553.106(e), your letter states your view that such factors are more relevant to a volunteer firefighter situation than a school coach's situation. The Department agrees that, historically, the factors enumerated in § 553.106(e) were intended to provide guidance in the context of whether firefighters were paid a nominal fee and qualify as *bona fide* volunteers. However, in the context of school coaching or club sponsorship, the "substitute for compensation" and "tied to productivity" standards are still generally relevant. As the attached opinion letter states, "These factors focus upon whether the fee is actually analogous to a payment for services or recompense for something performed and, hence, is not nominal." *See* July 14, 2004 Opinion Letter (enclosed).

In evaluating the nominal fee issue in the case of the school coach, we recognize that a coach might travel significant distances for away games, which may occur at the volunteer's expense. Any such unreimbursed expenses will increase the amount of the stipend that may qualify as nominal. In addition, a coach's expected time commitment often will depend on the sport he or she coaches, as the length of the season can vary greatly depending upon the sport. The time commitment also can vary depending upon other factors, such as whether the sport is varsity or junior varsity. The stipends established for different sports may vary based upon such broad variations in the coaches' time commitments and still qualify as nominal. However, the length of the season also could vary significantly depending on whether the team makes the play-offs and how far the team advances in the play-offs. If a school paid a coach more because his team made the play-offs, the Department would likely view such a payment as a "substitute for compensation" or a payment "tied to productivity." As indicated in the July 14, 2004 letter, the regulations are focused on preventing payment for performance, which is inconsistent with the spirit of volunteerism contemplated by the FLSA.



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

The definition of "nominal fee" includes an economic realities test. In making a determination whether the $3,675 stipend at issue here constitutes a "nominal fee," the Department believes the analysis of the "economic realities" as described in 29 C.F.R. § 553.106(f), should include a comparison between the volunteer stipend and what it would otherwise cost the school district to compensate someone to perform those services. The FLSA and the implementing regulations use a 20 percent test to assess whether something is insubstantial with regard to prohibited driving on public roadways by employees who are 17 years of age. Congress defined "occasional and incidental" activities to be less than 20 percent of an employee's hours worked in a workweek in that capacity. *See* 29 U.S.C. § 213(c)(6)(G). In the case of volunteer coaching, the Department believes that 20 percent of what the district would otherwise pay to hire a coach or advisor for the same services is appropriate in dividing between a permissible nominal fee and an impermissible payment. Such a threshold assumes that the coaches are freely volunteering their services and the school district simply provides a lump-sum payment or series of payments without regard to wins or losses or hours worked as discussed above.[1] Moreover, a willingness to volunteer for an activity for 20 percent of the prevailing wage for the job is a likely indicium of the spirit of volunteerism contemplated by the 1985 amendments to the FLSA. *See* 29 U.S.C. § 203(e)(4)(A). Therefore, when a public agency employee volunteers as a coach or extracurricular advisor, the Department will presume the fee paid is nominal as long as the fee does not exceed 20 percent of what the public agency would otherwise pay to hire a full-time coach or extracurricular advisor for the same services.

With regard to your specific school district, the Department is unable to answer whether the fee of $3,675 is nominal due to the limited information provided concerning what the school district would otherwise pay to hire a full-time coach or advisor for the same services. However, the market information necessary to complete this good faith determination is generally within your client school district's knowledge and control. Thus, any coaches the school district has on its payroll would be a good benchmark for this calculation. Absent such information, your client may look to information from neighboring jurisdictions, the state, or ultimately, the nation including data from the Department of Labor, Bureau of Labor Statistics. So long as your calculations are based on an approximation of the prevailing wages of a coach in your district and the fee amount does not exceed 20 percent of that coach's wages for the same services, the Department would find that such a fee would be nominal within the meaning of 29 C.F.R. § 553.106.[2]

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

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[1] In the case of public school employees, a 20 percent level also appears reasonable given that various states have endorsed significant lump sum amounts of compensation as "nominal" for state public agency volunteers; and we believe current coaching stipends of 20 percent would likely not reach such amounts. *See* Ind. Code § 36-8-12-2 (2005) ("'Nominal compensation' means annual compensation of not more than twenty thousand dollars ($20,000)."); *see also* Minn. Stat. § 144E.001, Subd. 15 (2005) (nominal fee for volunteer ambulance attendant may be up to $6,000 annually).

[2] We are withdrawing the opinion letter dated July 11, 1995 as it relates to "nominal fee." The Department does not believe this letter fully took into account the "economic realities" of the particular situation of coaches and extracurricular sponsors as discussed in this letter including the humanitarian nature of the volunteer effort, the lack of pay for performance, and the fact that school districts often do not track or control their coaches' hours. The Department is also withdrawing opinion letters dated July 15, 1988, April 2, 1992, and September 17, 1999 to the extent they are inconsistent with the interpretation of nominal fee in this opinion.

# Appendix

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

This opinion is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. *See* 29 C.F.R. §§ 790.17(d), 790.19; *Hultgren v. County of Lancaster*, 913 F.2d 498, 507 (8th Cir. 1990).

We trust you will find the above discussion and analysis responsive to your request.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures: 29 C.F.R. §§ 553.100-106
July 14, 2004 Opinion Letter

* *Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*







Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
**August 19, 1999**

***

This is in response to your letters concerning the application of the Fair Labor Standards Act (FLSA) to the employment of certain city employees. We regret the delay in responding.

The issues presented in your three letters are similar. Therefore, we will consolidate our response to these issues. Specifically, you request an interpretation on the following:

1. Whether City firefighters may be paid to work as firefighters and/or emergency medical service (EMS) providers for organizations within the Borough (which is like a county) on their off-duty time without the City incurring the expense of overtime for the time spent working for these other departments. The organizations in the Borough range from private fire and/or EMS departments, Borough financed fire and/or EMS departments and the State Division of Forestry. The City participates in a mutual aid agreement with the State Division of Forestry. One other department to be considered is the University of *** Fire Department, with which the City also has a mutual aid agreement.

2. Whether City firefighters may work during their off-duty time as Tactical EMS medics for the City Police Bureau without the City Fire Bureau incurring the expense of overtime. This time would be spent in training for SWAT team activities and performing during SWAT team emergencies.

3. Whether City firefighters may volunteer as firefighters and/or EMS providers with organizations within the Borough without the City incurring the expense of overtime for the time spent with these departments. The organizations to consider range from private corporation fire and/or EMS departments to Borough financed fire and/or EMS departments. The City does have mutual aid agreements for both fire and/or EMS with these departments.

In responding to your questions, it may be helpful to review some principles unique to public sector employment. The regulations promulgating the FLSA to public sector employees are 29 CFR Part 553 (copy enclosed).

Section 7(k) of the FLSA provides a partial overtime pay exemption for public agency employees employed in fire protection or law enforcement activities (including security personnel in correctional institutions). Under this provision, an employer may establish a work period of 7- to 28- consecutive days for the purpose of paying overtime compensation to employees employed in fire protection or law enforcement activities. The maximum hours standard for fire protection employees ranges from 53 hours worked in a 7-day work period to 212 hours worked in a 28-day work period.

# Appendix



Section 7(o) of the FLSA provides that "employees of a public agency which is a State, a political subdivision of a state, or an interstate agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime is required by this section."

Section 7(p)(1) of the Fair Labor Standards Act (FLSA) makes special provision for fire protection and law enforcement employees of public agencies who, at their own option, perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer (public or private) during off-duty hours. The hours of work for the separate and independent employer are not combined with the hours worked for the primary public agency employer for the purposes of overtime compensation. Section 7(p)(1) applies to such outside employment provided (1) the special detail work is performed solely at the employee's option, and (2) the two employers are in fact separate and independent. Whether two employers are, in fact separate and independent can only be determined on a case-by-case basis. See §553.227 of Regulations, 29 CFR Part 553.

Section 7(p)(2) of the FLSA provides that State and local government employees may, solely at their own option, work occasionally or sporadically on a part-time basis for the same public agency in a different capacity from their regular employment, and the hours worked in the different jobs need not be combined for the purpose of determining overtime liability under the FLSA. See §553.30 of Regulations, 29 CFR Part 553.

Under the FLSA, individuals may not volunteer services to private sector for profit employers. On the other hand, in the vast majority of circumstances, individuals can volunteer services to public sector employers. When Congress amended the FLSA in 1985, it made clear that people are allowed to volunteer their services to public agencies and their community with but one exception - public sector employers may not allow their employees to volunteer, without compensation, additional time to do the same work for which they are employed.

As indicated in §553.101 an individual who performs hours of service for a public agency for civic, charitable or humanitarian reasons without promise, expectation or receipt of compensation for services rendered is considered to be a volunteer. At the same time, in enacting §3(e)(4), Congress was concerned about the potential for abuse of minimum wage or overtime requirements through coercion or undue pressure upon employees to "volunteer" their services. See Senate Report No. 99-159, October 17, 1985, page 14, 2 U.S. Cong. News, page 662 ("the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to "volunteer" D').

The last principle we wish to point out is that of "mutual aid agreements." The regulations at 29 CFR §553.105 provide that an agreement between two or more States, political subdivisions, or interstate governmental agencies for mutual aid does not change the otherwise volunteer character of services performed by employees pursuant to such agreement. For example, where Town A and Town B have entered into a mutual aid agreement related to







fire protection, a firefighter employed by Town A who is also a volunteer firefighter for Town B will not have his or her hours of volunteer service for Town B counted as part of his or her hours of employment with Town A. The mere fact that services volunteered to Town B may in some instances involve performance in Town A's geographic jurisdiction does not require that the volunteer's hours are to be counted as hours of employment with Town A.

Assuming that the City is a separate and independent employer from the other entities (privately financed departments; Borough financed departments; State Division of Forestry; and *** Fire Department), it is our opinion that the hours worked for those other entities by City firefighters do not have to be combined with the hours worked by the firefighters for the City for purposes of FLSA overtime compensation. The employment of City firefighters by separate and independent employers comes within §7(p)(1) of the FLSA.

Based on the information contained in your letters, §7(p)(2) does not apply in the instance of City firefighters working for the City police department as tactical EMS medics for the SWAT team. In this instance, the work performed for the same public employer (the City) is not in a different capacity. The legislative history, contained in the Committee Report at page 25 makes this clear, "The Committee expects the Secretary of Labor in promulgating regulations to interpret 'different capacity' in the strictest sense so as to prohibit instances where a public safety employee might be encouraged to take on any kind of security or safety function within the same local government." (Emphasis added.) Therefore, it is our opinion that the hours worked by City firefighters for the City police department as tactical EMS medics for the SWAT team must be included in determining overtime hours worked and the corresponding overtime pay (or compensatory time) due.

In response to your third issue, whether the City firefighters may volunteer as firefighters and/or EMS providers to private corporation fire and/or EMS departments without the City including such time for overtime purposes is dependent on the nature of the relationship between the City and the private fire and/or EMS departments.

In a recent decision in Benshoff v. City of Virginia Beach, 1999 WL 371592 (4th Cir. 1999), the court addressed such a situation. The court ruled, under the facts of that particular case, that City firefighters who were cross trained as EMTs were not employees of the City entitled to compensation when they voluntarily performed additional hours as EMTs within the City's jurisdiction for non-profit, separately incorporated rescue squads.

The court recognized, however, that the analysis of whether an individual is an employee or a volunteer must be made on a case-by-case basis, due to the very fact dependent nature of each situation. In cases where there is sufficient integration of operations and control of the operations of the non-profit fire corporation or rescue squad by the public agency, so that a joint employment relationship exists, the court acknowledged that the firefighters would be performing the same services for their public agency employer as they are hired to perform. In such a situation, the fire fighter/EMT activities would not be recognized as bona fide volunteer activities under the FLSA.

# Appendix



This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

Sincerely,

Daniel F. Sweeney

Office of Enforcement Policy Fair Labor Standards Team

Enclosure

1999 WL 1788145 (DOL WAGE-HOUR)

END OF DOCUMENT







Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
**September 3, 1999**

***

This is in response to your letter of July 14, 1999 concerning the issue of employees volunteering to perform work for the same public agency by which they are employed. You also request the Department comment on the legality of a City employee, who also volunteers for the City, being covered under two pension plans.

The Wage and Hour Division of the Department of Labor administers and enforces the Fair Labor Standards Act (FLSA) which is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage, $5.15 per hour, effective September 1, 1997, for all hours worked. Overtime pay of not less than one and one-half times the regular rate of pay is required for all hours worked over 40 in a workweek. The major provisions of the law are outlined in the enclosed "Handy Reference Guide to the Fair Labor Standards Act."

You indicate that the full-time paid Fire Marshall is also a volunteer fireman with the City, responding as a volunteer in the same City provided vehicle as when he is in pay status. Although the FLSA as amended in 1985 does permit employees to volunteer their services to public agencies and their communities, there is one exception. Public sector employers may not allow their employees to volunteer, without compensation, to perform the "same type of services" for which they are paid. It appears from your letter that the volunteer service in question is the "same type of service" pursuant to the Department's regulations at 29 CFR 553.103 (copy enclosed); is closely related to the actual paid duties of the Fire Marshall; and, as such, would be compensable, i.e., the time spent by the Fire Marshall in the performance of the volunteer fireman duties should be treated as any other hours worked and paid accordingly.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

With regard to your request concerning criteria used as qualifications in two different pension plans for the same employer, we are forwarding your request to the Department of Labor's Pension and Welfare Benefits Administration (PWBA) which enforces the Employment Retirement Income Security Act and the Consolidated Omnibus Budget Reconciliation Act.

# Appendix

Westlaw.



PWBA will respond directly to you on this issue.

We trust that the above information is responsive to your inquiry. If we can be of further assistance please do not hesitate to contact us.

Sincerely,

Daniel F. Sweeney

Office of Enforcement Policy Fair Labor Standards Team

Enclosures

1999 WL 1788151 (DOL WAGE-HOUR)

END OF DOCUMENT





U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

**April 14, 2003**

**FLSA2003-2**

Dear ***Name*,***

I am writing in reply to your letter of September 16, 2002, to Assistant Secretary of Labor Christopher Spear. You request a letter ruling on numerous hypothetical questions divided into three issue areas and offer several suggestions for action by the Department, all relating to the application of the Fair Labor Standard Act (FLSA), particularly Section 3(e)(4)(a), to volunteer fire fighters.

As you know Section 3(e)(4)(a) of the FLSA states that the "term 'employee' does not include any individual who volunteers to perform services for a public agency" if the individual receives no compensation or is paid a nominal fee, expenses or reasonable benefits, and if "such services are not the same type of services which the individual is employed to perform for such public agency."

The FLSA recognizes the generosity and public benefits of volunteering, and does not pose obstacles to bona fide volunteer efforts for charitable and public purposes except in very limited circumstances. In this spirit, in enacting the 1985 FLSA Amendments, the Congress sought to ensure that true volunteer activities were neither impeded nor discouraged. Congress, however, also wanted to minimize the potential for abuse or manipulation of the FLSA's minimum wage and overtime requirements in "volunteer" situations. To this end, Congress narrowly constrained the circumstances in which individuals may volunteer services to a public agency by which they are employed: (1) the individual may receive no compensation, or is paid only expenses, reasonable benefits or a nominal fee, and (2) the volunteer services may not be the same services as those which the individual is employed to perform for his or her employer. These narrow constraints offer public sector employees a vast array of opportunities to serve their communities as volunteers.

Please be assured that this Administration fully supports volunteerism and is committed to work with organizations like yours to ensure that citizens are able to freely volunteer their services for charitable and public purposes.

We will restate your scenarios, hypothetical questions, and suggestions, followed by our responses.

ISSUE ONE -- Circumstances in which public agency employees may volunteer their services for a public agency fire department serving the same jurisdiction.

SCENARIO ONE

- Individual is a mechanic employed by County A Parks Department.
- The individual also serves as a volunteer fire fighter with the County A Fire and Rescue Department (FRD).
- The FRD, a combination department, is a joint powers board which is funded by both City A and County A.
- County A and the FRD are listed separately by the Census Bureau.
- County A provides the majority of funding to the FRD and also appoints and removes Board members.
- The individual is allowed to respond to fire calls during his work hours with the Parks Department.
- The individual is not required to take personal leave in order to be paid for his volunteer fire fighting time.

# Appendix



- The Parks Department gives the individual paid leave for the time spent as a volunteer fire fighter.

Q.1 Are County A and the FRD the same public employer?

A.1 Whether two entities of a local government constitute the same public agency can only be determined on a case-by-case basis. The attached letter dated June 7, 2002 provides a framework for making such a determination and identifies factors that are relevant to the determination. Your letter does not provide information relevant to a number of the factors set forth in that letter, such as: whether the two agencies have separate payroll and retirement systems; whether they both have the authority to sue and be sued in their own names; whether they have separate hiring and other employment practices; and how they are treated under state law. Moreover, the information you have provided offers little information on the level of integration of County A and FRD operations and control of the FRD operations by County A.

Therefore, we are unable to provide a definitive response with regard to whether these agencies are two separate agencies or not. If those other factors also show that the agencies should be treated as separate entities, as they are by the Census of Governments, then we would agree that they are not the same employer and an employee of one could volunteer for the other.

Q.2 Is the individual's status as a bona fide volunteer jeopardized because he receives paid leave from the Parks Department for his time responding to fire calls?

A.2 Assuming that the County Parks Department and the FRD are separate agencies, the fact that the Parks Department allowed its employee to cease his usual duties to respond to fire calls and paid the employee for his normal work hours spent on such calls would not make the mechanic an employee of the FRD. However, such time would be compensable hours worked for the Parks Department and would have to be counted when computing total hours worked for purposes of overtime.

If the time off involves the employee's use of paid personal leave earned with the Parks Department, which the individual may use as he or she sees fit -- including for time spent as a volunteer fire fighter -- the individual's status as a bona fide volunteer to the FRD is not jeopardized and the hours would not be compensable hours worked for the Parks Department.

Assuming that the County Parks Department and the FRD are part of the same public agency, if the County pays the employee wages for the hours he works as a firefighter, then the County employs him as both a mechanic and as a firefighter. In essence, he is employed by the County as both a full-time mechanic and as a part-time firefighter. Therefore, he would not be able to serve additional hours as a volunteer firefighter for the County, because of the statutory prohibition against an employee volunteering to his own agency to perform the same type of services he is employed to perform.

Q.3 Is the employee performing the same or similar services?

A.3 Although you do not describe the services provided as a mechanic or a fire fighter, these two occupations clearly are categorized under different 3-digit codes in the Dictionary of Occupational Titles. Consequently we believe that serving as a mechanic and serving as a firefighter do not involve the same type of services, absent evidence to the contrary.

Q.4 Is this the type of situation that the FLSA was truly intended to protect employees from?

A.4 In enacting the 1985 FLSA Amendments Congress sought to ensure that true volunteer activities were neither impeded nor discouraged by the FLSA. Congress was equally clear, however, that it recognized and wanted to minimize the very real potential for abuse or manipulation of the FLSA's minimum wage and overtime requirements.



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Q.5 Is the County liable for overtime earned during the fire calls answered outside the employee's regular working day?

A.5 If the employee is a bona fide volunteer, either because he is volunteering to a separate public agency or is not performing the same or similar services (see discussion above), the time spent on fire calls outside the employee's regular Parks Department working day will not be compensable time under the FLSA, and thus would lead to no FLSA required overtime.

Q.6 (first paragraph on page 4 of your letter) May the County automatically charge the time spent responding to a fire call against the employee's compensatory, vacation or other leave time?

A.6 A public sector employer may at any time require an employee to take time off from work and to use compensatory time in payment for the leave. Christensen v. Harris County, 529 U.S. 576 (2000). Thus, if the hours spent responding to a fire call are bona fide volunteer hours for which no compensation is due, the employer may charge or dock the employee's compensatory time and thereby pay the person for the time taken off.

We note, however, that compensatory time off is a form of payment for overtime hours previously worked for which cash wages were not paid. Therefore, if the hours spent responding to a fire call are actually compensable hours worked, such as if the employee also is employed as a firefighter, then those hours are not time off. In that situation, the agency may not dock an employee's compensatory time bank to cover the wages due for the new hours worked. Attempting to use compensatory time in that manner would effectively be double counting – using the same compensatory time to pay for the original hours worked and to pay for the new hours.

The FLSA does not regulate the use of paid vacation or other leave provided by an employer.

ISSUE TWO -- Definition of the same public agency and the same type of services.

SCENARIO TWO

- The County A Fire Department is a joint powers board created pursuant to state law as a separate agency from the agencies which form it.
- The joint powers board is treated as a "special district government" in the Census of Governments.
- City B, County A and Town C appoint the joint powers board members, review annual budgets and provide funding.
- The joint powers board has no separate taxing authority.
- County A has two law enforcement agencies within 5,000 square miles, the Police and County Sheriff's Departments, which are sub-governments of the City and County respectively.
- The county has one hospital which is a separate government agency supported by its own tax district.
- The hospital runs the ambulance service that is staffed with full time and volunteer EMTs.
- There are no other law enforcement, fire departments or medical services within the county.
- The County Sheriff's Office and the County Fire Department are two different departments with two different governing bodies and are operating two different payrolls.

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Q.1 May city police or county deputies volunteer as fire fighters without the City or County being responsible to pay overtime for those volunteer hours?

A.1 Your letter accurately restates DOL regulations 29 CFR Part 553.101, which define a public agency volunteer as an individual who:

1. Performs hours of service for a public agency for civic, charitable or humanitarian reasons without promise, expectation or receipt of compensation for services rendered [Part 553.101(a)];

2. Offers services freely and without pressure or coercion, direct or implied, from an employer [Part 553.101(c)]; and

3. Is not otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer [Part 553.101(d)].

Your letter does not provide information covering the first two criteria listed above but rather focuses on the third criteria. Consequently we will assume that criteria one and two above are met and will focus this response on the third criteria.

It is not necessary to analyze one aspect of the third criteria [Part 553.101(d)] if the other is met. If the individual is obviously not employed by the same public agency, (what you call the "who is an employer" question) then there is no need to examine the nature of the services provided (what you call the "what are the same type of services" question). Similarly, if the individual obviously does not perform the same type of services for the respective agencies, there is no need to examine the relationship of the agencies receiving the individual's services. In the interest of being responsive, however, we will analyze both aspects of the third criteria for your scenario, starting with the same public agency aspect.

You indicate that the facts in your County Fire Department (a joint powers board) scenario are similar to those found in a July 1, 1993 DOL letter ruling.

The July 1, 1993 letter found that a county vocational school system and the county were not considered separate and independent employers for purposes of Section 7(p)(1) of the FLSA. Section 7(p)(1) provides a "special detail" exception for fire protection and law enforcement employees of public agencies. This opinion was based in part on the indication that the "Census of Governments classifies county vocational schools as dependent agencies of the county government and they are not counted as separate governments". Moreover, the 1993 letter involved only a single county, not three separate public agencies that jointly fund and appoint members to the board of a fourth entity.

We disagree with your belief that the facts in your scenario are similar to those in the July 1, 1993 letter, as you indicate that the "joint powers board is treated as a separate 'special district government' by the Census Bureau". This is clearly opposite to the "dependent" classification of the school system discussed in July 1, 1993 letter.

Absent the existence of information indicating significant integration of the operations of the County Fire Department and the County Sheriffs Department/City Police Department it appears that these agencies are not the same public agency for purposes of determining bona fide volunteer status under the FLSA. This opinion is based on your indication that the:

- Census of Government treats the County Fire Department as a separate agency from the agencies that form it;

- County Sheriff's Office and the County Fire Department are two different departments with two different governing bodies and two different payrolls (we assume the same is differences exist between the City Police Department and the County Fire Department); and



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- County Fire Department is created pursuant to a state law as a separate agency from the agencies that form it.

Your discussion of the second aspect of the third criteria, same type of services [Part 553.101(d)], explains some of the difficulties inherent in providing police and fire support in small or rural communities where small pools of trained emergency personnel must routinely perform multiple tasks. You indicate that emergency personnel often wear a number of different "hats", so that there is no "bright line" of services between the agencies.

As you are aware, a same type of services determination can only be made after an examination of all the facts and circumstances of a particular case. We believe, however, that the definition of same type of services typically allows for a determination that police and firefighters on the whole provide a different type of services, consistent with their different Dictionary of Occupational Titles categories. Responding to the same emergencies as the other, such as traffic accidents and fire calls, or acting as a medical first responder on occasion will typically not change the inherent difference in the two occupations.

We believe, for the reasons cited above, that the city police or county deputies described in your scenario may volunteer as fire fighters without incurring FLSA wage liability for their volunteer time.

Q.2 May paid firefighters with emergency medical technician certifications volunteer for the county ambulance service without being paid overtime by the fire department?

A.2 Your discussion related to this question cites extensively from two opinion letters dated April 20, 1993. These letters, written without a detailed analysis of the facts, concluded that career fire fighters who volunteer their services to private non-profit corporations that serve the same jurisdiction are volunteering for their employing public agency and must be compensated.

We withdrew these letters, and their conclusion that the provision of the same type of services in the same community precludes bona fide volunteer status, in a November 27, 2001 opinion letter (copy enclosed). This letter was written in light of the findings in the decision you cited, Benshoff v. City of Virginia Beach, 180 F.3d 136 (4th Cir. 1999).

You indicate that the county ambulance service is operated by the hospital, which is a separate public agency supported by its own tax district. However, your letter provides no specific information regarding whether state law and the Census treat the hospital as a separate public agency, whether its payroll, retirement and other personnel systems are separate, and whether it may sue and be sued in its own name. Additionally, you provide no evidence concerning the extent to which the county fire department exercises day-to-day control over the volunteer services provided to the county ambulance service. Consequently we are unable to determine if the entities are the same public agency. If the entities are determined to be separate public agencies under the FLSA, it is not necessary to determine if the individuals perform the same type of services.

Your scenario also provides insufficient information to make a same type of services determination. Consequently we are unable to provide a response to this question.

ISSUE THREE: The potential for otherwise bona fide volunteers to be employees because they receive some sort of remuneration for their services.

Q.1 Do unemployed volunteers or volunteers who are currently in college full time become employees of the department?

A.1 Your question focuses on Krause v. Cherry Hill Fire District 13, 969 F. Supp. 270 (D.N.J. 1997), in which the District Court found that the fire district could not eliminate part time employees (called non-career firefighters) and return them to volunteer status to avoid the minimum wage provisions of the FLSA, while still continuing to pay them significant hourly compensation.

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This decision found that the fire district initially paid non-career fire fighters $8.00 per hour for "duty crew" shifts and $5.05 per hour for "sleep-in" shifts, then reduced the compensation for "sleep-in" shifts to $20.00 per eight hour shift. The Krause court found, and we agree, that non-career fire fighters expected and received hourly compensation in an amount greater than a nominal fee allowed by the regulations (29 CFR Part 553.106) and it was "clear that the plaintiffs were not volunteers."

The lack of other employment or the status as a full time college student does not affect the determination of whether an individual is a bona fide volunteer. The evaluation of the employment status vs. volunteer status of all individuals in the public sector, including the unemployed and college students, is done by the application of the factors found in Section 203(e)(4) of the FLSA and Regulations Part 553.101, as discussed in the beginning of A.1, Issue Two above.

You suggest that the Department take two actions:

- An interpretation of 29 U.S.C. Section 203 (e)(4)(a) should be done through a regulatory interpretation from DOL; and
- Provide a definition of "same type of services".

We believe that the current regulation, 29 CFR Part 553, Subpart B provides the interpretation and definition.

I hope the above has been responsive to your request. We stand ready to work with you at any time to support the wonderful spirit of volunteerism that sustains this country.

Sincerely,

Tammy D. McCutchen
Administrator

Enclosures

*Note: * The actual name(s) was removed to preserve privacy.*



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Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

**October 29, 2004** **FLSA2004-26NA**

Dear ***Name****,

This is in response to your letter concerning the application of Section 3(e)(4)(A) of the Fair Labor Standards Act (FLSA) to certain employees of the ***Name**** County Sheriff's Office.

You write that the ***Name**** County Sheriff's Office is divided into three primary departments: Administration, Detention, and Law Enforcement. Individuals employed as deputies in the Detention Division have recently asked if they could also volunteer in the Law Enforcement Division during their off-duty hours. You enclose copies of the job descriptions of both positions.

You contend that the job duties of the two positions differ greatly, that the positions require different sets of skill and knowledge, that the jobs are performed under different environmental conditions, and that expectations of the previous experience and background of candidates for the two positions are different. Based on the descriptions you have provided, Detention Deputies primarily provide security at the jail facilities while Deputy Sheriffs perform more diverse duties as they work toward providing security for residents of the county.

As you know, Section 3(e) of the FLSA and 29 CFR 553.103(a) provide that individuals performing volunteer services for units of State and local governments will not be regarded as "employees" under the FLSA when (a) their services are offered freely and without pressure or coercion, direct or implied, from an employer and (b) the individual is otherwise not employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer. The phrase "same type of services" means similar or identical services.

As your letter indicates, a determination of whether the services that volunteers seek to provide are the "same type of services" they are employed to perform requires "…consideration of all the facts and circumstances in a particular case…" See 29 CFR 553.103(a). Among the facts the regulation states will be considered is how the volunteered services and the services for which the volunteer is employed to provide are classified by the three digit categories of occupations in the Dictionary of Occupational Titles (DOT), published by the Employment and Training Administration (ETA). The DOT was recently superseded by the O*NET system, also published by ETA. Of equal weight to the DOT/O*NET is whether the volunteer services are "closely related to the actual duties performed or responsibilities assigned to the employee." Id.

As mentioned above, you indicate that the job duties for both the Detention Deputies and Deputy Sheriffs differ greatly. Detention Deputies are primarily responsible for security and patrolling of the jail facilities. Generally, Detention Deputies' job duties require them to be involved in one or more of the following areas: Security; Housing; Management Operations; Inmate Property; Mail and Money; Transportation; Visitation; Administration; Attorney Booth; Bookings; Disciplinary Review Board; Farm Supervisor; Food Service; Intoxilizer Maintenance; Judicial Complex; Dual Certified; Trustee Supervisor; and the Weekend Program. Also, they must search inmates and property, and prevent escapes. Detention Deputies direct evacuations of the facility, subdue disorderly inmates and monitor the inmates' behavior. In addition, they must assist with book-in procedures and verifying inmate identities.

On the other hand, Deputy Sheriffs are responsible for all aspects of detecting crimes against persons and property, and arresting criminal suspects. This includes interviewing witnesses and searching for evidence. In patrolling certain areas, Deputy Sheriffs are required to frisk and pat down individuals who are being searched, pursue vehicles, respond to rescue calls, bomb threats and civil unrest. Deputy Sheriffs are also responsible for serving arrest warrants and subpoenas. Other activities include traffic control and parking enforcement.

While the specific duties of the two positions in question may be different in the particular daily tasks performed, the overall similarity and commonality of the jobs as variations of law enforcement outweigh

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these differences between them. The fact that the Sheriff's Office finds Detention Deputies qualified to act in the role of Reserve Deputies only reinforces the fact of the two jobs' similarity. In both instances, the Detention Deputies and Reserve Deputies are performing basic law enforcement functions. The Wage and Hour Division has taken the position, for example, that law enforcement duties such as transferring or taking custody of prisoners, and booking, fingerprinting, restraining, etc., with respect to suspects or prisoners are the same type of services whether performed by police officers, detectives, bailiffs, jailers, deputies, etc. See opinion letters dated September 26, 1991; February 18, 1992; March 18, 1992; and April 21, 1995 (enclosed).

Further, the O*NET description of duties performed by correctional officers and jailers (33-3012.00) and sheriffs and deputy sheriffs are similar and, in fact, are in the same job family, and are treated as related occupations. Moreover, the regulations provide that public safety employees taking on any kind of security or safety function for the same local government are never considered to be employed in a different capacity. 29 CFR 553.30(c)(3). This is based on the 1985 legislative history instructing the Department to interpret the phrase working in a "different capacity" in the "strictest sense" with regard to public safety employees. House Report No. 99-331, October 24, 1985, page 25. Thus, based on Section 3(e)(4)(A) and the information you have provided, the responsibilities of the jobs are sufficiently similar that the ***Name**** County Sheriff's Office may not accept the volunteer services of the Detention Deputies as Reserve Deputies.

The Detention Deputies are allowed to volunteer in other capacities for the county government, such as assisting the coach of a high school baseball team, for example. The Wage and Hour Division would not question their volunteer status in such unrelated occupations so long as the other requirements of Section 3(e)(4)(A) are met. Also, the Division will not question the volunteer status of an individual who is not employed in any capacity by a public agency but who wishes to volunteer his or her services to a public agency.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that the above information is responsive to your inquiry.

Sincerely,

Barbara R. Relerford
Fair Labor Standards Team
Office of Enforcement Policy

Enclosures

* *Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*





consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day. Once the beginning and ending time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within the period. The beginning and ending of the work period may be changed, provided that the change is intended to be permanent and is not designed to evade the overtime compensation requirements of the Act.

(b) An employer may have one work period applicable to all employees, or different work periods for different employees or groups of employees.

**§ 553.225 Early relief.**

It is a common practice among employees engaged in fire protection activities to relieve employees on the previous shift prior to the scheduled starting time. Such early relief time may occur pursuant to employee agreement, either expressed or implied. This practice will not have the effect of increasing the number of compensable hours of work for employees employed under section 7(k) where it is voluntary on the part of the employees and does not result, over a period of time, in their failure to receive proper compensation for all hours actually worked. On the other hand, if the practice is required by the employer, the time involved must be added to the employee's tour of duty and treated as compensable hours of work.

**§ 553.226 Training time.**

(a) The general rules for determining the compensability of training time under the FLSA are set forth in §§ 785.27 through 785.32 of this title.

(b) While time spent in attending training required by an employer is normally considered compensable hours of work, following are situations where time spent by employees of State and local governments in required training is considered to be noncompensable:

(1) Attendance outside of regular working hours at specialized or follow-up training, which is required by law for certification of public and private sector employees within a particular governmental jurisdiction (e.g., certification of public and private emergency rescue workers), does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions.

(2) Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government (*e.g.*, where a State or county law imposes a training obligation on city employees), does not constitute compensable hours of work.

(3) Time spent in the training described in paragraphs (b) (1) or (2) of this section is not compensable, even if all or part of the costs of the training is borne by the employer.

(c) Police officers or firefighters, who are in attendance at a police or fire academy or other training facility, are not considered to be on duty during those times when they are not in class or at a training session, if they are free to use such time for personal pursuits. Such free time is not compensable.

**§ 553.227 Outside employment.**

(a) Section 7(p)(1) makes special provision for fire protection and law enforcement employees of public agencies who, at their own option, perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer (public or private) during their off-duty hours. The hours of work for the separate and independent employer are not combined with the hours worked for the primary public agency employer for purposes of overtime compensation.

(b) Section 7(p)(1) applies to such outside employment provided (1) The special detail work is performed solely at the employee's option, and (2) the two employers are in fact separate and independent.

(c) Whether two employers are, in fact, separate and independent can only be determined on a case-by-case basis.

(d) The primary employer may facilitate the employment or affect the conditions of employment of such employees. For example, a police department

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may maintain a roster of officers who wish to perform such work. The department may also select the officers for special details from a list of those wishing to participate, negotiate their pay, and retain a fee for administrative expenses. The department may require that the separate and independent employer pay the fee for such services directly to the department, and establish procedures for the officers to receive their pay for the special details through the agency's payroll system. Finally, the department may require that the officers observe their normal standards of conduct during such details and take disciplinary action against those who fail to do so.

(e) Section 7(p)(1) applies to special details even where a State law or local ordinance requires that such work be performed and that only law enforcement or fire protection employees of a public agency in the same jurisdiction perform the work. For example, a city ordinance may require the presence of city police officers at a convention center during concerts or sports events. If the officers perform such work at their own option, the hours of work need not be combined with the hours of work for their primary employer in computing overtime compensation.

(f) The principles in paragraphs (d) and (e) of this section with respect to special details of public agency fire protection and law enforcement employees under section 7(p)(1) are exceptions to the usual rules on joint employment set forth in part 791 of this title.

(g) Where an employee is directed by the public agency to perform work for a second employer, section 7(p)(1) does not apply. Thus, assignments of police officers outside of their normal work hours to perform crowd control at a parade, where the assignments are not solely at the option of the officers, would not qualify as special details subject to this exception. This would be true even if the parade organizers reimburse the public agency for providing such services.

(h) Section 7(p)(1) does not prevent a public agency from prohibiting or restricting outside employment by its employees.

OVERTIME COMPENSATION RULES

**§553.230 Maximum hours standards for work periods of 7 to 28 days—section 7(k).**

(a) For those employees engaged in fire protection activities who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 212 as the number of days in the work period bears to 28.

(b) For those employees engaged in law enforcement activities (including security personnel in correctional institutions) who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to 28.

(c) The ratio of 212 hours to 28 days for employees engaged in fire protection activities is 7.57 hours per day (rounded) and the ratio of 171 hours to 28 days for employees engaged in law enforcement activities is 6.11 hours per day (rounded). Accordingly, overtime compensation (in premium pay or compensatory time) is required for all hours worked in excess of the following maximum hours standards (rounded to the nearest whole hour):

| Work period (days) | Maximum hours standards | |
|---|---|---|
| | Fire protection | Law enforcement |
| 28 | 212 | 171 |
| 27 | 204 | 165 |
| 26 | 197 | 159 |
| 25 | 189 | 153 |
| 24 | 182 | 147 |
| 23 | 174 | 141 |
| 22 | 167 | 134 |
| 21 | 159 | 128 |
| 20 | 151 | 122 |
| 19 | 144 | 116 |
| 18 | 136 | 110 |
| 17 | 129 | 104 |
| 16 | 121 | 98 |
| 15 | 114 | 92 |
| 14 | 106 | 86 |
| 13 | 98 | 79 |
| 12 | 91 | 73 |
| 11 | 83 | 67 |
| 10 | 76 | 61 |
| 9 | 68 | 55 |
| 8 | 61 | 49 |





U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

April 28, 2006 FLSA2006-13

Dear **Name*:**

This is in response to your letter inquiring whether police officers who work special details for a third party entity servicing a city-owned coliseum qualify for the Fair Labor Standards Act (FLSA) section 7(p)(1) partial overtime exemption. It is our opinion that the special detail qualifies under section 7(p)(1).

The City owns a municipal coliseum that hosts various activities throughout the year including basketball games, concerts, and monster truck shows. Currently, the City uses off-duty sheriff deputies, who are employed by the County, to provide security for these events. The City would like to enter into a service contract with a private sector, for-profit employer located in another city that provides entertainment services with expertise in crowd management, event staffing, and security for large spectator events at public facilities. The third party contractor may employ off-duty City police officers for some of the security for the events, as well as officers who are not employed by the City. You have requested an opinion regarding whether and how the employment relationships would be affected if the City decides to provide workers' compensation insurance for the officers while the third party at the coliseum employs the officers. The City currently provides workers' compensation for officers who work for a third party entity on non-city property and are injured in the course of their law enforcement duties for the third party.

FLSA section 7(p)(1) (copy enclosed) provides that if a public employee engaged in law enforcement activities voluntarily

> agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—
>
> (A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,
> (B) facilitates the employment of such employees by a separate and independent employer, or
> (C) otherwise affects the condition of employment of such employees by a separate and independent employer.

Under 29 C.F.R. § 553.227(e) (copy enclosed), "a city ordinance may require the presence of city police officers at a convention center during concerts or sports events. If the officers perform such work at their own option, the hours of work need not be combined with the hours of work for their primary employer in computing overtime compensation." We assume for purposes of this inquiry that the officers are employed by the third party contractor solely at their option and are not coerced into such employment by the City.

The question then remains whether the City and the third party are separate and independent of each other. The Department's regulations provide a list of actions the City may take regarding the third party employment without affecting this determination, including maintaining a roster of officers who wish to perform the special duty, selecting the officers for such detail, negotiating the officer's pay, and retaining a fee for administrative duties. 29 C.F.R. § 553.227(d). These principles are exceptions to the usual rules on joint employment set forth in 29 C.F.R. Part 791. 29 C.F.R. § 553.227(f). *See* WH Opinion Letter August 27, 1990 (copy enclosed).

The City and the private third party contractor are separate legal entities. Furthermore, their dealings with each other involving the officers are within the type of activity specifically allowed by FLSA section 7(p)(1) and 29 C.F.R. § 553.227. Based on a review of the information provided, we believe that the City and the

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third party contractor are separate and independent employers under § 7(p)(1). Therefore, the special detail employment of City police officers by the third party contractor need not be combined with the hours worked by the police officers for the City in determining entitlement to overtime compensation.

The fact that the City would provide the officers workers' compensation during third party employment does not alter this outcome. *See* WH Opinion Letter May 28, 1998 (copy enclosed). Here, the City is self-insured, and its decision to extend workers' compensation coverage to its off-duty officers does not undermine the separate status of the City and the private third party employer with regard to these services. Therefore, the City may provide workers' compensation for the officers while they are providing security for a third party without losing the section 7(p)(1) partial overtime exemption.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

Enclosures:
FLSA § 7(p)(1)
29 C.F.R. § 553.227
WH Opinion Letters August 27, 1990 and May 28, 1998

**Note: * The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7)**



Internal Revenue Service
United States Department of the Treasury

## FICA and Volunteer Firefighters

Many local government entities rely on the services of individuals, such as firefighters and emergency workers, to perform services for little or no regular compensation. Workers who perform these services are subject to the same rules regarding social security and Medicare (FICA) coverage as other workers. If they receive some form of compensation, including expense allowances tax abatements, or noncash property, these withholding rules apply. It does not matter whether the workers are called "volunteers" or whether they are defined as employees by the entity's administrative policy. It is irrelevant whether they receive a regular salary.

### General Exception for State and Local Government Employees

Under Internal Revenue Code section 3121(a), all wages that are paid for "employment" are subject to FICA, unless an exception applies.
There is an exception from the definition of "employment" for state and local government workers under section 3121(b)(7). However, after July 1, 1991, this exception applies only if the state or local government employee is a member of a qualifying state retirement system. In addition, employees hired after March 31, 1986, are subject to the Medicare portion of the tax, regardless of coverage in a retirement plan.

A qualifying plan must meet certain requirements to provide a benefit approximately equivalent to that provided under social security. The requirements are discussed in detail in Regulation 31.3121(b). The remuneration received for services by volunteers, if it is subject to FICA, is taken into account in determining the employee's social security benefits. There are special rules for determining whether a part-time employee (including a "volunteer") is covered by a public retirement system. The accrued benefits under the plan must be 100 percent nonforfeitable to meet the test. See Publication 963 for more information.

### Exception for Emergency Workers

There are special rules under section 3121(b) that except emergency workers from social security coverage. This exception applies only in when the workers are hired to respond, on a temporary basis, to an unforeseen, unusual situation to perform services related to that emergency (forest fire, flood, earthquake, flood, etc.). Firefighters or emergency workers who serve or are available on a continuing or regular basis do not meet this test.

### Reimbursements

If a volunteer receives only reimbursement or allowance for expenses, these payments will be excludable only if they meet the accountable plan rules, discussed in Circular E. If the tests are not met, then the allowances are treated as wages, and subject to the withholding rules discussed above. If the only consideration a volunteer receives is expense reimbursement under an accountable plan, and the expenses are properly accounted for, there are no wages and therefore no withholding for income, social security or Medicare tax is required.

## Notes



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