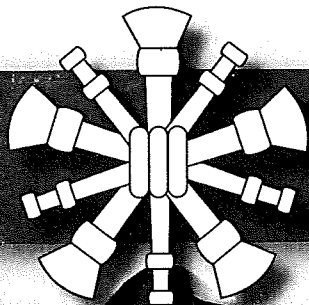
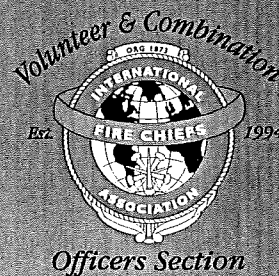
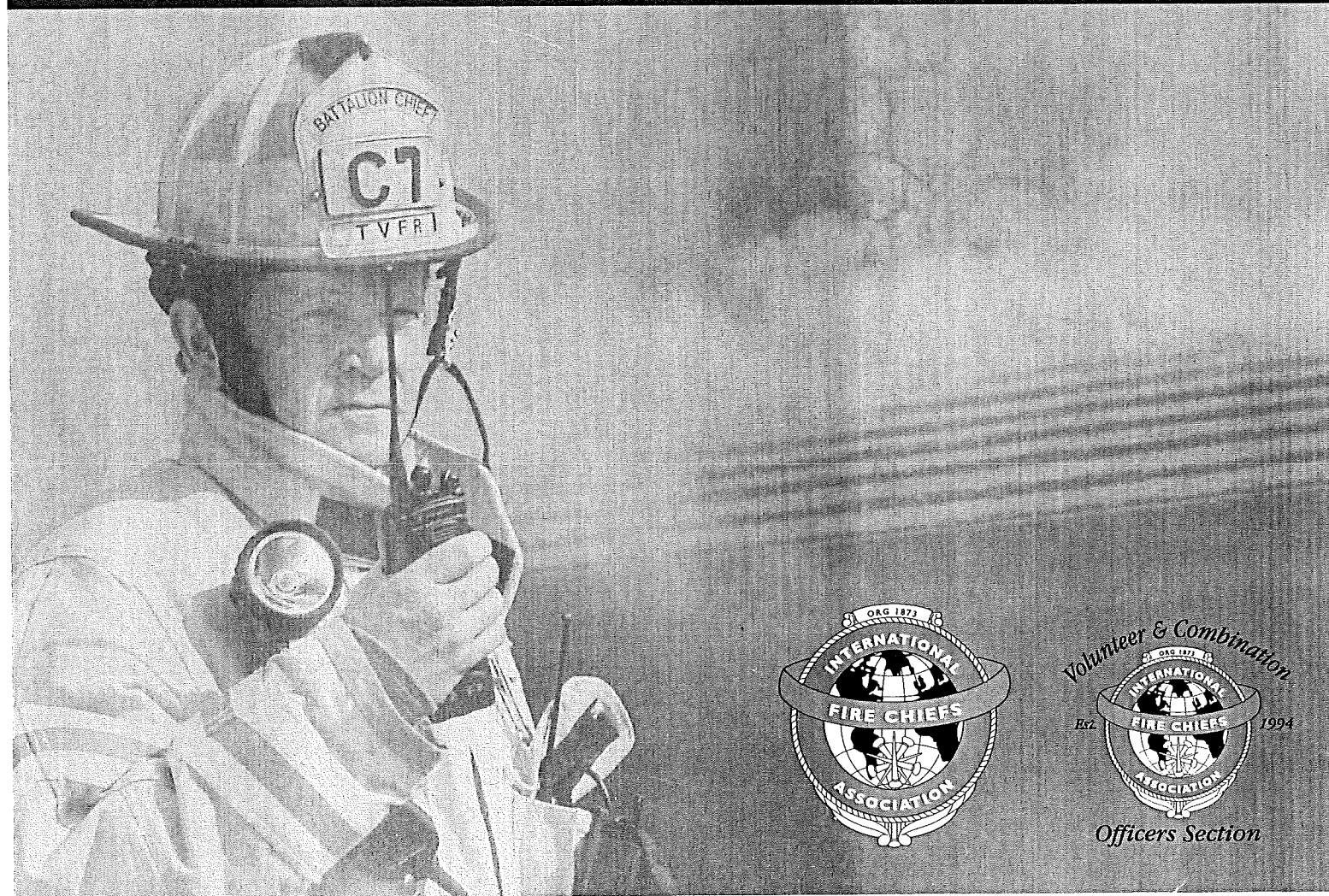
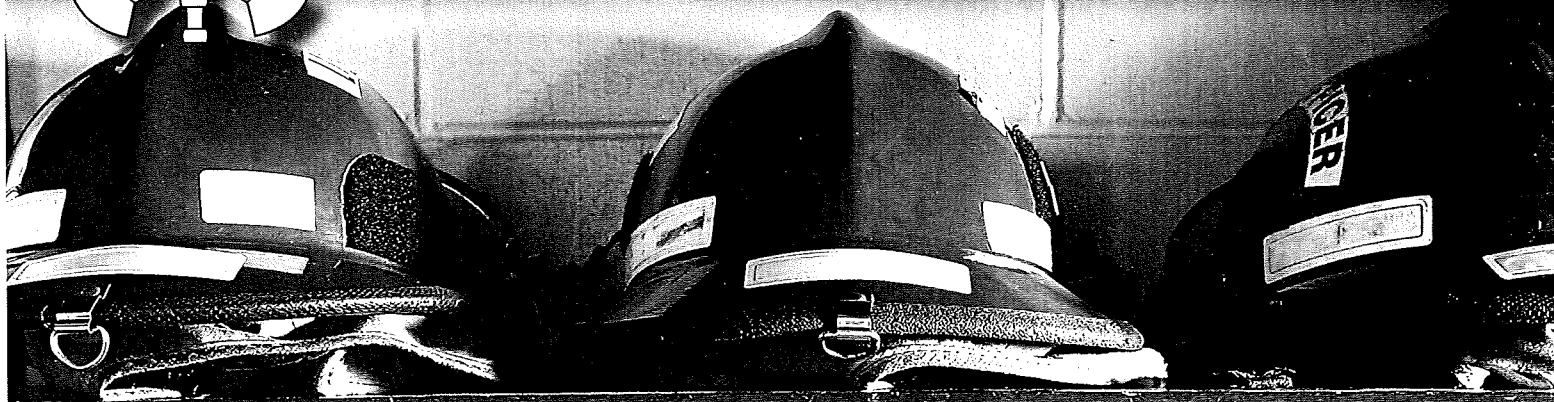


MANAGING VOLUNTEER FIREFIGHTERS FOR FLSA COMPLIANCE:



A GUIDE FOR FIRE CHIEFS AND COMMUNITY LEADERS



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 Relief⁷

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 year⁹

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

CHAPTER 2. *continued*

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 employment¹⁹

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 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 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.