

Firehouse Lawyer

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Stop the Presses – Important FLSA Opinion Issued

We were about to finalize a different *Firehouse Lawyer* for August when I became aware of an August 7, 2006 Wage and Hour Division opinion released by the federal Department of Labor. This letter, addressed to the International Association of Fire Chiefs, addresses critical "volunteer" issues that are always of interest to the fire service, and especially those departments throughout the United States that rely heavily on volunteer firefighters, EMTs, and/or paramedics.

This letter opinion addresses several critical issues comprehensively and somewhat differently than in the past, so we devote virtually the entire issue to it this month.

The opinion deals with numerous hypothetical questions concerning issues such as "same type of services", "same public agency", and "nominal fee", all of which we have wrestled with for many years. The FLSA recognizes the generosity and public benefits of volunteering to serve public agencies such as fire departments, so the 1985 FLSA amendments tried to ensure that true volunteer activities were not discouraged. Congress also wanted, however, not to allow abuses, or manipulation of the FLSA's minimum wage and overtime provisions.

Many of the questions stem from the regulations, which are contained in 29 CFR 553.101 and 553.103, which essentially provide that a person qualifies as a bona fide volunteer and not an employee if the person 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.

Inside This Issue

- | | |
|---|--|
| 1 | Stop the Presses – Important FLSA Opinion Issued |
| 4 | Disclaimer |

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The Wage and Hour Division addressed the first nine questions (see below) using Scenario 1. Under this factual scenario, the agency just assumed that an individual serves as a volunteer firefighter for County A, which provides some monetary payment (or tax relief) calculated on a yearly, monthly, shift, or on-call basis. Also, the payment varied based on factors such as amount of time spent, length of service, number of calls or number of shifts but not linked at all to expenses incurred. The opinion mentioned that the preamble to the regulations calls for application of an “economic realities” test, and states that no guidelines on specific amounts can be provided. The regulations do provide some factors to help guide the decision on whether a stipend or payment qualifies as a “nominal fee”. Factors to examine include the distance traveled and time or effort required, availability of the volunteer, and the basis—as needed or throughout the year—to aid in the determination. Payments cannot be tied to productivity. The preamble stated that almost 30% of all volunteers were then paid a small fee for each fire call to which they responded, and the intent was not to invalidate that model. Thus, the opinion reiterated, nothing in the statute would directly preclude payment of a nominal fee per call or even per shift.

This opinion letter also cited favorably to Wage and Hour Opinion Letter FLSA2005-51 (Nov. 10, 2005) in which it was stated that a public agency volunteer coach would be presumed to have received only a nominal fee, when the *payment did 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 % rule is derived from the FLSA and implementing regulations. A willingness to volunteer for only 20% is a likely indication of the spirit of volunteerism, the Acting Administrator wrote, stating: **“We believe this interpretation of ‘nominal fee’ applies equally in the context of firefighters.”**

Here are the nine questions analyzed:

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 \$20,000. The volunteer is paid \$15,000 annually. On average, the volunteer spends at least 3,000 hours annually waiting or responding to calls.

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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 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 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.

In summary, the opinion states that questions 1-8 represent instances of nominal compensation, assuming that there are no other payments or benefits provided, and no other facts that bear on the question, such as reimbursement for expenses. Thereafter, the opinion reiterated that it would apply the 20 percent rule, and generally an amount not exceeding 20% of the total compensation the employer would pay to employ a full-time firefighter for performing comparable services would be deemed nominal. Thus, in questions 1-6, a nominal fee could be 20% or less of the total compensation County A would pay for the same services. It is less relevant, the opinion states, whether it is paid on an annual, monthly or daily basis. The DOL has withdrawn three

Wage and Hour Opinion Letters issued between 1988 and 1999, which were inconsistent with the interpretation of "nominal fee" in this opinion, so this shows how significant this opinion really is to the Department and to the fire service.

As noted, the "market information" necessary to make this 20% determination in good faith is generally within the control or knowledge of the local fire departments or chiefs. In other words, what a full-time firefighter or EMT is paid in a local area or region should be readily determinable and is generally a matter of public record. Any full time firefighter that the same employer has on its payroll should be a good benchmark. Or the department could look to information from neighboring jurisdictions, the state, the nation, or data available from the DOL, Bureau of Labor Statistics.

On question 7, the letter expressed some doubt, as \$15,000 annually for a volunteer would have to be less than 20% of what a \$75,000 firefighter cost might be annually. The DOL expressed considerable doubt however about the 3,000 annual hours, as that would be 50+ hours per week and looked to them like a full time job. On question 8, with increased payment every year, the DOL could not say definitively this was not a seniority or productivity system, so without added facts, offered no opinion. On question 9, the letter stated that this appeared to be a "reasonable benefit" and need not be evaluated under the nominal fee issue.

We certainly welcome the guidance that this letter represents, even if there are some departments that may have to make changes due to the 20% interpretation. This opinion letter offers a brighter line to determine when "nominal compensation" becomes something else, jeopardizing the volunteer and the agency. This lawyer will be doing some comparisons with the compensation costs for a full-time firefighter and EMT paid by my clients in the State of Washington. I look forward to dealing with these issues for all concerned.

Next month, we will delve into Scenario 2, which deals with the issues of "same agency" and "same type of services". Occasionally, my clients do ask questions about employees who also volunteer in a different capacity, such as paid maintenance person who comes back in the evenings and serves as a firefighter. Stay tuned for more next month.

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