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Compensation and Employee Status of Volunteer Firefighters

Dennis Wolf
Municipal Technical Advisory Service, Dennis.Wolf@tennessee.edu

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Compensation and Employee Status of Volunteer Firefighters

Dennis Wolf, Fire Management Consultant

February 2012

THE UNIVERSITY of TENNESSEE

MUNICIPAL TECHNICAL ADVISORY SERVICE

In cooperation with the Tennessee Municipal League

Compensation and Employee Status of Volunteer Firefighters

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MTAS OFFICES

Knoxville (Headquarters) ..... (865) 974-0411
Johnson City ..... (423) 854-9882
Nashville ..... (615) 532-6827
Jackson ..... (731) 423-3710
Martin ..... (731) 587-7055

www.mtas.tennessee.edu

The Municipal Technical Advisory Service (MTAS) was created in 1949 by the state legislature to enhance the quality of government in Tennessee municipalities. An agency of the University of Tennessee Institute for Public Service, MTAS works in cooperation with the Tennessee Municipal League and affiliated organizations to assist municipal officials.

By sharing information, responding to client requests, and anticipating the ever-changing municipal government environment, MTAS promotes better local government and helps cities develop and sustain effective management and leadership.

MTAS offers assistance in areas such as accounting and finance, administration and personnel, fire, public works, law, ordinance codification, and wastewater management. MTAS houses a comprehensive library and publishes scores of documents annually.

MTAS provides one copy of our publications free of charge to each Tennessee municipality, county and department of state and federal government. There is a $10 charge for additional copies of "Compensation and Employee Status of Volunteer Firefighters."

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COMPENSATION AND EMPLOYEE STATUS OF VOLUNTEER FIREFIGHTERS

BACKGROUND

Compensation for volunteer firefighters is a complex issue. The Fair Labor Standards Act (FLSA) addresses the issue of compensation for volunteers. Different federal agencies and the courts have issued rules and opinions on whether a volunteer firefighter is a volunteer or an employee, and on whether any compensation or remuneration the volunteer firefighter receives for services provided is subject to withholding for income tax, social security or Medicare. Municipalities also face the question of whether their policies and procedures apply to volunteer firefighters. This publication will answer several questions:

- What is the definition of a volunteer?
- What types of compensation may a municipality provide to a volunteer without jeopardizing the person's volunteer status?
- What constitutes a "nominal fee" under FLSA?
- Is volunteer compensation subject to IRS withholding rules and regulations?
- What options are available to a municipality for compensating volunteer firefighters?
- How should the municipality report volunteer compensation to the IRS, on a W-2 or a 1099?
- Are volunteer firefighters subject to the rules and regulations of a municipality?

DEFINITION OF VOLUNTEERS

Section 3(e)(4)(A) of FLSA and 29 C.F.R. §§ 553.101 and 553.103 state that individuals are volunteers and not employees of a public agency when they meet the following criteria:

- Perform hours of service for civic, charitable or humanitarian reasons without promise, expectation, or receipt of compensation for the services rendered. Volunteers can receive no compensation or be paid expenses, reasonable benefits or a nominal fee to perform such services (§ 553.101(a));
- Offer their services freely and without any pressure or coercion, direct or implied, from the employer (§ 553.101(c)); and
- Are not employed by the same public agency to perform the same services as those for which they propose to volunteer (§ 553.101(d)). For example, a park's department worker can serve as a volunteer firefighter for the same agency (§ 553.103(c)).

COMPENSATION FOR SERVICES PROVIDED

29 C.F.R. § 553.106(a), *Payment of Expenses, Benefits, or Fees*, states that, "Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers." It is important to remember that anything resembling an hourly rate or minimum wage jeopardizes the person's status as a volunteer. Examples of the types of compensation permitted include:

- Payment of the volunteer's tuition to a firefighting course.
- Reimbursement for expenses incidental to fire protection training.
- Reimbursement for "approximate out-of-pocket expenses incurred incidental to answering a call."
- Reimbursement for the cost of replacing clothing or equipment consumed or damaged in responding to a call.
- An annual party given to recognize the volunteer firefighters.
- A uniform and related equipment may be furnished free of charge.

- The volunteer may be included in a retirement or relief fund, worker's compensation plan, or life or health insurance program.
- A "nominal sum."

There are two different issues concerning compensation: the application of FLSA, and Internal Revenue Service (IRS) rules and regulations. FLSA says that volunteers can receive a "nominal fee," but the law itself does not define what a nominal fee is. However, § 553.106(e) states that a fee is not nominal if it is:

- a substitute for compensation; or
- tied to productivity.

A municipality must establish a nominal fee that reflects the sacrifice of the volunteer. Again, anything resembling an hourly rate or minimum wage is not a nominal fee and jeopardizes the person's status as a volunteer. The following quote is from 29 C.F.R. § 553.106(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.

Section 553.106(e) is notable regarding providing a nominal per shift fee for volunteers who work a shift. On August 7, 2006, the Department of Labor (DOL) sent Wage and Hour Opinion Letter FLSA2006-28 to the International Association of Fire Chiefs (IAFC), stating that "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."

As described below, the DOL has set a limit on nominal compensation, but the municipality determines what is reasonable and fair given local circumstances. 29 C.F.R. § 553.106(f) states that the decision of whether the expenses, benefits, or fees would preclude an individual from qualifying as a volunteer under FLSA must be made by examining the total amount of payments in the context of the economic realities of a particular situation. The DOL 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." The responsibility for setting an appropriate nominal fee rests with the municipality, and the DOL may consider a nominal fee unreasonable if the fee seems out of proportion to the volunteer's service, even if the fee is less than what is described in Wage and Hour Opinion Letter FLSA2006-28.

The DOL clarified further the issue of a nominal fee in Wage and Hour Opinion Letter FLSA2006-28. The DOL considers any fee paid to a volunteer firefighter as nominal **as long as the fee does not exceed 20 percent of what that public agency would otherwise pay to hire a full-time firefighter**. The compensation may include being paid per call, insurance benefits, retirement benefits, etc. If the compensation is nominal, the volunteer firefighter is not subject to the wage and hour provisions of FLSA. FLSA provides no exemption for the volunteer firefighter being subject to withholding of taxes.

The IRS views compensation for volunteers from a different perspective. The ability of the employer to exercise direction and control, not the label (volunteer, reserve, etc.), determines whether an employer-employee relationship exists. Any worker receiving compensation for services performed who is subject to the will and direction of the employer is a common-law employee. A common-law employee is defined as an employee who performs services for an employer and the employer has the right to control what will be done and how it will be done, even if the employee has freedom of action. Under Section 3121 of the Internal Revenue Code, all employees are subject to social security and Medicare taxes unless there is a specific exception. Because volunteer firefighters serving a municipal fire department are subject to the will and direction of the employer (the municipality), they are considered common-law employees under IRS regulations and subject to withholding for income, social security, and Medicare taxes.

Under Internal Revenue Code section 3121(b)(7)(F)(iii), an exception is provided from social security and Medicare coverage for a worker "serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency." This exception applies only to workers who respond to unforeseen emergencies. For example, a municipality could employ temporary personnel to help recover from an ice storm or flood. The exception does not apply to workers, such as firefighters, who work for pay or volunteer on a recurring basis even if their work involves emergencies.

TAXABLE EARNINGS

Reimbursements to any worker, including firefighters, made under an accountable plan are not subject to tax and withholding. An accountable plan must require workers to substantiate business expenses, allow no reimbursement for unsubstantiated expenses, and require the employee to return any amounts reimbursed over documented expenses to the employer within a reasonable period. Any amounts reimbursed to employees that do not meet these conditions are considered wages subject to all the taxes discussed above. It does not matter whether the amount is labeled per call, per diem, or any other description: it is still taxable.

OPTIONS FOR COMPENSATING VOLUNTEER FIREFIGHTERS

A municipality using volunteer firefighters has two options when it comes to compensation for volunteer firefighters.

Option 1:

The municipality should process any compensation a volunteer firefighter receives through the municipality's regular payroll system and issue the volunteer firefighter a W-2 at the end of the year. Compensation is defined as any money paid to the volunteer firefighter in the form of a per call stipend, per drill stipend, per diem allowance, monthly allowance for administrative services, etc. A person is an independent contractor if the payer (municipality) has the right to control or direct the result of the work only and not what is done and how it is done. Volunteer firefighters do not meet the definition of contractor, so reporting compensation on a 1099 form is not appropriate. It is important that the municipality classify volunteer firefighters properly. If the municipality improperly classifies a volunteer firefighter as an independent contractor, the municipality may be liable for employment taxes for that volunteer firefighter.

If the compensation is less than 20 percent of what a paid firefighter for the local area would make on an annual basis, the firefighter is considered a volunteer under FLSA. If the municipality pays the firefighter any type of hourly rate, or ties the compensation to the length of time worked or productivity, FLSA considers the person an employee and not volunteer. A part-time firefighter also cannot be a volunteer for the same agency.

Option 2:
Have true volunteers who serve without any compensation and establish an accountable plan whereby the volunteers are reimbursed for actual expenses allowed under IRS regulations. The plan must be in writing and include the requirement that the volunteers substantiate business expenses, allow no reimbursement for unsubstantiated expenses, and require that they return any amounts reimbursed over documented expense to the employer within a reasonable period. Under this plan, the volunteer firefighter is receiving reimbursement for expenses and is not receiving compensation for services, so the employer is not required to complete a W-2 or 1099.

APPLICATION OF MUNICIPAL POLICIES AND PROCEDURES TO VOLUNTEER FIREFIGHTERS

Because a volunteer firefighter working for a municipal fire department is a common-law employee, the municipality's personnel policies, rules, and regulations apply to the volunteer. A municipality receiving fire services from an independently owned and operated volunteer fire department should have a written agreement with the fire department that includes how the volunteer firefighters will be supervised and whether they will follow any of the municipality's policies and procedures. If the volunteer firefighters will follow municipality policies and procedures, the written agreement should reference those specific policies, procedures, rules, and regulations.

SUMMARY

Volunteer firefighters perform valuable emergency and essential services for their communities and are cost effective. The Fair Labor Standards Act includes provisions to recognize the public benefits of volunteers and prevent the manipulation of the law by employers seeking to avoid paying fair wages and overtime for work performed. Important points to remember include:

- Public employees may volunteer with their agency in a capacity that is different from what they are paid to do.
- Both FLSA and IRS rules and regulations apply to volunteers.
- Volunteers may receive a reasonable nominal fee for their service, and the municipality is responsible for determining the amount of the nominal fee.
- If volunteer firefighters receive compensation, the municipality must report the compensation using a W-2, not a 1099.
- Optionally, volunteers may serve under a valid accountable plan, which is not considered compensation by the IRS.
- The policies, rules, and regulations of the municipality apply to volunteers working for a municipally operated fire department.

It is important for a municipality to classify, supervise, and compensate volunteers appropriately. Failure to do so causes internal administrative and financial problems, discord with the volunteers, may result in fines or penalties, and may result in liability for back employment taxes.

REFERENCES AND ADDITIONAL INFORMATION:

29 CFR Part 553, **Fair Labor Standards Act Regulations**, *Application of the Fair Labor Standards Act to Employees of State and Local Government*. Available at: http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=48d6ee3b99d3b3a97b1bf189e1757786&rgn=div5&view=text&node=29:3.1.1.1.29&idno=29

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U. S. Department of Labor. Wage and Hour Opinion Letter FLSA2005-51. Available at: http://www.dol.gov/whd/opinion/FLSA/2005/2005_11_10_51_FLSA.htm

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