SCHNADER, HARRISON, SEGAL & LEWIS

ATTORNEYS AT LAW

SUITE 1400
330 MADISON AVENUE
NEW YORK, NEW YORK 10017
212-973-8000

SUITE 1000
1111 NINETEENTH STREET, N. W.
WASHINGTON, D. C. 20036
202-463-2900

SUITE 3600
1600 MARKET STREET
PHILADELPHIA, PENNSYLVANIA 19103

215-751-2000
FAX: 215-751-2205
TELEX: 83-4280 · CABLE: WALEW

SUITE 1300
240 NORTH THIRD STREET
HARRISBURG, PENNSYLVANIA 17101
717-231-4000

SUITE 700
ONE MONTGOMERY PLAZA
NORRISTOWN, PENNSYLVANIA 19401
215-277-7700

SUITE 700
108 NORTH WASHINGTON AVENUE
SCRANTON, PENNSYLVANIA 18503
717-342-6100

DIRECT DIAL NUMBER

(215) 751-2600

November 1, 1991

Caroline Hoffer, Esquire
126 E. King Street
Lancaster, Pennsylvania 17602

Dear Ms. Hoffer:

Pursuant to your recent inquiry concerning the application of the Fair Labor Standards Act to volunteers, enclosed is an excerpt from the Fair Labor Standards Handbook. The excerpt relates primarily to the volunteers performing services for "public agencies." Also enclosed are relevant excerpts from the BNA Wage and Hour Manual. I hope this helps.

Sincerely yours,

Jeffrey D. Kahn

Jeffrey D. Kahn
For SCHNADER, HARRISON, SEGAL & LEWIS

bc: Susan J. Ellis (w/encl.)

the craftspeople are an integral part of the marketing medium's business and are under the full control of the marketing medium so that no initiative, judgment, or foresight in open market competition is required for the success of the craft producers. The craftspeople follow the usual path of an employee and must be paid in compliance with the Act's minimum wage and overtime pay requirements. (Opinion WH-361, signed by Acting Wage Hour Administrator Warren D. Landis, October 1, 1975).

NON-PROFIT STATION VOLUNTEERS

This is in reply to your letter of September 25, 1975, regarding the status of employee "volunteers" under the Fair Labor Standards Act.

You state that the company is a non-profit organization whose principal activity is non-profit educational television (a Public Broadcasting Station, * * *). You state that secretaries, administrative assistants, and a janitor wish to volunteer for work on special events, performing duties outside their regular assignments. For example, an administrative assistant would like to volunteer for work as a member of the production crew, a secretary would like to do some announcing and air work, the janitor would like to work in the production area, and the bookkeeper would like to do air work. You ask whether such voluntary services must be treated as compensable.

Volunteer services are discussed on pages 5 and 6 of the enclosed pamphlet, *Employment Relationship*. As indicated there, in certain circumstances individuals who are regular employees of a religious, charitable or non-profit organization may donate their services as volunteers and the time so spent is not considered to be compensable "work". This position recognizes that the Act does not necessarily stamp as work those activities performed by persons who without expectation of compensation, might work for their own advantage on the premises of another. The U.S. Supreme Court has stated that the Act's purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the minimum wage.

In accordance with this guidance, we would not regard time spent by employees of a non-profit organization in voluntary activities as compensable working time under the following circumstances:

(1) The services are entirely voluntary, with no coercion by the employer, no promise of advancement, and no penalty for not volunteering.

(2) The activities are predominantly for the employee's own benefit.

(3) The employee does not replace another employee or impair the employment opportunities of others by performing work which would otherwise be performed by regular employees.

(4) The employee serves without contemplation of pay.

(5) The activity does not take place during the employee's regular working hours or scheduled overtime hours.

(6) The volunteer time is insubstantial in relation to the employee's regular hours. (Opinion WH-369 signed by Acting Wage Hour Administrator Warren D. Landis, December 3, 1975.)

STUDENT PUBLICATION

This is in reply to your letter of December 9, 1975, concerning the status under the Fair Labor Standards Act of high school students engaged in activities in connection with a school publication which appears in the local newspaper.

You present the following fact situation: The publication class of a local high school, as part of the reg-

Volunteer Services

Bona fide efforts of individuals to volunteer and donate their services for activities of a humanitarian, public service, or religious nature where there is no expectation of payment would not create an employment relationship. The Wage and Hour Division has held such arrangements to apply to:

- A doctor's wife who volunteers a few hours each week as a nurse
- A housewife who donates her services as a secretary to local hospitals
- An office employee of a hospital who volunteers to minister to the comforts of patients in the hospital outside regular working hours. However, where an employment relationship does exist, that relationship may not be waived, so that a hospital's bookkeeper could not be treated as an unpaid volunteer bookkeeper for the hospital in the same week in which he is also an employee. (WH AdmOp, June 28, 1967)
- Volunteer workers in a Head Start Program operated by a non-profit school system. (WH AdmOp, Apr. 21, 1967)
- Nuns, priests, and other members of religious orders who serve pursuant to their religious obligations in preschools, schools, hospitals, or other institutions operated by their church or religious order are not considered employees (WH-188, Dec. 27, 1972)
- Persons who participate in city-sponsored recreation programs for civic or personal motives, without promise or expectation of compensation, at hours that suit their own convenience, and who do not replace regular employees in the performance of their normal duties. (WH-282, Aug. 12, 1974)

Commission Salesmen

Commission salesmen employed by a retail chain to sell appliances outside the stores would be "employees" of the chain for the purposes of the Act, according to the Wage-Hour Administrator, although they still might qualify for exemption as outside salesmen.

- A retail chain proposed to hire a group of outside salesmen to sell "white goods"—refrigerators, washing machines, clothes dryers, etc. These salesmen would be paid on a commission basis without any drawing account. They would not participate in any of the various benefits given to regular employees of the company. But they would have to submit their orders to the store and occasionally bring prospective buyers to the store for a view and demonstration.

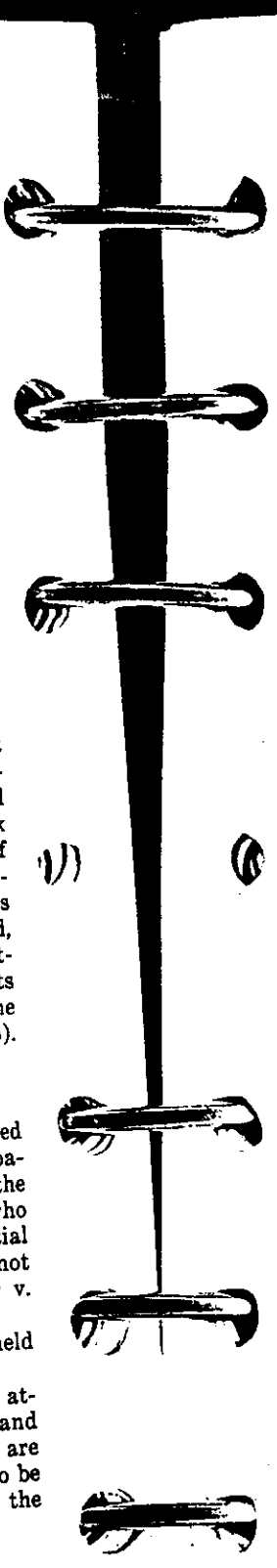
The Wage-Hour Administrator said these salesmen would be "employees" and not independent contractors. He emphasized: (1) The salesmen would not make any investment in facilities and equipment; (2) they would not have a limited opportunity for profit and loss; (3) they would exercise and insignificant decree of independent initiative, judgment, or foresight; (4) they would not have an independent business organization or operation; and (5) the store would have control over them, since it would fix the price of the equipment, the amount of commission per unit, the time of demonstrations in the store, and other aspects of the relationship. The salesmen could, however, qualify for exemption as outside salemen, provided they met the tests for such exemption as set out in the white-collar regulations. (See 92:715). (WH AdmOp, Sept. 11, 1961)

Patient-workers

- A federal district court has ruled that the FLSA applies to resident patient-workers at state hospitals for the mentally ill and mentally retarded who perform work which is of consequential economic benefit to the hospitals and not mere therapeutic excercises. (Souder v. Brennan, DC DC, 21 WH Cases 398)

The Wage and Hour Division has held that:

- Retarded persons who no longer attend school and perform clerical and janitorial work, while such activities are of therapeutic value, would appear to be in an employment relationship with the



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¶216 Bona Fide Volunteers

In 1985 Congress enacted legislation to clarify the issue of compensation for so-called "volunteers." The amendment to the FLSA (29 U.S.C. §203(e)(4)(a)) reads as follows:

> 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.

A volunteer is generally defined as an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons. Moreover, a volunteer performs these services without promise, expectation or receipt of compensation for services rendered. If these conditions are met, an individual will not be subject to the FLSA (29 C.F.R. §553.10(a)).

Public employee volunteers

As the 1985 Amendments state, an individual may not be a volunteer for a public agency when the volunteer hours involve the *same type* of service which the individual is employed to perform for the *same agency*. One issue that may arise under this section is determining whether two agencies of the same state or local government constitute the same or separate public agencies. According to DOL, this issue will be determined on a case-by-case basis. One factor that will be considered by DOL is how the agency is treated for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce (29 C.F.R. §553.102(b)). Since DOL has determined that such issues will be resolved on a case-by-case basis, it would be wise for any public employer considering this issue to request a Wage Hour Opinion Letter.

Another important issue when considering public employee volunteers is determining whether or not the employee is providing the *same type of services* which the individual is employed to perform for the same agency. Individuals may not volunteer to do what they are otherwise paid for. Among other criteria, DOL will consider:

> (1) the duties and other factors contained in the definitions of the 3-digit categories of occupations in the *Dictionary of Occupational Titles;* and (2) 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. 29 C.F.R §553.103(a)

Once again, because of the vagueness of the DOL criteria, any public employer in doubt as to whether a public employee volunteer is performing the same services which he or she is otherwise employed to do is advised to seek a Wage Hour Opinion Letter.

In an effort to clarify the provisions, DOL has provided examples of when services constitute the "same type of services" and thus do not qualify for bona fide activities. For instance, the following employees would *not* be considered volunteers according to 29 C.F.R. §553.103(b)(c):

Permitted payments and benefits to volunteers

Volunteers may be reimbursed for *expenses*, *reasonable benefits* and *nominal fees*, or a combination of all three (29 C.F.R. §553.106). An example of *expenses* would be:

- a uniform allowance or reimbursement for reasonable cleaning expenses for a school crossing guard, or
- out-of-pocket expenses incurred during volunteering, such as meals and transportation.

A volunteer may also be reimbursed for tuition, transportation, and meal costs involved in attending classes where the purpose of the class is to teach the volunteers to perform the services they provide or will provide as volunteers. Volunteers may also be furnished books and supplies essential to their training.

The following are examples of *reasonable benefits* which a public agency may provide volunteers:

- inclusion of volunteers in group insurance plans, or
- pension plans, or
- "length of service awards."

Volunteers may also be provided with *nominal fees* from a public agency without fear of losing their volunteer status. DOL has made clear that a nominal fee is *not* a substitute for compensation and may not be tied to productivity. This, however does not preclude paying volunteer firefighters a nominal amount "per call." There are a number of factors that will be considered when determining if an amount given is "nominal" including:

- the distance traveled;
- 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. A volunteer who agrees to provide services periodically on a year-round basis may receive an annual stipend or fee and still be considered a volunteer.

An example of benefits to volunteers deemed acceptable by DOL can be seen in a Nov. 19, 1986, Wage Hour Opinion Letter. In this particular instance, the locality proposed to give volunteer firefighters the following benefits:

- minimum city water and sewer allotments—valued at $9.00 and $5.50 per month, respectively;
- membership in the city's swimming pool—valued at $20 per month for a single person and $30 per month for a family, the pool season being three months; and
- a contribution to a retirement investment fund—valued at $250 per year, with an increase of $25 per year up to $500.

In a May 1985 publication, "State and Local Government Employees Under the Fair Labor Standards Act," DOL further elaborated on volunteer services:

> There are also situations in which employees may volunteer their services in one capacity or another, usually on a part-time basis, and without contemplation of pay for services rendered. For example, an office employee of a hospital may volunteer to sit with a sick child or elderly person during off-duty hours as an act of charity. An employer-employee relationship will not exist with respect to such volunteer time between the hospital and the volunteer or between the volunteer and the person for whose benefit the service is performed. However, if an office employee volunteered to perform office duties for the hospital by which he or she is employed, such time would be considered as compensable hours of work for purposes of FLSA. Similarly, a full-time paid firefighter could not agree to identify a portion of the workweek as "volunteer time." An employee cannot be both a "paid" employee and a "nonpaid" volunteer while performing the same type of work for the same employer.

In a Wage Hour Opinion Letter dated Aug. 12, 1974, the DOL further noted as follows when asked about city employees who devote some off-duty time to city-sponsored recreation programs:

> For example, an office employee of the city may volunteer to perform nonclerical services, such as coaching a softball or basketball team in a city-sponsored program, during his or her off-duty time as a charitable or civic act. A person may not, however, be both an employee and a volunteer while performing essentially the same duties. Thus, a person employed in park activities cannot have his or her time divided into "working hours" and "volunteer hours" while performing the same or related duties. Accordingly, the position regarding volunteers will normally encompass those who participate in the programs for civic or personal motives of their own, without promise or expectation of compensation at hours that suit their own convenience, whether by schedule or otherwise and who do not replace regular employees in the performance of their normal duties. The activity may be performed on the employer's premises, so long as it is not done during any time the employee is required to be on the premises, and the control exercised by the employer is only nominal.

In Wage Hour Opinion Letter WH-281, dated Aug. 5, 1974, DOL also ruled that volunteers of a grantee acting as an agent of the State of Nebraska under the Domestic Volunteer Services Act of 1973 were not employees under the FLSA.

Special rules for fire protection and law enforcement volunteers are discussed beginning at ¶630.

¶217 Independent Contractors

It is common for state and local governments to contract with private employers for portions of their work. For example, a state government may hire a consultant on a tax reform study, a private security firm to run prisons, a private cafeteria for state workers, or a private firm for trash removal services.

As a general rule, independent contractors bid to perform government work and are evaluated based on results rather than their day-to-day operations. Independent contractors control their own workers and must ensure that those workers are compensated in accordance with the FLSA. State and local governments, therefore, need not be concerned with FLSA compliance for the employees of their independent contractors.

State or local governments, however, are obviously not free to set up sham independent contractor relationships that violate the FLSA. They cannot, for example, designate a particular employee to be an