¶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):

(1) A nurse employed by a state hospital who volunteers nursing services at a state operate clinic (which is not a separate agency).
(2) A firefighter volunteers as a firefighter at the same public agency.

*For example, in an Oct. 5, 1987, Wage Hour Opinion letter, a fire department wanted to know if firetruck drivers in the same district could volunteer the same or similar work during their off-duty hours. DOL explained that because §203(e)(4)(A)(ii) of the FLSA does not allow individuals to volunteer the same or similar duties for the public agency that employs them, the firetruck drivers could not work additional time without the work being counted and paid for in compliance with the FLSA. However, in a Jan. 2, 1988, letter, DOL stated that a firefighter may volunteer the same services for a *different* public agency in another jurisdiction. (See also Wage and Hour Opinion Letters dated April 21, 1987, and March 28, 1987.)

On the other hand, the following employees would not be engaged in volunteering the "same type of services," and thus would be considered bona fide volunteers:

(1) A city police officer who volunteers as a part-time referee in a city basketball league.
(2) An employee of the city parks department who serves as a volunteer city firefighter.
(3) An office employee of a city hospital who volunteers to spend time with a disabled or elderly person in the same institution during off duty hours.

*In several Wage Hour Opinion Letters, DOL emphasized that public employees can volunteer for the same agency that employs them if the volunteer position is substantially different from their paid work. A May 7, 1986, Wage Hour Opinion Letter addressed a case in which a public high school's full-time custodian was prohibited by the school from working as an assistant baseball coach. The Wage and Hour Division noted that the facts in the letter clearly indicated that the custodian was volunteering his coaching services and could continue to coach without fear of losing his volunteer status. A police department in an Oct. 21, 1987, Wage Hour Opinion Letter asked if civilian members (such as switchboard operators or record clerks) of the department could volunteer their services as reserve police officers without the public agency incurring overtime compensation liabilities. DOL, citing §553.103 of the regulations, noted that since the employees in question would not be performing the same activities for the same agency that employs them, the civilian workers could volunteer as police reserve officers. In a Nov. 16, 1987, letter, DOL said that firefighters could also volunteer their services as police reserve officers, since the duties they would perform would be dissimilar from their paid positions.

Private employee volunteers

An individual who is not employed by state or local government agencies and who donates hours of service is considered a volunteer, not a public agency employee, so long as the services are provided with no promise, expectation or receipt of compensation for the services rendered. There are no limitations on the types of services rendered which private individuals may provide. For examples see 29 C.F.R. §553.104(b).

*Indicates new or revised material.

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.

*The letter noted that under section 3(e) of the FLSA, volunteers performing services for state and local governments should not be considered "employees." In this case, DOL ruled that the benefits offered were *nominal in value* and therefore such provisions would not affect the volunteer status of the city's firefighters. Similarily, an Oct. 1, 1987, Wage Hour Opinion Letter addressed volunteer reserve officers who receive $8 to $25 per assignment, with a maximum of two weekly assignments, a uniform and inclusion in the city's workman's compensation plan. DOL ruled that the payments were nominal in value and benefits were reasonable, and therefore they were considered bona fide volunteers.

DOL received numerous requests during the notice and comment period on the regulations to clarify and give specific guidance on the meaning of nominal fees. DOL, however, refused to do so. Instead, DOL stated that they would examine all expenses, benefits or fees in the "context of the economic realities of the particular situation" (29 C.F.R. §553.106(f)). This vague standard will no doubt prove troublesome for state and local governments.

*Since DOL's regulations are somewhat vague, particularly in terms of what constitutes a "nominal fee" and "reasonable benefits," it is important that state and local governments avoid taking actions that create an employer/employee relationship. Thus, the common law rules that have developed over "volunteers" remain relevant to compliance with the Act. For example, in a Wage Hour Opinion Letter dated July 15, 1988, DOL ruled that volunteer firefighters compensated at $7.00 an hour while on call were *not* bona fide volunteers because the payment of an hourly rate established an employer-employee relationship.

The FLSA defines the term "employ" in a manner that includes "to suffer or permit to work" (29 U.S.C. §203(g)). Thus, where a state or local government permits a person to work, that person generally has to be paid the minimum wage and any overtime premium. Of course, the employer must know that the work is being performed in order to "permit" its performance. However, it is possible for the state or local government to knowingly accept volunteer work from a civic-minded citizen; this person, however, must be a bona fide volunteer and not an employee who is otherwise being coerced to volunteer.

DOL has provided the following statement on volunteers (U.S. Department of Labor WH Publication 1297, "Employment Relationship Under the Fair Labor Standards Act," pp. 6–7 (Rev. 5/80)):

> For example, members of civic organizations may help out in a sheltered workshop; women's organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or the elderly; mothers may assist in a school library or cafeteria as a public duty to maintain effective services for their children; or fathers may drive a school bus to carry a football team or band on a trip. Similarly, individuals may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross, working with retarded or handicapped children or disadvantaged youth, helping in youth programs as camp counselors, scoutmasters, den mothers, providing child care assistance for needy working mothers, soliciting contributions or participating in benefit programs for such organizations and volunteering other services needed to carry out their charitable, educational, or religious programs. The fact that services are performed under such circumstances is not sufficient to create an employee-employer relationship.

*Indicates new or revised material.

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

independent contractor and then violate the FLSA with regard to the employee.

The legal test that establishes a true independent contractor is called the "economic reality test." In *Doty v. Eddy's Steakhouse*, 733 F.2d 720 (10th Cir. 1984), one court has characterized this test in the following terms:

> The focal point in deciding whether an individual is an employee is whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself. In applying this test, the courts generally focus on five factors:
> (1) the degree of control exerted by the alleged employer over the worker.
> (2) the worker's opportunity for profit or loss.
> (3) the worker's investment in the business.
> (4) the permanence of the working relationship.
> (5) the degree of skill required to perform the work.

Thus, if a so-called independent contractor does not meet this test of economic reality, the contractor must be treated as an employee for FLSA purposes. See also *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

The Department of Labor has endorsed an economic reality test of its own, adopting many of the factors discussed above. A Wage Hour Opinion Letter dated June 23, 1986, commented on the applicability of the FLSA's monetary provisions to one who signs an employment contract as a "contracted individual" rather than as an employee.

According to DOL, there is no single rule that the courts have applied to determine whether an individual is truly an independent contractor or an employee for purposes of the FLSA. Furthermore, the mere labeling of an individual as an independent contractor is not controlling. Instead, the courts have looked at the totality of the circumstances in the employment relationship. DOL points to a number of factors which the courts and DOL consider important, including:

- the extent to which services rendered are an integral part of the employer's business;
- the permanency of the relationship;
- the amount of individual investment in facilities and equipment;
- the opportunities for profit and loss;
- the degree of initiative, judgment, or foresight exercised by the individual who performs the services.

In *Powell v. Tucson Air Museum Foundation of Pima County*, 771 F.2d 1309 (9th Cir. 1985), employees sought back pay against a museum under the FLSA. The museum claimed that it was not covered by the FLSA because it was an independent contractor and not a "public agency" within the definition of the Act. The court held that the museum was exempt because it was a bona fide independent contractor leasing county property, notwithstanding the close relationship between the two and the substantial governmental regulation involved. To the extent that the contractors are covered by the FLSA, the costs of the Act will, of course, be incorporated into the contract price.