U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210

FLSA2018-16

January 5, 2018

Dear **Name***:

This letter responds to your request that the Wage and Hour Division ("WHD") reissue Opinion Letter FLSA2009-35. On January 16, 2009, then-Acting WHD Administrator Alexander J. Passantino signed the opinion letter as an official statement of WHD policy. On March 2, 2009, however, WHD withdrew the opinion letter "for further consideration" and stated that it would "provide a further response in the near future."

We have further analyzed Opinion Letter FLSA2009-35. From today forward, this letter, which is designated FLSA2018-16 and reproduces below the verbatim text of Opinion Letter FLSA2009-35, is an official statement of WHD policy and an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259.

I thank you for your inquiry.

Bryan L. Jarrett
Acting Administrator

Dear **Name***:

This is in response to your request for an opinion regarding the application of the Fair Labor Standards Act (FLSA)[1] to volunteers of a volunteer fire company (VFC). The VFC contracted with a private for-profit company to provide paid emergency medical technician (EMT) personnel to augment its volunteer staff. You asks whether the EMTs paid by the VFC's contractor may continue to "volunteer" as EMTs for the VFC without being compensated in accordance with the FLSA. The answer to this question depends on whether the VFC is considered to be an employer of the paid staff members. If the VFC is in fact deemed to be an employer (along with the contractor) of the paid staff members, the EMTs could not "volunteer" to the VFC the same services that they perform for pay for the contractor. Rather, in that

[1] Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

situation, compensation would have to be paid to those "volunteers" in accordance with the FLSA.

According to the information furnished, the VFC is a private, nonprofit, tax-exempt entity, incorporated in 1936, that provides fire, rescue, and emergency medical services to the community. The VFC holds an operating certificate from the state to provide emergency ambulance services to the city in which it is located. It is comprised entirely of volunteers and is governed by a volunteer board of directors who are selected by its members. The VFC receives some funding from the city and bills Medicare and private insurance carriers for the cost of providing EMT services. It is accountable to the city under state law, but the city has no say in the VFC's hiring practices or who serves on the board of directors, which is chosen in accordance with its bylaws.

The VFC contracted with a for-profit personnel management service to provide additional paid EMTs and paramedics to increase the staffing of its ambulances. The contractor provides paid staff to cover one paramedic position 24 hours a day, 7 days a week, and one basic-level EMT position 16 hours a day, 7 days a week. VFC's volunteers cover the remaining hours of basic-level EMT service each day. The volunteers also respond to calls during hours staffed by the contractor so that a paid EMT remains available to respond to a second emergency call if necessary. The VFC pays the contractor a flat fee for its services.

The contractor EMTs wear uniforms provided by the contractor; the uniforms are approved by the VFC and bearing both the contractor and VFC logos. The contractor's staff works on the VFC premises and uses the VFC facilities and ambulances. The VFC has added the contractor's employees to its malpractice, general liability, and motor vehicle insurance policies. The contractor provides all payroll services, benefits, and work-related insurance for the employees. The VFC has no ownership interest in the contractor and none of the VFC's volunteers, officers, directors, or chiefs serves in the management of the contractor.

Section 3(e)(4)(A) of the FLSA, 29 U.S.C. § 203(e)(4)(A), permits public sector employees to volunteer their services to their employing public agency, as long as there is no coercion or undue pressure on the employee, and they do not provide the same type of services for which they are employed. The phrase "same type of services" means "similar or identical services." 29 C.F.R. § 553.103(a). Although the FLSA does not include a similar provision for private nonprofit employers, the Department applies the same policy for employees of religious, charitable, or nonprofit organizations who volunteer their services to their employing organization.[2] The time spent volunteering dissimilar services to the same employer, whether

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[2] Based on the information furnished, we agree with your conclusion that the VFC is a private nonprofit corporation and not a public agency under the FLSA. *See Benshoff v. City of Virgnia Beach*, 180 F.3d 136 (4th Cir. 1999); *Conway v. Takoma Park Volunteer Fire Dep't*, 666 F. Supp. 786 (D. Md. 1987); Wage and Hour Opinion Letter FLSA2002-1 (Jun. 5, 2002); Wage and Hour Opinion Letter FLSA2001-19 (Nov. 27, 2001). Employees of nonprofit organizations like fire companies are individually covered under the FLSA if in the performance of their duties they are engaged in interstate commerce or in the production of goods for interstate commerce. Firefighters and emergency service employees typically are covered by the FLSA as they respond to emergencies on state road and interstate highways over which commerce between the states flows, and thus help remove obstructions so as to enable commerce to move freely. *See Benson v. Universal Ambulance Serv.*, 675 F.2d 783, 786 (6th Cir. 1982); *Wirtz v. A-1 Ambulance Serv., Inc.*, 299 F. Supp. 197, 201 (E.D. Ark. 1969); Wage and Hour Opinion Letter 2004-15 (Oct. 18, 2004).

that employer is a public agency or a religious, charitable, or nonprofit organization, is not compensable under the FLSA. *See* Field Operations Handbook § 10b03(d); Wage and Hour Opinion Letter FLSA2006-25NA (Dec. 1, 2006); Wage and Hour Opinion Letter April 12, 1996 (copy enclosed).

For example, *office* employees of a volunteer fire department may volunteer to provide *firefighting* services during off-duty hours. On the other hand, a regular *office* employee may not volunteer to perform similar *office* work arising from a special fund drive or other operations of the volunteer fire department. Volunteer firefighters may not work some shifts for pay and other shifts on a volunteer basis for the same fire company. *See* Wage and Hour Opinion Letter FLSA2004-15 (Oct. 18, 2004). In such cases, the volunteer and paid work consists of the same type of service, and all hours worked are combined and compensable for FLSA purposes. *See* Wage and Hour Opinion Letter FLSA2006-25NA; Wage and Hour Opinion Letter FLSA2005-33 (Sept. 16, 2005); Wage and Hour Opinion Letter FLSA2004-15.

To determine whether the VFC is a joint employer of the EMTs provided to them by the contractor, which necessarily would preclude those EMTs from volunteering the same services to the VFC, an "economic realities" test should be applied. *See Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 143-50 (2nd Cir. 2008).[3] In *Barfield*, the Second Circuit concluded that under an "economic realities" test, Bellevue Hospital Center exercised sufficient formal and functional control over Barfield, a certified nursing assistant who was directly employed and paid by three referral agencies which arranged for her to work on a temporary basis at Bellevue hospital, to be considered a joint employer. While the referring contractor and the VFC clearly are interconnected to some degree with regard to the EMTs, there are insufficient facts in your letter to allow us to conclude with certainty whether there is the requisite degree of control by the VFC and other indicia to render it a joint employer of the EMTs in this particular situation. Thus, although, the Department strongly supports volunteerism and commends individuals who wish to volunteer their services, we cannot say definitely whether the EMTs may "volunteer" for the VFC, without being paid appropriate compensation under the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

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[3] As to the secondary question posed by the employer whether a paid EMT may serve as a volunteer firefighter for the same or joint employers, the answer depends on the specific facts presented. *See* Wage and Hour Opinion Letter January 27, 1997 (copy enclosed) (firefighters with emergency medical services training and skills who are regularly dispatched to fires, accidents, natural disasters, crimes, and medical emergencies are performing the same type of service when volunteering as EMTs).

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

***Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**