



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 2, 2009

Dear **Name***:

Enclosed is the response to your request for an opinion letter signed by the then Acting Wage and Hour Administrator Alexander J. Passantino on January 16, 2009 and designated as Wage and Hour Opinion Letter FLSA2009-35. It does not appear that this response was placed in the mail for delivery to you after it was signed. In any event, we have decided to withdraw it for further consideration by the Wage and Hour Division. We will provide a further response in the near future.

The enclosed opinion letter, and this withdrawal, are issued as official rulings of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. See [29 C.F.R. §§ 790.17\(d\), 790.19](#); *Hultgren v. County of Lancaster, Nebraska*, 913 F.2d 498, 507 (8th Cir. 1990). Wage and Hour Opinion Letter FLSA2009-35 is withdrawn and may not be relied upon as a statement of agency policy.

Sincerely,

John L. McKeon
Deputy Administrator for Enforcement



FLSA2009-35

This Opinion Letter is withdrawn.

January 16, 2009

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 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

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.

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 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

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 Virginia 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 \(Oct. 18, 2004\)](#).

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).

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.

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).**