



October 18, 2004

FLSA2004-15

Dear **Name\***,

This is in response to your inquiry on behalf of **Name\*** County Volunteer Fire and Emergency Medical Services Association (the Association) in **Name\***. The Association currently provides all emergency medical service (EMS) to **Name\*** County. Some of the volunteer companies in the Association would like to augment their staff by hiring their own volunteer members as part-time, paid personnel. **Name\*** stated that allowing companies to hire their own personnel, who are already familiar with the equipment, territory, and patients, would be the most efficient way to increase staffing levels. Based on advice provided by two attorneys whom **Name\*** contacted, he questioned whether the companies could include volunteer members as part of their paid staff without violating the Fair Labor Standards Act (FLSA).

**Name\*** provided additional information regarding the Association and volunteer companies in a conversation with a member of my staff. He advised that the Association compiles and enforces standards for twelve volunteer companies in **Name\*** County. Each of these companies is an independent, non-profit, private corporation with a Board of Directors chosen from the volunteer members. The Association is proposing that a non-profit foundation be established to hire and distribute part-time EMS employees to the companies and that the foundation be reimbursed for wages by the companies.

There is no exclusion in the FLSA for private non-profit organizations. Employees of non-profit organizations 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 or materials for interstate commerce. In determining whether employees are engaged in interstate commerce for purposes of the FLSA, "the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567 (1943).

EMS employees would be covered by the FLSA as they respond to emergencies on state roads and interstate highways over which commerce between the states flows, and thus help remove obstructions so as to enable commerce to move freely. This fact satisfies the "interstate commerce" prerequisite for FLSA jurisdiction. *Benson v. Universal Ambulance Service*, 675 F.2d 783, 786 (6<sup>th</sup> Cir. 1982). See also *Wirtz v. A-1 Ambulance Service, Inc.*, 299 F. Supp. 197, 201 (E.D. Ark. 1969) (ambulance emergency crews who respond to accidents on city streets, state highways, and interstate highway systems are engaged in commerce within the meaning of the FLSA).

In addition, to the extent that **Name\*** County EMS employees regularly perform their work in connection with other "instrumentalities" of commerce, including railroad rights-of-way, waterways, and the interstate METRO passenger commuter lines, they would be considered to be engaged in interstate commerce within the meaning and coverage of the FLSA. **Name\*** County EMS employees would be considered to be engaged in interstate commerce under the FLSA because they cross state lines to respond to emergencies, transport patients, receive training and education, and the volunteer companies and their employees are subject to the mutual aid arrangements that exist with other states.

In circumstances where individuals who are regular employees of religious, charitable, or non-profit organizations donate services as volunteers to such organizations *but in a different employment capacity*, the time so spent is not considered compensable under the FLSA because the Wage and Hour Division will not claim that an employee/employer relationship exists for that different employment capacity. For example, office employees of the Association or one of its volunteer companies may volunteer to provide EMS during off-duty hours as an act of charity. On the other hand, such a regular office employee may not volunteer uncompensated to handle office work arising from a special fund drive or other operations of the Association or one of its volunteer companies.

Thus, individuals who are EMS volunteers could not work some shifts for pay for their employer and continue to work some shifts on a "volunteer" basis. In such cases, all hours worked on all shifts would have to be combined and compensated for FLSA purposes.



Even where there is no evidence of coercion, allowing paid employees to perform the same type of services for their employer on an uncompensated “volunteer” basis if they choose to do so would in effect allow employees to waive their rights to compensation under the FLSA. The Supreme Court has held that an employee may not waive his or her rights to compensation due under the FLSA. *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697 (1945). The Court observed that “while in individual cases, hardship may result, the restriction will ensure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large (citations and internal quotations omitted).” *Id.* at 713. Similarly, in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), the Court held that a labor organization may not negotiate a contract provision that waives employees’ statutory rights under the FLSA.

We have previously issued opinion letters relating to paid career fire fighters who wanted to volunteer additional time in the same capacity but to a different nonprofit entity. As we noted in a November 27, 2001 letter, a copy of which is attached hereto, an employee of one entity (in that case a public agency) may provide volunteer services to a separate and independent non-profit corporation. See 29 U.S.C. § 203(e)(4)(A). As we understand **Name\*** description of the Association’s plans to create a foundation that will coordinate hiring and distribution of paid EMS employees among the twelve volunteer companies (including collecting reimbursement from the volunteer companies), a significant question is raised whether the employees would be providing both paid and volunteer services to the same entity, which, as previously explained, is not permitted under the FLSA.

If we are to provide a more definitive answer to this particular question, we require further information on the relationship involving the Association, the proposed foundation, and the volunteer companies, including their overall organizational structure and operational control. Factors relevant in determining whether there is a de facto single entity include whether the organizations are separate and independent legal entities with their own by-laws and boards of directors controlling their decisions; who establishes the licensing and certification standards; who schedules the employees’ shifts and determines rates and methods of compensation; who controls the employees’ duty assignments and provides supervision for all aspects of the work; how employees are disciplined; whether the volunteer companies impose additional requirements related to the training or duties of their members; whether the organizations engage in separate or joint hiring decisions; whether volunteers are paid to work some shifts for their volunteer company; and whether there is evidence, as the court stated in *Benshoff v. City of Virginia Beach*, 180 F.3d 136, 149 (4th Cir. 1999), that “a sham” private volunteer corporation [was] placed between an employee and his employer to avoid the compensation provisions of the Act.”

If the Association would like to provide us with additional information related to these factors, **Name\*** or another representative of the Association should feel free to contact Michael Ginley at (202) 693-0745. We hope that you find the above information helpful in addressing the concerns raised by **Name\***. If you have questions or need additional information, please do not hesitate to contact us.

Sincerely,

Alfred B. Robinson, Jr.  
Acting Administrator

Attachment

*Note: \* The actual name(s) was removed to preserve privacy.*