



County Technical Assistance Service
INSTITUTE *for* PUBLIC SERVICE

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Non-Covered Workers

Dear Reader:

The following document was created from the CTAS website (ctas.tennessee.edu). This website is maintained by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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Non-Covered Workers

Reference Number: CTAS-131

The following workers are not included within the definition of "employee" for purposes of the FLSA, and thus are *not covered* by the Act:

1. Independent contractors;
2. Elected officials and their personal staff, policy-making political appointees, and legal advisors;
3. Bona fide volunteers; and
4. Prisoners.

Independent Contractors

Reference Number: CTAS-132

Independent contractors are not covered by the FLSA. There is no simple method for determining whether a worker is an employee or an independent contractor. A determination of the relationship cannot be based on isolated factors or upon a single characteristic or on technical concepts. It depends on all of the circumstances of the whole activity. All the facts relevant to the relationship between the worker and the employer must be considered. In general, workers who are economically dependent on the business of the employer, regardless of their skill level, are employees. Independent contractors are workers with economic independence who are in business for themselves. Among the factors that are considered significant, although no single one is regarded as controlling, are:

1. The extent to which the services in question are an integral part of the employer's business.
2. Whether the worker's managerial skills affect his or her opportunity for profit and loss.
3. The relative investments in facilities and equipment by the worker and the employer.
4. The worker's skill and initiative.
5. The permanency of the worker's relationship with the employer.
6. The nature and degree of control by the employer.

Each of the above-listed factors should be carefully analyzed, as well as any other relevant factors, to determine whether a person is an independent contractor based on the totality of the circumstances.

There are some factors that the Department of Labor deems immaterial to the determination of whether an employment relationship exists. The fact that the worker signs an agreement stating that he or she is an independent contractor is not controlling. The fact that the worker has incorporated a business or is licensed by a governmental agency is also not determinative. These include the place where the work is performed, the absence of a formal employment agreement, and whether the alleged contractor is licensed by state/local government. Finally, the time or method of payment does not control the determination. For more information, see FLSA Fact Sheet #13, *Am I an Employee? Employment Relationship under the Fair Labor Standards Act*.

Elected Officials and Their Personal Staff

Reference Number: CTAS-133

Elected county officials are not covered by the FLSA. Also not covered are political appointees to policymaking positions, legal advisors, and the personal staff of elected officials, as long as these persons are not under civil service protection. The exclusions for an elected official's personal staff and political appointees are very narrowly applied, and great care should be exercised in relying on those exclusions.

To determine whether someone meets one of these exclusions, the definition of "employee" under the FLSA must be examined, together with the administrative interpretations of that definition. The definition

of "employee" does not include an individual who:

1. Holds a public elective office of that state, political subdivision, or agency;
2. Is selected by the holder of such an office to be a member of the official's personal staff;
3. Is appointed by the office holder to serve on a policymaking level;
4. Is an immediate adviser to such an office holder with respect to the constitutional or legal powers of the office; or
5. Is an employee of the legislative branch of that state, political subdivision, or agency;

as long as such individuals are not subject to civil service laws of the state, political subdivision, or interstate governmental agency which employs them.^[1]

The exclusion for personal staff of an elected official is construed very narrowly by the DOL. As explained by the DOL in a Wage and Hour Opinion Letter dated November 27, 1998 (1998 WL 1147737), the exception applies only to individuals who are in a "highly intimate and sensitive position of responsibility" on the staff of the elected official. It generally includes only persons who are hired by and under the direct supervision of the elected official and who have regular direct contact with the official. See Wage and Hour Opinion Letter, September 12, 1997 (1997 WL 971910).

When a publicly elected official appoints an individual to serve on a policymaking board or commission, such an appointed individual is not covered by the FLSA. The most obvious examples of these policymaking appointees are appointed members of planning and zoning commissions, recreation boards, or other boards and commissions that have specific policymaking or advisory responsibilities.

[1] 29 U.S.C. § 203(e)(2)(C).

Volunteers

Reference Number: CTAS-134

Individuals performing volunteer services for units of state and local governments are not considered "employees" under the FLSA, and are therefore not covered by the act. The regulations governing volunteers are found in 29 C.F.R. §§ 553.100 - 553.106. A volunteer is an individual who performs a service for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation. These services must be offered freely and without pressure or coercion, direct or implied, from the employer. Individuals performing volunteer services for counties will not be regarded as employees for purposes of the FLSA. However, an employee cannot volunteer to perform services for his or her own employer that are similar to the services the employee is paid to do. For example, 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 non-paid volunteer while performing the same type of work for the same employer.

For county employees who want to volunteer their time, two determinations must be made: (1) whether the services are performed for the same employer, and (2) whether the services are the same or similar to those the employee is paid by the county to do. Whether two units of a county are considered the same employer (same public agency) depends on the facts and circumstances, determined on a case-by-case basis. One factor the DOL considers is whether the agencies or departments are treated separately for statistical purposes in the Census of Governments, issued by the Bureau of the Census, U. S. Department of Commerce. The DOL normally takes an expansive view of the county as an employer, and if the agency for which a county employee wishes to volunteer is even remotely related to the county government, it might be wise to seek an opinion from the Wage and Hour Division on the issue.^[1]

If the volunteer services are being performed for the same public employer, the services cannot be the same or similar services that the employee is paid to perform. The *same or similar services* means similar or identical services, based on all of the facts and circumstances. The DOL will consider such things as the three-digit categories of occupations in the *Dictionary of Occupational Titles*, as well as whether the volunteer duties are closely related to either the actual duties performed or the responsibilities assigned to the employee.

The DOL has issued several opinion letters on these issues. In an opinion dated October 5, 1987, the DOL stated that fire truck drivers in the same district could not work additional time for the same district without the hours worked being counted and compensated in accordance with the FLSA. In a ruling dated January 2, 1988, the DOL stated that a firefighter could volunteer the same services for a different public agency in another jurisdiction. In Opinion FLSA2008-11NA dated September 22, 2008, the DOL found that detention officers cannot volunteer for the same public agency as sheriff deputies.

The DOL also has issued opinions confirming that public employees can perform volunteer work for the same employer, as long as the volunteer work is substantially different from their paid position. For example, in a letter dated May 7, 1986, the Wage and Hour Division stated that a full-time paid high school custodian could volunteer services to the high school as an assistant basketball coach. See also *Purdham v. Fairfax County School Board*, 637 F.3d 421 (4th Cir. 2011) (the court held that where a public employee engages in services different from those he or she is normally employed to perform, and receives no compensation or only a nominal fee, such work is exempt from the FLSA and the public employee is deemed a volunteer). Because all of these issues are decided on the facts and circumstances of the particular case, any county wishing to rely on such opinions would be well advised to request an opinion letter based on its own facts and circumstances.

Volunteers can be reimbursed for *expenses, reasonable benefits, and nominal fees* without losing their volunteer status. The DOL's regulations do not include any dollar limitation on the amount of money that can be paid to volunteers. The regulations state that a fee will not be considered nominal if it is tied to "productivity." The regulations make clear, however, that fees may be paid on a per-call or similar basis (e.g., a point system). The determination of whether an individual should lose volunteer status and be considered an employee for purposes of the FLSA will be made by DOL on the basis of an examination of the total amount of payments made, including fees, benefits, and expenses, "in the context of the economic realities of the total situation." Examples of allowable payments include uniform allowances, reasonable cleaning expense reimbursement, and compensation for wear and tear on personal clothing. These must be limited to actual reimbursement amounts and cannot be artificially high. Reasonable payments are permitted for tuition, books, supplies, transportation, and meal costs involved in training a volunteer to teach them to perform efficiently the services they will provide as a volunteer.

Some reasonable benefits also may be provided, such as liability, health, life, disability, worker's compensation, a nominal monthly or annual stipend or a "per call" stipend so long as these are nominal in the context of the economic realities of the particular situation. The regulations define allowable "reasonable benefits" to include a wide range of benefits such as pensions and length of service awards, and eliminate the requirements that benefits be "service-related" and be provided to county employees who perform the same type of services as the volunteers in order to qualify as allowable reasonable benefits.

In an opinion letter dated November 9, 1986, the DOL addressed the "reasonable benefits" issue in the context of volunteer firefighters. In this particular instance, the locality proposed to reward its firefighters with the following benefits:

1. Minimum water and sewer allotments—valued at \$9.00 and \$5.50 per month, respectively;
2. Membership in the government's swimming pool—valued at \$20 per month for a single person and \$30 per month for a family, for the pool season of three months; and
3. A contribution to a retirement investment fund—valued at \$250 per year, with an increase of \$25 per year up to \$500.

In this case, the DOL ruled that the benefits offered were nominal in value and therefore would not affect the volunteer status of the firefighters.

[1] One issue that has been fairly controversial is whether a county employee such as an EMT or paramedic can volunteer the same services to a volunteer rescue squad or volunteer fire department within the county. The DOL appears to have relaxed its views somewhat in this area in light of a case in another jurisdiction, *Benshoff v. Virginia Beach*, 180 F.3d 136 (4th Cir. 1999). If the employee volunteers freely and without coercion, and if the volunteer organization is independently chartered with separate by-laws and policies and it is sufficiently separate from the county, the employee may volunteer even though the county provides some funding to the volunteer organization. See Wage and Hour Opinion Letters dated May 22, 2002 (2002 WL 32487830), June 5, 2002, and November 27, 2001.

Prisoners

Reference Number: CTAS-135

Prisoners who are required to work by or for the government are not considered employees under the FLSA and need not be paid minimum wages or overtime. Use of inmate labor does not violate the FLSA if the prisoner works for or is required to work by the government having custody of the prisoner. However, if the inmates are contracted out to a private contractor, this can create an employment relationship requiring the payment of wages in accordance with the FLSA if the private contractor exercises sufficient control over the prisoner to give rise to an employer-employee relationship. Even where minimum wage is required, deductions for restitution or other matters set by law or court order may reduce the wages below minimum wage so long as the employer does not gain from the deduction.

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