No 'bona fide' volunteers?
A reality check on the economic realities test

Because of Michigan’s long tradition of volunteer fire departments, many township firefighters are referred to as volunteers, recognizing that they may have other occupations and respond to fire or emergency medical incidents “on call.” But when it comes to determining what employment responsibilities and obligations a township has to its firefighters, the word “volunteer” has a very narrow, limited legal meaning for the purposes of federal and state employment laws, such as the federal Fair Labor Standards Act (FLSA) and the Michigan Payment of Wages and Fringe Benefits Act (Public Act 390 of 1978).

What is a ‘bona fide’ volunteer?
The U.S. Department of Labor issues guidance to clarify how the FLSA should be interpreted. Some guidance documents use the term “bona fide volunteer” and provide clarification as to what that term means in the context of the FLSA. “Bona fide” is Latin for “genuine,” and it refers to definitions in the FLSA, federal rules and interpretations that spell out what a volunteer is—and isn’t. But it really just comes down to determining whether a position, such as firefighter, is a volunteer OR an employee for FLSA purposes. There aren’t different types of volunteers. A position is either a volunteer that meets the FLSA definition or it is an employee, such as a full-time, part-time or paid on-call firefighter. This is not determined by what the position or the department is called; it is determined by the facts and the FLSA “economic realities” test.

Why does it matter?
A township employee is subject to the compensatory time and overtime requirements of the FLSA as well as the Family Medical Leave Act, Affordable Care Act, and wage and hour laws. A township volunteer is not subject to those requirements—as long as the position meets the FLSA definition of a volunteer.

Note that township fire department members—including volunteers—are all employees of the township from the standpoint of township board authority to hire, discipline, discharge; determine hours, pay and benefits; and provide workers’ compensation and liability insurance coverage. This article is specifically discussing the question of whether a fire department position must comply with the FLSA and other laws regarding the extent and levels of compensation, hours, compensatory pay, overtime, and benefits. Future articles will discuss compensation and overtime issues for fire department employees, including paid on-call, part-time or full-time firefighters.

Who is a volunteer?
Under the FLSA, a “volunteer” is any individual who:
1) volunteers to perform services for a township; 2) receives no compensation OR is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered, and 3) those services are not the same type of services the individual might also be employed to perform for the township. (29 U.S.C. Sec. 203(e)(4)(A)) (Emphasis added.)

The arrangement must be voluntary. According to 29 C.F.R. Section 553.101, “(b) Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes, but expressed its wish to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to ‘volunteer’ their services.”

Further, “(c) Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.
(d) An individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.”

What are allowable expenses?
A volunteer may receive the following expenses without losing the status of volunteer:
1) A uniform allowance or reimbursement for reasonable cleaning expenses or wear and tear on personal clothing worn while performing hours of volunteer service.
2) Approximate out-of-pocket expenses, such as the cost of meals or transportation (including gas for a private vehicle), incurred incidental to providing the volunteer services.
3) Reimbursement for tuition, transportation and meal costs involved in classes training them to perform the service.
4) The provision of actual books, supplies and other materials essential to their volunteer training or reimbursement for the costs, if privately purchased.

What are ‘reasonable benefits’?
A volunteer may receive the following types of benefits without losing the status of volunteer:
1) Inclusion in group insurance plans, such as liability, health, life, disability, or workers’ compensation,
2) Inclusion in a pension plan, and
3) “Length of service” awards
but only if furnishing the benefits, along with any expenses or fees/stipends, meets the “economic realities test.” (See below.)

What is a ‘nominal fee’?

So far, it seems pretty easy to qualify as a bona fide volunteer. But the devil, as they say, is in the details—specifically the details of how much the volunteer is “sacrificing” compared to someone who is paid as a permanent employee to perform the same service. This is determined based on the economic realities of each township’s situation.

U.S. Department of Labor opinion FLSA2008-15, dated Dec. 18, 2008, explains that volunteer firefighters may receive a nominal fee, which can include a per-call fee:

“Under the FLSA, a public agency volunteer cannot receive any compensation, but may be paid ‘expenses, reasonable benefits, or a nominal fee, or any combination thereof.’ The regulations allow for volunteer firefighters to be paid a nominal fee even if paid on a ‘per call’ or similar basis, as long as such payment is consistent with certain factors denoting the relative ‘sacrifice’ of the volunteer. Among the factors to be considered: the distance traveled and time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock; and whether the volunteer provides services throughout the year, even if those services are provided periodically.” (Citations omitted)

A nominal fee should not vary based on the hours worked:

“But a nominal fee cannot be a substitute for compensation or tied to productivity. Generally, a key factor in determining if a payment is a substitute for compensation or tied to productivity is ‘whether the amount of the fee varies as the particular individual spends more or less time engaged in the volunteer activities.’ If the amount varies, it may be indicative of a substitute for compensation or tied to productivity and therefore not nominal.” (Citations omitted)

And any expenses, reasonable benefits and nominal fee, combined, should meet the “economic realities test,” also known as the “20 percent rule”:

“Determining whether a specific amount of expenses, benefits, or fees prevents an individual from qualifying as a volunteer under the FLSA requires an examination of ‘the total amount of payments made ... in the context of the economic realities of the particular situation.’ As a general rule, the Department finds that a fee paid is (apart from expenses) nominal as long as it does not exceed 20 percent of the amount that otherwise would be required to hire a permanent employee for the same services. ... Thus, for example, if a volunteer firefighter staffs the equivalent of three shifts during a month, the nominal fee should not exceed 20 percent of what it would cost to employ a firefighter to staff these three shifts.” (Citations omitted)

To determine the amount that would be required to hire a permanent firefighter for the same services, a township must look to the “market information” for its area, which could include “neighboring jurisdictions, the state, or ultimately the nation, including data from the Department of Labor, Bureau of Labor Statistics. So long as the calculations are based on an approximation of the prevailing wage in that area, and the amount of the fee portion of the proposed stipends (monthly or per call) does not exceed 20 percent of the wages for the same services, we would find that such a fee is ‘nominal’ within the meaning of 29 C.F.R. § 553.106.”

If a position does not meet the FLSA definition of a volunteer, the position is an employee and must be classified as a paid on-call, part-time or full-time firefighter and comply with the FLSA for minimum wage and overtime payments.

Can different volunteer firefighter positions be paid different stipend rates?

Yes. The U.S. Department of Labor has stated that volunteers can hold different titles and receive different stipends for their services as long as the stipend does not exceed the definition of a nominal stipend for that position.

Can firefighters paid using a point system be volunteers?

Yes, but only if they meet the FLSA criteria. Some volunteers are paid using a point system. They accumulate points for responding, training, station work, equipment testing, etc. Using a point system does not relieve the township from compliance with the FLSA. If the total compensation received from a point system results in a nominal fee, then they can be considered a volunteer firefighter not subject to FLSA. However, if the total compensation received under a point system exceeds the 20 percent of the economic reality test as cited in FLSA2008-15, or they are compensated for time and productivity, then the firefighter must be classified as a paid on-call, part-time or full-time firefighter and be in compliance with the FLSA for minimum wage and overtime payments.

Must volunteers be paid any nominal fee according to a schedule?

No law specifies how often a township must pay volunteers any nominal fee. But volunteers may be paid a nominal fee on a schedule without automatically losing their volunteer status. According to 29 C.F.R. 553.106(e), “An individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status.”

Resources

Visit the “Volunteers” page on the MTA Members website, or call MTA at (517) 321-6467 for more resources on determining who is a bona fide volunteer, including links to the FLSA, the federal rules regarding volunteers, and U.S. Department of Labor compliance guidelines and opinions.