

SNURE LAW OFFICE, PSC

A Professional Services Corporation

Clark B. Snure
1930-2014

Brian K. Snure
brian@snurelaw.com

Of counsel
Thomas G. Burke

March 12, 2023

MEMORANDUM

To: Washington State Fire Departments – 2023

From: Brian Snure

Re: Volunteer Compensation

.....

The following memorandum provides an overview of the appropriate method for managing and reporting volunteer compensation for fire protection districts, regional fire authorities and city or town fire departments collectively referred to as “fire departments.” Payments to volunteer firefighters must be analyzed under two separate and somewhat contradictory legal frameworks: (1) income tax and other laws interpreted by the IRS, which are different from (2) FLSA and other federal or state laws.

Issue 1: What are the rules for providing compensation to volunteers without turning the volunteers into employees for minimum wage and overtime purposes? This issue requires consideration of the application of the minimum wage and overtime requirements imposed by the United States Department of Labor under the Fair Labor Standards Act “FLSA” and the Washington State Department of Labor and Industries under the Washington State Minimum Wage Act “MWA”. This issue is addressed in part 1 of this memorandum.

Issue 2: What requirements must a fire department comply with in reporting the compensation received by a volunteer, pursuant to various federal and state statutes, rules and regulations? This issue requires a consideration of the rules of the Internal Revenue Service, Social Security Administration and various state taxing departments such as Labor and Industries and the Employment Security Department. This issue is addressed in part 2 of this Memorandum.

This memorandum is intended to be informational in nature and is not intended to provide legal advice. The memorandum should not be relied on as a full and complete explanation of the materials reviewed or how they apply to any specific fire departments. Fire departments that intend to take any actions or make any decisions based on the material should review the actual documents referred to in the summaries and obtain legal advice regarding the materials. The author does not make either express or implied warranties in respect to the accuracy of the memorandum.

PART I – FLSA/MWA VOLUNTEER EXEMPTION

The Fair Labor Standards Act excludes **bona fide** volunteers from coverage of the Act. The MWA also recognizes a volunteer exemption and will generally follow the guidance created by the FLSA.

Creation of Volunteer Status. Sections 553.101 and 553.104 of the regulations define the term volunteer. The key elements in a volunteer relationship under the FLSA and MWA include the willing provision of services without promise, expectation or receipt of compensation. Section 553.101 provides in part as follows:

*(a) An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, **without promise, expectation or receipt of compensation for services rendered**, is considered to be a volunteer during such hours....*

(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.

(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. (emphasis added)

Payments to Volunteers. Under sections 553.104 and 553.106 of the regulations, individuals who voluntarily agree to perform fire protection activities on a part-time basis as a public service are not considered to be employees of the fire department. The fire department may provide benefits including cost of training, reimbursement for approximate out-of-pocket expenses incurred in providing volunteer services, i.e., uniforms, replacement of clothing damaged while responding to a call; the fire department's premiums for the Volunteer Fire Fighters' Relief and Pension System; and insurance benefits.

In section 553.106 of the regulations, the Department of Labor also authorizes limited cash payments to volunteers. The section provides substantially as follows:

"Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers.

Individuals do not lose their volunteer status if they receive a nominal fee from a public agency. A nominal fee is not a substitute for compensation and must not be tied to productivity. However, this does not preclude the payment of a nominal

amount on a 'per call' or similar basis to volunteer firefighters. The following factors will be among those examined in determining whether a given amount is nominal: The distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year. 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.

Whether the furnishing of expenses, benefits, or fees would result in individuals' losing their status as volunteers under the FLSA can only be determined by examining the total amount of payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation."

This section has resulted in several acceptable methods of making limited payments to volunteers. The following sections discuss each of the approaches used by fire departments.

Expense Reimbursement System. A fire department may attempt to reimburse the actual expenses incurred by volunteers. Under an accountable plan, each volunteer would be required to account for every expense incurred while volunteering for a fire department. It would appear that if a fire department intends to reimburse volunteers on the basis of reimbursement of expenses that the fire department must be able to prove that each volunteer has incurred expenses for each call, drill or other unit of service equal to or in excess of the established rate. This probably would result in a situation where a fire department could not pay its volunteers on an equal basis but would have to establish a payment schedule for each volunteer based on an itemized expense list submitted by the volunteer. While an accountable plan does not generate reportable income for a volunteer the approach is not widely used because of the challenges of accounting for all expenses. The current IRS regulations establishing the rules for accountable plans can be found in IRS publication 463.

Nominal Sum per Unit of Service. Instead of requiring each volunteer to account for all expenses, many fire departments establish a nominal sum per unit of voluntary service and pay such sum for each drill, response or other events at which the volunteer provides service. The determination of what constitutes a nominal sum is up to the reasonable discretion of the board of commissioners.

In 2006, the Department of Labor established safe harbor guidelines by defining what would be considered nominal payment (see below). The regulations provide that where fire fighters receive more than a nominal amount or where payment is on a basis which does not reasonably approximate the expenses incurred by them, they are considered employees rather than volunteers and therefore must be paid in accordance with the requirements of the Fair Labor Standards Act including the minimum wage and overtime provisions. If a fire department stays within the limits of guidelines discussed below the volunteers will retain their volunteer status.

Point or Unit System. Many fire departments compensate volunteer fire fighters under a point or unit system. Under the system, each volunteer earns points or units of credit for performing various functions for the fire department. Each year the fire department budgets a specific amount for

compensation to volunteer fire fighters and annually or periodically the funds are distributed on the basis of the number of points or units that each fire fighter has accrued. Use of a point or unit system, consistent with the requirements outlined below, is acceptable under the FLSA.

Stipend Payments. Many fire departments also compensate volunteers using stipend payments. Stipend payments may be the exclusive form of nominal payment or may be paid in addition to points or units. Stipends often take the form of a fixed dollar amount per response and drill or fixed amounts for shift work. Once again, the concept of a stipend, or a point, system is to reimburse volunteers for expenses and is not intended to serve as wages or compensation for service.

Regardless of the method used to make nominal payments volunteers, the payments must be nominal and not tied to productivity. To maintain the volunteer status of your volunteers and avoid FLSA issue, the following factors should be considered when establishing or reviewing your volunteer payment system:

1. The fire department should only award points, units or stipends per activity. Do not award points, units or stipends based upon the amount of time spent by any volunteer in performing services for the fire department.
2. Points, units or stipends could be awarded for each drill attended, each alarm responded to, each meeting attended, or for the performance of any activity that the fire department may require regardless of the length of time required to perform the activity.
3. A maximum dollar limitation per point or unit must be established.
4. The fire department could, in addition, still reimburse volunteers for actual out of pocket expenses, such as items of clothing that the fire department requires the fire fighter to provide.
5. The payment system must document compliance with the following nominal fee guidelines.

Nominal Fee Guidelines

In 2006, the Administrator of the Wage And Hour Division of the Employment Standards Administration issued a letter to the President of the International Association of Fire Chiefs that provides specific guidelines defining the concept of a nominal sum. A summary of the guidelines follows:

A fire department may pay its volunteers a sum not to exceed twenty percent of what it pays its paid fire fighters for similar services “20% threshold.” If a fire department has no paid fire fighters, it may use the amount paid by nearby fire departments. Factors that may be considered in determining nominal compensation per unit of service include “distance traveled, time and effort expended, around-the- clock versus limited availability, throughout the year versus upon request”. Fire departments should formally document how it has determined the dollar amount it is using for purposes of the 20% threshold. This could be based on average compensation paid to firefighters in the department (or neighboring department) or could be based on specific compensation to specific employees performing similar duties to the volunteer.

Another common question is whether the 20% threshold should be calculated only on wages or on the total cost of compensation paid to a paid firefighter. While the DOL opinion suggests that total cost of compensation can be used, this is not clearly defined in the 2006 opinion and a wage only approach would be more conservative and less likely to be challenged in the event of an audit or court challenge.

Caution – A fire department still cannot pay a volunteer an hourly wage. The payment must be based on a “unit of voluntary service” such as a drill, response, etc. and should not be based on the time spent in performing the service.

The Administrator included the following hypotheticals as examples of acceptable nominal sum payments (provided that the total dollar amount paid was less than the 20% threshold):

- A volunteer is paid \$1,200 per year regardless of the number of shifts or amount of time spent responding to calls. On average the volunteer staffs a minimum of 24 shifts and/or spends a minimum of 60 hours responding to calls annually.
- A volunteer is paid \$100.00 per month regardless of the number of shifts or amount of time spent responding to calls. On average the volunteer staffs a minimum of 4 shifts and/or spends a minimum of 8 hours responding to calls monthly.
- A volunteer is paid \$100.00 per month so long as the volunteer staffs a minimum of 2 shifts and /or spends a minimum of 5 hours responding to calls during the month. Additional payments of \$25.00 are made for each additional shift over 4 during the month and/or for every 2.5 hours spent responding to calls exceeding 12 hours during the month.
- A volunteer is paid \$25.00 (or \$30.00 or \$40.00) for each four-hour block of time regardless of the actual amount of time below four hours spent at the station house or responding to calls.
- A volunteer is paid \$20.00 for each shift regardless of the length of the shift or the time spent responding to calls. On average, the volunteer works a 6 hour shift and/or spends 2 hours per shift responding to calls.
- A volunteer is paid \$25.00 if the volunteer staffs a shift of at least 8 hours and/or spends 2.5 hours responding to calls. An additional \$15.00 per shift is paid if the shift exceeds 8 hours or responds to calls over 5 hours during a single shift.

Keep in mind, that when applying the 20% threshold, you must not only consider the value paid for a specific activity but must also consider the total amounts received by the volunteer as payment for the volunteer services. In the 2006 Department of Labor opinion, DOL included an example of a “highly active volunteer” and indicated that the total amount of payment, and time incurred to earn the payment would likely not be considered a nominal sum.

- Volunteer is paid \$15,000 per year and, on average, spends at least 3,000 hours waiting for or responding to calls. Assuming the payment does not vary depending on the productivity of the volunteer or whether the volunteer spends more or less time on

volunteer activities, the payment of \$15,000 might qualify as “nominal” under the 20 percent rule if County A would otherwise need to pay \$75,000 or more to hire a full-time firefighter to perform the same services. However, it is unlikely that 3,000 hours of service (50+ hours per week) is “volunteering” rather than employment. Indeed, without knowing additional facts and circumstances about the economic realities of the locality, a payment of \$15,000 for 3,000 hours of volunteer services arguably constitutes compensation for a full-time job rather than a “nominal fee” for volunteering.

Volunteer status under the FLSA is an exception to the FLSA and, as such is narrowly construed. If a fire department disregards the above rules and pays volunteers in a manner that violates the FLSA, the fire department will be exposing itself to significant potential liability in the event a volunteer, or group of volunteers, decides to claim employee status and sue the fire department for failure to pay minimum wage and overtime. In order to minimize potential challenges, all volunteer programs should be clearly established by agreement or policy and such agreements or policies should establish the following:

1. Formally document 20% basis threshold.
2. Formally document civic, charitable, humanitarian intent.
3. Limit Total Amount of Nominal Sums or hours to avoid the highly active volunteer issue.
4. Do not allow volunteers to work paid shifts.
5. Clearly separate shift stipends from productivity.
6. Formally establish that stipends are provided as a form of expense reimbursement.
7. Formally establish that volunteer positions are not intended to be substitutes for employment.

PART II - TAXATION OF VOLUNTEER COMPENSATION

Income Tax. Payments made for drills and responses, regardless of whether the fire department calls it a payment of a nominal sum per unit of voluntary service or an expense reimbursement under a non-accountable plan, must be reported on form W-2 as income. Effective July 1, 1990, the Internal Revenue Service adopted regulations relating to the tax status of expense reimbursements. Basically, the regulations provide that if reimbursement of itemized expenses is paid under an "*accountable plan*" there are no tax consequences to the employee. Expense reimbursements paid under a non-accountable plan are treated as income. A fire department's reimbursement to its volunteer fire fighters is not normally paid under an "*accountable plan*" since the volunteers do not itemize the actual out-of-pocket expenses they incur in providing service to the fire department.

The regulations further provide that if the reimbursement is paid under a "*non-accountable plan*", such as that used by most fire departments, the amount is treated as income paid to the volunteer employee. As stated above, the reimbursement must be reported as taxable income on form W-2. The regulations provide that the employee (volunteer) may claim an offsetting business expense deduction provided the expenses actually incurred by the volunteer are classified as deductible business expenses by IRS and provided that the volunteer has sufficient records to prove the expenses claimed. The restrictions and limitations on the deductibility of employee-incurred expenses will apply in all situations. The fire department must require that each volunteer who receives such payments complete a form W-4 for the fire department, upon commencing volunteer status.

In late 2020, Congress permanently established the Volunteer Incentive Responder Act by amending Section 139B of the Internal Revenue code to exempt volunteer pay of up to \$50.00 per month (\$600.00 per year) from federal income tax and from FICA taxes. Under a letter issued by the IRS, employers are not required to report the first \$50.00 of payment to a volunteer each month but must report payments in excess of \$50.00.

FICA. IRC section 3121(b)(7)(F)(iii) exempts from FICA compensation paid to employees serving on a temporary basis in case of fire, storm, earthquake, flood or other similar emergency. There is a question whether this exemption covers compensation paid to volunteers for drills and responses or only for emergency responses. There is a 1992 written directive from OASI that concludes that all drills and responses are exempt. The Seattle IRS office, however, has rejected this determination and claims that regularly serving volunteers do not fall within this exemption and therefore all volunteer firefighter reimbursements are subject to FICA.

The other issue under FICA is whether volunteers meet the definition of employee under IRC 3121. The Federal, State and Local Government "FSLG" division of the IRS takes the position that volunteers are employees and therefore all volunteer payments are subject to FICA. I note that this position is an interpretation of the statutory language and, to date, there are no IRS regulations or judicial decisions directly supporting the FSLG position. If the volunteer is a member of a qualified retirement system of the fire department the Social Security tax portion would not be applicable. However, the Volunteer Fire Fighters' Pension System in Washington State is not considered a qualified retirement system.

The IRS is the only governmental agency that attempts to treat payments to volunteers in a manner similar to the payment of wages. Under the FLSA, FUTA, the State Unemployment Tax system, and under Washington court decisions, volunteers are not considered to be employees. Given the ambiguity in the IRS code provisions, it is our opinion that volunteer payments, which are based on a nonaccountable expense reimbursement concept, should remain exempt from FICA. Because of the IRS's current position, however, unless a fire department is willing to challenge the IRS or risk future interest and penalties if the IRS position is upheld, any decision not to pay FICA taxes on volunteer payments is not currently recommended.

IRC section 139B, discussed above, which exempted up to \$600.00 of qualified payments to volunteers from income also exempted the \$600.00 from FICA.

Federal Unemployment Tax Act (FUTA). Compensation paid to volunteers is not covered.

Industrial Insurance (Workers' Compensation). Compensation paid to volunteer fire fighters is not covered unless the fire department elects coverage.

Volunteer Firefighters Relief System. All volunteers must be enrolled in the Volunteer firefighters relief system through the Board for volunteer firefighters.

Volunteer Firefighters Pension Systems. The volunteer pension system must be made available to all volunteer fire fighters who wish to participate.

Paid Sick Leave. Volunteers are not eligible for mandatory paid sick leave.

State Unemployment Tax Although not specifically defined by statute, since payments made to volunteers are not "wages," volunteers do not meet the definition of employment and are neither eligible for unemployment benefits nor is the Fire department required to report or pay unemployment taxes for volunteers. Most fire departments elect to make payments in lieu of contributions so would not report any employee. If you have not elected to make payments in lieu of contributions, it is my opinion that volunteer payments would, nonetheless also be exempt.

Paid Family Medical Leave. Although not specifically defined by statute, since payments made to volunteers are not "wages," volunteers do not meet the definition of employment and are neither eligible for family medical leave benefits nor is the volunteer or fire department required to report or pay paid family medical leave payroll taxes for volunteers.

Long Term Care Act. Although not specifically defined by statute, since payments made to volunteers are not "wages," volunteers do not meet the definition of employment and are neither eligible for long term care benefits nor is the volunteer or fire department required to report or pay long term care act payroll taxes for volunteers.