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## CORNERSTONE

FIRE AND EMERGENCY SERVICES

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**Who Can Be a Volunteer Firefighter?****By: William Sager, Senior Associate**

Who can volunteer to work as a firefighter in your community? The first answer that comes to mind is, “anyone can.” Not so fast. The Fair Labor Standards Act prohibits employees of government agencies from volunteering their time to perform the same job for which they receive pay. For many smaller communities this comes as something of a surprise, particularly in their fire departments. Many communities have “combination” departments to protect them where the staffing consists of both paid career firefighters and volunteers.

Most of the volunteers come from the ranks of citizens who enjoy the camaraderie of the fire service and want to give something back to their communities. Likewise, many of the career firefighters follow this vocation for a living and

often do not even live in the community where they work. However, there is a third group: career firefighters who both live and work in the community and would like to volunteer their services. The commonly used term to describe these volunteers is “two haters.”

Can you answer these questions when presented: Can the career firefighters from the city adjacent to your fire district be volunteer firefighters in the district? Can the career firefighters in your city also be volunteer firefighters in their “off-hours”? Can the fire dispatchers be volunteer firefighters? Finally, can a career firefighter be a member of a volunteer ambulance company that stages its equipment in a city fire station? These are the confusing situations that fire chiefs and other public officials who use volunteers face whenever they allow a public employee to volunteer his or her services.

**What are the Rules?**

Most career firefighters are hourly employees, and as such, come under the provisions of the Federal Fair Labor Standards Act (FLSA). The FLSA prevents employers from coercing or requiring employees to volunteer at their place of employment. On the face of it, that seems straightforward. Unfortunately, misinterpretation of this law has been the rule almost more than the exception.

The so-called “Benshoff test” tried unsuccessfully to establish a test based on a decision of the Fourth Circuit Court of Appeals in 1999. This ruling came about as the result of over a decade of grappling with the issue of volunteer/career firefighters (so-called “two-hatters”) between the Department of Labor and the fire service.

Subsequent to that decision the Department of Labor issued two formal opinion letters to further sort out this issue for situations similar to the court case but with different nuances. Many people misinterpreted this decision and these letters to mean that they no longer had to worry about overtime requirements for career firefighters who then work as volunteer firefighters in combination departments.

One thing employers have long desired is a straight-forward “bright-line test” that they could use to determine if a career firefighter could also be a volunteer, and, if so, under what circumstances. The International Association of Fire Chiefs, after years of effort, got congress to direct the Department of Labor to repackage case law and DOL decisions into such a bright line test. The International Association of Fire Chiefs published this guidance last year.

As in any question involving the legal standing of the agency in an issue, it is imperative to seek com-

petent legal counsel. A good labor law attorney can assist the agency in navigating through the labyrinth of laws, court decisions, and administrative rulings that affect the status of “two-hatters.” Any agency that has its own employees acting in a volunteer status should exercise great caution in their use; they could wind up paying them overtime for their “volunteer” work.

### The Basic Rule

The basic FLSA rule concerning who can volunteer still stands; an employee of an agency cannot volunteer to perform the same duties for the same agency that he or she performs for pay. A firefighter who works for a city fire department can probably work as a volunteer firefighter in an adjacent fire district; same job, different employer. A fire dispatcher for a city fire department can probably work as a volunteer firefighter in the same city; same employer, different duties. Mutual aid agreements do not affect the situation. While this is easy to understand, it gets much more complicated when an agency has separate but subsidiary organizations such as a volunteer ambulance, rescue squad, or a volunteer fire company as part of a county-wide fire department.

### The Bright Line

When the Department of Labor examines a situation to see if there is a violation of the FLSA concerning employees volunteering to work, they check the following to see if there are two distinct “employers.” If there are, then it should not be a violation; if the line is fuzzy and it appears that there is one employer, then it is likely that there is a potential FLSA violation.

Public officials should ask these questions of both employers to sort out the career versus the volunteer status of employees, and then share that with legal counsel:

- Does each have its own hiring guidelines and observe different employment practices?
- Does each have its own power to make determinations concerning employees including hiring and compensating?
- Does each have its own budget?
- Does each have its own funding source?
- Does each have its own payroll and retirement systems?
- Does each have its own command and control system?
- Other aspects to consider are: the authority to enter into lawsuits; separate treatment under the law; and how the Census Bureau treats each entity.

If the answer to these questions is *yes*, then it is likely that the employee is not volunteering to work for his or her career employer; if the answer is *no*, it is likely that the agency is potentially violating the FLSA. Regardless, public officials should always seek legal counsel.

For more information, you can obtain the booklet [Managing Volunteer Firefighters for FLSA Compliance: a Guide for Fire Chiefs and Community Leaders](#) from the International Association of Fire Chiefs, Volunteer and Combination Officers Section, 4025 Fair Ridge Drive, Suite 300, Fairfax, VA 22033.

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