FLSA-491

April 2, 1992

This is further response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to volunteer firefighters under the *** State Forest Service cooperative firefighting agreements. We regret the delay in responding to your inquiry.

You state that the *** State Forest Service (SFS) is charged with assisting Federal, State and local government agencies in wildland fire protection. To provide this protection, the SFS relies primarily on the services of volunteer firefighters that are furnished by local fire protection districts in *** under cooperative agreements negotiated by the parties. Fire protection districts are considered to be political subdivisions under the *** Code.

When required, the local fire districts will provide assistance in wildland firefighting beyond their immediate locality to jurisdictions both within and outside of *** including state and local governments, and Federal agencies such as the U.S. Forest Service and the Bureau of Land Management. Under the agreements, the jurisdiction requesting assistance in fighting a fire provides a lump sum reimbursement to the SFS for all resources provided through it for the incident. In turn, the SFS proposes reimbursing the volunteer firefighters furnished by the fire protection districts by paying them hourly rates of pay ranging from $10.50 to $12.50 an hour for hours engaged in travel or firefighting.

The volunteer firefighters are covered by worker's compensation and liability insurance provided by their own fire protection district, but receive no compensation for services rendered within their home district other than reimbursement for expenses. Those that maintain the annual training requirement can also accrue fire pension eligibility.

You state that it is contemplated that the home fire protection district will pass on to the volunteer firefighters the hourly rate paid by the SFS and the requesting jurisdiction. The majority of these assignments involve long term conflagrations that require the volunteers to absent themselves from their regular jobs for up to seven days for in-state assignments, and up to twenty-one days for out-of-state assignments. Past experience indicates that volunteer firefighters would be unwilling (or unable) to participate in lengthy out-of-district assignments without pay.

However, the contemplated payments raise the issue of whether the status of the volunteer firefighters would be affected so that they would be considered to be employees of the fire districts for FLSA purposes when they fight fires within their own fire district. You state that the fire districts cannot afford to convert the volunteers to paid employees for purposes of serving their home jurisdictions.

In light of this background, you ask several questions that will be addressed in the order presented:

Q.1. Would the contemplated hourly wages of $10.50 to $12.50 an hour paid by the requesting jurisdiction and/or by SFS to the fire district volunteer fire fighters for out-of-district assignments constitute "nominal fees" for FLSA purposes?

A. 1 . No. Hourly wages that are more than double (and in some cases almost three times) the FLSA minimum wage cannot be considered to be "nominal" for FLSA purposes. Moreover, under the facts described, it is clear that the firefighters are contemplating pay for the services rendered.

Q.2. Under the proposed SFS cooperative agreements with the fire districts, would the SFS and/or the requesting jurisdiction be considered to be the employer of the firefighters for FLSA purposes?

A.2. Yes. Under the circumstances described, we would consider an employment relationship to exist between the volunteer firefighters and the requesting jurisdiction and/or SFS. It is clear that there is an "employer" and an "employee" under the relationship and that the relationship contemplates the payment of hourly wages for services rendered.

Q.3. Would the SFS cooperative agreements with the fire districts be considered to be "mutual aid" agreements under §203(e)(4)(B) so that the volunteer firefighters would not be considered to be employees when serving their home fire districts?

A.3. Yes. As indicated in §553.105 of 29 CFR Part 553, an agreement between two or more States, political subdivisions, or interstate governmental agencies for mutual aid does not change the otherwise volunteer character of services performed by employees of such agencies pursuant to said agreement. While the example in §553.105 describes a more traditional situation of volunteering to another jurisdiction, the situation you have described would also come within the exclusion provided in §203(e)(4)(B).

Q.4. and Q.5. See A.3. above.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your request might require different conclusions than the ones expressed herein.

We trust that the above is responsive to your inquiry.

Sincerely,

Karen R. Keesling
Acting Administrator