

The Changing Legal Landscape for Volunteer & Combination Fire Departments

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In the June 2006 SDA Newsletter (*The New Challenge in Volunteer Firefighting: Complying with State Pension, FLSA and IRS Laws*), I discussed the Colorado Volunteer Firefighter Pension Act ("Pension Act")ⁱ, the federal Fair Labor Standards Act ("FLSA")ⁱⁱ, and the federal Internal Revenue Code of 1986 ("IRS Code"), and the impact these three interrelated laws have on today's all volunteer or combination fire departments. This article discusses the changes in the Pension Act, and recent interpretations of the FLSA and IRS Code that impact volunteer and combination fire departments.

Today, a municipal fire department, fire protection district, or county improvement district providing fire protection services (collectively, "fire department(s)") operating a volunteer firefighter program must ensure that *all* aspects of the program comply with all three laws. As discussed below, some progress has been made in harmonizing the Pension Act with the FLSA; however, each aspect of the program must be analyzed for compliance with each law separately, as compliance with one law does not automatically mean the requirements of one or both of the other laws have been met. And, even more importantly, following one law may violate another law.

The Pension Act

In 2007, the Pension Act's definition of a "volunteer firefighter" was amended to bring it more in line with the FLSA's definition of a volunteer. Under the Pension Act, a volunteer firefighter is some who:

- Does not receive compensation; and
- Is not an employee under the FLSA based on payments, fees or benefits received.

Under the new definition, the term "compensation" does not include:

- Reimbursement of actual lost salary (**Caution!** See FLSA discussion below).
- Reimbursement of actual expenses.
- Participating in or receiving benefits from an *IRS Qualified* Length of Service Award Plan ("LOSAP").
- Nominal fees/benefits paid per-call or as part of an annual merit, recognition or incentive award program.
- Federal (**Not State!**) money for a temporary emergency incident.

- Participating in or receiving benefits from a pension fund established under the Pension Act.

Except for reimbursement of actual lost salary (discussed below), each of the foregoing payments, benefits and reimbursements are permitted by the FLSA without jeopardizing an individual's status as a volunteer as opposed to an employee. Moreover, in 2007 a new Part 12 was added to the Pension Act that specifically authorized fire departments to establish a LOSAP for volunteer firefighters. This new law is known as the Volunteer Service Award Act.ⁱⁱⁱ It is important to note that both the Pension Act and the Volunteer Service Award Act require the LOSAP to be qualified under the applicable IRS Code.^{iv}

In 2008, a new Part 13 was added to the Pension Act that expressly authorizes fire departments to provide health insurance for volunteer firefighters. This new law is known as the Volunteer Health Insurance Act.^v The Volunteer Health Insurance Act only applies to active volunteer firefighters. Retired volunteer firefighters are not covered by the law. Active volunteers can participate in the fire department's paid employee group health plan, which may be beneficial for combination fire departments.

There appears to be some confusion regarding pension plans and LOSAPs. A pension fund established under the Pension Act is a qualified governmental retirement plan under IRS Code §401(a).^{vi} A pension plan established under the Pension Act is eligible for State matching contributions. In contrast, a LOSAP established under IRS Code §457(e)(11)(A)(ii) is a unique benefit plan. It is *not* a qualified governmental retirement plan under IRS Code §401(a). Nor is it an "eligible deferred compensation plan" as defined in IRS Code §457(b). As a result, a fire department may establish both a pension plan and a separate LOSAP, which perform very different functions and provide different benefits and incentives to volunteer firefighters. Funds cannot, however, be "rolled over" from a pension plan to a LOSAP or vice versa. Qualified tax and special district/pension counsel should be consulted before attempting to modify, establish or eliminate either a pension plan or a LOSAP.

The FLSA

The FLSA defines a "volunteer" as an individual who works for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation. An individual cannot perform the "same type of services" as both an employee and a volunteer. The United States Department of Labor Wage and Hour Division ("DOL"), which interprets and enforces the FLSA, looks first to the federal *Dictionary of Occupational Titles* 3-digit categories in determining whether the two positions perform similar or identical services.

A paid firefighter may switch to a volunteer firefighter, if: 1) not unilaterally converted to a volunteer to avoid the FLSA's wage and overtime requirements; 2) he/she volunteers for civic, charitable, or humanitarian reasons without promise, expectation, or receipt of compensation,

although expenses, reasonable benefits, or a nominal fee may be provided; and 3) he/she volunteers freely without coercion, direct or implied.

Under the FLSA, a volunteer firefighter may receive:

Nominal Fees

- Cannot be tied to productivity, but a nominal amount on a 'per call' or similar basis is okay.
- Cannot exceed 20% of what it would cost to have a paid firefighter perform the same service.^{vii}

Expense Reimbursements

- Uniform allowance, reasonable cleaning expense, wear and tear on personal clothing worn during volunteer services.
- Cost of meals and transportation expense.
- Tuition, transportation and meal costs in attending classes intended to teach individuals to perform efficiently the services they provide or will provide as volunteers.
- Costs of books, supplies or other materials essential to volunteer training.
- **Caution!** Although permitted under the Pension Act, reimbursement of lost wages constitutes compensation and makes the volunteer an employee.^{viii}

Reasonable Benefits

- Pension plans.
- Group insurance plans (liability, health, life, disability, worker compensation, unemployment compensation).
- Length of service awards commonly or traditionally provided to local government volunteers.
- Tax relief on personal property taxes is a "reasonable benefit" and is not evaluated as a "nominal fee". Providing this benefit will not, in and of itself, preclude *bona fide* volunteer status. (**Caution!** Providing this benefit may violate the Pension Act)^{ix}
- A fire department may charge/dock an employee's compensatory time/accrued leave for time off responding to a fire call as *bona fide* volunteer.^x

Taxation Issues

In the IRS's world, there are only two types of workers – employees and independent contractors. Factors for determining the existence of employment status are found in three substantially similar sections of the Employment Tax Regulations (see, Regs. 31.3121(d)-1, 31.3306(i)-1 and 31.3401(c)-1, relating to the Federal Insurance Contributions Act ("FICA"), the Federal Unemployment Tax Act ("FUTA") and federal income tax withholding, respectively).

Those regulations generally provide that the relationship of employer and employee exists when the entity for which the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. According to the IRS:

A volunteer is an employee if the entity as the right to direct and control the volunteer's performance, not only as to the results to be accomplished, but also as to the methods by which the results are accomplished. It is the "right" to control, even if the entity does not exercise the right, that is important. Many factors in an employment relationship have to be considered before a decision can be made as to whether the entity has the right to direct and control.^{xi}

Absent unique circumstances, the IRS will deem a volunteer firefighter to be an employee for taxation purposes:

Generally, "volunteer" firefighters are employees of the fire department or district for which they perform services. The usual common-law tests apply in determining their employment status. For example, the relationship between the firefighter and the fire department will generally indicate that the department provides training and direction in how the work will be performed and provides the equipment to perform the work. * * * Payments to those firefighters who are employees under the common-law tests are treated the same as to other government employees....^{xii}

Many fire departments mistakenly believe they are not required to report stipends as long as the total annual stipend to a volunteer firefighter is less than \$600. The \$600 "*de minimis*" rule only applies to independent contractors. There is no rule exempting *de minimis* payments from taxes if the IRS classifies the volunteer firefighter as an employee.^{xiii}

In 2007, the IRS Office of Federal, State and Local Government ("FLSG") distributed an informational packet to Colorado fire departments on IRS rules applicable to emergency services providers. This informational packet includes a document entitled, *Federal Tax Issues for Firefighters*, drafted by Stewart Rouleau, Senior Analyst for FLSG. In this document, Senior Analyst Rouleau makes the point even more emphatically:

It does not matter whether firefighters are termed "volunteers", are considered employees, or are identified by another name, if the work they do is subject to the will and control of the [Special District], under the common-law rules, they are employees for Federal tax purposes. * * * Similarly, it does not matter whether they are paid on a "call" basis, monthly, hourly, etc.; or whether the worker is full-time or part time. These payments are wages that should be reported on Form W-2, subject to withholding for Federal income tax, social security, and Medicare purposes. * * * If a worker is a common-law employee, any amounts they receive, that are not exempt under some

special provision, are reported on Form W-2 as wages to the employee. It does not matter what the payments are called.

The IRS's tax rules relating to nominal fees, benefits and reimbursements provided to volunteer (and paid) firefighters are too complex to cover in detail in this article. Very generally, the IRS considers property tax relief/rebate to be taxable income. Similarly any stipend (nominal fee) paid to a volunteer is taxable income. Life/disability insurance is not taxable, unless the coverage exceeds \$50,000, then the premium for the coverage above \$50,000 is taxable income – unless the insurance is provided through FPPA. Health insurance is a non-taxable benefit, except for certain long-term care. Contributions to a qualified LOSAP are not taxable income until they are disbursed to the volunteer firefighter. A pension plan established under the Pension Act is a non-taxable benefit, as is worker's compensation insurance. Uniforms are not taxable as long as they are specifically required as condition of volunteer service *and* are not worn or adaptable to general usage as ordinary clothing.

All expense reimbursements must meet the IRS's detailed "accountable plan" requirements, including demonstrating a business connection, substantiation, and all excess must be returned to the fire department. All fire departments providing per diems should review and comply with the IRS's 2008 revenue procedures for per diems.^{xiv}

Fire departments providing any form of education benefit to volunteer (or paid) firefighters must be sure that they comply with the applicable IRS Tax Code sections.^{xv} Oh, and a fire department's laptop computers and cellular telephones constitute "listed property" to which very detailed tax rules apply.

Conclusion

Today's volunteer and combination fire departments face a complex legal landscape that must be carefully negotiated to avoid unintended tax consequences (and significant fines and penalties), mistakenly converting volunteer firefighters into employees, or disqualifying a volunteer firefighter from participating in a pension fund established under the Pension Act. On the other hand, there has never before been such a wide array of options available to fire departments to recruit and retain qualified volunteer firefighters.

In accordance with the requirements imposed by the U.S. Treasury Department, readers are hereby notified that the information contained in this article is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under any federal tax law, or (ii) promoting, marketing or recommending to another party any transaction or tax-related matter addressed in this article.

ⁱ C.R.S. §31-30-1101, et. seq.

ii 29 U.S.C. § 201 et seq. and the federal regulations interpreting or implementing the FLSA, 29 C.F.R. Part 500 et seq.

iii C.R.S. §31-30-1201, et seq.

iv IRS Code §457(e)(11).

v C.R.S. §31-301301, et seq.

vi C.R.S. §31-30-1133.

vii August 7, 2006 DOL Opinion Letter

viii September, 2007 DOL Opinion Letter.

ix *Id.*

x April, 2003 DOL Opinion Letter.

xi *Public Employer Tax Guide*, Internal Revenue Service (July 2007). In theory, a volunteer firefighter could be classified as an independent contractor if he/she is a member of a *separate* volunteer association or nonprofit corporation that has contracted with a fire department or fire protection district to provide emergency services. The separate organization would need to have total control over the volunteer firefighter's training and volunteer services. The fire department's or fire district's involvement would need to be limited to little more than providing funding to the organization. Under such circumstances an independent contractor relationship *might* be demonstrated; however, such an arrangement would raise a host of other thorny legal issues, not the least of which are whether the volunteer firefighters would be afforded governmental immunity and whether they could participate in a pension fund established under the Pension Act (in at least one instance the Department of local Affairs indicated they would not).

xii Page 82, *Taxable Fringe Benefit Guide*, Internal Revenue Service (January 2007).

xiii *Id.*

xiv Rev. Proc. 2008-59.

xv IRS Tax Code §127 (qualified education assistance program); IRS Code §132(d) (working condition fringe); and IRS Tax Code §117(d)(qualified tuition reimbursement).