

THE NEW CHALLENGE IN VOLUNTEER FIREFIGHTING: COMPLYING WITH STATE PENSION, FLSA AND IRS LAWS

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Fighting forest fires, floods and chemical plant explosions may not prepare our volunteer firefighters, and the public agencies that rely upon their services, for the most challenging fight of all -- safely negotiating the dangerous traps for the unwary that lie within the Colorado Volunteer Pension Act, the Fair Labor Standards Act, and the Internal Revenue Code of 1986. This article explores the legal landscape of these three interrelated laws, and their impact on today's volunteerism.

Volunteerism – Then and Now

Ah, the good ole' days. Things were simple. You had a steady day job, family and friends – a sense of community. And to help protect that community, some people volunteered part of their free time to the local fire department. The demands made upon the fire departments and their volunteer firefighters reflected the needs of the communities they served – mostly small to mid-sized communities with moderate populations and large areas of rural and agricultural lands. Fire was the biggest enemy, with some associated medical care required. Volunteer firefighters would serve in the same fire department for their entire careers, and often put in 15, 20 or even 30 years of selfless volunteerism, willing to give their all in the evenings (or the middle of the night) and weekends when an emergency arose. Training was important, but it could usually be easily met with a modest amount of effort.

Today's volunteer firefighter lives and works in a different world. Less and less men and women can find the time in their hectic lives to volunteer. And the demands of being a volunteer firefighter have dramatically increased. Training requirements place significant demands on a volunteer firefighter's time, both in terms of the amount of training and the level of skill and technical knowledge required. Moreover, many fire departments have seen the nature of their services dramatically shift, as improved fire prevention practices continue to reduce the numbers fires, and the ever-growing and aging population demands more emergency medical services. It is not uncommon for a modern fire department's firefighters to spend 70% of their time responding to emergency medical calls. And the need for these emergency medical services is often greatest during the work days, when most volunteer firefighters are required to be at their regular jobs. This trend has forced fire departments to hire paid firefighters to ensure that emergency services can be provided during these high demand periods. As a result, a significant number of individuals view volunteer firefighting as an interim step – a necessary apprenticeship to landing a paid firefighter position.

All of these factors place tremendous pressure upon the public agency—whether it is a municipal fire department, a fire protection district, a fire authority, or a county improvement district with fire code enforcement authority—to do everything it can to attract and retain volunteer firefighters.

Volunteer Pension Fund Eligibility

Perhaps the single biggest benefit a fire department can offer its volunteer firefighters is participation in a pension fund established under the Volunteer Firefighter Pension Act, C.R.S. §31-30-1101, *et seq.*, and predecessor statutes (the "Volunteer Pension Act"). Unfortunately, the Volunteer Pension Act contains very strict requirements for a volunteer firefighter to be eligible to

participate in a pension fund established under the Volunteer Pension Act. The Volunteer Pension Act defines a "volunteer firefighter" as:

...[A] firefighter who renders service to a fire department in a municipality or district and who does not receive compensation under a contract of employment as a firefighter. "Volunteer firefighter" may include other designations or titles given to firefighters provided that the firefighter meets all of the requirements for being a volunteer firefighter in this part 11.

C.R.S. § 31-30-1102(9)(emphasis added).

Under the foregoing definition, providing a volunteer firefighter with any form of compensation directly related to or calculated on individual call response, training hours, or work hours would render the volunteer firefighter ineligible for pension benefits under the Volunteer Pension Act. On the other hand, for the purpose of determining a volunteer firefighter's eligibility to participate in the Authority's Pension Fund, the term "compensation" does not include: 1) actual reimbursement of expenses incurred by a volunteer firefighter; or 2) salary lost as a consequence of actual firefighting duties causing the absence of the firefighter from his or her employment. C.R.S. §31-30-1102(9)(b)(I) & (II)(emphasis added). Read literally, this would require volunteer firefighters to submit itemized expense reports for actual expenses incurred (such as mileage, clothing, etc.), and they would receive reimbursement for the actual documented expenses. As anyone who works in the industry can tell you, it would be difficult to establish and administer such a reimbursement program. Instead, most fire departments with a reimbursement program establish a set "stipend" that they in good faith believe closely approximates the actual expenses incurred by the volunteer firefighters.

Volunteers or Employees? – Application of the Fair Labor Standards Act

The State statutory requirements for eligibility to participate in a pension fund established under the Volunteer Pension Act are separate and different from the Federal requirements for qualifying as a volunteer under the Fair Labor Standards Act, 29 U.S.C.A. §201, *et seq.* ("FLSA"), and the regulations promulgated by the US Department of Labor Wage and Hour Division interpreting and implementing the FLSA, 29 C.F.R. §515, *et seq.* (the "FLSA Regulations"). Maintaining the "volunteer" status of the volunteer firefighters under the FLSA is important because, if they do not meet the FLSA definition of a volunteer, the Department of Labor (and the Courts) will deem them to be employees, who are entitled to compensation for all hours of worked (*i.e.* all of the volunteer services provided) during the preceding two years, plus statutory penalties (and attorneys' fees if legal action is involved).

Under the FLSA, volunteer firefighters are not "...employees...if their hours of service are provided with no promise, expectation or receipt of compensation for the services rendered..." 29 C.F.R. §553.104. Under the FLSA, "[v]olunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers." 29 C.F.R. §553.106(a)(emphasis added). Expense reimbursement may include: 1) a uniform allowance, reimbursement for reasonable cleaning expenses, or for wear and tear on personal clothing worn while performing volunteer services; 2) the cost of meals and transportation expenses; 3) reimbursement for tuition, transportation and meal costs involved in their attending classes intended to teach them to perform efficiently the services they provide or will provide as volunteers; and, 4) reimbursement for the cost of books, supplies or other materials essential to their volunteer training. 29 C.F.R. §553.106(b) & (c).

Unlike the Colorado Volunteer Pension Act, the FLSA permits “reasonable” benefits, including the “...inclusion of individual volunteers in group insurance plans (such as liability, health, life, disability, workers compensation), or pension plans or ‘length of service’ awards, commonly or traditionally provided to volunteers of State and local government agencies....” 29 C.F.R. §553.106(d).

Also, unlike the Colorado Volunteer Pension Act, the FLSA permits a volunteer to be paid a “nominal fee”, so long as the nominal fee is not tied to productivity. 29 C.F.R. §553.106 (e). However, with respect to fire departments, the FLSA regulations clarify that “...this does not preclude the payment of a nominal amount on a ‘per call’ or similar basis to volunteer firefighters.” *Id.* The factors that must be examined in making this determination include: a) the distance traveled and the time and effort expended by the volunteer; b) whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and, c) whether the volunteer provides services as needed or throughout the year. *Id.* 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. Finally, “[w]hether the furnishing of expenses, benefits, or fees would result in individuals losing their status as volunteers under 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.” 29 C.F.R. §553.106(f).

The IRS’s “Courtesy Review” of the Golden Fire Department’s Volunteer Program

The Internal Revenue Service (“IRS”) recently sent shock waves through the firefighting community as a result of the conclusion reached during its “courtesy review” of the Golden Fire Department’s volunteer firefighter program for compliance with the Internal Revenue Code of 1986, as amended (the “Code”). At the time of the IRS’s “courtesy review” Golden Fire Department’s volunteer program looked like many volunteer firefighter programs in the State. Volunteer firefighters received an \$8.00 per call stipend, for which the Department issued IRS Forms 1099 to each volunteer firefighter at the end of each year. The Golden Fire Department provided, and paid the premiums for, workers’ compensation insurance, and life and disability insurance of \$150,000 per volunteer firefighter. Each volunteer firefighter participated in the Golden Fire Department’s volunteer firefighter pension fund, which is administered by the Fire and Police Pension Association (FPPA).

The IRS determined that the \$8.00 per call stipend constituted taxable compensation and therefore was subject to a withholding tax and the issuance of IRS Forms W-2 to the volunteer firefighters. The IRS took the position that in order to avoid withholding under an expense reimbursement arrangement, reimbursements must be made under an “accountable plan” that complies with Section 62(c) of the Code. The requirements for establishing an “accountable plan” are detailed, and any fire department wanting to develop an accountable plan should work closely with its legal counsel and qualified tax attorneys to develop an IRS qualified accountable plan.

The IRS also concluded that the portion of the premiums paid to purchase life and disability insurance in excess of \$50,000 was taxable compensation. One solution that may be acceptable to the IRS is to have the Fire and Police Pension Association (FPPA) purchase the insurance as part of its administration of a fire department’s pension plans. Again, fire departments should work closely with their legal counsel and qualified pension/tax attorneys to determine what course of action is best for them.

On the bright side, the IRS determined the volunteer firefighters' participation in the FPPA administered pension fund and their coverage under the Golden Fire Department's workers' compensation insurance did not constitute compensation to the volunteer firefighters.

Finally, the IRS (and the FLSA regulations) may permit a fire department to establish a Code Section 457 plan to reward volunteer firefighters for length of service. A fire department interested in establishing a 457 plan for length of service rewards should work closely with their legal counsel and qualified pension/tax attorneys to determine whether such a plan is appropriate for their department.

Closing Comments

As the nature of volunteerism has changed over the last 40 years, so too has the laws impacting volunteer firefighter programs within the State of Colorado. Large and small fire departments alike must carefully craft their volunteer programs to comply with the myriad Federal and State laws and regulations that may apply.

This article is intended only as a general discussion of the Federal and State laws and related regulations that may affect volunteer firefighter programs, and is not intended, and should not be construed as, providing legal advice with respect to any matter discussed in this article. To ensure compliance with the requirements imposed by the U.S. Treasury Department, readers are notified that, unless specifically indicated otherwise, any tax advice 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.