

1-27-97

This is in response to your inquiries concerning the application of the Fair Labor Standards Act to County Emergency Medical Service (EMS) employees who volunteer as firefighters for the County Volunteer Fire Service. The question presented is whether the EMS employees are providing "the same type of services" for purposes of §3(e)(4), 29 U.S.C. 203(e) (4), when so engaged. We regret the delay in responding to your inquiry.

You state that the Fire Service was established by the County and is controlled, and funded in part, by the County Commissioners. In addition, some of the municipalities within the County provide funds, equipment and/or facilities for the Service. The County fire department serves those areas of the County that have no municipal services.

Since 1992 County has operated a free-standing EMS Division that provides county-wide EMS services. To staff this assumed function, the County hired a number of firefighters who were cross trained as emergency medical technicians (EMT/paramedics and who were formerly employed by the City of to perform EMS services county wide, which was that jurisdiction's responsibility prior to 1992.

Former City employees that became County EMS employees continue to serve as volunteer firefighters with the County and they perform the exact same firefighter and "first responder" EMS services for the County's Volunteer Fire Service as they previously performed when employed by the City of

Approximately 300 volunteer firefighters serve the County's Fire Department. Some are municipal firefighters, others are employees of fire departments or EMS

departments in surrounding cities and counties, and 17 are full-time employees of the County's EMS. In addition, nine temporary on-call EMS employees of the County volunteer in the Fire Service. To reiterate, it is the latter 26 County EMS employees that are the focal point of your inquiry.

When the EMS employees are serving the County as volunteer "firefighters," they provide "first responder" services at fire or emergency scenes, i.e., primary medical assistance to victims until the on-duty paid County EMS personnel arrive on the scene. Presumably, they also engage in fighting fires and related duties. Of the 300 volunteer firefighters, 131 have first responder training (40 hours of training/certification in EMS assistance), 67 have EMT training (180 hours of training/certification), and 21 have paramedic training (requiring even more advanced life support training/certification).

Section 3(e)(4)(A)(ii) of the FLSA provides that individuals are not "employees" entitled to compensation for hours of service if the volunteer services they provide to a public agency are not "the same type of services" which they are employed to perform by that agency. In the case you describe, the public agency is County. The term "same type of services" is defined at 29 CFR §553.103 to mean similar or identical services, and refers to the duties and other factors contained in the definitions of the three-digit categories of occupations in the Dictionary of Occupational Titles. Equally important are all the facts and circumstances in a particular case, including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee who "volunteers."

In many communities firefighters must have EMS training and skills and they are regularly dispatched to incidents resulting from fires, accidents, natural disasters, crimes, and medical emergencies. In fact, they are regularly dispatched to such incidents and may be the "first responder," even though EMS employees of the same employer may also be dispatched to the scene to provide ambulance services or to provide advanced life support services. Under such circumstances, a firefighter volunteering as an EMS employee (or vice versa) would be considered to be providing the "same type of services" that he or she is employed to perform by the employer.

In light of the facts you have provided, we conclude that County EMS employees are providing the same type of services when they serve the County Volunteer Fire Service. Consequently, they may not volunteer without compensation in accordance with the requirements of the FLSA. The separate

employment of firefighters and EMS employees by the two different jurisdictions, the City and County, prior to 1992 presented less of a likelihood of coerced services in the form of volunteering. But since that time the employment by the County of firefighters and EMS employees performing the same duties for a single employer, the County, creates the possibility that an employee could be pressured or feel pressured to provide "volunteer" services to the County. It was concern about the possibility of such a situation that led Congress to provide narrow circumstances under which individuals could provide volunteer services to the same public agencies that also employed them as employees. This concern was explained in the legislative history of the 1985 Amendments: "[T]he Committee wishes to prevent any manipulation or abuse of the minimum wage requirements through coercion or undue pressure upon employees to 'volunteer.'" Senate Report No. 99-159, page 14, 2 U.S. Cong. News, page 662.

We note, however, that EMTs employed by other jurisdictions are not so affected, and may continue to volunteer to the County Volunteer Fire Service, even if "mutual aid" agreements exist between their employing jurisdictions and County. In this regard, see 29 CFR §553.105.

Whether the EMT/firefighter reports to the scene in an EMS vehicle or with a fire truck is not relevant in our view. This would appear to be more governed by chance than design. The basic duties performed at the scene are the same or closely related services required for public safety.

Maria Echaveste
Administrator