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Non-Covered Employees

Dear Reader:

The following document was created from the MTAS website (mtas.tennessee.edu). This website is maintained daily by MTAS staff and seeks to represent the most current information regarding issues relative to Tennessee municipal government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Non-Covered Employees

Reference Number: MTAS-1518

The act defines an “employee entitled to the protection of the act” 29 U.S.C. § 203(e)(2)(C) to include:

(C) any individual employed by a state, political subdivision, or an interstate governmental agency, other than such an individual —

(i) Who is not subject to the civil service laws of the state, political subdivision, or agency;

(ii) Who:

I. Holds a public elective office of that state, political subdivision, or agency;
II. Is selected by the holder of such an office to be a member of his personal staff;
III. Is appointed by such an office holder to serve on a policy making level;
IV. Is an immediate advisor to such an office holder with respect to the constitutional or legal powers of his office; or
V. Is an employee in the legislative branch of that state, political subdivision, or agency.

Elected officials, their personal staffs, policy making appointees, and legal advisors are not covered (non-covered employees) as long as they are not subject to the civil service laws of their state or local government. Therefore, any non-elected individual employed by a municipal government who is subject to a civil service system is covered. According to the DOL regulations 29 C.F.R. § 553.11(c), the term “civil service” refers to:

“... a personnel system established by law which is designed to protect employees from arbitrary action, personal favoritism, and political coercion, and which uses a competitive or merit examination process for selection and placement. Continued tenure of employment under civil service, except for cause, is provided.”

In 1985, a new non-covered employee category was added to 29 U.S.C. § 203(e)(2)(C)(i-v) of the act. The amendment “excluded employees not subject to civil service law who work in the legislative branch of a state or one of its political subdivisions.” Thus, almost all non-civil service employees in the state legislature or county, city council or board are excluded by this provision. Additionally the Department of Labor has determined that “no matter what activity an elected official performs, he/she is not considered an employee for FLSA purposes.” (DOL Wage and Hour opinion letter, December 3, 1986.)

Also not covered by the act are personal staff members who are selected or appointed by elected public officials. According to 29 C.F.R. § 553.11(b), “the term ‘personal staff member’ includes only persons who are under the direct supervision of the selecting elected official and have regular contact with such officials.” “Personal staff member does not include individuals supervised by someone other than the official, even if initially selected for the position by the elected official.” 29 C.F.R. § 553.11(b). Furthermore, to qualify for the exemption, a personal staff member must not be subject to the civil service laws of the employing agency. It would not include all members of an operational unit, since all the members could not have a personal working relationship with the elected official.

To determine whether an employee is a member of an elected official’s personal staff, the Department of Labor (DOL) issued a Wage and Hour Opinion dated December 19, 1974, that provides a test of exclusion based on personal staff membership. Among the tests to be considered are the following:

1. Is the person’s employment entirely at the discretion of the elected official;
2. Is the position not subject to approval or clearance by the personnel department or division of any part of the government;
3. Is the work performed outside of any position or occupation established by a table of organization as part of the legislative branch or committee formed by an act of the legislature; and
4. Is the person’s compensation dependent upon a specific appropriation or is it paid out of an office expense allowance provided to the officeholder?

DOL further elaborated on this issue by stating in an opinion letter dated April 30, 1975, that, “individuals such as pages, stenographers, telephone operators, clerks, typists and others may be considered employees under the act.”

Policy Making Appointees and Legal Advisors

Reference Number: MTAS-913

Also classified as non-covered under the act are policy-making appointees. When a publicly elected official appoints an individual to serve on a policymaking level, such an appointed individual is not covered by the act. To fall within the policy-making appointee exception, the staff member must be appointed by and serve solely at the pleasure or discretion of the elected official and must formulate policy rather than simply implement or apply the policy to others. In *Elrod v. Burns*, 427 U.S. 347, 1976, the courts ruled that "in determining whether an employee occupies a policymaking position, consideration must be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals."

Immediate legal advisors to elected officials also are not covered by the act. "Immediate advisors are defined as 'staff who serve as advisors on constitutional matters or legal matters and who are not subject to the civil service rules of the employing agency'." 29 C.F.R. § 553.11(d). City attorneys are clearly outside the coverage of the act because they advise on legal matters and generally are not subject to the civil service rules of the organization.

Volunteers, Independent Contractors, Prisoners, Trainees

Reference Number: MTAS-1520

Another group of individuals not covered by the act include bona fide volunteers, independent contractors, prisoners and trainees.

Volunteers:

29 U.S.C. § 203(e)(4)(A) provides that "employee does not include any individual who volunteers to perform service for a public agency that is a state, a political subdivision, or an interstate governmental agency, if:

- The individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
- Such services are not the same type of service which the individual is employed to perform for such public agency.

There are several issues to be evaluated when determining the volunteer status of an individual in the public sector. The first has to do with whether two agencies of the same state or local government constitute the same or separate public agencies. The second issue arises when considering whether the employee is volunteering for the "same type of services" that the individual is employed to perform for the same agency.

The bottom line is that individuals may not volunteer to do what they are otherwise paid to provide. DOL will consider:

- The duties and other factors contained in the Dictionary of Occupational Titles
- 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. 29 C.F.R. § 553.103(a)

Examples of when an employee **would not** be considered a volunteer are:

> A nurse employed by a state hospital who volunteers nursing services at a state-operated clinic (which is not a separate agency); or a firefighter [who] volunteers as a firefighter at the same public agency. (Note: A January 7, 1988, DOL opinion letter stated that a firefighter may volunteer to perform the same services for a different public agency in another jurisdiction without incurring any entitlement to overtime compensation.)

The following employees, however, **would be** considered bona fide volunteers because they are not engaged in volunteering the "same type of services":

> A city police officer who volunteers as a part-time referee in a city basketball league; or an employee of the city parks department who serves as a volunteer firefighter; or an office

employee of a city hospital who volunteers to spend time with a disabled or elderly person in the same institution during off-duty hours.

In several opinion letters, the DOL emphasized that public employees can volunteer for the same agency that employs them if the volunteer position is substantially different from their paid work. An employee cannot be both a “paid” employee and a “non-paid” volunteer while performing the same type of work for the same employer.

Independent Contractors:

Another class of non-covered individuals are independent contractors. As a general rule, independent contractors bid to perform government work and are evaluated based on results rather than their day-to-day operations. Independent contractors control their own workers and must ensure that those workers are compensated in accordance with the FLSA. The legal test that establishes a true independent contractor is called the “economic reality test,” which looks at the degree of control exerted, the worker’s opportunity for profit or loss, the worker’s investment in the business, the permanence of the working relationship and the degree of skill required to perform the work. *Doty v. Elias*, 733 F.2d 720 (10th Cir. 1984). Failure to meet the economic reality test means the individual is not an independent contractor and must be treated as an employee for FLSA purposes. Other courts have developed similar standards (*Donovan v. Dial Am. Marketing Inc.*, 757 F.2d 1376 (3rd Cir. 1985) and *Brock v. Superior Care Inc*., 840 F.2d 1054 (2nd Cir. 1988).

The U.S. Supreme Court has on a number of occassions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Courts have held that it is the total activity or situation which controls. Among the factors which the Court considered significant are:

1. The extent to which the services rendered are an integral part of the principal's business;
2. The permanency of the relationship;
3. The amount of the alleged contractor's investment in facilities and equipment;
4. The nature and degree of control by the principal;
5. The alleged contractor's opportunity for profit and loss;
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor;
7. The degree of independent business organization and operation. (Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA))

There are certain factors that are immaterial in determining if there is an employment relationship. Such facts are the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by the State/ or local government, are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.

The best strategy when hiring an independent contractor is to negotiate a contract that gives the contractor the greatest possible freedom as to the manner and schedule for performing the work. Also, the employing agency should avoid, if possible, long-term or exclusive contracts and other onerous requirements that may be deemed to make the contractor dependent on the business. The contractor should bear all or at least a portion of the risk of loss under the contract and should supply his or her own tools and materials needed to perform the work. Once the work is done, the employing agency should avoid, if possible, any ongoing supervision or direction of the work

Prisoners:

Prisoners who are required to work by or for the government also are not considered employees under the FLSA and need not be paid minimum wage or overtime. Thus prisoners can be worked long hours by a governmental entity without an FLSA violation. Moreover, it is not a violation of the Constitution, since they have no right to any pay. *Woodall v. Partilla*, 581 F. Supp. 1066, 1074 (N.D. Ill. 1984).

Trainees:

Finally, the last groups of non-covered individuals are trainees. The DOL issued an opinion letter dated January 6, 1969, which established guidelines for determining whether trainees are employees covered by the act.

*Whether trainees are employees depend upon **all** of the circumstances surrounding their activities on the premises of the employer. If **all** six apply, the trainees are not employees:*

- *The training, even though it includes actual operation of the facilities ..., is similar to that which would be given in a vocational school*
- *The training is for the benefit of the trainee*
- *The trainees do not displace regular employees, but work under close observation*
- *The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion his operations may actually be impeded*
- *The trainees are not necessarily entitled to a job at the completion of the training period*
- *The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training*
