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Joint Employment

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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When an employee works for two or more separate employers, there normally is no special FLSA problem. Each employer must separately consider and pay overtime for hours the individual worked for that particular employer in excess of 40 hours per week. However, in the case of governments that often work in conjunction with other government organizations, units or department, DOL has stated that "... various departments and agencies of the federal or state government, or of the political subdivisions of a state government, are to be treated as separate employers." Wage and Hour Opinion Letter dated Aug. 23, 1974.

Even when the employee works for an entirely separate employer, there still may be questions of whether the two employers are so entangled as to create what is called a "joint employment" relation whereby, for the purpose of the FLSA, they are treated as one entity. "The test for joint employment includes (1) sharing employees' services so as to interchange employees; (2) an employer acting in the direct interest of another employer; (3) and employers who are not so completely disassociated that they are deemed to be under common control and share employees." 29 C.F.R. § 791.2(b).

In an October 10, 1985, opinion letter, DOL identified the following factors that would support a determination that two or more agencies are separate employers:

1. The agencies are treated as separate employers from other agencies for payroll purposes;
2. The agencies deal with other agencies at arm's length concerning the employment of any individual;
3. The agencies have separate budgets or funding authorities;
4. The agencies participate in separate employee retirement systems;
5. The agencies are independent entities with full authority to perform all of the acts necessary to their function under state statute; and
6. The agencies can sue and be sued in their own names.

If the agencies are found to be separate employers, there still may be a "joint employment relationship" between them. If the agencies are considered joint employers, they are still treated as one under the act. The October 1985 opinion letter identified the following factors as important in determining if a joint employment relationship exists:

1. When employed by one agency, is the employment by another agency completely voluntary on the part of the employee, or is the employee led to believe in any way that he/she should accept additional work at the other agency?
2. When employed by one agency, is the employee assured, promised or led to believe that he/she will receive additional work from another agency?
3. Are employees of one agency given a special preference for additional work at another agency?
4. Does the work for one agency represent only part-time or irregular work?
5. What are the percentages of time in all workweeks in which the employee works for one agency as compared to the employee's work for another agency or agencies?
6. What effect does the employee's work in one job have on his/her other job or jobs? For example, has any employee ever been fired from or been disciplined by one agency because the employee failed to perform a job for another agency?

A special joint employment provision for law enforcement, fire protection and security correctional employees was added to the FLSA. 29 U.S.C. § 207(p)(1). This provision "allows public safety employees on a voluntary basis, to be employed by special detail to a separate and independent employer in fire protection, law enforcement or related activities without combining together the employees' hours of work for the two or more employers." 29 C.F.R. § 553.227. Even if the governing body requires the second employer to hire its public safety employees for particular work or is in any other way involved (for example, approved the job, collects compensation from the second employer,

then directly pays the employee), the hours of the public safety employee still are not totaled. Thus, for firefighters and more importantly police, the agency can facilitate the employment of its officers by other separate agencies without creating a joint compensation problem.