

Compensation for Services Provided

Dear Reader:

The following document was created from the MTAS website ([mtas.tennessee.edu](https://www.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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29 CFR § 553.106(a), Payment of Expenses, Benefits, or Fees, states that, "Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers." It is important to remember that anything resembling an hourly rate or minimum wage jeopardizes the person's status as a volunteer.

Examples of the types of compensation permitted include:

- Payment of the volunteer's tuition to a firefighting course.
- Reimbursement for expenses incidental to fire protection training.
- Reimbursement for "approximate out-of-pocket expenses incurred incidental to answering a call."
- Reimbursement for the cost of replacing clothing or equipment consumed or damaged in responding to a call.
- An annual party given to recognize the volunteer firefighters.
- A uniform and related equipment may be furnished free of charge.
- The volunteer may be included in a retirement or relief fund, worker's compensation plan, or life or health insurance program.
- A "nominal sum."

There are two different issues concerning compensation: the application of FLSA, and Internal Revenue Service (IRS) rules and regulations. FLSA says that volunteers can receive a "nominal fee," but the law itself does not define what a nominal fee is. However, § 553.106(e) states that a fee is not nominal if it is:

- a substitute for compensation; or
- tied to productivity.

A municipality must establish a nominal fee that reflects the sacrifice of the volunteer. Again, anything resembling an hourly rate or minimum wage is not a nominal fee and jeopardizes the person's status as a volunteer. The following quote is from 29 CFR § 553.106(e):

Individuals do not lose their volunteer status if they receive a nominal fee from a public agency. A nominal fee is not a substitute for compensation and must not be tied to productivity. However, this does not preclude the payment of a nominal amount on a "per call" or similar basis to volunteer firefighters. The following factors will be among those examined in determining whether a given amount is nominal: The distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year. 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.

Section 553.106(e) is notable regarding providing a nominal per shift fee for volunteers who work a shift. On August 7, 2006, the Department of Labor (DOL) sent Wage and Hour Opinion Letter FLSA2006-28 to the International Association of Fire Chiefs (IAFC), stating that "nothing in the statutory language would directly preclude the payment of nominal per call or even per shift fees to volunteer firefighters as section 553.106(e) specifically provides that a nominal fee can be paid on a "per call" or similar basis for volunteer firefighters."

As described below, the DOL has set a limit on nominal compensation, but the municipality determines what is reasonable and fair given local circumstances. 29 CFR § 553.106(f) states that the decision of whether the expenses, benefits, or fees would preclude an individual from qualifying as a volunteer under FLSA must be made by examining the total amount of payments in the context of the economic realities of a particular situation. The DOL stated, "Whether a specific amount is 'nominal' depends on the economic realities of the situation and that no guidelines on specific amounts applicable to all (or even most) possible situations can be provided." The responsibility for setting an appropriate nominal fee rests with the municipality, and the DOL may consider a nominal fee unreasonable if the fee seems out of proportion to the volunteer's service, even if the fee is less than what is described in Wage and Hour Opinion Letter FLSA2006-28.

The DOL clarified further the issue of a nominal fee in Wage and Hour Opinion Letter FLSA2006-28. The DOL considers any fee paid to a volunteer firefighter as nominal as long as the fee does not exceed 20 percent of what that public agency would otherwise pay to hire a full-time firefighter. The compensation may include being paid per call, insurance benefits, retirement benefits, etc. If the compensation is nominal, the volunteer firefighter is not subject to the wage and hour provisions of FLSA. FLSA provides no exemption for the volunteer firefighter being subject to withholding of taxes.

The IRS views compensation for volunteers from a different perspective. The ability of the employer to exercise direction and control, not the label (volunteer, reserve, etc.), determines whether an employer-employee relationship exists. Any worker receiving any compensation (no matter how small) for services performed who is subject to the will and direction of the employer is a common-law employee. A common-law employee is defined as an employee who performs services for an employer and the employer has the right to control what will be done and how it will be done, even if the employee has freedom of action. Under Section 3121 of the Internal Revenue Code, all employees are subject to social security and

Medicare taxes unless there is a specific exception. Because volunteer firefighters serving a municipal fire department are subject to the will and direction of the employer (the municipality), they are considered common-law employees under IRS regulations and subject to withholding for income, social security, and Medicare taxes.

Under Internal Revenue Code section 3121(b)(7)(F)(iii), an exception is provided from social security and Medicare coverage for a worker "serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency". This exception applies only to workers who respond to unforeseen emergencies. For example, a municipality could employ temporary personnel to help recover from an ice storm or flood. The exception does not apply to workers, such as firefighters, who work for pay or volunteer on a recurring basis even if their work involves emergencies.

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