InterOffice Memo

Department of Workforce Development

Date: June 21, 2012

To: Connie Schulze
Legislative Liaison

From: Jim Chiolino
Director, Labor Standards Bureau

Subject: **On Call Time and "Volunteer" Services for Municipalities**

We understand that municipalities around Wisconsin use volunteer emergency medical personnel (EMTs or paramedics) to handle a significant amount of their work. Under Wisconsin wage and hour law this poses no particular problem unless the persons filling these positions (1) are not truly "volunteers" and (2) are "on call" with short response times required.

You asked how municipal employers can ensure that these volunteers will not be subject to Wisconsin's minimum wage law. The answer is twofold. First, they should see that volunteers are either not paid for the services they perform or paid only a "nominal fee." Second, if these workers are paid more than a nominal fee, the workers are "employees." Therefore, the employer would need to ensure that on call time is not work time. To do this, they would need to make sure that required response times are long enough so that workers can use the time "effectively for their own purposes."

This memo discusses these recommendations in greater detail.

A. Ensure That Volunteers are Truly Volunteers.

Wisconsin's minimum wage law covers all "employees" in the State. An employee is anyone "who is in receipt of or is entitled to any compensation for labor performed for an employer." Wis. Stat. § 104.01(2)(a). The law excludes individuals who work for the state or municipalities if they are not considered employees under the federal Fair Labor Standards Act (FLSA). The FLSA excludes volunteers.

If these workers can be classified properly as volunteers, there is no further problem with Wisconsin's minimum wage law. They can be so classified as long as they receive no compensation *or* "a **nominal fee** to perform … services." If fees given to these volunteers are "nominal," the volunteer is excluded from minimum wage requirements.

What Constitutes a Nominal Fee?

The FLSA's regulations allow for volunteers to be paid a nominal fee even if paid on a "per call" or similar basis, as long as the payment is consistent with certain factors denoting the relative sacrifice of the volunteer. *See* 29 C.F.R. § 553.106(e) (factors can include: the distance traveled; time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock; and whether the volunteer provides services throughout the year, even if those services are provided periodically).

A nominal fee cannot be a substitute for compensation or tied to productivity. *See* 29 C.F.R. § 553.106(e). A fee may be tied to productivity if it is paid on a per-call basis, for

example. If the amount varies, it may be indicative of a substitute for compensation or tied to productivity and therefore not nominal.

Determining whether a specific amount of expenses, benefits, or fees prevents an individual from qualifying as a volunteer under the FLSA requires an examination of "the total amount of payments made … in the context of the economic realities of the particular situation." 29 C.F.R. § 553.106(f). **As a general rule**, the US Department of Labor's Wage and Hour Division finds that a fee (apart from expenses) is nominal as long as it does not exceed 20% of the amount that otherwise would be required to hire a permanent employee for the same services. The DWD would follow this general rule if a case were presented to this agency.

B If Workers Are Employees, Ensure They Receive at Least $7.25 Per Hour Each Pay Period.

If an employer cannot show that the fees are nominal, we will consider the workers to be employees. To ensure there is no liability, the municipality will have to see that minimum wage is paid for every hour worked each pay period. This includes not only compensation per call but also on call time where the employee's activities are restricted to such a degree … "that they cannot use the time effectively for their own purposes." *See* Wis. Admin. Code § DWD 272.12(2)b.4. and 29 C.F.R. § 785.17.

Courts have looked at response time restrictions and determined that this is a case-by-case determination. In *Dinges v. Sacred Heart St. Mary's Hospitals*, 164 F.3d 1056, 1058 (7th Cir. 1999), the Seventh Circuit Court of Appeals found that emergency medical technicians were able to use on-call time effectively for their own purposes where they were subject to a seven minute response time). The Court made it clear that this was not to be interpreted to bless a 7-minute response time in all circumstances. What that lower limit should be depends upon all of the circumstances. A 15-minute response time is likely going to be okay under all circumstances; a 10-minute response time will likely work in many situations, but not all. Seven minutes is difficult, but not impossible, to support. Anything shorter would be very difficult to support.

I hope this information is useful. Feel free to contact me at 608.266.3345 if you have any questions or concerns.