

Is a town required to pay overtime compensation to a town employee who volunteers his or her services or who does part-time, occasional work for the town in addition to and separate from his or her regular duties?

Under federal law, town employees may volunteer their services to the town, for example by serving on a volunteer fire department, as long as they offer those services freely and without pressure or coercion from their employer. 29 C.F.R. § 553.101(c). In this case, the employee's role as a volunteer is separate and distinct from his or her role as a town employee; therefore, a town *does not* have to pay the employee overtime for hours he or she spends performing volunteer fire fighting services for the town. *However, this rule only applies if the type of work the volunteer is performing is not the same type of service he or she performs as a town employee.* Fair Labor Standards Act, § 3(e)(4)(A), 29 U.S.C. § 203(e)(4)(A); 29 C.F.R. §§ 553.102 and 553.103.

Whether volunteer service will be considered the "same type of service" is decided on a case-by-case basis. An employer must consider all the facts and circumstances involved before determining whether volunteer service is closely related to the actual duties performed by the employee. 29 C.F.R. § 553.103(a). An example of volunteer service that would not be considered the "same type of service" for purposes of the FLSA, is an employee of a city parks department who serves as a volunteer firefighter. 29 C.F.R. § 553.103(c). In contrast, an example of "same type of service" would be a paid supervisor of a local volunteer ambulance department who volunteers for the department for weekend emergency coverage. A second example of "same type of service" would be a nurse employed by a state hospital who volunteers medical services at a state run health clinic. 29 C.F.R. § 553.103(b).

The town should make clear to the employee wishing to volunteer:

- Volunteer work is optional and not a condition of employment with the town.
- The employee's status as a volunteer is separate and distinct from that of his or her employment with the town. Therefore, his or her regular pay, benefits and overtime regulations do not apply with respect to the volunteer work if the work is determined not to be the same type of service as his or her regular employment with the town.

Town employees may also do part-time, occasional work for the town in a separate capacity than their regular position *without* the town being required to include those hours for determining overtime compensation. 29 U.S.C. § 207(p)(2). The ability of a town to exclude those part-time hours for purposes of determining overtime compensation depends on whether the part-time work the employee performs is in a different capacity from the employee's regular position. Only if the part-time work is performed in a different capacity than the employee's regular position may the town exclude those part-time hours for purposes of calculating overtime compensation. 29 U.S.C. § 207(p)(2).

In addition, the employee must have agreed to perform those services without coercion from his or her employer and the part-time work may only be occasional and sporadic. 29 U.S.C. § 207(p)(2).

Occasional or sporadic is defined as "infrequent, irregular, or occurring in scattered instances." 29 C.F.R. 553.30(b)(1). An example of work that *would be* considered

occasional and sporadic is if a town employee sold tickets or beverages at the annual town fair. In contrast, an example of work that *would not be* considered occasional or sporadic under the law would be if a town employee filled in selling tickets or beverages at the town recreation facility every week or every other week. 29 C.F.R. § 553.30(b)(3). Whether the work the employee is performing is in a different capacity as the employee's regular position is decided on a case-by-case basis, after consideration of all the facts and circumstances. An example of work that *would not be* considered in the same capacity, would be if a town bookkeeper or mail clerk occasionally refereed a town-sponsored sporting event. 29 C.F.R. § 553.30(c)(4). In contrast, work that *would be* considered in the same capacity for purposes of determining overtime eligibility would be if a town parks employee who regularly engages in playground maintenance occasionally cleans the town recreation center. 29 C.F.R. § 533.30(c)(3). Teachers who engage in any activity associated with teaching (coaching, counseling, etc.) *will be* considered as performing duties in the same capacity, and therefore may be eligible for overtime compensation for those part-time hours. 29 C.F.R. § 533.30(c)(5). Additional questions regarding this subject may be directed to the Department of Labor, Employment Standards Administration, Wage and Hour Division in Manchester, New Hampshire, tel. 603/666-7716.

VLCT News, March 1999