

COMPENSATION/CONTACTS: COACHES AND REFEREES

ATTORNEY TONY J. RENNING
TRENNING@LAW-RLL.COM

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SCHOOL BOARD MEMBERS

- Wis. Stat. § 120.20 provides that a school board member may serve as a volunteer coach or supervisor of an extra-curricular activity if all of the following apply:
 - The school board member does not receive compensation;
 - The school board member abstains from voting on any issue that substantially and directly concerns the activity that he or she coaches or supervises while he or she is coaching or supervising; and
 - The school board receives the results of a criminal background investigation (conducted by the Department of Justice or Federal Bureau of Investigation).

FAIR LABOR STANDARDS ACT

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at not less than time and one-half the regular rate of pay for all hours worked over 40 hours in a work week.

COMMUNITY MEMBERS

- On January 5, 2018, the Department of Labor re-issued an Opinion Letter addressing the DOL's opinion as to community members serving as coaches, advisors, etc. (Wage and Hour Opinion Letter, FLSA 2018-6).
- The DOL concluded that the "teaching exemption" set forth in 29 CFR § 541.303(a) applies to the community members because the "primary duty" of their public school employment consists of student instruction.
- However, the Opinion Letter expressly noted that the DOL's opinion did not apply to individuals who are also employed by the school district in other non-exempt capacities.

TEACHERS

Teachers are educational employees exempt from salary basis:

- Involves “teaching and imparting knowledge.”
- Teaching is the “primary function of the job. This means that teaching must be the principal, main or most important duty of the job.
- Employed by an “educational establishment.”
- Factors that may establish that an employee is a “teacher” include:
 - Provides general academic instruction;
 - Holds a teaching license or certificate for the duties being performed; and
 - Delivers an established curriculum.

ACADEMIC ADMINISTRATIVE PERSONNEL

Academic Administrative Personnel – Exempt provided they are paid at least the same salary as a starting teacher:

- Primary duties involving performing administrative functions that are directly related to academic instruction or training.
- Includes administrators, such as Superintendents, Principals, Curriculum and Instruction or academic counselors.
- Does not include personnel who do not directly support academic instruction, such as custodians, food service personnel, maintenance or buildings and grounds functions.

NON-EXEMPT EMPLOYEES

- Non-exempt employees must be paid overtime if all hours worked for the same employer in a workweek exceed 40 hours (and if at two different rates of pay, the overtime rate should be a blended or agreed upon rate), unless they meet the exemption for “irregular and sporadic” work.

29 CFR § 553.30(a)

(a) Section 7(p)(2) of the FLSA provides that where state or local government employees, solely at their option, work occasionally or sporadically on a part-time basis for the same public agency in a different capacity from their regular employment, the hours worked in the different jobs shall not be combined for the purpose of determining overtime liability under the Act.

29 CFR § 553.30(b)(1)

- (b) Occasional or Sporadic.
- (1) The term occasional or sporadic means infrequent, irregular or occurring in scattered instances. There may be an occasional need for additional resources in the delivery of certain types of public services which is at times best met by the part-time employment of an individual who is already a public employee. Where employees freely and solely at their own option enter into such activity, the total hours worked will not be combined for purposes of determining any overtime compensation due on the regular, primary job. However, in order to prevent overtime abuse, such hours worked are to be excluded from computing overtime compensation due only where the occasional or sporadic assignments are not within the same general occupational category as the employee's regular work.

29 CFR § 553.30(b)(2)

(2) In order for an employee's occasional or sporadic work on a part-time basis to qualify for exemption under section 7(p)(2), the employee's decision to work in a different capacity must be made freely and without coercion, implicit or explicit, by the employer. An employer may suggest that an employee undertake another kind of work for the same unit of government when the need for assistance arises, but the employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision.

29 CFR § 553.30(b)(3)

(3) Typically, public recreation and park facilities, and stadiums or auditoriums utilize employees in occasional or sporadic work. Some of these employment activities are the taking of tickets, providing security for special events (e.g., concerts, sports events, and lectures), officiating at youth or other recreation and sports events, or engaging in food or beverage sales at special events, such as a county fair. Employment in such activity may be considered occasional or sporadic for regular employees of state or local government agencies even where the need can be anticipated because it recurs seasonally (e.g., a holiday concert at city college, a program of scheduled sports events or assistance by a city payroll clerk in processing returns at tax filing time). An activity does not fail to be occasional merely because it is recurring. In contrast, for example, if a parks department clerk, in addition to his or her regular job also regularly works additional hours on a part-time basis (e.g., every week or every other week) at a public park food and beverage sales center operated by that agency, the additional work does not constitute intermittent and irregular employment and, therefore, the hours worked would be combined in computing any overtime compensation due.

29 CFR § 553.30(c)(1)

- (c) Different Capacity.
- (1) In order for employment in these occasional or sporadic activities not to be subject to the overtime requirements of Section 7 of the FLSA, the regular government employment of the individual performing them must also be in a different capacity, i.e., it must not fall within the same general occupational category.

29 CFR § 553.30(c)(2)

(2) In general, the Administrator will consider the duties and other factors contained in the definitions of the 3-digit categories of occupations in the Dictionary of Occupational Titles (except in the case of public safety employees as discussed below in section (3)), as well as all the facts and circumstances in a particular case, in determining whether employment in a second capacity is substantially different from the regular employment.

29 CFR § 553.30(c)(3)

(3) For example, if a public park employee primarily engaged in playground maintenance also from time to time cleans an evening recreation center operated by the same agency, the additional work would be considered hours worked for the same employer and subject to the Act's overtime requirements because it is not in a different capacity. This would be the case even though the work was occasional or sporadic, and, was not regularly scheduled. Public safety employees taking on any kind of security or safety function within the same local government are never considered to be employed in a different capacity.

29 CFR § 553.30(c)(4)

(4) However, if a bookkeeper for a municipal park agency or a city mail clerk occasionally referees for an adult evening basketball league sponsored by the city, the hours worked as a referee would be considered to be in a different general occupational category than the primary employment and would not be counted as hours worked for overtime purposes on a regular job. A person regularly employed as a bus driver may assist in crowd control, for example, at an event such as a winter festival, and in doing so, would be deemed to be serving in a different capacity.

29 CFR § 553.30(c)(5)

(5) In addition, any activity traditionally associated with teaching (e.g., coaching, career counseling, etc.) will not be considered as employment in a different capacity. However, where personnel other than teachers engage in such teaching-related activities, the work will be viewed as employment in a different capacity, provided that these activities are performed on an occasional or sporadic basis and all other requirements for this provision are met. For example a school secretary could substitute as a coach for a basketball team or a maintenance engineer could provide instruction on auto repair on an occasional or sporadic basis.

VOLUNTEERS

The regulations have long permitted public employees to serve as “volunteers” for their public employers. The devil, however, as they say, is in the details.

29 CFR § 553.101(a)

(a) An individual who performs hours of service for a public agency for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours. Individuals performing hours of service for such a public agency will be considered volunteers for the time so spent and not subject to Sections 6, 7 and 11 of the FLSA when such hours of service are performed in accord with Sections 3(e)(4)(A) and (B) of the FLSA and the guidelines in this subpart.

29 CFR § 553.101(b)

(b) Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable or humanitarian purposes, but expressed its wish to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to “volunteer” their services.

29 CFR § 553.101(c)

(c) Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.

29 CFR § 553.101(d)

(d) An individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.

29 CFR § 553.106(a)

(a) Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers.

29 CFR § 553.106(e)

(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 through 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.

WAGE AND HOUR OPINION

- Albeit the “teaching exemption” does not apply to individuals who are also employed by school districts in other non-exempt capacities (e.g., coaches, advisors, etc.).
- The DOL has opined that under certain circumstances the “volunteer exemption” may apply. (Wage and Hour Opinion Letter, FLSA 2005-51).

WAGE AND HOUR OPINION

The DOL addressed the issue of a school district that paid a stipend (in this particular case \$3,765.00) to non-exempt staff who “volunteered” to serve as coaches. The Opinion Letter notes that the term “employee” does not include individuals volunteering for a public entity so long as the volunteer:

- Performs services for a school district without an expectation of compensation (except for expenses, reasonable benefits or nominal fee);
- Offers to perform the services freely and without pressure or coercion; and
- Is not otherwise employed by the school district to provide the same type of service as those the individual volunteers to perform.

WAGE AND HOUR OPINION

The DOL spent a great deal of time analyzing whether the compensation provided constitutes a “nominal fee” – If the stipend is independent of a teams success and the time spent engaged in the activity (e.g., no time cards, etc.), the stipend is more likely to be considered a nominal fee.

WAGE AND HOUR OPINION

The DOL also discussed a 20% test for determining whether a fee is nominal (does not exceed 20% of what the public agency would otherwise pay to hire a full-time coach or advisor for the same services (i.e., take into account all of the time the coach/advisor is required to put in and pay at least minimum wage)).

Purdham v. Fairfax County School Board

- 637 F.3d 421 (4th Cir. 2011).
- Security assistant (primary) and golf coach (volunteer) for approximately 20 years.
- Received a stipend for his volunteer work as coach.
- School board paid him overtime pay for 2003-05 school years and then contracted with him to coach the 2005-2006 school year due to ongoing FLSA related litigation on the issue. When the DOL came out with their clarification in 2006 the school board stated he would no longer be eligible for overtime as a result of his coaching. The school board went back to the stipend system. Purdham sued to receive all of his overtime pay.

Purdham v. Fairfax County School Board

- The determination of whether an individual is an employee or a volunteer under the FLSA is a question of law (therefore intent does not matter)
- The terms the parties use in describing the employment roles are not controlling.
- **Finding: Public school employee who also coaches the high school golf team is not owed overtime pay for his time spent coaching due to his “volunteer” status under the FLSA.**

Strout v. School Board of Broward County Florida

- 2016 WL 4804075 (SD Fla 2016).

Finding: The District Court essentially adopted Purdham.

EXAMPLES

- An elementary teacher who coaches basketball. An exempt employee voluntarily coaching basketball. Eligible for a nominal stipend but no overtime pay.
- A school secretary who coaches basketball. A non-exempt employee who becomes an exempt employee when she/he volunteers to coach basketball. A “volunteer” for the purpose of teaching basketball and eligible for a nominal stipend but no overtime pay.
- A basketball coach who also coaches basketball would not be a volunteer. An individual is “otherwise employed by the same public agency to perform the same type of services as those for which the individual purposes to volunteer. 29CFR 553.101(d).

TAKE-AWAYS

The “volunteer exemption” arguably applies to individuals employed by the District in non-exempt positions who want to coach, advise, sell tickets, etc. provided:

- The individual performs the work for the District for a nominal fee/stipend (that is fixed) – Less than 20%.
- The individual “volunteers” to perform the services.
- The individual is not otherwise employed by the District to perform the same type of services.

LICENSURE/CERTIFICATION

- Generally a certification is required to be a coach in Wisconsin. It also depends upon the level of the program. If it is a state or regional league the coach may also be required to be licensed.
- The Wisconsin Department of Public Instruction has promulgated guidelines for coaching licensure programs (540).

WIAA OFFICIALS

- To be a Licensed Official by the WIAA:
 - File application with WIAA;
 - \$35 basic fee and \$15 per sport fee;
 - Background check is required for all new officials;
 - Officials are not employees of WIAA but act as independent contractors; and
 - Submit to yearly online exam.

STUDENT OFFICIALS

- Students enrolled at WIAA member schools may apply to become WIAA Licensed Officials.
- No background check required.
- No licensing fees but can only apply through their high school athletic director.
- WIAA does not assign officials – rather high school athletic director will assign Officials.

ASSIGNMENTS

- Duration (Specific Term / Modification or Elimination).
- Stipend (Timing / Pro-Rated).
- Duties (As Assigned / Board Policies).
- Term (Annual Review / At-Will).
- Board Approval.

THANK YOU.



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