



Memorandum

To: Mr. Ignacio Saucedo, Board of Trustees President
Members of the Board of Trustees
Mr. Gilbert Gonzalez, Superintendent of Schools

From: Richard A. Strieber and Wesley Johnson

Date: May 6, 2013

Re: Non-exempt Employees Serving as Coaches

You have expressed concerns regarding allowing non-exempt employees to serve as coaches who receive stipends because of issues that will arise based on the Fair Labor Standards Act ("FLSA") and have requested our guidance in determining what, if anything, the District can do in such a situation. This legal memorandum serves to explain the confines of non-exempt at will employees who serve as coaches and sponsors of extracurricular activities within the District thereby receiving stipends and other compensation.

ANSWER AND ANALYSIS:

If specific circumstances are met, non-exempt at will employees can serve as a volunteer coach and receive a nominal stipend without the District potentially violating the FLSA by not paying overtime to the employee for the volunteer coaching. The Fair Labor Standards Act ("FLSA"), allows individuals who are performing volunteer services for units of state and local government to do so and not be considered "employees" for purposes of being concerned with overtime requirements.¹ However, these individuals must meet certain criteria. The FLSA permits an individual to perform hours of volunteer service for a public agency when such service does not involve the same type of services that the individual is employed to perform for the same public agency.² Additionally, the individual must perform the hours of service for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for services

¹ 29 U.S.C. § 203(e)(4); 29 CFR § 553.100

² 29 CFR § 553.102; An analysis of the definition of "same type of services" as defined in 29 CFR § 553.103 is provided herein.

rendered.³ A volunteer may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their services without losing their status as a volunteer. Therefore, the individual may be provided a nominal stipend for their coaching services. However, an analysis of the expenses or fees paid may occur if a complaint is lodged against the employer which may lead to a determination that the FLSA was violated.⁴ Lastly, the employee must offer their services freely and without coercion, direct or implied, from the employer.⁵

Same Type of Services

The Code of Federal Regulations for the FLSA provides an analysis of the "same type of services" as service by example.⁶ The actual duties and responsibilities of the employee in his or her actual employment assignment should be reviewed on a case-by-case basis to determine whether they are closely related to the duties and responsibilities of the volunteer service.⁷ The regulations use the example of a city police officer volunteering as a part-time referee in a basketball league sponsored by the city as an example of a volunteer service that does not constitute the "same type of service."⁸ Additionally, the Department of Labor ("DOL") has analyzed a very similar situation in which a classified employee (bus driver, maintenance worker, etc.) wishes to volunteer to coach an extra-curricular activity.⁹ In that opinion, the DOL held that such an arrangement was permissible and that these activities were not providing the "same type of services."¹⁰

However, when asked whether "teacher's assistants" could permissibly serve as volunteer coaches, the DOL answered that they could not do so without being paid for overtime.¹¹ The DOL's reasoning was that they contrasted the position of a teacher assistant who provides guidance and education to students with the position of a school employee such as a custodian, bus driver, building maintenance or food service workers in which the employee does not routinely work with students in this manner.¹² In yet another opinion, the DOL held that it would not be a violation of the overtime pay provisions of the FLSA for a security assistant at a school district to also serve as an assistant football coach because the duties of the two roles did not constitute "the same type of services."¹³

It is our opinion that the job duties of the at will employees who volunteer to serve as a coach must be sufficiently different from the duties of a coach in order to avoid violating the overtime pay provisions of the FLSA.

³ 29 CFR § 553.101

⁴ 29 CFR § 553.106

⁵ 29 C.F.R. § 553.101(b)

⁶ 29 CFR § 553.103

⁷ See *id.*

⁸ 29 CFR § 553.103(c)

⁹ Wage-Hour Opinion No. WH-1847, July 11, 1995

¹⁰ See also Wage-Hour Opinion No. WH-2056, September 22, 1997

¹¹ *Id.*

¹² *Id.*

¹³ Wage-Hour Opinion No. WH-2164, June 9, 1999; See also WH-1656, May 7, 1986 (Custodian can volunteer as an assistant baseball coach.)

Additionally, we recommend that you take this opportunity to review the volunteering roles of all at will employees in the District to ensure that FLSA violations are not occurring. For example, taking tickets and counting money at a ballgame involves responsibilities that are very similar to those of a secretary or book keeper and could be a violation of the FLSA. Future decisions to allow non-exempt employees to volunteer their services in various ways should always include an analysis of whether the services being volunteered are the same type of service as those that the employee performs in his or her actual employment assignment.

Compensation

A stipend for serving as a coach is not prohibited as long as the stipend constitutes a nominal fee. A volunteer must not be compensated for her services – the services must be offered freely and without coercion.¹⁴ However, the regulations do allow a volunteer to receive payment for expenses.¹⁵ Additionally, volunteers can be reimbursed for tuition to attend classes on how to perform the volunteer functions, transportation, meals, reasonable benefits, or nominal fees.¹⁶ The Fifth Circuit Court of Appeals has held that consideration of who is a “volunteer” requires a common-sense approach that takes into account the totality of the circumstances surrounding the relationship between the individual providing services and the entity for which the services are provided.¹⁷

The only guidance provided in the federal regulations for what constitutes a “nominal fee” is that it should not be a substitute for compensation and must not be tied to productivity.¹⁸ The factors that will be considered in whether a fee is nominal include: 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.¹⁹ Nominal monthly or annual stipends or fees can be given to an individual who volunteers to provide periodic services on a year-round basis.²⁰ The DOL has provided some opinion guidance in the matter of what constitutes a “nominal fee.” In Letter Opinion WH-1847, the DOL references a stipend as a “fixed sum of money” and states, “...if the stipend, when divided by the hours spent in [a] coaching activity would yield the equivalent of \$4.25 an hour (current minimum wage) or greater to the employee, such payment would be considered more than nominal.”²¹ Of course, the current minimum wage is currently much higher than this; however, the analysis is the same and this opinion does provide good guidance as to how an appropriate stipend for a volunteer coach should be determined.

¹⁴ See 29 CFR 553.101; See also FLSA2006-40 (DOL letter)

¹⁵ 29 CFR § 553.106(b)

¹⁶ 29 CFR § 553.106(c)-(e)

¹⁷ *Cleveland v. City of Elmendorf*, 388 F.3d 522, 528 (5th Cir. 2004)

¹⁸ 29 CFR § 553.106(e)

¹⁹ *Id.*

²⁰ *Id.*

²¹ Wage-Hour Opinion No. WH-1847, July 11, 1995; See also WH-2191, September 17, 1999 (Juvenile counselor can also work as a reserve sheriff, but not at a rate of \$11.60 per hour.); WH-2173, August 6, 1999 (DOL refused to answer whether payment of \$1,500.00 – 2,500.00 for officers of a volunteer fire protection was a “nominal fee” due to lack of sufficient information, presumably, the amount of time actually spent “on-duty” performing volunteer services.)

If a non-exempt employee is serving as a volunteer, we recommend that you perform an internal review of the employee's hours actually worked performing the various coaching duties and divide the stipend that is received by the number of hours that are volunteered. Time spent talking to parents, analyzing videos, training students, charting practice schedules, coordinating with coaches from opposing teams, and traveling should all be factored into the time spent volunteering. You should then ensure that the employee is not being compensated for the time spent volunteering at a minimum pay rate. For example, if the employee spends 100 hours in their role as head volleyball coach – planning for and attending practices and games, communicating with players and their parents as well as other coaches and teams and UIL, etc., then a \$3,000 stipend should not be problematic. $\$3,000/100$ is $\$3.00/\text{hour}$ which is well below minimum wage and looks more like a nominal fee.²² Stipends for another volunteer situation may require further or additional analysis.

Additionally, the fact that the employee wants to volunteer for the position because of the stipend does not prohibit them from serving as coach or from receiving the stipend. At least one higher court has held that the fact that the employee is motivated by the stipend is irrelevant to this analysis. Therefore, the employee can even elect to volunteer because of the stipend without fear that the positive nature of a stipend will negate the fact that it is merely a nominal fee.

No Coercion

It is important that any non-exempt employee who wishes to also volunteer with the District is doing so “freely and without pressure or coercion, direct or implied, from an employer.”²³ The non-exempt employee should sign a written acknowledgment indicating that they understand that they are free to elect to either volunteer or not volunteer for various coaching opportunities. It should be made clear to non-exempt employees who volunteer that volunteering is optional and not required. If this is not the case, then the District could potentially be found in violation of the FLSA. Having the opportunity to decline a volunteer opportunity without fear of any retribution or negative results is essential to this part of the volunteer analysis.

Conclusion

A non-exempt employee's volunteering as a coach does not violate the Fair Labor Standards Act overtime provisions if the individual is serving in a different capacity than that of the everyday job duties, only receives a nominal fee for volunteering, and is truly serving as a volunteer. An analysis should be made in each specific situation. An analysis would include comparing the tasks that are performed in the employee's regular job and the coaching responsibilities to ensure that they are significantly different to pass the “same services” portion of the analysis. A stipend is acceptable as long as it constitutes a nominal fee for purposes of the FLSA analysis. This portion of an analysis would involve calculating the hours served as a volunteer coach and dividing them by the amount of the stipend to ensure that the stipend is not minimum wage or

²² The regulations provide that a nominal fee should (1) not be a substitute for compensation; (2) must not be tied to productivity; and (3) should be examined by the total amount of payments made...in the context of the economic realities of the particular situation. *Purdham v. Fairfax County Schl. Bd.*, 637 F.3d 421 (4th Cir. 2011) citing 29 C.F.R. § 553.106(e)-(f)

²³ See 29 C.F.R. § 553.101(c)

higher. The more hours that are worked in the volunteer capacity as coach, the greater the argument that the stipends paid for each volunteer opportunity are, in fact, a nominal fee. The fact that the employee likes receiving a stipend or is motivated to volunteer because he receives a stipend will not affect the analysis. The last part of the analysis considers whether the employee is coerced, either directly or indirectly, to volunteer. We can assist you with an analysis of specific employees and the specific coaching roles/stipends, etc. if desired.

We appreciate having the opportunity to assist you. Please do not hesitate to contact us if you have further legal questions.

[DISTRICT LETTERHEAD]

VOLUNTEER AGREEMENT

School Year: _____

I, _____, volunteer my time and service to participate as
for the position of _____ at _____ School.

My signature below indicates the following:

- My time and service in this volunteer capacity are given without promise, expectation or receipt of compensation, benefits or other remuneration for this service other than a nominal fee of \$_____ to be given to me by the District as reimbursement for my expenses associated with the volunteer work.
- I understand and agree that my volunteer participation is not being performed in the course and scope of my regular employment with the District and that my participation in this activity is not in any way required by the Eagle Pass Independent School District.
- I acknowledge and agree that my volunteer services do not involve the same or similar type of services I perform as an employee of the Eagle Pass Independent School District, nor are these volunteer services closely related to my duties and responsibilities as an employee.
- I understand that my participation as a volunteer may be terminated at any time, without cause, and that I may withdraw from participation at any time for any reason and that my withdrawal will not affect my continued employment with the Eagle Pass Independent School District.

This agreement will continue in force until terminated.

Volunteer Signature

Date

Authorized School Official

Date