

The Ultimate Backup

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RAINS, LUCIA & WILKINSON LLP

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FLSA PROHIBITS EMPLOYER FROM ALLOWING DEPUTY TO SERVE AS A VOLUNTEER RESERVE

By Alison Berry Wilkinson

A deputy sheriff would not be allowed to volunteer his or her services as a reserve for the same employer, the United States Department of Labor (DOL) ruled in a recently released opinion letter, because the uncompensated duties were the same type of services for which the deputies are paid. (Wage and Hour Opinion Letter, May 22, 2001.)

In the opinion letter, the DOL stated: "To allow public employees to volunteer to perform for their public agency employer the same type of services for which they are paid raises the potential for abuse which Congress clearly had in mind in enacting this section of the law." Indeed, although the FLSA was not intended to discourage or impede volunteer activities undertaken for "civic, charitable or humanitarian purposes", the FLSA was specifically designed to "prevent any manipulation or abuse of ... overtime requirements through coercion or undue pressure upon individuals to 'volunteer' their services." 29 C.F.R. section 553.101

Even where the employer is not forcing the employee to volunteer the additional services, someone who is willing to receive no pay to perform services similar to his or her regular paid duties would, in effect, be waiving his or her rights

under the FLSA, which is specifically prohibited by the United States Supreme Court decision in *Brooklyn Savings v. O'Neil*, 328 U.S. 697 (1945).

It is important for every peace officer to be aware that section 3(e)(3)(A)(ii) of the FLSA does not permit an individual to perform hours of volunteer service for a public agency when such hours involve the "same type of services" which the individual is employed to perform for the same public agency. Examples of volunteer services which do not constitute the "same type of services" include: A city police officer who volunteers as a referee in a city-sponsored basketball league, and a city parks department employee who volunteers as a city firefighter. See, 29 C.F.R. section 553.103(c). Notably, however, the FLSA allows individuals who are not employed in any capacity by a state or local government agency to donate hours of service for civic or humanitarian reasons.

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