

# **2013 Volunteer 360° Task Force Report**

**Oregon Fire Chiefs Association**

**November 4, 2013**

## Executive Summary

The purpose of this Report is to recommend best practices for volunteer firefighter recruitment and retention, with a specific focus on reimbursement and compensation issues. Comprehensive review of relevant rules and laws, personal interviews, and an on-line survey of Oregon fire departments were used to collect the data for this report. The Task Force then analyzed these results and consulted with advisors in addressing the often-conflicting definitions and policies of various state and federal agencies. **These recommendations are advisory in nature, as each fire agency must decide what is in its own best interests.**

The Task Force's recommendations include:

1. Change is needed in federal and state laws to eliminate inconsistencies and to remove unnecessary barriers to volunteer service.
2. Each fire services agency should promptly review its volunteer program, in consultation with its legal counsel. Agencies across the state have shared ideas for components of volunteer programs that help attract and retain volunteers. This Report defines some of these components of a volunteer program. It also presents two bundles of components, along with the likely consequences of each for federal and state purposes.
  - a. Plan A describes a program for traditional volunteers who are not paid any cash compensation, but who receive components such as reimbursements under an Accountable Plan, working condition fringe benefits, and LOSAP.
  - b. Plan B describes a program in which volunteers are paid cash compensation, but not more than a nominal fee, and may also receive one or more components of a Plan A program.
3. Volunteers should be treated as employees for employment tax and withholding purposes, and should be issued W-2's if taxable compensation is paid to them (Plan B, for example). Volunteers should not be issued a Form 1099 and treated as independent contractors.

4. Fire service agencies should adopt Accountable Plans to reimburse appropriate expenses in Plans A and B. If they use nonaccountable plans, they should treat the reimbursement as taxable compensation (Plan B).
5. Resident volunteer programs should be carefully reviewed to ensure that they meet DOL and other requirements.
6. Student Intern programs should be carefully reviewed to ensure that they meet DOL, BOLI, and PERS exemptions.
7. Student intern programs should be treated separately from resident volunteer programs. They are two different programs.
8. All compensation programs that involve cash payments to volunteers should be carefully scrutinized to ensure that they result in only nominal fees to volunteers. Payments should not be tied to hours or productivity.
9. Any fire service agency that pays a separate volunteer association, which is then expected to pay volunteers for their activities, should immediately cease that practice and consult with legal counsel.
10. A fire service agency can provide a reasonable amount of educational training and classes for volunteers, if the education is related to the needs of the fire agency and training of the volunteer to conduct his or her activities as a volunteer.
11. Whether volunteer emergency personnel are potentially subject to PERS remains unresolved at the time of this writing. PERS apparently takes the position that the issuance of a W-2 triggers PERS reporting and potential contributions. The Task Force disagrees with this position, and is seeking a dialogue with PERS with the objective of finding an approach better suited to the realities of today's fire service.

Because there are significant differences of opinion on which methodology is considered a “Best Practice,” policy makers should seek legal counsel in this area and carefully document their analysis and reasoning for making a determination of the nature of compensation and type of IRS reporting.

There is no interest by OFCA or the Volunteer 360 Task Force in removing or decreasing any benefits provided to volunteer firefighters, but there are significant requirements and liabilities that go along with providing them. It is important that agencies with volunteer firefighters understand the responsibilities and liabilities that accompany the compensation of volunteers. This document does not “fix” anything in terms of the complicated issues that agencies with volunteers are and have been experiencing. It merely points out some of the confusion and the requirements that currently exist in state and federal rules and laws. These laws are not likely to change, especially on a federal level, without a better understanding by legislators of the complexity of the rules applicable to the fire service. Until such time as these laws change and/or become consistent with each other, confusion will continue to exist.

Respectfully submitted,

Volunteer 360 Task Force

\_\_\_\_\_, 2013

APPROVED:

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Oregon Fire Chiefs Association  
Date: \_\_\_\_\_, 2013

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Special Districts Association of Oregon  
Date: \_\_\_\_\_, 2013

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## Table of Contents

Executive Summary .....	2
Table of Contents .....	5
Introduction and Background .....	6
Task Force Procedure and Objectives.....	7
Definitions.....	9
Survey Results .....	22
Discussion .....	28
Recommendations.....	34
Reference List .....	40
Appendix A (Selected Laws/Policy Statements) .....	42
Appendix B (Sample Accountable Plan) .....	45
Appendix C (Chart: Employee Definitions.....	46
Appendix D (Survey Questions) .....	48
Appendix E (Chart: Comparison Tax Consequences of Plans A and B).....	51
Appendix F (What If's) .....	52

### **Introduction and Background**

Oregon fire service agencies have long struggled with the proper design of volunteer programs that include reimbursement of expenses or the provision of some sort of compensation to volunteer firefighters in recognition of their important service to their communities. Multiple Oregon fire agencies have faced audits, inquiries and legal challenges from the Internal Revenue Service (IRS), the Oregon Bureau of Labor and Industries (BOLI), the US Department of Labor (DOL), and the Oregon Public Employees Retirement System (PERS).

The problem is that each federal and state agency has its own set of laws, rules, definitions, and policies about volunteers, and some of these rules and policies conflict with each other. Fire agencies have a legitimate and genuine problem understanding and trying to comply with these laws that do not work in harmony to accommodate the needs of today's fire service.

Additionally, some fire service agencies are understandably concerned with changing existing practices that may be noncompliant, due to concerns that include the potential loss of volunteers.

Noncompliance can have enormous negative consequences for fire services agencies, including significant potential financial exposure for back wages and benefits, PERS contributions, and/or fines and penalties, as well as legal expenses.

In 2008, the Governor's Fire Policy Task Force, the Oregon Fire Chiefs Association, the Oregon Fire Districts Directors Association, and the Oregon Volunteer Firefighters Association prepared the "Volunteer Compensation Practices," which was a guide to best practices. Due to information that has since been clarified, that document has been pulled from publication. This Report is intended to replace the 2008 Guide.

### **Task Force Procedure and Objectives**

The Task Force was first assembled on April 12, 2013 in Canby, Oregon. A series of meetings and communications followed over several months. The work was divided into four categories: Resident Volunteer/Intern, Compensation, PERS, and Definitions. A survey was developed to determine how volunteers have been utilized in Oregon, methods of compensation, student/resident volunteer programs, and recruitment and retention tools. Input was sought from all Task Force members and nearly the entire Oregon fire service. Results and data were assembled and analyzed by the Task Force leaders. The Task Force used a collaborative approach to clarify the laws and develop ideas for compensation and to offer recommendations for Oregon's fire service agencies that utilize volunteers. The final document was approved and adopted by the Board of the Oregon Fire Chiefs Association on Nov. 4, 2013.

#### **A. Mission Statement**

To develop an Oregon recommended Best Practices document by defining the role of the Oregon Fire Service volunteer firefighters, resident volunteers and interns, and recommend recruitment, retention, and incentive practices.

#### **B. Objectives**

1. Develop a 360° description of the different ways volunteers are utilized throughout the state of Oregon. Develop a survey of fire service agencies to meet this objective.
2. Define a model incentive plan for volunteers that is in compliance with the Internal Revenue Service (IRS), the US Department of Labor (DOL), the Bureau of Labor and Industries (BOLI), and the Public Employees Retirement System (PERS) requirements.
3. Combine the above definitions into recommended best practices.

The Task Force concluded that it is not possible to recommend a single volunteer program. Oregon fire service agencies vary widely in their needs, goals and capacities to provide volunteer programs, so no one program would be suitable for all agencies. This report identifies components of volunteer programs that are prevalent among Oregon agencies and comments on

the likely consequences of using these components under federal and state law. The report also illustrates two different "bundles" of volunteer program components, which are referred to as Plan A and Plan B, and comments on the relative advantages, disadvantages and risks of each.

However, the many inconsistencies and uncertainties in federal and state laws applicable to volunteer programs makes it impossible for the Task Force to recommend any particular program or program component. Each fire service agency should consult with its own legal counsel in reviewing its current program and adopting any new components.



## **Definitions**

As described above, the various state and federal agencies that address volunteer issues have differing (and sometimes conflicting) laws, rules and policies—and especially definitions. The Task Force recognizes that compliance by a fire service agency depends on a proper understanding of the various terms that may have specialized meaning for an agency, or different meanings for different agencies. This section of the Report offers definitions of terms commonly used in the fire service in connection with volunteers. **Appendix A** provides selected laws, rules and policies of various agencies.

### **A. Accountable Plan**

A fire service agency may reimburse certain expenses that volunteers pay personally, either through an "Accountable Plan" or a "nonaccountable plan" (a plan that does not qualify as an Accountable Plan). An Accountable Plan has significant tax benefits. In order to qualify as an Accountable Plan, a plan should be written and it must include the following:

1. It must only allow for reimbursement of expenses that qualify as "trade or business" or similar business expenses under the Internal Revenue Code (IRC) and that are paid in connection with the performance of volunteer services;
2. Volunteers must account for these expenses, with proper substantiation, to the fire service agency within a reasonable period of time after incurring them; and
3. If advances for expenses are given, volunteers must return any excess allowance within a reasonable period of time. See Treas. Reg. §1.62-2(d)-(f).

A fire service agency may have both an Accountable Plan *and* a nonaccountable plan operating at the same time. These would have different tax consequences. A sample Accountable Plan is included as **Appendix B**.

See also Definitions, "Reimbursement."

### **B. Compensation**

1. Tax Definition: Anything of Value

For tax purposes, "compensation" is anything of value paid for services rendered, regardless of the form of payment, whether in cash or property. "Current" compensation is compensation that is paid at or near the time of providing services. "Deferred" compensation is compensation that is paid at a time later (usually much later) than the services are performed. For tax purposes, all "compensation" is included in the gross income of the recipient, unless a specific exclusion can be found in the Code or in judicial or administrative exceptions. Compensation can include reimbursement for expenses, unless provided under an Accountable Plan. Making a volunteer "whole" after he or she suffers a loss, however, is generally not considered "income," even in the compensation setting. For example, replacement of the fair market value of eyeglasses or clothing destroyed in the course of volunteer service is generally considered to be nontaxable, although this has not recently been tested.

## 2. Other Definitions: Only Taxable Amounts?

In some situations, "compensation" refers only to taxable amounts paid to a volunteer. There is some suggestion in the PERS arena, for example, that reimbursements under an Accountable Plan or certain nontaxable fringe benefits do not constitute compensation.

## C. Employee

Probably the most misunderstood word in the volunteer arena is "*employee*." This is because each of the six governmental agencies discussed in this Report has a different definition of the word "employee" (and two use different tests for different purposes!). **Appendix C** provides a chart summarizing the various definitions.

### 1. Internal Revenue Service (IRS): Employee or Independent Contractor for Employment Tax Purposes?

The IRS distinguishes between "employees" and "independent contractors" in order to assign the responsibility for withholding and payment of income and employment taxes. An employee's employer must withhold and pay to taxing authorities both income and employment taxes, and must issue a W-2 to the employee at the end of each year. An independent contractor pays self-employment taxes, and receives 1099s from those that pay him or her any amount over \$600.

The IRS has long used a 20-factor test to make this distinction. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are

performed, and factors other than the listed 20 factors may also be relevant. The 20 factors identified by the IRS are as follows:

- 1) Instructions: If the person for whom the services are performed has the right to require compliance with instructions, this indicates employee status.
- 2) Training: Worker training (e.g., by requiring attendance at training sessions) indicates that the person for whom services are performed wants the services performed in a particular manner (which indicates employee status).
- 3) Integration: Integration of the worker's services into the business operations of the person for whom services are performed is an indication of employee status.
- 4) Services rendered personally: If the services are required to be performed personally, this is an indication that the person for whom services are performed is interested in the methods used to accomplish the work (which indicates employee status).
- 5) Hiring, supervision, and paying assistants: If the person for whom services are performed hires, supervises or pays assistants, this generally indicates employee status. However, if the worker hires and supervises others under a contract pursuant to which the worker agrees to provide material and labor and is only responsible for the result, this indicates independent contractor status.
- 6) Continuing relationship: A continuing relationship between the worker and the person for whom the services are performed indicates employee status.
- 7) Set hours of work: The establishment of set hours for the worker indicates employee status.
- 8) Full time required: If the worker must devote substantially full time to the business of the person for whom services are performed, this indicates employee status. An independent contractor is free to work when and for whom he or she chooses.

- 9) Doing work on employer's premises: If the work is performed on the premises of the person for whom the services are performed, this indicates employee status, especially if the work could be done elsewhere.
- 10) Order or sequence test: If a worker must perform services in the order or sequence set by the person for whom services are performed, that shows the worker is not free to follow his or her own pattern of work, and indicates employee status.
- 11) Oral or written reports: A requirement that the worker submit regular reports indicates employee status.
- 12) Payment by the hour, week, or month: Payment by the hour, week, or month generally points to employment status; payment by the job or a commission indicates independent contractor status.
- 13) Payment of business and/or traveling expenses. If the person for whom the services are performed pays expenses, this indicates employee status. An employer, to control expenses, generally retains the right to direct the worker.
- 14) Furnishing tools and materials: The provision of significant tools and materials to the worker indicates employee status.
- 15) Significant investment: Investment in facilities used by the worker indicates independent contractor status.
- 16) Realization of profit or loss: A worker who can realize a profit or suffer a loss as a result of the services (in addition to profit or loss ordinarily realized by employees) is generally an independent contractor.
- 17) Working for more than one firm at a time: If a worker performs more than de minimis services for multiple firms at the same time, that generally indicates independent contractor status.
- 18) Making service available to the general public: If a worker makes his or her services available to the public on a regular and consistent basis, that indicates independent contractor status.
- 19) Right to discharge: The right to discharge a worker is a factor indicating that the worker is an employee.

- 20) Right to terminate: If a worker has the right to terminate the relationship with the person for whom services are performed at any time he or she wishes without incurring liability, that indicates employee status. *See* Revenue Ruling 87-41, 1987-1 C.B. 296.

More recently, the IRS has identified three categories of evidence that may be relevant in determining whether the requisite control exists under the common-law test and has grouped illustrative factors under these three categories: (1) behavioral control; (2) financial control; and (3) relationship of the parties. The IRS emphasizes that factors in addition to the 20 factors may be relevant, that the weight of the factors may vary based on the circumstances, that relevant factors may change over time, and that all facts must be examined.

For future consideration, the Affordable Care Act (ACA) may have an interesting impact on volunteer firefighters, particularly in organizations employing 50 or more employees (defined by the number of W-2's issued). At the time of this publication it is unclear what impact that the ACA will have on volunteer compensation. Because IRS considers volunteers to be employees (IRS, Fringe Benefit Guide 2013 page 86), and is the appointed agency to help enforce the ACA, volunteers may be considered employees for this purpose. The International Association of Fire Chiefs (IAFC) and the National Volunteer Fire Council (NVFC) have asked for a clarification on the issue because the law may create unintended consequences for fire service agencies.

## 2. Internal Revenue Service – Fringe Benefits and Deduction Purposes

Certain fringe benefits are available only to "employees." In addition, employees are treated as being engaged in a "trade or business," so they may deduct certain ordinary and necessary business expenses associated with employment, but only to the extent such expenses exceed 2% of their adjusted gross income. Although the issue is not free from doubt, it appears that the IRS applies a different standard than the 20-factor test to determine whether a person is an "employee" for fringe benefit and deduction purposes.

For these purposes, a person performing services provides them either (1) in an "employment context," as an "employee;" or (2) in a "non-employment context," as a non-employee. (A person might also perform services for purely personal purposes, which is beyond the scope of this discussion.)

To be an employee for these purposes, a person must engage in the regular activity of providing services with the bona fide intention and expectation of making a profit or obtaining income.

It is critical that a volunteer not have the intention or expectation of making a profit through volunteering in order to be considered a volunteer for FLSA purposes (and avoid minimum wage issues). See Definitions, "Volunteer." If a person does not have a profit motive for fringe benefit purposes, he or she will be treated as providing services for another in a "non-employment" context, i.e., as a volunteer (not an employee), who cannot qualify for tax-free employee fringe benefits. However, there is one exception. If the recipient of those services is a governmental entity, a profit motive is imputed to the volunteer for purposes of "working condition fringe benefits" (§ 132(d) of the Code). For other fringe benefit purposes, the person is not treated as having a profit motive. See Definitions, "Fringe Benefits."

3. Oregon Department of Revenue (ODR) and Oregon Employment Department (OED): Employee or Independent Contractor?

Like the IRS, the ODR must distinguish between employees and independent contractors for tax purposes, and the OED must do so for unemployment purposes. Both agencies refer to ORS 670.600, which defines an employee as a person other than an independent contractor. To be an independent contractor, the statute requires that:

- 1) The worker be free from direction by the employer; and
- 2) The worker be customarily engaged in an "independently established business" (as proven by specific factors); and
- 3) The worker is responsible for any licenses or certificates necessary to provide the service.

4. Federal Department of Labor (DOL): Employee or Independent Contractor?

The DOL defines employees for purposes of wage/hour laws, including employment taxes, using the "economic reality" five-part test, which refers to the following factors:

- 1) the degree of control exercised by the alleged employer;
- 2) the extent of the relative investments of the [alleged] employee and employer;

- 3) the degree to which the "employee's" opportunity for profit and loss is determined by the "employer";
- 4) the skill and initiative required in performing the job; and
- 5) the permanency of the relationship.

5. Oregon Bureau of Labor & Industries: Employee or Independent Contractor? BOLI must define an "employee" for two purposes. First, for purposes of wage and hour determinations, BOLI uses the "economic reality" test discussed above. Second, for civil rights issues, BOLI uses a "right to control" test. Under the "right to control test," four factors are weighed to determine whether an employer has the "right to control" the work of an individual. Where an employer clearly has the "right to control" the work of an individual under this test, that individual is deemed an employee rather than an independent contractor. The factors of the "right to control" test are:

- 1) Direct evidence of the right to, or the exercise of, control;
- 2) The method of payment;
- 3) The furnishing of equipment; and
- 4) The right to terminate employment.

It is not necessary that all factors coincide to determine whether a given worker is an employee. In such cases, the weight or strength of the factors present will be considered.

#### **D. Fringe Benefits**

For tax purposes, it is helpful to classify payments of value to volunteers as cash payments or "fringe benefits." The Code provides an exclusion from gross income for certain fringe benefits provided to employees. Of these, the most important for the fire services are "working condition fringe benefits." These are benefits provided to an employee which, if incurred directly by the employee, would be deductible under §162 or §167-168 of the Code. Another important fringe benefit to fire agencies is the value of lodging provided to resident volunteers. Section 119 of the Code excludes from an employee's gross income the value of lodging on the employer's premises provided to an employee so that the employee can be on-call for the employer.

Generally, for tax purposes, in order to exclude a fringe benefit from income, the recipient must be an "employee," *See* Definitions, "Employee." For these purposes, "employee" is defined as a

person who regularly carries on an activity with the expectation and intention of making a profit or generating income. Volunteers generally do not have a profit motive or the expectation of generating income when they undertake volunteer service. Treasury Regulation § 1.132-5(r) imputes a profit motive for purposes of working condition fringe benefits, but not for any other fringe benefit. That said, in two court cases interpreting the Code section (§119) that provides tax-free lodging, the IRS did not take the position that volunteers provided lodging by a charity must include the amounts as gross income because they were not employees. In those cases, the IRS' objection was that the lodging was not for the convenience of the employer or on the business premises of the employer. That gives fire agencies some comfort that a resident volunteer would not have gross income in the amount of the fair market value of the lodging. The IRS has not issued a public ruling on this issue, however, and there may be other reasons that the IRS is not interested in pursuing this issue.

For PERS purposes, nontaxable fringe benefits are not considered "salary," and should not trigger PERS reporting, contributions or benefits. This position of PERS on this issue is unclear, however, and discussions are ongoing to find an approach suitable for the fire service.

## **E. Interns**

Significant confusion has existed regarding the definition of an "intern" in the fire service.

### **1. Intern--Federal Department of Labor**

The US DOL Wage and Hour Division uses the following six criteria to determine whether a person is an "intern" under the Fair Labor Standards Act:

- 1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- 2) The internship experience is for the benefit of the intern;
- 3) The intern does not displace regular employees, but works under close supervision of the existing staff;
- 4) The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- 5) The intern is not necessarily entitled to a job at the conclusion of the internship; and



- 6) The employer and the intern understand that the intern is not entitled to wages for the time spent in internship.

Oregon BOLI uses these same criteria but it is important to note that the US DOL uses these as criteria for “private sector” employers while BOLI appears to apply the test to public sector agencies as well. There is no substantive reason that the same test cannot apply to both private and public entities.

## 2. Internal Revenue Service—Intern (Student Worker)

The IRS views most interns as employees, using the same test as it uses in distinguishing between employees and independent contractors. Certain students performing services for colleges and universities are excused from paying FICA taxes on compensation paid to them, if certain requirements are met. However, this exception does not apply to fire service agencies, even if the worker is enrolled in a college program.

## 3. PERS - Student Workers

ORS 238A.005(4)(d) provides that an eligible employee does not include a “student employee.” A student employee is defined as a person designated by the participating employer as a student employee, and who:

- 1) Is enrolled at least half time in a school and whose employment is principally for the purpose of furthering the person’s education; or
- 2) Is an employee who works during a break or between semesters or quarters of study provided that the student employee has indicated his or her intent to resume at least half-time enrolled status following the break, provided that the break does not exceed an academic quarter or semester, and the employer has a reasonable expectation that the employee shall resume at least a half-time enrolled status following the break.

ORS 238.015(4); 238A.005(4), OAR 459-010-0025.

## F. LOSAP Plan

The Length of Service Award Program (LOSAP) is a tool to help fire service agencies attract and retain volunteer firefighters. LOSAP is a benefit that provides volunteers an incentive to continue

service and expresses appreciation for a volunteer's years of service. In a LOSAP plan, the fire service agency makes a contribution to a non-qualified deferred compensation plan for the benefit of a "bona fide volunteer." A LOSAP Plan is not a qualified plan, such as a 401(k) Plan or PERS. A LOSAP can have significant tax advantages: (1) the volunteer isn't taxed on the income until it is distributed to him or her; and (2) the income is not subject to employment taxes. The Oregon Fire Districts Directors Association sponsors a LOSAP program, which the Task Force supports.

### **G. Reimbursement**

Reimbursement is a payment by a fire service agency to a volunteer to repay him or her for expenses that the volunteer actually pays in connection with the performance of volunteer services. For example, a fire service agency may reimburse a volunteer for his or her travel expenses. These can be the actual out-of-pocket expenses, or a mileage rate can be used. Or the volunteer might pay tuition for a fire services-related class. An agency might reimburse him or her for all or part of that tuition. Reimbursement can be accomplished through an Accountable Plan or a nonaccountable plan (see Definitions, "Accountable Plan").

It is also important to know what reimbursement is not, as the Task Force Survey suggests some confusion about what constitutes reimbursement. When a fire agency itself initially incurs the cost of providing a benefit to volunteers, that is not treated as "reimbursement." Using the previous example, if an agency were to pay a volunteer's tuition, this would not be "reimbursement." See Definitions, "Fringe Benefits."

A note on mileage: A volunteer may be reimbursed for his or her actual expenses (gas and oil, but not insurance or repairs) of operating a vehicle for the benefit of a fire services agency. However, the administrative burden of reimbursing actual expenses leads most agencies to use the alternative "mileage rate." Under general Accountable Plan principles, reimbursement of mileage would be proper only for mileage from the station to an emergency scene, or for out-of-town trainings, etc. Mileage from a volunteer's home to the station would not be reimbursable because it would be considered the personal expense of commuting. Because most volunteers do not take their own cars to scenes, this would not generate a large reimbursement amount for most volunteers.

However, the IRS generally allows reimbursement at the charitable mileage rate (currently 14 cents per mile) for vehicles used in the service of a governmental/charitable entity. "In service of" can potentially include mileage from a volunteer's home to a station, although the IRS has never ruled specifically on that issue. Therefore, a fire service agency could adopt a mileage plan with two different mileage rates: (1) the charitable mileage rate for what would be considered "commuting miles;" and (2) the business mileage rate (currently 56.5 cents per mile) for other service-related uses. Obviously having two different rates for volunteers creates an administrative burden and so the most practical solution is to adopt the .14 cents per mile for all volunteer reimbursement.

## **H. Volunteer**

As with other terms, "volunteer" means different things to different agencies.

### **1. "Volunteer" as used in the Fire Service**

In general, a volunteer is defined in the fire service as an individual who performs services without pay for a fire service agency to serve his or her community. Within the category of volunteers, there are subcategories that raise special issues. A "resident volunteer" is a volunteer who lives at a fire station and is expected to respond to calls when on the premises and available. An "intern" is a volunteer who is pursuing a degree in emergency services and participates in the volunteer program as part of that educational program.

### **2. Volunteer for Wage/Hour Purposes--US Department of Labor**

For DOL purposes, a volunteer is an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, or expectation of receipt of compensation for services rendered. Individuals are considered volunteers only when their services are offered freely and without pressure or coercion, direct or implied, from an employer.

Individuals do not lose their volunteer status if they receive a "nominal fee" from a public agency. Payments to volunteer firefighters of expenses, reasonable benefits or a nominal fee are allowed under 29 CFR 553.106 (e) for the purposes of excluding volunteers from the requirements of federal wage and hour laws. The precise threshold for "reasonable" has yet to be established by the US Department of Labor. A nominal fee is not a substitute for compensation and must not be tied to productivity. However, this does not necessarily preclude

the payment of a nominal amount on a “per call” or similar basis to volunteer firefighters. Any volunteer compensation should not exceed 20% of the **hourly rate not including benefits** of the lowest paid firefighter. The US DOL has provided conflicting definitions and interpretation of the 20% rule.

### 3. “Volunteer” for Tax Purposes—IRS

The term "volunteer" does not appear frequently in the Internal Revenue Code or its regulations. The concept does arise, however, in the context of employment taxes and certain fringe benefits.

#### 1) Volunteers as Employees for Employment Tax Purposes

The IRS states in its Fringe Benefit Guide that:

“A volunteer is an employee under common law if an entity has the right to direct and control the volunteer's performance, not only as to the results to be accomplished, but also as to the methods by which the results are accomplished.” (IRS, Fringe Benefit Guide 2013, p. 85)

If a volunteer firefighter is an employee, any taxable compensation paid is considered wages for purposes of income and employment taxes. Withholdings are required and must be reported quarterly and on Form W-2. The IRS views volunteer firefighters as employees, not independent contractors.

#### 2) Volunteer Fringe Benefits

The fringe benefit regulations provide that "working condition fringe benefits" may be paid to a volunteer as a tax-free fringe benefit, even though the volunteer does not have a profit motive. For these purposes, the IRS defines a volunteer as a person who provides services that have a value greater than the remuneration paid. Treas. Reg. 1.132-5(r). Section 457 of the Code, which authorizes LOSAP plans, defines a volunteer in the same way as the DOL, i.e. a person who receives reimbursement of reasonable expenses, reasonable benefits, and nominal fees for services.

### 4. “Volunteer firefighter” – Wage and Hour/Employment Issues

ORS 652.050(3) states that "volunteer firefighter" means a person who performs services as a firefighter for a regularly organized fire department and whose work hours and work shifts are

voluntary and whose volunteer service is not a condition of employment. ORS 653.020(12) exempts volunteer firefighters from state minimum wage.

5. Volunteer - PERS

PERS excludes from the term "employee" a number of classes of people, including, "[A]n individual providing volunteer service to a public employer without compensation for hours of service as a volunteer, except for volunteer firefighters who establish membership in accordance with ORS 238.015(6)." See OAR 459-005-0001(12)(b)(C).

## **Survey Results**

An electronic SurveyMonkey survey (**Appendix D**) was sent by email to OFCA member agencies during July and August of 2013 to determine current practices for reimbursement, recruitment and retention. One hundred and two (102) departments responded to the survey. The results of this survey help achieve Objective 1 of the Task Force: *to develop a 360° description of the different ways volunteers and resident volunteers are used throughout the state of Oregon.*

### **A. Who Utilizes Volunteers, and How?**

According to survey results, 95 of 102 (**93%**) survey respondents indicated that they utilize the services of volunteers, and in multiple forms in the same agency. Of those, 95% utilize combat volunteer firefighters, 72% utilize non-combat volunteers for a variety of functions, 52% utilize EMS-only volunteers, 31% have community (CERT, NERT or Firecorp) volunteers, and 32% have cadet or Explorer programs. Other functions include chaplain, Public Information Officer (PIO), public education, and specialty rescue teams.

### **B. How are Volunteers Compensated or Reimbursed?**

When asked how volunteers are either compensated or reimbursed, 75% of survey respondents reported that they offer uniform items, 75% hold an awards banquet, 69% offer financial compensation, 60% offer some form of educational reimbursement, 58% offer life insurance, 31% offer food and 31% offer some type of other insurance related benefit, such as workers comp and accidental death and disability. Nineteen percent (19%) indicated that they reimburse actual expenses incurred. Among other benefits offered are air and ground ambulance memberships, LOSAP plans, and drawings for prizes. One indicated that it turns (city) money over to the volunteer organization, which then pays the volunteers.

When asked about the basis of compensation, 54% of survey respondents indicated that they use some type of a point system to determine how much volunteers are paid for alarms and training with *no tie* to hours “worked,” 18% indicated that they pay based on hours attended for alarms, training, and 18% indicated pay for shifts worked or attended. Fourteen percent (14%) base reimbursement on actual expenses incurred and 23% indicated the question was not applicable to

them. Points are awarded for activities such as public education activities, or a certain number of hours. Points can also tie to LOSAP contributions. One indicated that they pay “stipends” per calls and drills and state that they are paying above state minimum wage.

For those who indicated that they compensate financially, 44% report on Form W-2, 20% report on Form 1099, and 11% indicated they reimburse using an Accountable Plan. Of interest is that more than 32% indicated that they use neither Form W-2 nor 1099. One respondent indicated that money is not paid to the volunteers. Rather, it is used to purchase “products” that the department keeps in inventory.

For those who offer an Accountable Plan, there are several items reimbursed. Thirty-nine percent (39%) reimburse travel expenses (per diem, meals, lodging – mainly for out of area training), 14% reimburse mileage, 15% damaged clothing, and 5% reimburse for business related expenses, of which only 1 response indicated some type of reimbursement for personal cell phones. That district uses the lowest cost cell phone plan among all of their volunteers, and reimburses based on that amount.

The agencies reported a wide variety of types of payments and other items of value payable to volunteers:

1. Typically provided:

- Accidental death & disability insurance, in accordance with ORS 243.025
- Workers Compensation
- Training (fire/EMS/rescue/Haz-Mat/ICS/Wildland) per the agency’s minimum standards
- Uniforms (T-shirts, sweatshirts, Class B uniforms, footwear, badge, coat, etc.)
- Structural Protective Apparel (Bunker Gear)
- Wildland Protective Apparel
- Oregon and/or National Registry recertification expenses
- Respiratory fit testing

2. Occasionally provided:

- Personal liability coverage for volunteers, while performing their duties
- Participation in air and ground ambulance subscription programs

- LOSAP program
- Physical wellness examinations
- Nominal fee compensation (which then requires a W-2)
- Reimbursement for additional training in fire and EMS areas
- Reimbursement for additional training that is determined to be in the best interest of the fire agency (up to \$5,250 per year tax free).
- SCBA spectacle kits, when requested for vision impaired firefighters

### C. Specialized Programs

Forty percent (40%) of agencies have some type of **in-station crew program** for their regular volunteers, who are not students or resident volunteers. Some of those compensate based on actual hours on standby and others pay a set amount not based on how many hours are spent at the station. One uses these points for part of its LOSAP calculations.

Fifty-six percent (56%) have a **“duty officer” program** where officers respond from home or the station. Forty-eight (48%) of those offer some type of compensation while 23% do not. One indicated that they pay the officer \$250 per year for participating in the duty officer program but it is not known if there is a minimum participation level required.

Forty-Nine (49) departments have some kind of **student, intern or resident volunteer program**. Thirty-one (31) allow interns or student firefighters who are not yet fully cleared for an IDLH environment via internal agency credentials and/or DPSST to respond on first out apparatus. Among those, 10 allow them to respond in a support role, 8 allow them as observers only, 4 allow them on EMS calls, 3 state that their program entry requirements are such that they are already cleared for IDLH, 2 allow them on EMS calls and wild land fires, 1 stated that their interns can but their students cannot, 1 allows them if there is a full crew and 1 allows them if space is available.

Out of 53 responses, only 1 allows resident volunteers, students, or interns to displace a position normally held by a full-time career firefighter. Thirty-six (36) state that they treat their resident volunteers in a similar manner to other volunteers.



#### D. LOSAP

Thirty-eight percent (38%) have a Length of Service Award Program (LOSAP) and 73% of those use the plan offered by OFDDA. Alarm and drill activity along with crew duty and duty officer activity both count for LOSAP contributions. **However, 71% indicated that there was no evidence that their LOSAP program actually helps their department retain volunteers.** Some indicated that their program may help retain their older volunteers but the newer members probably do not value it.

#### E. Creative Retention Ideas

One question asked about creative retention ideas. Responses included: worthwhile training, certifications, tuition reimbursement, respect, honor, and simple recognition for their time and efforts, possibly providing food for in-station meals, uniform items, banquets, air and ground ambulance subscriptions, signs on buildings advertising for volunteers, local advertising, load sharing by adding different types of members, LOSAP and other length of service related tools (such as traditional helmets), equipment, civil service points, in-station video game system(s), meaningful work that is valuable to their community, accountability and reasonable expectations. Many of these ideas have relatively little cost and few negative tax implications. Some indicated frustration that they have found no magic bullet or solution yet.

Creative reimbursement ideas included: moving from points to a flat-rate system, paid training for advancements, nominal payment under 20% rule, ambulance memberships, pay for alarms and drills, ancillary equipment (assumed to be for member use in the station), flat \$4 per hour for clothing, fuel, etc., company store, uniform and PPE allowance, educational reimbursement, EMT classes, food - in station, an emergency shelter for families during large scale events, uniform and training reimbursement, travel stipend step pay increases, and creative "sleeper" shifts – with different available schedules and point credits.

There were several ideas for effective recruiting. Twenty-five (25) departments said that they used word of mouth, 16 use the opportunity to provide public service, professionalism in behavior and training, and motivation of a future career, 9 have some type of high school, Explorer Programs or community college opportunities, 9 also use signs, banners and reader boards, 6 use printed material such as mailers or flyers, 4 have their own student or resident program, 4 also use public education opportunities, and 3 have grant programs such as SAFER.

Rounding out the remaining are movie and theatre ads, social media, use of out-of-district volunteers, pay, and a family atmosphere.

One question asked if there were any specific examples of recruitment efforts that did not work out well. Of 16 responses, there was mention of mass mailers, movie theatre ads, website ads and high school career day. One responded indicated that they had nothing to offer but it was not clear if that referred to any kind of monetary effort.

#### **F. Concerns about Change**

**Fifty-three percent (53%) of survey respondents indicated that they thought they would lose volunteer members if they discontinued compensating their volunteers, i.e., providing nothing more than just simple reimbursement of actual expenses (Accountable Plan).**

Some respondents indicated evidence of it happening in their agencies while others indicated that they have lost none, or very few volunteers may have been likely to leave the organization regardless of the change. Many individual responses indicated that most of those members may have been likely to have left the organization regardless of the change.

Of concern to many agencies is whether they would lose volunteers if they switched to an Accountable Plan from a nonaccountable plan. In some agencies where there has been a conversion, few or no members left for that reason. During the course of this study and investigation by Task Force members, several agencies reported that they use an Accountable Plan. However, there were indications that some of these agencies may not know exactly what an Accountable Plan is or how to legally implement it.

#### **G. Compliance Initiatives**

Of 78 survey respondents, 8 indicated that they **have been audited by a federal or state agency such as IRS, BOLI, PERS, or DOL**. Of those, 3 have been audited by BOLI (one twice), 2 have been audited by DOL and 3 have been audited by PERS. Of those, 1 agency has experienced two BOLI investigations and a visit by DOL. **In 7 of those investigations the agency was found to be noncompliant.** In one case, DOL found their volunteers to be “employees” which required the agency to pay three years of back wages for training and public education time. In another case, the agency was issuing 1099’s to their volunteers and W-2’s when their officers were serving as duty officers. The dual reporting (1099 and W-2) was found

to be not permissible. Since the survey was completed, the Task Force has become aware of additional audits at both the state and federal levels.

When it comes to the **financial impact of these investigations**, 2 agencies had to pay prior withholding, 5 made PERS contributions, 2 indicated paying back wages, and 2 indicated legal expenses. For one agency, these expenses totaled over \$300,000. None reported having to pay any penalties. In one case, previous withholding and penalties were waived because the agency was moving to an Accountable Plan. Following an IRS audit in another Oregon agency, the IRS told them that there would only be one year of withholding (they threatened three years) and no penalties if the agency would immediately begin issuing a W-2 to their volunteers.

Four agencies indicated that during their audit(s) they **received conflicting information from the same or different sources within the same regulatory agency**. PERS and DOL seem to be the agencies with these issues. Of note is a previous letter from the IRS commissioner (not part of this survey) stating that there was no effort to go after volunteer fire agencies when in fact Oregon fire agencies have been experiencing this for several years.

Several agencies have received an email from PERS titled “self assessment questionnaire.” This Task Force found no law or rule stating that any agency must complete the survey.

## **H. One Final Question**

The final survey question asked if agencies thought their volunteers were considered to be employees in any capacity. Forty-two (42) said yes, 25 said no, and 10 were unsure.

## **Discussion**

The second objective of the Task Force was to *define a model incentive plan for volunteers that is in compliance with the Internal Revenue Service (IRS), the US Department of Labor (DOL), Social Security (SS), the Bureau of Labor and Industries (BOLI), and the Public Employees Retirement System (PERS) requirements.*

The Task Force recognizes that there are significant differences of opinion on how to structure a recruitment and incentive plan for volunteers. Fire service agencies should consider obtaining legal counsel in this area and should carefully document their analysis and reasoning for choosing a particular structure for the volunteer program, taking into consideration tax, wage/hour, PERS and other areas of concern.

There is no interest by OFCA or the Volunteer 360 Task Force in removing or decreasing any benefits provided to volunteer firefighters. But there are significant compliance requirements that go along with any but the simplest volunteer program. It is important that agencies with volunteer firefighters understand the responsibilities that accompany whatever volunteer program structure they choose.

Because of the complexity of the laws and rules about compensating and reimbursing volunteers, and the widely ranging needs of fire service agencies, the Task Force finds that it is impossible to define a “model plan” for volunteers. Instead, each fire service agency must make choices as to components of a program based on its own goals and preferences. However, volunteer programs typically fall into two major types, the operation and consequences of which will be described in this section. These are what we have defined as:

- Plan A—Traditional Volunteers
- Plan B—W-2 Volunteers

### **A. Plan A—No Taxable Compensation**

In Plan A, the volunteer recruitment and incentive program is designed for what might be called the "true volunteer," because the volunteer is performing services without any cash compensation. The only benefits provided are those that are tax-free under guidance provided by

the IRS. On the plus side, Plan A avoids any taxable compensation to volunteers, lowers tax burdens for both volunteers and agencies, simplifies compliance for fire service agencies, and probably avoids wage/hour and PERS issues because no cash compensation is paid. However, the Task Force survey suggests that many fire service agencies worry that they would lose volunteers if they used a Plan A program. Sections 1 - 4 below explain the components of such a program and the likely compliance/regulatory consequences of these components.

### 1. Fire Agency Provides Equipment, Uniforms, and Other Items Necessary for Volunteer Service

Under this component of the program, the fire service agency provides essential equipment, uniforms, training, and all other items necessary for volunteer service by a volunteer. Any items provided do not become the property of the volunteer, unless required by law.

### 2. Use of Accountable Plan for Reimbursement of Expenses

Under the reimbursement component of the program, volunteers may be reimbursed for certain expenses they incur in accordance with an Accountable Plan. These would be only expenses which qualify as "trade or business" and similar expenses incurred in connection with volunteer services. Expenses suitable for reimbursement would include mileage, the cost of uniforms or equipment (but not street-suitable clothing), and food and lodging while traveling away from home overnight. In addition, a recent IRS memo (IRSIG SBSE 04-091-083 Sept. 14, 2011) explains that reimbursement of a portion of cell phone costs for employees is potentially acceptable under an Accountable Plan. None of these items are included in the volunteer's gross income, and are not reported on a W-2. Nor should they trigger "employee" status for wage/hour or PERS purposes.

### 3. LOSAP

Under the LOSAP program, the fire service agency makes a contribution of not more than \$3,000 per year to the LOSAP account established for the benefit of each qualifying volunteer. If the volunteer meets certain vesting requirements, at a later time such as when the volunteer attains a certain age, the amount in the LOSAP account will be paid to him or her. The contribution is not treated as compensation to the volunteer for tax purposes when contributed to the LOSAP. When paid, this deferred compensation is included in the volunteer's gross income and is taxed at that time. These amounts are not subject to employment taxes. These amounts

are not reported on a W-2. It is generally believed that a LOSAP contribution does not trigger issues with PERS and is a "nominal fee" for wage/hour law purposes.

#### 4. Fringe Benefits

In a Plan A model, the fire service agency provides “working condition fringe benefits” to volunteers on a tax-free basis and without reporting these benefits on a W-2. The way to identify a working condition fringe benefit is to ask whether, if the volunteer paid for the benefit personally, the volunteer would be entitled to a deduction under §162 of the Code (trade or business expenses) or §167 (depreciation and amortization). Training (in-house and off-site), conferences, and classes that are directly connected to the activity of volunteering (such as communication or leadership classes for an officer, for example) are examples. There is no dollar limit on these amounts for this type of training or education, because they are considered for the primary benefit of the fire service agency, although amounts expended must be reasonable given the duties of a volunteer. Cell phones or cell phone plan coverage can be provided if used for agency-related purposes. None of these items are included in the volunteer's gross income, and are not reported on a W-2. Nor should they trigger "employee" status for wage/hour or PERS purposes. In fact, all of the benefits listed as “Typically Provided” on p. 21 likely qualify as working condition fringe benefits. Other examples would include personal liability insurance related to volunteering, additional training or conferences for fire or emergency services, SCBA spectacle kits, subscriptions to fire- or emergency-related publications, and memberships in fire- or emergency-related associations.

In the Plan A model, the fire service agency does not provide any other fringe benefits under Code § 132 or any other Code section (such as general education benefits) because, in accordance with the FLSA rules, the fire agency and volunteers take the position that volunteers do not have a profit motive or an intention to generate income, and therefore do not qualify as employees under Code provisions other than §132(d) (working condition fringe benefits).

This could create a problem for resident volunteers. Section 119, which provides an exclusion for the value of lodging provided to employees if they must live on the business premises of the employer to be “on call,” applies only to employees, and there is no extension regulation that extends this benefit to volunteers.

That said, the IRS has not in the past made the argument that volunteers provided with lodging should include those amounts in gross income because they are not “employees.” Instead, it has inquired into whether the statutory requirements of §119 are met, principally whether the lodging is provided for the convenience of the employer, to allow the employee to be on call. This is not a published position of the IRS, and agencies providing tax-free lodging to resident volunteers should be aware that there is some risk with this position.

## **B. Plan B—W-2 Traditional Volunteers**

Plan B is very simple: it involves the payment of cash or cash-like compensation (such as gift cards) to volunteers by a fire services agency. The amount of compensation must be small enough that it would be considered "nominal" for both LOSAP and DOL purposes. For example, a Plan B program might pay a beginning volunteer a flat fee of \$250 per year; a five-year veteran \$500 per year; and a 10-year-or more volunteer \$750 per year. Plan B can also include one or more components of Plan A, such as an Accountable Plan.

Once cash compensation is added to the program, the tax compliance headaches increase and other problems (such as PERS reporting) potentially arise. However, the Task Force survey suggests that paying at least some compensation in cash is critical to retention of volunteers.

### **1. Tax Consequences**

Any sort of cash payment to a volunteer will be considered compensation to that volunteer. The paying agency should treat the volunteers as employees for tax purposes. It must withhold and pay to taxing authorities income and employment tax, and report to the IRS (quarterly and at the end of the year). The agency must issue a W-2 to the volunteer. Issuing a Form -1099 is not appropriate.

This applies to any cash payment. It doesn't matter how the cash payment is calculated. Points pay, pay-per-standby-shift, pay for training, or paying fixed amounts for activity are all considered compensation. Reimbursements under a nonaccountable plan are also treated as cash compensation. It also doesn't matter the form in which the payment is made. Gift cards, for example, are treated just like cash payments for tax purposes. Gift cards in excess of \$50 are also a potential Oregon Ethics Commission violation. Finally, it doesn't matter who pays the

compensation to the volunteer on behalf of the fire service agency. Indirect payments, such as payment from the agency to a related organization and then to the volunteer, can be imputed to the fire service agency as if it made the payment directly.

## 2. PERS Issues

PERS appears to take the position that the issuance of a W-2 to any volunteer triggers PERS reporting for that volunteer. The Task Force disagrees with this position. Until this issue is resolved administratively, judicially or legislatively, the payment of cash to volunteers potentially triggers PERS reporting and contributions.

## C. Comparison of Plans

The Chart below summarizes the likely treatment of these Plans from the tax, DOL, compliance, and PERS perspectives. A chart in **Appendix E** summarizes the likely tax treatment of the components of these Plans. Plan A provides the most certainty and simplicity. Plan B adds a nominal cash component, which may help attract and retain volunteers, but Plan B triggers the obligation to file W-2s and potentially creates PERS issues.



**CHART 1: COMPARISON OF PLANS A and B****Advantages and Disadvantages of Volunteer Plans A and B**

	<b>Plan A</b>	<b>Plan B</b>
<b>ADVANTAGES</b>	<p>Tax Free Reimbursement under Accountable Plan</p> <p>Tax Free Working Condition Fringe Benefits to Volunteers</p> <p>Easy compliance for Agency</p> <p>No W-2's issued</p> <p>No DOL concerns</p> <p>No PERS concerns</p> <p>May be a way to exclude volunteers from employee base for ACA</p> <p>SAFE: BASED ON IRS GUIDANCE and COURT cases (except for ACA issues, which are untested)</p>	<p>Tax Free Reimbursement under Accountable Plan</p> <p>Tax Free Working Condition Fringe Benefits to Volunteers</p> <p>Cash could attract and retain volunteers</p> <p>No DOL concerns if "nominal" in amount</p> <p>SAFE: BASED ON IRS GUIDANCE and COURT cases (except for ACA issues, which are untested)</p>
<b>DISADVANTAGES</b>	<p>Lack of cash compensation may cause volunteers to leave, according to Task Force Survey</p>	<p>Tax Compliance: W-2's and quarterly reporting</p> <p>PERS takes the position that employers must report</p>
<i>Questions:</i>	<i>Will lack of cash compensation really cause volunteers to leave?</i>	<i>Does a nominal amount of cash really attract and retain volunteers?</i>

## **Recommendations**

The third objective of the Task Force was *to combine the above definitions and survey responses into recommended best practices*. Of course, each fire service agency will need to determine which practice(s) they will use for volunteer recruitment and retention. These recommendations are advisory in nature as fire agencies must decide what is in their own best interests. This document does not “fix” anything in terms of the complicated issues that agencies with volunteers are experiencing. It merely calls attention to some of the confusion and the requirements that currently exist in state and federal rules and laws. These laws are not likely to change, especially on a federal level, without a national understanding of the complexity of the issues. Until such time as these laws change and/or become consistent with each other, confusion will continue to exist.

That said, the Task Force does make certain recommendations, outlined below:

### **A. The Fire Service Should Seek Statutory and Administrative Changes**

It is the opinion of the Task Force that the Oregon Fire Service needs to formally acknowledge that a change is needed to the 1986 tax code as well as certain state agencies' statutes, regulations, and policies (such as PERS and other regulatory bodies). Both our state associations and our national partners should address this issue and make it a priority.

### **B. Fire Service Agencies Should Promptly Review their Volunteer Programs**

The Task Force recommends that each fire agency consider the core needs and expectations for its volunteer program. A key aspect of this would be setting an appropriate expectation of services to be rendered by volunteers.

Each agency should consider the items typically and occasionally provided by Oregon fire service agencies, as described in this Report, and choose components of a program based on the agency's specific goals and objectives, in consultation with its legal counsel. Plan A and Plan B provide convenient bundles of components to make compliance obligations clear to fire services agencies.

Fire service agencies should consider the creative recruitment and retention ideas generated by the Task Force Survey.

### **C. Reimbursement of Expenses**

The Task Force recommends that each fire service agency examine its methodology for reimbursing volunteers for expenses they incur in carrying out their responsibilities. Adopting and implementing an Accountable Plan for appropriate reimbursable expenses can reduce tax liability for volunteers and fire services agencies. Not every expense of volunteering can be reimbursed tax-free using an Accountable Plan. An agency may consider having a nonaccountable plan that operates alongside an Accountable Plan if it wishes to reimburse expenses that are not suitable for an Accountable Plan. However, it should consider the negative tax implications of such a program.

### **D. Taxable Compensation Paid to Volunteers—Tax Treatment**

If any taxable payment is made to a volunteer, the fire service agency should treat the volunteer as an employee for tax purposes. All amounts of any income, social security, or Medicare taxes should be withheld, and the fire agency must report quarterly to the IRS and file a W-2 for the volunteer. (IRS, 2013 Issues for Firefighters). Treatment of volunteers as independent contractors for tax purposes is no longer acceptable.

### **E. Resident Volunteers**

The Task Force reviewed a number of fire agency programs for resident volunteers (aka sleepers). We encourage each fire agency to have a written agreement with each resident volunteer that clearly delineates mutual expectations, requirements and chain of command. We recommend that the program documents make it clear that resident volunteers ARE volunteer firefighters. We reviewed several programs that did not consider resident volunteers as volunteer firefighters and we discourage this practice due to the new questions/challenges that may result. Moreover, to minimize the risk that the fair market value of the lodging provided is not included in the gross income of the resident volunteer, the program documents and implementation of the program must demonstrate that the volunteer is required to reside at the station for the convenience of the fire service agency. Agencies should be aware that there is some tax risk that this would be treated as taxable compensation to a resident volunteer.

While proper utilization of trained and qualified resident volunteer firefighters does serve to strengthen an agency's ability to serve the public, the Task Force discourages the use of resident volunteers to replace existing career personnel.

The Task Force recognizes that many fire agencies have resident volunteers who also happen to be student interns affiliated with a higher education program (fire/EMS, etc.). We recommend that it be very clear to the individual when he/she is functioning as a resident volunteer and separately as a student intern. We believe a volunteer firefighter can potentially fulfill both roles, though obviously not at the same moment in time. Something as simple as different uniform, agreements, log records, etc. can help clarify any potential areas of confusion. **We believe it is important that resident volunteers NOT be considered interns as "interns" have a specific definition and benchmark test at both the state and federal level.**

#### **F. Interns**

The Task Force recognizes that fire/EMS student internship programs have served as the educational foundation for a large majority of career firefighters across the nation, as well as in Oregon. The Task Force supports opportunities for students to learn in an environment that has intentional leadership and oversight, typically by working with career firefighters. The Task Force also recognizes that student interns have recently been the subject of high-profile investigations at the federal level, with serious, adverse impacts on employers. Fire service agencies should not consider themselves immune from similar investigations.

Internships should be considered part of a formal educational program for students and should not be used to replace regular career firefighters. In order to be considered an intern, the program in which he or she participates must meet the six-factor test discussed herein, including that an individual must be enrolled in some type of higher learning program or training pathway with a focus of fire prevention, fire protection and/or EMS. Internship program documents must demonstrate how the program meets each of these requirements. It is also recommended that the fire service agency be able to demonstrate an ongoing working relationship between the student's institution and the agency.

Interns should not be considered employees of the fire agency and there must not be any type of agreement that they will be hired by the fire agency as a result of the completion of an internship.

We have heard of fire agencies that chose to lay-off qualified and trained career firefighters and then replace those positions with unsupervised interns. We do not recommend this practice and believe it creates increased liability for the fire agency as well as the potential for grievances with organized labor.

The Task Force recommends that interns be on the Plan A volunteer program. We recommend that no taxable compensation be paid to interns because fire agencies then risk confusion and conflicting interpretation at both the state and federal level as discussed in detail elsewhere within this Report. Internships specifically have the potential for increased scrutiny by the DOL, IRS, PERS and BOLI, as well as media scrutiny.

The Task Force recommends that fire service agencies avoid connecting the word “intern” to resident volunteer (sleeper) programs. This avoids US DOL & potentially BOLI arguments at several levels. For the sake of clarity, we recommend that the term “intern” be used only when a relationship exists between a fire agency and an educational institution, typically for fire and/or EMS related training and practical experience. The primary purpose of the educational program is to create a safe and realistic opportunity for hands-on continued learning. Educational institutions do not typically design intern programs to specifically benefit fire agencies. Given the position of the US DOL as well as Oregon BOLI, we do not recommend using the term “intern” synonymously with resident volunteer programs. In the event that a resident volunteer is also functioning as an educational intern, it must be very clear when the individual is functioning as a resident volunteer firefighter or an educational intern. We find nothing improper about a volunteer firefighter serving as both a resident volunteer and participating in an internship as long as it is very clear when the individual is functioning in which capacity.

#### **G. Shift Stipend Program for Volunteer Firefighters and Duty Officers**

We found a wide variety of unique programs across the state regarding the computation of nominal payments to volunteers who serve as firefighters and/or duty officers. The primary purpose of this paper does not focus on any specific payment methodology. That said, all of the core tenets of compensation discussed in this document still apply. If a fire agency compensates (vs. reimburses) a volunteer, they are increasing the risk of audits and questioning at both the state and federal level. If volunteers are compensated, they should be issued a W-2 at the close

of the calendar year. In other words, the methodology of computation of cash payments to volunteers doesn't affect the tax and other analyses.

#### **H. Use of Related Organizations to Pay Volunteers.**

Some fire agencies have historically directed tax revenue funds to a volunteer association that has a § 501(c) (3) status (some may not even be § 501(c) (3)), and then have the § 501(c) (3) organization make payments for services to the volunteer firefighters, with the belief that this somehow lessens tax liability. This practice is strongly discouraged and the Task Force believes that it creates new and additional problems for the fire service agency, the volunteer organization and even the individual volunteers who lead that organization. While there are legitimate reasons for volunteers to organize as separate nonprofit organizations, using such organizations for indirect payments to volunteers isn't one of them. Fire agencies that are paying a lump sum to their Volunteer Association for distribution to volunteers need to immediately discontinue this practice. This may require a reorganization of the Volunteer Association.

#### **I. Fringe Benefits/Reimbursement**

A fire service agency may provide reasonable "working condition fringe benefits" to volunteers without tax. This can include a reasonable amount of educational training directly related to their duties as volunteers that primarily benefits the agency. This can be paid directly by the agency or paid by a volunteer and reimbursed in accordance with an Accountable Plan. If properly structured, this amount is not treated as wages and is therefore not subject to employment taxes and is not reportable on a W-2.

#### **J. PERS Eligibility for Volunteers**

Until the PERS issues can be resolved legislatively, administratively or in the courts, the Task Force recommends that fire service agencies that wish to avoid the PERS issue altogether adopt Plan A volunteer programs. In these programs, volunteers receive no taxable compensation and no W-2s are issued. If a fire service agency pays taxable compensation to volunteers, it risks having the volunteers included in PERS, for purposes of reporting, eligibility and contributions, as well as problems in coordination with other agencies under the six-month waiting period. At the time of this Report, discussions are ongoing between PERS and the fire service to seek an approach that is suitable for the needs of today's fire service.

The Task Force has included a list of questions its members frequently encountered during their work (What If's?) as Appendix F.

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Appendix A

**Oregon Administrative Rules Chapter 459: Public Employees Retirement System, Div. 5  
Administration**

**OAR 459-005-0001 (2012) (Content limited by relevance)**

- “Emergency Worker” means an individual engaged in case of emergency, including fire, storm, earthquake, or flood.
- “Employee” has the same meaning as provided in ORS 238.005 and shall be determined in accordance with OAR 459-010-0030.
- For the purposes of ORS 238.005 to 238.750 the term “employee” includes public officers whether elected or appointed for a fixed term.
- The term “employee” does not include: A member of the governing board of a political subdivision unless the individual qualifies for membership under ORS 238.015; An individual who performs public services for a public employer as a contractor in any independently established business or as an employee of that contractor in accordance with OAR 459-010-0030; An individual who performs services for a public employer without compensation for hours of service as a volunteer, except for volunteer firefighters who establish membership in accordance with ORS 238.015(6).
- “Employment” is compensated service to a participating employer as an employee whose: (a) period or periods of employment includes only the actual hours of compensated service with a participating employer as an employee; and (b) compensated service includes, but is not limited to paid vacation, paid sick leave, or other paid leave.
- “General service member” means membership in PERS as other than a judge member, a police officer, a firefighter, or a legislator.
- “Independent contractor” means an individual or business entity that is not subject to the direction and control of the employing entity as determined in accordance with OAR 459-010-0032.
- “Qualifying position” and “Salary” have the same meaning as provided in ORS 238.005.
- “Volunteer” means an individual who performs a service for a public employer, and who receives no compensation for the service performed.
- The term “volunteer” does not include an individual whose compensation received from the same public employer for similar service within the same calendar year exceeds the reasonable market value for such service (RMV is not defined).

**Oregon Administrative Rules Chapter 459: Public Employees Retirement System, Div. 10  
Membership**

**OAR 459-010-0030 (2012) (Content limited by relevance)**

- Determination of whether an individual is an employee is made under common-law rules. Under common-law rules, every individual who performs labor or services to the direction and control of an employer, both as to what must be done and how it must be done, is an employee. It does not matter that the employer allows the employee discretion and freedom of action, so long as the

employer has the legal right to control both the method and result of the labor or services, resulting in an employee/employer relationship.

- If under common-law rules, there is an employee/employer relationship, it makes no difference how it is described. It is not controlling whether the employee is called an employee. It is not controlling how the payments are measured. It is not controlling whether the individual is employed full time or part time. There is no distinction made between classes of employees. Superintendents, executives, managers, supervisors, and other supervisory personnel are all employees.
- In applying the common-law rules, **the 20-factor test** as described in **IRS Service Ruling 87-41** shall be used in determining whether or not an individual is an employee. The degrees of importance of each factor varies depending on the labor or services to be performed and the context in which the labor or services are performed. The 20 factors are:

- A. Instructions
- B. Training
- C. Integration
- D. Services rendered personally
- E. Hiring, supervising, and paying assistants
- F. Continuing relationship
- G. Set hours of work
- H. Full time required
- I. Doing work on employer's premises
- J. Order of sequence set
- K. Oral or written reports
- L. Payment by hour, week, or month
- M. Payment of business or travelling expenses
- N. Furnishing of tools and materials;
- O. Significant investment
- P. Realization of profit or loss
- Q. Working for more than one employer at a time
- R. Making service available to general public
- S. Right to discharge
- T. Right to terminate

Appendix B  
**Sample**  
**ACCOUNTABLE PLAN**  
**FOR VOLUNTEER EXPENSE REIMBURSEMENT**

**Purpose**

This document can be used as a guide to draft an "accountable plan" for fire service agency volunteer expense reimbursements. It is merely an example, however, and it is not meant to be adopted or adapted without consulting appropriate legal counsel. In addition, each agency must establish procedures to ensure that the requirements of the plan are properly implemented.

**Accountable Plan**

The \_\_\_\_\_ (the Agency) desires to establish an expense reimbursement policy that meets the requirements for an "accountable plan," pursuant to Treasury Regulation section 1.62-2, upon the following terms and conditions:

Volunteers of the Agency shall be reimbursed for any necessary business and professional expenses incurred on behalf of the Agency only if the expenses are adequately accounted for as required by the Agency policy on expense reimbursements and are of the type and amount suitable for reimbursement. More information about types of reimbursable expenses is available upon request from the Agency and volunteers are encouraged to inquire prior to incurring expenses.

Under no circumstances will the Agency reimburse volunteers for business or professional expenses incurred on behalf of the Agency that are not properly substantiated. The Agency and volunteers understand that this requirement is necessary to prevent our expense reimbursement plan from being classified as a "non-accountable" plan. Volunteers may be required to produce receipts, account books, diaries, or similar records with respect to expense they incur.

Advances for ordinary and necessary business and professional expenses shall not be issued more than 30 days prior to the anticipated expense. Advances shall be limited in an amount to the estimated expenses, and volunteers must provide an estimate of those expenses with any request for an advance.

All expenses must be substantiated within a reasonable period of time and not more than 60 days after the expense is paid or incurred by the volunteer, except with specific approval of \_\_\_\_\_.

Advances that are not substantiated within a reasonable period of time must be returned (paid back) within a reasonable period of time and not more than 120 days after the expense is paid or incurred.

Agency Officer: \_\_\_\_\_ Date: \_\_\_\_\_

Appendix C  
Definitions of "Employee"

Agency/Purpose	Definition
Internal Revenue Service—income and employment taxes	<b>20-factor common-law test</b>
Internal Revenue Services—fringe benefits	Regularly engaged in the activity of providing services with a bona fide intention of making a profit or generating income
(Federal) Department of Labor—wage and hour issues; civil rights	<p><b>"Economic Reality" five-part test.</b> In <i>United States v. Silk</i>, 331 U.S. 704 (1947), a case dealing with whether an employer owed Social Security taxes on certain workers, the Supreme Court found the following factors important:</p> <ul style="list-style-type: none"> <li>• the degree of control exercised by the alleged employer;</li> <li>• the extent of the relative investments of the [alleged] employee and employer;</li> <li>• the degree to which the "employee's" opportunity for profit and loss is determined by the "employer";</li> <li>• the skill and initiative required in performing the job; and</li> <li>• the permanency of the relationship.</li> </ul> <p>The Fifth Circuit, in <i>Brock v. Mr. W Fireworks, Inc.</i>, 814 F.2d 1042 (5th Cir. 1987), stated that the "focus is whether the employees as a matter of economic reality are dependent upon the business to which they render service". The same case notes further that "it is dependence that indicates employee status...the final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected" that they are employees.</p>
Oregon Bureau of Labor & Industries (BOLI) (min. wage & working conditions)	<p><b>Wage &amp; Hour Issues: "Economic Reality" test (see above)</b></p> <p><b>Civil Rights Issues--four-factor "Right to Control" test:</b> Under the "right-to-control test," four factors are weighed to determine whether an employer has the "right to control" the work of an individual. Where an employer clearly has the "right to control" the work of an individual under this test, that individual is deemed an employee rather than an independent contractor. The factors of the "right-to-control" test are:</p> <ol style="list-style-type: none"> <li>(1) Direct evidence of the right to, or the exercise of, control</li> <li>(2) The method of payment;</li> <li>(3) The furnishing of equipment; and</li> <li>(4) The right to fire.</li> </ol>

	<p>It is not necessary that all factors coincide to determine whether a given worker is an employee. In such cases, the weight or strength of the factors which are in evidence will be considered.</p>
Oregon Department of Revenue – income and employment taxes	<p><b>A worker that is not an independent contractor (IC) under ORS 670.600, which requires that:</b></p> <ol style="list-style-type: none"> <li>1. The worker be free from direction by the employer; AND</li> <li>2. The worker be customarily engaged in an "independently established business" (as proven by specific factors); AND</li> <li>3. The worker is responsible for any licenses or certificates necessary to provide the service.</li> </ol>
Oregon Employment Department – unemployment benefits	<p><b>A worker that is not an independent contractor under ORS 670.600—see above.</b></p>
PERS	<p><b>Uses the 20-factor test adopted by the IRS (see above)</b></p>

## Appendix D

### Survey Questions

1. Does your agency use volunteers in any form? If you answered no, your survey is complete. Thank you for your time. If your agency has used volunteers in the past, please continue based on past experience.
2. If you answered yes to #1, how do you utilize the services of volunteers? Please select any that apply
  - a. Combat firefighter
  - b. EMS only volunteer (ambulance, rescue squad, direct responder) Details
  - c. Non-combat member (tender driver, general support – clerical, administration, logistics, teaching, etc.) Details
  - d. Community safety (CERT, NERT)
  - e. Firecorp Volunteer (Details)
  - f. Any others?
  - g. NA
3. Do you reimburse or compensate your volunteers any way including money or other benefits?
4. If you reimburse or compensate them financially, do you do so:
  - a. **Based on a point system per call/training etc. with no tie to hours worked,**
  - b. Based on hours worked and/or training hours attended
  - c. Based on shifts “worked” or “attended, ”
  - d. Based on actual expenses incurred.
  - e. NA
5. If you answered yes to the previous question, do you
  - a. Offer an accountable plan
  - b. Report compensation on a W-2
  - c. Report compensation on a 1099
  - d. No IRS reporting form and not an accountable plan
6. If you offer an Accountable Plan, what do you reimburse to your members?
  - a. Mileage to and from station
  - b. Other mileage - Training
  - c. Damaged clothing
  - d. Cell phone bill – any portion
  - e. Educational Reimbursement
  - f. Travel Expenses, i.e. per diem
  - g. We do not use an accountable plan
  - h. De minimus compensation in accordance with the DOL 20%rule
  - i. Other business related expenses

- j. NA
- 7. Do your volunteers who are non-student, non-intern, and non-resident participate in a standby type of shift where they are assigned to stay at the station, for a set period of time, any time during the day or night?
- 8. If you answered yes to the previous question, are they paid anything for those shifts?
  - a. Cash for a set shift with no tie to hours worked
  - b. A per-hour rate
  - c. No
  - d. Other form of reimbursement or compensation – money
  - e. Other non-cash award
  - f. NA
- 9. Do you have a duty officer program (from home or the station) that your volunteer officers participate in?
- 10. If you answered yes to the previous question, are they reimbursed or compensated?
  - a. Cash for a set shift with no tie to hours worked
  - b. A per-hour rate
  - c. No
  - d. Other form of reimbursement or compensation – money
  - e. Other non-cash award
  - f. NA
- 11. Does your agency have a LOSAP plan for your volunteers?
- 12. If you answered yes to the previous question, what plan do you use?
  - a. OFDDA
  - b. Other
- 13. How are LOSAP contributions earned? Check either if they apply
  - a. Points for alarm activity
  - b. Points for drill activity
  - c. Other
- 14. Has your LOSAP plan been updated by legal counsel or a tax attorney within the last five years?
- 15. Is there evidence that your LOSAP plan actually helps retain volunteers?
- 16. What creative retention ideas have you used with success?
- 17. Do you feel you would lose volunteers if you discontinued compensating them above simple reimbursement of actual expenses (accountable plan)?
- 18. What creative retention ideas have you used with success?
- 19. What do you feel have been your most successful methods of recruitment?
- 20. Do you have examples of reimbursement, recruitment, or retention ideas that do not or did not work, and why?
- 21. Do you have a resident volunteer, intern, or student firefighter program?



22. Please elaborate on what your organization views as the difference between a resident volunteer (sleeper) program and an intern program
23. Are your interns or students who are not yet cleared for an IDLH environment via internal agency credentials and/or DPSST, ever allowed to respond on first out apparatus? If so, please elaborate.
24. Has your agency ever used resident volunteers, students, or interns to “displace” a position normally held by a full-time career firefighter?
25. With your agency, are resident volunteers (sleepers) generally treated in a similar manner to other volunteers?
26. If you have any written program plans for your internship or student programs, particularly those that relate to fire and EMS training programs connected to vocational/community college programs, will you please provide a copy?
27. Has your department been audited by any state or federal organization(s), i.e. IRS, BOLI, DOL, PERS etc. relating to volunteers or resident volunteers (students, interns) etc?
28. As a result was your agency found to be non-compliant?
29. Did you have to pay:
  - a. Penalties
  - b. Prior withholding
  - c. PERS payments
  - d. Legal expenses
  - e. Back wages
  - f. NA
30. During your audit experience, were you given conflicting information from the same or different sources within the same agency?
31. Have you received an email from PERS containing a “self assessment” questionnaire?
32. Based upon your experience and knowledge of volunteer firefighters, do you believe they are considered to be employees in any capacity?

Appendix E  
**SUMMARY OF PLANS A & B TAX CONSEQUENCES**

**Plan A: Traditional Volunteers**

**Plan B: W-2 Volunteers**

<b>Aspect of Program</b>	<b>Plan A</b>	<b>Plan B</b>
Provide essential equipment and training for volunteering tax-free	YES	YES
Reimburse appropriate expenses using an Accountable Plan tax-free	YES	YES
Mileage reimbursed using Accountable Plan tax-free	YES: Commuting miles reimbursed at charitable rate and non-commuting miles at business rate	YES: Commuting miles reimbursed at charitable rate and non-commuting miles at business rate
LOSAP—tax free until withdrawals; exemption from employment taxes	YES	YES
Provide “working condition” fringe benefits (IRC §132(d)) tax-free: *Mandatory state insurance *Additional insurance related to volunteering activity *Additional Fire-Emergency-related Training *Uniforms *Subscriptions to fire/emergency related publications *Memberships in volunteer organizations (OVFA) *Cell phones, if properly structured	YES	YES
Provide Tax-free Lodging to Resident Volunteers (IRC §119)	MAYBE	MAYBE
Provide cash or cash-like (e.g., gift cards) compensation (will be taxable)	NO	YES
Provide Educational Benefits tax-free (IRC §127)	NO	NO
Provide other Fringe Benefits tax-free (IRC §132)	NO	NO

## Appendix F

### “What If’s”

1. What if a volunteer agency wants to give their volunteers one check per year in the amount of \$300? It’s probably considered low enough to be “nominal” but will require a W-2, which increases risk/confusion of reporting to PERS.
2. What about providing uniform items only? Uniforms necessary for serving as a volunteer can be provided tax-free. However, the IRS takes the position that the provision of clothing that is suitable as street wear is a taxable benefit.
3. What about the federal \$360 exemption amount? It expired in 2011 and there is a draft bill at the federal level for replacing or changing it.
4. What about the Oregon state tax exemption for rural volunteer EMT’s? The rural EMT tax credit, as part of HB 3367, was extended for six more years during the legislative session. It remains at \$250 for qualifying rural, volunteer EMS providers.
5. What’s the problem with giving money to the volunteer organization and have them pay the volunteers? It’s an indirect payment from the agency, and can be imputed to the agency. It can also create substantial federal tax problems for both the volunteer organization and the volunteers personally.
6. Why are volunteer “point systems” taxable? They equal a cash amount and the IRS and Department of Revenue consider them to be taxable.
7. Can the district reimburse volunteers a portion of their cell phone bill? Yes, but it’s somewhat complicated. A portion of the bill, which can be verified as pertaining to the needs of the fire agency for required notifications, may be reimbursable under an Accountable Plan. The cell phone coverage must be "reasonably related" to the needs of

the fire service agency and the reimbursement must be reasonably calculated so as not to exceed the expenses the volunteer actually incurs in maintaining the cell phone.

Additionally, the reimbursement must not be a substitute for regular wages. The IRS has warned that it will carefully scrutinize any arrangement that allow for unusual or excessive expense reimbursement.