Voluntary Services

The Anti-Deficiency Act ("ADA") greatly limits the Government's ability to accept voluntary services. Specifically, the ADA provides:

> An officer or employee of the United States Government or the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. *See also*, Army Regulation 37-1, para. 7-6, which incorporates the statutory prohibitions. 31 U.S.C. § 1342 (1999).

Generally, voluntary services may only be accepted in emergencies. The ADA provides that "emergencies" do "not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or protection of property." 31 U.S.C. § 1342 (1999). Accordingly, the Comptroller General has held that such an emergency must represent an immediate danger. *See* Decision by Comptroller General McCarl, A-34142, 10 Comp. Gen. 248 (1930) (Agreement to voluntarily tow Navy airplane after being forced down was not an emergency because it did not involve sudden emergency involving loss of human life or destruction of Government property), *but see* Decision by Comptroller General McCarl, unnumbered, 2 Comp. Gen. 799 (1923) (Payment for voluntary service to assist sinking ship in the middle of the Atlantic Ocean was allowable and met the emergency exception).

However, Voluntary Services also may be accepted if authorized by law. *See* In Re: Student Volunteers –Traveling and Living Expenses, B-201528, 60 Comp. Gen. 456 (1981); In Re: Senior Community Service Employment Program, B-222248, 1987 U.S. Comp. Gen LEXIS 1458 (1987) (holding that "in the absence of specific statutory authority, Federal agencies are generally prohibited from accepting voluntary services offered by individuals"). The following are examples of voluntary services authorized by law:

> (a) Student Volunteers are authorized, provided they serve without compensation in an established Agency program designed to provide them with educational experience and will not displace any current employees. *See* 5 U.S.C. § 3111(1999); In Re: Student Volunteers –Traveling and Living Expenses, 60 Comp. Gen. 456, *but s*ee Decision of the Comptroller General, B-159715, 1978 U.S. Comp. Gen. LEXIS 1613 (1978) (need statutory authorization to allow Washington work-study students to provide services to the Government)

(b) The U.S. Forest Service may accept uncompensated volunteers. *See* 16 U.S.C. 558 § (1999); Monte and Kathy Kentta, AGBCA No. 85-161-1, 87-1 B.C.A. (CCH) ¶ 19, 342 (1986).

(c) Army Reserve officer may be ordered to active duty without pay if statute provides for such. In Re: Major Jean-Francois J. Romey, USAR , B-216466, 1984 U.S. Comp. Gen. LEIS 248 (1984).

(d) Employment for disadvantaged groups may be accepted if authorized by statute. *See* In Re: Senior Community Service Employment Program, 1987 U.S. Comp. Gen LEXIS 1458 (authorizing the Equal Employment Opportunity Commission to accept the services of volunteers enrolled in the Senior Community Service Employment Program)

(e) 10 U.S.C. § 1588 (1999) authorizes the military to accept the following volunteer services:

(i) Medical services, dental services, nursing services, or other health-care related services;

(ii) Museum or a natural resources program services; and

(iii) Programs to support Armed Forces members and their families (e.g. family support programs, library and education programs; religious programs, housing programs; employment assistance). *See* 10 U.S.C. § 1588 (1999)

(f) The U.S. Army Corps of Engineers may accept volunteers for civil works projects, 33 U.S.C. § 569c

(g) The President may accept Red Cross assistance. 10 U.S.C. § 2602 (1999).

GAO distinguishes gratuitous services from voluntary services and provides that, generally, gratuitous services may be accepted by Federal agencies. Specifically, it has stated that "voluntary service….is not necessarily synonymous with gratuitous service, but contemplates service furnished on the initiative of the party rendering the same without request from, or agreement with the United States therefor. Services furnished pursuant to a formal contract are not voluntary within the meaning of said section (the ADA prohibition)." Comptroller General McCarl to the Chairman of the Federal Trade Commission, A-23262, 7 Comp. Gen. 810, 2-3 (1928) (allowing contractor to provide services in exchange for exclusive right to publish certain transcripts). *See also* Opinion of Hon. George Wickersham-Employment of Retired Army Officer as Superintendent of Indian School, 30 Op. Atty. Gen. 51 (1913). Voluntary services have been defined "as

those which are not rendered pursuant to a prior contract, or under an advance agreement that they will be gratuitous. Therefore, voluntary services are likely to form the basis of future claims against the Government." In Re: Army's authority to accept services from the American Association of Retired Persons/National Retired Teachers Association, B-204326, 1982 U.S. Comp. Gen. LEXIS 667, 3 (1982).

However, two important elements are necessary to ensure that services are gratuitous, not voluntary. Specifically, any agreement to volunteer without compensation must be done so in writing and must be done in advance. *See* In Re: Army's authority to accept services from the American Association of Retired Persons/National Retired Teachers Association, 1982 U.S. Comp. Gen. LEXIS 667, 4 (1982) (Army may accept services of the American Association of Retired Persons ("AARP") if "each volunteer formally agrees in advance to serve gratuitously, and that the agreements are properly documented…"). It is important to note that the reason for the ADA prohibition is that "Congress does not wish to honor pay claims founded on moral consideration or so-called quasi contracts for which pay is not available. Congress does not want employees to work or to be worked in the expectation of having Congress retroactively honor their claims." Hagan v. U.S., 671 F.2d 1302, 1305 (COFC 1983). Hence, the need for ensuring that prior to gratuitous services being performed there be proper documentation and it must be done so in advance in order to ensure the Government will not be sued for compensation.

An important caveat to the above exception is that unless authorized by statute gratuitous services may not be used to improperly augment work normally performed by Federal employees. Specifically, the GAO has stated that "[i]f the work to be performed by the non-Federal workers would normally be performed by the sponsoring agency with its own personnel and appropriated funds, acceptance of 'free' services to perform the same work would augment the agency's appropriations impermissibly." In Re: Community Work Experience Program – State General Assistance Recipients at Federal Work Sites, B-211079.2, 1987 U.S. Comp. Gen. LEXIS 1815 (1987). (GAO held that it was essential to find specific statutory authority to allow state workfare program participants to work for agencies and that failure to do so would be an improper augmentation since an agency could not accept gratuitous services).

Government officers or employees ~~often~~ are generally prohibited from volunteering or gratuitously providing their services. The general rule is that "it is contrary to public policy for an appointee to a position in the Federal government to waive his ordinary right to compensation or to accept something less when the salary for his position is fixed by or pursuant to legislative authority." In Re: The Agency for International Development (AID)– waiver of compensation fixed by or pursuant to statute, B-190466, 57 Comp. Gen. 423, 3 (1978) (AID could not enter into an agreement to pay Executive Schedule or General Schedule employee amounts less then the annual rate of pay established by Title 5 or Title 22 of the U.S. Code). *See also*, Comptroller General

Warren to the President, United States Civil Service Commission, B-66664, 26 Comp. Gen. 956, 13 (1947) (Holding that "in the absence of statutory authority therefor, there are no circumstances under which an original appointee to a position in the Federal service properly may legally waive his ordinary right to compensation fixed by or pursuant to law for the position and thereafter be estopped from claiming and receiving the compensation previously waived." Id. at 13.) This rule could arguably be used by Federal employees covered under the Federal Employees Pay Act ("FEPA) or the Fair Labor Standards Act ("FLSA") to claim they can not waive their right to compensation for overtime. (Government liability for overtime via the FEPA and the FLSA is discussed *infra*). However, an employee may waive the right to compensation directed by statute if another statute authorizes acceptance of service without compensation. Comptroller General Warran to the Director, Bureau of the Budget, B-69907, 29 Comp. Gen. 194 (1947) (Allowing compensation to be waived by experts and consultants because of statutory authority to hire employees without regard to civil service classification laws).

The case law regarding whether compensation fixed by statute can be waived is further complicated since GAO has held that if a statute fixes a maximum, but no minimum amount of compensation, that amount can be waived. Specifically, "if the level of compensation is discretionary, or if the relevant statute prescribes ~~on~~ only a maximum (but not a minimum), the compensation can be set at zero, and an appointment without compensation or a waiver, entire or partial is permissible." Principles of Federal Appropriations Law, Vol. II, GAO/OGC 92-13, p. 6-59 *citing* 27 Comp. Dec. 131 at 1333 (1920).

The Principles of Federal Appropriations Law provides a summary of the case law regarding whether compensation can be waived:

- If compensation is not fixed by statute, i.e., if it is fixed administratively or if the statute merely prescribes a maximum but no minimum, it may be waived as long as the waiver qualifies as "gratuitous." There should be an advance written agreement waiving all claims.

- If compensation is fixed by statute, it may not be waived, the voluntary vs. gratuitous distinction notwithstanding, without specific statutory authority. Unfortunately, the decisions are not consistent as to what form this authority must take, and the extent to which authority to accept donations of services (as opposed to explicit authority to employ persons without compensation) will not suffice is not entirely clear.

- If the employing agency has statutory authority to accept gifts, the employee can accept the compensation and return it to the agency as a gift. Even if the agency has no such authority, the employee can still accept the compensation

and donate it to the United States Treasury. Principles of Federal Appropriations Law, Vol. II, GAO/OGC 92-13, p. 6-62.

Generally, most Federal employees are covered by the FLSA, 29 U.S.C. § 201 *et seq.* or the FEPA, Subchapter V, "Premium Pay,"5 U.S.C. § 5541 *et seq.*, which require overtime compensation in certain situations. Thus, these statutes could be viewed as requiring a fixed amount of compensation that can not be waived by an employee.[1] The threshold determination to be made is whether any employee is covered by the FLSA or the FEPA. Any employee who is classified as a bona fide executive, administrative or professional employee is exempt from the FLSA's overtime provisions. 29 U.S.C. § 213 (1999).[2] Generally, courts will narrowly construe exemption criteria and will presume plaintiffs are nonexempt. Adams et al., v. U.S., 40 Fed. Cl. 772 (1999). If an employee is exempt they are usually covered by the FEPA, which applies to most Federal employees of an Executive agency, with a few exceptions such as United States Justices or members of the Senior Executive Service. 5 U.S.C. § 5441 (1999).

The two primary differences between the two overtime compensation statutes is the amount at which an employee can be compensated and the criteria for determining whether an Agency is liable for compensating an employee for overtime worked. Generally, the FLSA requires compensation of not less than one and one half times regular pay for an employee who works a workweek in excess of forty hours. 20 U.S.C. § 207 (1999). The FEPA requires compensation for work "officially ordered or approved in excess of 40 hours in administrative workweek, or…in excess of 8 hours in a day." However, an important distinction between the FEPA and the FLSA statutes is that the FEPA caps the rate of compensation for those over a GS-10 level to equal to one and one half times the minimum GS-10 hourly rate. 5 U.S.C. § 5542 (1999). Those employees on a flexible schedule are still entitled per statute to overtime in accordance with whatever statute, the FLSA or the FEPA, that is applicable to their position. 5 U.S.C. § 6123 (1999). The head of an agency may require compensatory time in lieu of overtime pay for employees above a GS-10 level, in an amount equal to the time worked. 5 U.S.C. § 5543 (1999).

Under the FLSA, an employer is obligated to pay overtime for all hours that the employer "suffers or permits" an employee to work. In Re: Frances W. Arnold – Overtime Claim Under the Fair Labor Standards Act, B-208203, 62 Comp. Gen. 187, 8 (1983). The test for whether work is "suffered or permitted" is "if it is performed for the benefit of an agency, whether requested or not, provided that the employee's supervisor ***knows or has reason*** to believe that the work is being performed. Under the FLSA,

[1] Currently, there are two major litigation actions being brought by attorneys who routinely work beyond a forty-hour a week period, demanding overtime compensation based on FEPA. One of the Defendants' defenses is that the attorneys voluntarily worked, without being ordered or approved to do so, these hours and therefore are not entitled to compensation under the FEPA.

[2] Generally, the Office of Personnel Management ("OPM") administers and sets regulations regarding the FLSA. 29 U.S.C. § 204(f) (1999); Adams et al., v. U.S., 40 Fed Cl. 303 (1998).

employers have a continuing responsibility to ensure that work is not performed when they do not want it to be performed." Id. (emph. added). Accordingly, an employer having knowledge that a nonexempt employee is working beyond the administrative workweek is enough to make an employer liable for overtime under the FLSA.

The FEPA has a far more stringent standard for determining whether an exempt employee is entitled to overtime. In order for an exempt employee to be compensated, the overtime must be "officially ordered or approved" by someone in authority authorized to approve the work. *See* In Re: Emma Welsh, B-214880, 1984 U.S. Comp. Gen. LEXIS 474 (1984); Decision of Associate General Counsel Higgens, B-257901, 1994 U.S. Comp. Gen. LEXIS 692 (1994). However, if it can be shown that an authorized supervisory official induced an employee to perform overtime work, an exempt employee will be entitled to overtime. In Re: Emma Welsh, 1984 U.S. Comp. Gen. LEXIS 474, 3 (1984); In Re: Lillie Alexander – Claim for Overtime Pay, B-224094, 1987 U.S. Comp. Gen. LEXIS 1526, 7 (1987). GAO has held that

> [i]nducement is shown if supervisory personnel require the employee to perform the work that cannot be accomplished during regular working hours, schedule extra hours by placing the employee on a roster, or indicate that failure to work overtime will adversely affect the employee's performance rating. On the other hand, a supervisor's mere tacit expectation that extra hours will be worked falls short of overtime "officially ordered or approved." In Re: Emma Welsh, 1984 U.S. Comp. Gen. LEXIS 474, 3-4 (Sep. 1984)

However, as stated above, supervisors having mere knowledge that an exempt employee is reporting to work early or staying late would not entitle that exempt employee to overtime under the FEPA. In Re: Lillie Alexander – Claim for Overtime Pay, 1987 U.S. Comp. Gen. LEXIS 1526, 7 (1987). Bantom, Jr. et al. v. U.S., 165 Ct. Cl. 312 (1964) (holding that policemen who voluntarily came to work to change into their uniforms, rather than doing so at home, are not entitled to overtime, as it could not be shown that their supervisors directed or induced them to do so).

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