



## Allowing 'voluntary services' without pay could trigger Antideficiency Act claims

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**DID YOU KNOW?** Agencies may generally not accept "voluntary services" from employees unless authorized by law or for emergencies "imminently" threatening safety or property under Section 1342 of the Antideficiency Act. [31 USC 1342](#).

Although case law is sparse and some differences of opinion exist, Section 1342 "is a smart way for a federal employee to have a claim" when a manager orders the person to work beyond the regular tour of duty without recording the time for compensation, Federal Practice Group partner Joanna Friedman told **cyberFEDS®**.

For employees eligible for overtime -- under either the Fair Labor Standards Act or "Title 5 overtime" under [5 USC 5541](#) (2) -- "an agency cannot expect you to volunteer your services without payment of overtime." Doing so would "violate the Antideficiency Act because the Act specifically states that federal employees cannot volunteer their services unless the public health is at risk, which is not inclusive of performance of regular job duties/functions."

However, Friedman said agency expectations are often inconsistent with the spirit of the law for employees in positions that do not allow overtime. That's because there is often an "expectation" that they will work "whatever hours necessary to get the job done," even though the Antideficiency Act "seems to say that federal employees, in general, cannot be expected to volunteer their services."

That means managers must be careful to avoid any violations that could lead to agency liability, like allowing overtime-eligible employees to work without compensation after reaching the biweekly 80-hour cap under [5 USC 5547](#), federal employment law expert John Mahoney told **cyberFEDS®**.

"Due to staff shortages, agencies frequently assign their employees way more work than a reasonable employee can accomplish in an 80-hour [two-week] timeframe, meaning employees may feel obligated to continue working beyond what is allowed," he added.

Some agencies have even encouraged or ordered their employees not to record overtime hours that go beyond the 80-hour limit in an administrative pay period, which

allows agencies to comply with the biweekly cap law but potentially violates the Antideficiency Act by denying those employees their "rightful" overtime pay or compensatory time, he explained.

Whether such employees are allowed, encouraged, or ordered to work, agencies are likely violating Section 1342's prohibition against accepting voluntary services, he said.

Mahoney said Congress and the Government Accountability Office "need to clamp down hard on this abusive and unlawful practice."

Echoing that sentiment, Friedman emphasized that "there should not be a situation where managers are directing employees to work past their tour of duty with no expectation of pay" because the "vast majority of pay provisions" provide for overtime. Even though overtime may be discretionary, "there is a budget for it so long as it is approved," she added.

### **Purpose of prohibition**

Although the Government Accountability Office, which handles claims relating to availability of appropriated funds under the Antideficiency Act, declined to comment, an official told **cyberFEDS®** that the agency's official guidance on voluntary services is outlined in the [GAO Red Book](#).

In one of the Red Book's cases, [Recess Appointment of Sam Fox, B-309301 \(GAO 2007\)](#), GAO explained that historically "Congress enacted the voluntary services prohibition because agencies would coerce their employees to 'volunteer' their services in order to stay within their annual appropriation," but "these employees would later come to Congress and seek additional appropriations to pay their salaries for the 'volunteered' time, and Congress would often feel a moral obligation to pass an appropriation." So, the voluntary services prohibition "was enacted to prevent these coercive deficiencies," GAO explained.

GAO also discusses how Section 1342 interacts with advance waivers and gratuitous services, salaries specified by statute, and statutory maximum rates of pay:

- **Gratuitous services.** GAO differentiated voluntary services from "gratuitous services." If compensation is not fixed by statute or the statute "merely prescribes a maximum but no minimum," generally, agencies may accept "gratuitous services," which are defined as uncompensated services from an individual who agrees to waive compensation in a properly recorded advance agreement or contract, GAO said. This would not violate the Antideficiency Act because Congress did not intend to compensate individuals who knowingly waived their salary.
- **Salary specified by statute.** When a statute specifies the salary, employees cannot waive their compensation without specific statutory authority, such as the authority to accept donations of services or to employ persons without compensation, according to the Supreme Court's ruling in *Glavey v. United States*, 182 U.S. 595 (U.S. 1901), GAO

explained. Because employees whose salary is specified in statute could bring a future claim against the government even if an advance salary waiver is executed, GAO and the Department of Justice "have refused to allow such arrangements and have applied the voluntary services prohibition to such cases."

- **Statutory maximum rate of pay.** However, in instances in which the statute did not specify a rate of pay or in which the statute specified only a maximum rate of pay, employees may waive their compensation by executing an advance waiver agreement, GAO said. For example, in 58 Comp. Gen. 383 (1979), United States Metric Board members could waive their salary in advance because the statute only specified a maximum rate "not to exceed the daily rate currently being paid grade 18 of the General Schedule."

### **Specific statutory exceptions**

Friedman noted that "the language of the statute is very straightforward and does not include any specific exclusions" for types of federal employees, but Section 1342 allows agencies to accept voluntary services when specifically allowed.

For example, [5 USC 3111](#) (d) allows voluntary services as part of the information technology exchange program.

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