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New Editor in Chief!

You may notice on the masthead to your left that Eric Quinn is now the Editor and Joseph Quinn is demoted to Staff Writer. This change is being made to reflect reality: Eric is now deciding what topics we will feature each month and Joe is doing more writing, first because that gives Eric more time to do real legal work and second because, well, Joe likes to write articles so much. But now Eric gets the larger font.

Pesky Paid Family and Medical Leave Act

Recently, the Washington Legislature adopted the Paid Family and Medical Leave Act, which is now codified at Chapter 50A.04 of the Revised Code of Washington. The act requires employers, both public and private, to begin paying premiums to the State Employment Security Department (ESD) commencing in 2019, although benefits are not payable out of the state funds so-collected until 2020. Essentially, the two separate state funds (one for family leave, the other for medical leave) will pay out some wage replacement funds for 12 weeks of leave, or even longer under certain conditions such as complications of pregnancy.

There is an important exemption you should know about: employers with fewer than 50 employees do not need to pay the employer

part of the premiums. Such small employers do need to collect and remit to ESD the employee portion of the premiums. (Similar to Social Security, this law mandates that some of the funds collected come from the employer and some from the employee.)

The statute, at RCW 50A.04.115(3)(d), does allow an employer to elect to pay all or any portion of the employee's share of the premium.

If you have a current collective bargaining agreement with an effective date prior to September 2017, the new law does not yet apply to your agency. The rights and responsibilities of the new act do not apply to those represented employees until such agreements are re-opened or renegotiated. It would still apply, however, to the un-represented employees, in our opinion. .

Now the ESD has raised a legal issue that was not anticipated: the department claims that elected officials such as fire commissioners are "employees" under the statutory definitions. Although we have previously contended that fire commissioners are not employees under the common law as they do not work or operate under the control of the agency, this particular law specifically provides that it is enacted in derogation of the common law.[1] Our previous argument, with the Department of Retirement Systems, arose in a pension context when DRS contended commissioners were employees and had to be reported as such.

[1] https://www.firehouselawyer.com/Newsletters/March2017FINAL.pdf

The statutory definition in RCW 50A.04 of "employee" means an individual who is "in the employment" of an employer. We find such circular definitions to be generally unhelpful, but still contend that commissioners are not "in the employment" of their agencies, using the common ordinary dictionary meaning of the word "employment" and not relying on common law (which would also be supportive of our position but the Legislature has ordered us to ignore common law).

While some of the common synonyms of the word "employment" might justify a broad definition of employment in the statute, we think it is not employment as we know it.

However, there is one critical part of the legal research that we feel everyone is missing. RCW 50A.04.900 seems to suggest that the federal law should not be disregarded. Interestingly, the federal Family and Medical Leave Act sheds some light on this issue of whether elected officials are employees or "in employment." The federal FMLA refers us to the definitions of "employment" and "employ" in 29 U.S.C. Section 203. There is a very specific exemption in Section 203(e)(2) providing that an individual who is not subject to the civil service laws and who "holds a public elective office...of a political subdivision or agency" is excluded expressly from the definition of employee!

It would be anomalous indeed if a person excluded from the definition of "employee" under the original act—the federal FMLA—is somehow not excluded just because Washington has now enacted a paid FMLA. Surely, given this ambiguity (the issue is *not* directly addressed either way in chapter

50A.04) we think the Washington State Supreme Court would hold that elected officials are not employees under this new law.

Further supporting our interpretation is the State Family and Medical Leave Act, codified now at chapter 49.78 of the Revised Code of Washington. Please note that it provides, in RCW 49.78.410, that: "This chapter *must* be construed to the extent possible in a manner that is consistent with similar provisions, if any, of the federal family and medical leave act...." Also, that section continues that consideration must be given to the "rules, precedents, and practices of the federal department of labor relevant to the federal act." RCW 49.78.410 is only effective until the end of 2019.

We believe this clearly means that both the federal and state FMLA recognize that elected officials are not deemed to be employees or "in employment." We find it not reasonable to believe that the Legislature has adopted a paid version of the FMLA that turns all of that "on its head" so to speak, therefore making elected officials "employees" under the paid FMLA version. RCW 50A.04 simply does not so provide and the ESD interpretation is wrong, respectfully.

A legal doctrine applicable to interpretation of ambiguous statutes also mandates the same conclusion. Statutes are said to be *"in pari materia"* when they relate to the same thing or class. See *State v. Roggenkamp*, 153 Wn. 2d 614, 106 P.3d 196 (2005, dissent) citing *Monroe v. Soliz,* 132 Wn. 2d 414, 425, 939 P. 2d 215 (1997) quoting *King County v. Taxpayers of King County*, 104 Wn. 2d 1, 9, 700 P.2d 1143 (1985). As we have shown above, the paid FMLA law codified under Chapter 50A.04 RCW relates to exactly the same subject matter (thing or class) as the federal and the state FMLA law, but now of course it is paid. To harmonize them it is necessary to conclude that the definition of "employee" in all three laws is intended to exclude elected officials.

If the Legislature wants to clarify the question by amendment in this session or later, that does not change our view that the new paid FMLA statute should not be construed to apply to any elected officials in the first place!

I would also note that it would be virtually impossible for commissioners to qualify for these leave benefits anyway, thus calling into question the propriety of collecting or deducting some of their compensation (which is property) for this purpose without their consent or due process. The applicable statute on commissioner compensation currently limits their pay for their services to $128 per day or any portion thereof. They are not paid by the hour, do not work by the hour, and agencies typically keep no records of their "hours" worked. Thus, it would be difficult if not impossible to determine whether a commissioner worked 820 hours or more within the four-quarter qualifying period so as to ever be eligible for benefits.

Another issue that such a process might raise is whether the employer portion of any such premium would cause the agency to violate RCW 52.14.010, which limits the compensation precisely. If an agency paid the employer portion of the premium to ESD arguably it would be violating that statute by exceeding the funds payable to them or on their behalf in the above statute. This is just

another example of how the ESD interpretation does not take into account other laws that conflict with their interpretation.

It is beyond the scope of this article to consider other questions. However, we have heard that ESD also contends that bona fide volunteers working with fire districts are to be counted and reported as employees under this law, and therefore contributions have to be paid for them as if they are part-time employees. We doubt that interpretation as well, but as of now no client has asked about that issue so we have no final opinion on that question.

But we cannot resist one observation: Is this an example of how ESD is administering a law that requires "employees" who could never benefit from the leave to pay premiums anyway? The factual question is whether such volunteers worked more than 820 hours during the qualifying period (four of the last five quarters). Our guess is that many bona fide volunteers do not "work," for example, as much as 69 hours per month, on average, for their districts. Many districts do not even keep records of the "hours" worked, but still compensate on a per call or per drill basis. It would be interesting to know how many such volunteers would never qualify for benefits anyway.

SAFETY BILL

We do not ordinarily think of insurance as a type of safety measure, but if safety relates to risk management, which we think it does, then insurance coverage should be seen as a safety measure protecting the agency from liability and loss. We think, for example, that errors and omissions insurance is smart to have, to cover potential liability for the decisions of the board of commissioners. Any corporation should have such coverage, whether it is a private or public (municipal) corporation. Recently, WFCA's carrier advised the various county fire commissioner associations that they have no continuing coverage. The Pierce County Fire Commissioners Association has purchased such errors and omissions coverage from a private insurance broker and recommends that other associations do the same, to ensure the safety of their municipal assets.