The Firehouse Lawyer

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Inside this Issue

An Editorial: Time to Update and Clarify RCW 52.30.020

Is the Firehouse Lawyer the only one who thinks it is high time to seek legislative updating and clarification of RCW 52.30.020? As many of you know, this statute is a mandatory statute.[1] It provides that all state agencies and municipal corporations "shall contract" with a fire district within the boundaries of which they own buildings and equipment. Note that any buildings leased to nontax exempt persons or organizations are excluded from the need to contract. And of course cities or towns with their own municipal fire departments are excluded. Finally, school districts are excluded as they have another method for paying for such services.

For numerous reasons, and resulting from experience trying for many years to negotiate such contracts with state agencies and municipal corporations, we feel the statute needs work. Yes, it is nice that the statute exists and appears to require such agencies to contract and pay something for service from their local fire district or regional fire authority with the adopted powers of a fire district. However, we have learned, over and over again, that the omission from the statute of any methodology

[1] https://app.leg.wa.gov/RCW/default.aspx?cite=52.30.020

or formula for determining the rate of payment or even factors to consider in negotiating the contract results in untold difficulties in negotiating such contracts if the fire department is lucky enough to get one done at all.

A few years ago, about five of us fire service attorneys were finally successful in negotiating such a contract with King County, applicable to many of the county-owned properties with buildings or equipment served by our local fire department clients in that county. The historic agreement provides for charges predicated upon recovering from the county the equivalent tax rate charged to private property owners in that fire district. The county assessor's stated value for each property was used, multiplied by the rate per thousand of assessed valuation that all other property owners pay. Any property for which benefit charges are already charged was of course exempted from such a fire protection contract.

Therefore, it can reasonably be argued that the statute could be amended to provide that payment according to valuation and at the rate otherwise charged to private property owners is an acceptable method.

We have seen some fire protection contracts, however, wherein the state or local government agreed to pay a set rate per square foot of buildings protected. That might also be an acceptable method of charging, especially if a statutory minimum rate per square foot was specified, and if that could be updated periodically.

It is not our purpose here to draft the potential revisions to the statute. The foregoing are examples only. The law predates the existence of such new municipal corporations to deliver fire and EMS service. Speaking of EMS, though, since 70-80% of the calls today are for EMS rather than fire, is it not time to insert that into the statute rather than pretend that "buildings and equipment" are all that matter? Do you not respond to heart attacks and other EMS calls at government buildings and property?

Another problem we have encountered is that the state or local government agency often argues that the call volume to their properties is infinitesimal or very small so they should pay little or nothing. Or they offer to pay "per call." The last time I looked, you charge taxes to all private property owners, even if you never went to Grandma's house! It is time we recognized that operating the fire department is like running a utility like a sewer department—we all benefit from having it when and if we need it. Did you know that often utility laws provide you have to pay for *availability of service* whether you actually hook up or not? Ladder trucks, fire engines, and indeed paid firefighters are an expensive resource. Government agencies like these are required to pay for service, but the law that so provides does not have any teeth or any specificity.

We call on those interested in the issue to help draft clarifying legislation, and lobbying the same at the Washington State Legislature.

May an Employer Require Employees to be Vaccinated or Covid-tested?

Recently a client asked these questions:

1. **Can we require our employees to obtain Covid-19 vaccinations?** Yes, in the interest of public health, *and* because requiring a vaccination is not a "disability-related

inquiry" or a "medical examination" under rules promulgated by the Equal Employment Opportunity Commission (EEOC), as set forth on the EEOC website[2]:

> *If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual's impairments or current health status and, therefore, it is not a medical examination*

All of this being said, the employer should pay at least a portion of the cost of vaccination if there ends up being a cost to the employee.

2. **How can we determine if an employee is vaccinated?** From a practical standpoint, and to be perfectly honest, there is no clear-cut answer to how you would monitor whether an employee is vaccinated. What you need to be sure of is that you do *not* pester the employee to the point where you are arguably making a "disability-related inquiry" or conducting a "medical examination," which is unlawful under EEOC guidelines.

3. **Verbal affirmation seems risky; can we require them to show their card demonstrating they have been vaccinated and/or tested?** Yes, you can require that they show their card or provide other evidence showing (1) that they were tested (or vaccinated) and (2) the results of any test. You should also obtain a copy of test results, but not *share those test results with anyone* unless you are required by law to do so.

4. **If employees are unwilling to share the information, can we require a test or vaccination of them?** Again, the EEOC issued guidance to the effect that requiring vaccination (or testing) is not a "disability-related inquiry" or a "medical examination." An employer, under EEOC guidelines, can find that an unvaccinated (or untested) employee constitutes a "direct threat" to other employees and therefore require vaccination and testing of that employee (and all other employees, so as not to single out an individual employee), according to the EEOC website:

> *Therefore an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others.*[3]

However, you cannot screen out individuals with disabilities and treat them differently. In other words, after announcing the general policy directive on vaccination and testing, you will need to work with your employees on an individualized basis.

I would advise that you take the following steps prior to forcing an employee to test or vaccinate:

a. Inform all employees of the requirement to test and vaccinate. We have drafted a memo informing employees of the

[2] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

[3] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

policy, as we want to be careful about items b and c, below:

b. If an employee raises concerns about being required to test or vaccinate, contact your attorney. We want to be sure that you do not get into a murky area with respect to the Americans with Disabilities Act or the Washington Law Against Discrimination. If an employee won't comply with mandatory vaccination or testing, before taking any employment action, you should engage in an interactive process of finding a reasonable accommodation for the employee.

c. Furthermore, be wary of Title VII protections for religious freedom. If an employee has a "sincerely held" religious belief against vaccination or required testing, you could not effectively force them to vaccinate or test. You can require the employee to furnish objective proof of their sincerely held religious belief against mandatory vaccination or testing. And of course, an employee's general suspicion of the vaccine or testing would not afford them Title VII religious-freedom protections. Ultimately, if the employee refuses to vaccinate or test on the basis of a sincerely held religious belief, you will need to engage in an interactive process of finding a reasonable accommodation.

5. **If we employ individuals represented by a labor union, do we have to bargain any of this? If so, what?** Yes, you have to bargain with the district's represented employees. However, you only need to bargain the *impacts*, not the *decision* to require vaccinations and/or testing. We believe requiring vaccination/testing is a *permissive* subject of bargaining rather than a *mandatory* one. When making the permissive vs. mandatory distinction, we always balance the extent to which the subject bears on wages, hours and working conditions versus the entrepreneurial right of the employer to manage the workplace.

Requiring a vaccination is quite different than altering minimum staffing requirements when that would have a demonstrable impact on employee workload and safety,[4] or when laying off employees for budgetary reasons.[5] Covid vaccination or testing is not a pervasive requirement that would affect the employee's working conditions over a prolonged period of time, unlike changes to drug testing, training or sick leave usage. Instead, vaccination or testing is something of a "one shot deal" (although the vaccine requires two shots) that is designed to protect the employees from each other, and to protect the public.

Perhaps some employees that refuse to vaccinate may raise *constitutional objections* to being vaccinated. They may claim that the Fourth Amendment is implicated due to the search or invasion of their body. I am of the opinion that mandatory vaccination and testing would be necessary to achieve the compelling government interest of keeping public-safety employees safe from a deadly virus. I do not believe that the constitution prevents a public employer from requiring its employees to test and vaccinate. This would be particularly true

[4] https://www.firehouselawyer.com/Newsletters/November2017FINAL.pdf

[5] https://www.firehouselawyer.com/Newsletters/April2016FINAL.pdf

when the employer is not performing the vaccinations or the testing.

Ultimately, whether or not any specific employer should require its employees to get vaccinated or test for Covid is a highly fact-intensive inquiry involving many factors. We therefore recommend that you consult your agency's attorney prior to implementing such a program.

Be Aware of SECURE Act

Between 2008 and 2010 Congress provided a nice benefit to volunteer firefighters, assuming their agencies and the state legislatures cooperated. In a law known as VRIPA (Volunteer Responder Incentive Protection Act) the federal government exempted from income taxes all benefits provided by state and local governments. Absent that law, of course any reimbursements or compensation paid would be "income" and reported as such on the W-2 prepared by the "employer". We wrote about VRIPA in the Firehouse Lawyer. Follow this link to the article: https://firehouselawyer.com/Newsletters/v08n01jan2008.pdf

Although that statutory exclusion from income expired after 2010, Section 301 of the Setting Every Community Up for Retirement Enhancement (SECURE) revives this exclusion for the 2020 tax year.[6] Now, for that year's taxes, up to $50 of what would otherwise be "income" is excluded for every month in which a volunteer firefighter or EMT provides service to the agency "employer". The provisions are included in the underlying Protecting Volunteer Firefighters and Emergency Responders Act.

There was a legislative attempt to make these benefits permanent, but we do not believe that has yet been enacted. For now, it is enough to know that you need to consider this when issuing W-2s in January 2021 to your volunteer firefighters for 2020. It seems to us—given the exclusion provided by law—that the (up to) $50 per month exclusion must be subtracted from the wage number reported, on a monthly basis, so that the W-2 will not include any of those qualified amounts that are excluded from income by law. Otherwise, the volunteer –the taxpayer—may have difficulty claiming the exclusion.

Did you know about this rarely used exemption?

We recently re-established that under RCW 38.52.575, information "contained in an automatic number identification or automatic location identification database" is exempt from "public inspection and copying" under chapter 42.56 RCW, when that information is "intended for display at a public safety answering point with incoming 911 voice or data."

Most of you are familiar with computer aided dispatch and GPS systems. Basically, the above statute means that such data to be used at the dispatch agency to assist with rescues or other emergencies is not public information. Sometimes we only think about these kinds of exemptions when a client asks a question.

[6] https://www.congress.gov/bill/116th-congress/house-bill/1994

Trademark your logo?

We rarely write about trademark or copyright law because it is a recognized specialty in the law and we are not patent or trademark lawyers. With that disclaimer, we have issued our thoughts in the *Firehouse Lawyer* pertaining to court opinions related to trademark and patent law.

Recently, a client again has asked us if we know whether a fire district can protect its logo, insignia, or other symbols that the district calls its own and uses on uniforms, patches, or other places to display its identity. On the internet, a company is advertising the sale of T-shirts (or more) that contain the logos of many fire departments in this region, including the client who asked the question.

The Chief asked if there is any recourse, or any way to stop the company from using the fire district logo for commercial purposes or profit. He felt of course that the practice, if unchecked, might mislead the public or even cause someone to misrepresent (while wearing the T-shirt of course) their affiliation with the fire department, when in fact there is no connection or affiliation. We have to concede that possibility exists. So what is the law?

When I heard this, it rang a bell, or a sense of déjà vu came over me. I checked the *Firehouse Lawyer* and immediately saw why. The question was asked in January of 2014 and so I wrote an article in the newsletter about a case involving the question arising out of the City of Houston, Texas and also out of Washington, D.C.[7] You can read that article by following this link to that issue. In fact, you might want to read that before you continue with this article, as the conclusions have not changed.

After that case came down, we wondered if a Supreme Court appeal would follow. Well now we know that the Court denied certiorari and therefore the Circuit Court decision stands as "the law". **The holding of that case was that a municipality cannot register a trademark under the federal trademark law (the Lanham Act is the popular name).**

In revisiting the question the other day, I did further research and confirmed that Washington State Law—at RCW 19.77.020[8]—also bans municipalities from registering such marks to protect them.

The question remains: is there no way or legal theory to pursue to protect the logos or other insignia from being misappropriated? It may well be confusing to the public to see those T-shirts for sale on the internet. Confusion of the public is often given as the main reason for upholding such trademarks or recognizing them. Indeed, that rationale was mentioned by the Supreme Court in the Houston case. But is it really so confusing? After all, the person who buys those shirts on the internet can readily see they are not for sale by the fire department but rather by the commercial entity that maintains the web site. However, as one Chief noted to

[7] https://www.firehouselawyer.com/Newsletters/v12n01mar2014.pdf

[8] https://app.leg.wa.gov/RCW/default.aspx?cite=19.77.020

me, the concern really is that the buyer might thereafter use the T-shirt in some sort of misrepresentation or hold themselves out to the public as representing the district, causing confusion to the general public.

Sometimes it is suggested that a city or county could pass an ordinance banning use of its fire department logo, but such an ordinance would only be effectively enforced within the boundaries of that municipality. It would be easy to evade that. Moreover, a fire district or regional fire authority is a special purpose district and has no Article 11, Section 11 police power to adopt ordinances in the first place.
We have also considered other theories of law such as a suit based on "unfair competition" or "unfair trade practices", relying on chapter 19.86 RCW—the Consumer Protection Act. Unfortunately, our conclusion is that such a claim might well fail as well and therefore we do not recommend spending public funds pursuing such claims.

We think the better course to follow is to contact the commercial entity and request that they disclaim (on their web site and all marketing) any connection to the fire department. Actually, some of their shirts say "I support" …. the fire department shown, and so it is somewhat clear that they do not purport to represent the actual department.

In summary, we hold out little hope for such claims. As stated first above, however, I am not a patent or trademark attorney, and I am merely reporting the case law and some commentary in legal journals or law reviews. If you really need a legal opinion on this, we refer you to the many such specialists in the greater Seattle-Tacoma area. I suspect that they will agree with me, but you never know. They have some other ideas as well.