

The Firehouse Lawyer

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Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to public agencies, which include labor and employment law, public disclosure law, mergers and consolidations, financing methods, risk management, and many other practice areas!!!

Joseph F. Quinn, Editor

Eric T. Quinn, Staff Writer

Quinn and Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

His office is located at:

**10222 Bujacich Rd. NW
Gig Harbor, WA 98332
(Gig Harbor Fire Dept., Stn. 50)**

Mailing Address:

**20 Forest Glen Lane SW
Lakewood, WA 98498**

Office Telephone: 253-590-6628

Email Joe at firelaw@comcast.net

Email Eric at ericquinn@firehouselawyer2.com

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New Statute May Affect You - or Not

A relatively new statute that arguably affects fire districts and regional fire authorities may have "slipped under the radar"—until now. HB 1298, informally known as the Washington Fair Chance Act, effective June 7, 2018,¹ amends RCW 49.60 by adding a new chapter to the Washington Law Against Discrimination (WLAD).² What this bill purports to do is prohibit questions in employment applications, hiring announcements, and the like, which ask about criminal history. Under this new law, questions about arrests and convictions are now totally off limits. The definition of employer includes public agencies. The apparent legislative intent was to give past offenders who have rehabilitated themselves a fair chance at employment.

¹

<http://apps2.leg.wa.gov/billsummary?BillNumber=1298&Year=2017&BillNumber=1298&Year=2017>

²

See the bill here:
<http://lawfilesexst.leg.wa.gov/biennium/2017-18/Pdf/Bills/House%20Bills/1298-S2.pdf>

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However, (and this is a big however) section 2 of the bill in subsection (4) exempts from the law persons who will or may have unsupervised access to minors and vulnerable adults. It also exempts employers seeking nonemployee volunteers. The upshot of those two exemptions, in our opinion, is that this law does not prevent public employers from doing background checks or asking application questions pertaining to relevant and recent convictions, with respect to firefighters, EMTs, paramedics and their parallel volunteer responders such as firefighters and EMTs. It does, however, seem to require a different approach and a whole different application for any employee who does not meet those exemption categories, such as administrative personnel or a mechanic or maintenance employee.

We might also note the "Pre-employment Inquiry Guide" contained in the administrative regulations promulgated by the Human Relations Commission to implement RCW 49.60 has, for years, prohibited questions about arrests, so we have long recommended that fire department employers not ask about mere arrests without convictions. *See* WAC 162-12-140. That WAC also limits conviction questions to more recent convictions and seems to require the questions to be business-related.

Many years ago court cases noted that many minority persons have a higher

incidence of arrests without convictions than non-minorities and so any law allowing such questions about arrests might have a disparate impact on minorities and therefore violate the Equal Protection Clause of the federal and/or state Constitution.

We are advising clients to change their applications for the non-exempt persons to remove any questions about arrests or convictions at all, and that no criminal background checks are done on the non-exempt personnel. Take note, however, that HB 1298 also states that "[O]nce the employer has initially determined that the applicant is otherwise qualified, the employer may inquire into or obtain information about [the applicant's] criminal record."

NEW INFORMATION ABOUT SICK LEAVE STATUTE

The *Firehouse Lawyer* reported in our December issue about the sick leave amendments to RCW 49.46.210 that were recently enacted. As you may recall, the law generally appears to require all employers to add one hour of accrued sick leave for each 40 hours worked, annually, to the sick leave bank of all employees. Of course, this law was intended to compel employers to provide paid sick leave whether they previously did or not, and did not take into account that many public employers—such as fire districts and regional fire authorities—provide much

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more generous sick leave benefit accruals than that.

We have learned since December 2017, however, that the Department of Labor and Industries and the Attorney General have concluded that this statutory change does not apply to firefighters who are required as a condition of employment to sleep at the fire station, such as the typical shift firefighters. Moreover, they concluded that it does not apply to wildland firefighters. This opinion is based upon an Attorney General opinion from the 1970's interpreting the applicability of the Minimum Wage Act to such personnel. Since that interpretation of the new law is accepted by those state agencies, we wanted to let all of our clients and other fire departments concerned about the impact of the new sick leave law know that the impact might not be as great as they feared. *See Also* RCW 49.46.010 (3)(j).

Of course, applying that rationale to exempt shift firefighters and wildland firefighters does nothing good for those firefighters, paramedics or EMTs that work days or are not required to sleep over at their place of work and respond therefrom. Certainly, our clients and other fire departments employ some responders who fit into that category. Nonetheless, a consensus seems to be emerging among those of us municipal lawyers who advise fire districts and regional fire authorities

that we can rely on the opinion of Labor and Industries and the Attorney General.

Case Note: Ordinances Banning Sale of Marijuana Ruled Constitutional

Division Two of the Washington State Court of Appeals recently found that Clark County could ban the retail sale of marijuana within unincorporated areas of the county in accordance with Article XI § 11 of the Washington Constitution (giving counties, cities and towns the police power). *See Emerald Enterprises v. Clark County*, No. 47068-3-II (2018).

SAFETY BILL

The vertical safety standards require that an incident commander manage an emergency incident—which is a “specific emergency operation.” WAC 296-305-05000 (3). One function of the incident commander is to clearly establish when his or her command is being continued, transferred or terminated. WAC 296-305-05000 (4)(g). That is the reason why mutual aid agreements must contain provisions establishing how the transfer of command between agencies must function.

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