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CORRECTION OF SEPTEMBER 2016 ISSUE

In our most-recent publication of the Firehouse Lawyer, we inadvertently asserted that the initial imposition of a benefit charge, by either a fire district or regional fire authority, requires a super-majority (60% plus 40% validation). In fact, fire districts or RFAs only require 60% approval for the initial imposition of the benefit charge. The 60/40 requirement is applicable generally to excess levies, M & O levies, and bond issues. Additionally, the previous publication also suggested that the renewal or continuation of a benefit charge by both RFAs and fire districts only requires a simple majority. In fact, only fire districts require a simple majority for renewal. *See* RCW 52.18.050 (3)(a). Because of the way RCW 52.26.220 (1) is written, renewal or continuation of the benefit charge by an RFA would require 60% approval. For ease of reference, we include the previous article herein, with the incorrect portions of the paragraph on page two highlighted in red:

A Potpourri of Sorts

We will call this issue the "potpourri" edition of the Firehouse Lawyer. In this issue, we are going to discuss some of the general Washington laws that affect fire districts and regional fire authorities (RFA), and perhaps draw some distinctions in how the laws may apply in different ways to fire districts and RFAs. When we are referring to both fire

districts and RFAs, we shall refer to them as "Entities."

First, under RCW 52.12.021, a fire district may carry out any and all lawful acts to carry on its purposes, including receiving gifts, and entering into "any and all necessary contracts." This means that fire districts have the freedom to contract with any person or entity so long as this is lawful. Of course, RFAs may adopt all of the powers of fire districts under RCW 52, if at least one of the participating fire protection jurisdictions is a fire district; and if there is not a fire district in the RFA, the RFA may specify that it adopts the powers of fire districts within its plan. *See* RCW 52.26.090; *See Also* RCW 39.34.030 (permitting municipal corporations to contract with one another "for joint or cooperative action.").

Second, both Entities may levy up to $1.50 per one thousand dollars of assessed valuation of taxable property within their boundaries, subject to the 1% limitation under chapter 84.55 RCW, and the $5.90 limitation for certain taxing districts set forth under RCW 84.52.043. *See* RCW 52.16.130-160; *See Also* RCW 52.26.140.

Third, RFAs may utilize the generalized excess levy (exceeding the $1.50 limitation) under RCW 84.52.052, while fire districts may utilize excess levies for maintenance and operations under RCW 84.52.130 (RFAs are not constitutionally or statutorily authorized to seek the M&O levy under RCW 84.52.130 so should not attempt to do so).

Fourth, both Entities may utilize the fire benefit charge, and the same principle that a benefit charge must be "reasonably proportioned to the measurable benefit" to the property in question is applicable to both Entities when collecting a benefit charge; when either Entity assesses the benefit charge, that entity may not levy the third $.50 general ad valorem property tax; and both entities must initially receive a super-majority vote (60% plus 40% validation) to collect the benefit charge. *See* RCW 52.18.010; *See Also* RCW 52.26.240. A renewal or continuation of the benefit charge only requires a majority. *See* RCW 52.18.050 (3). (see above corrections).

Fifth, the bid-law thresholds set forth under RCW 52.14.110 are the same for both Entities.

Sixth, fire districts may incur indebtedness for any general district purpose, without a vote of the people, and pay off that indebtedness by issuing general obligation bonds (GOBs), so long as the indebtedness, in addition to any other outstanding nonvoter approved indebtedness, does not exceed **3/8** of one percent of the taxable property of the district; RFAs may do the same, but may not exceed **3/4** of one percent. *See* RCW 52.16.061; *See Also* RCW 52.26.130 (1).

Seventh, with a vote of the people, fire districts may issue GOBs for *capital purposes*, which may not exceed **3/4** of one percent of the taxable property in the district, and repay those bonds via excess levy; RFAs may do the same—issue GOBs for *capital purposes*—with a vote of the people, so long as any debt incurred from the

issuance of the GOBs does not exceed **one and 1/2** percent of the taxable property in the RFA. *See* RCW 52.16.081; *See Also* RCW 52.26.130.

Eighth, both Entities, of course, are subject to the exact same laws applicable to any municipal corporation in Washington, such as RCW 43.09.210, the state auditor statute that prohibits one taxing district from subsidizing another; RCW 42.56.070, requiring that all public records shall be subject to public inspection and copying unless a specific exemption or other law protects the record from disclosure (the Public Records Act); or RCW 39.33.010, regarding the intergovernmental disposition of property (these are just examples; the list of general laws is much, much longer).

Ninth, fire districts may form local improvement districts within their boundaries, and so too may RFAs, provided that there is a fire district that is a member of the RFA or the RFA otherwise adopts the powers of fire districts within its plan. *See* RCW 52.20.010; *See Also* RCW 52.26.090.

Tenth, fire districts are expressly authorized to utilize the small works roster for public works under RCW 39.04.155, and RFAs may presumably utilize the small works roster. *See* RCW 52.14.110; *See Also* RCW 52.26.090.

Eleventh, both Entities are subject to WAC 296-305, the vertical safety standards for firefighters, both career and volunteer, and therefore both must be aware of the new regulation requiring that the employer generally shall not employ in firefighting activities those employees with "known physical limitations" without clearance from a physician. *See* WAC 296-305-01509 (7).

Twelfth, both Entities, to the extent they employ career firefighters, are subject to the Public Employees' Collective Bargaining Act, which requires that if an employer seeks to unilaterally change the wages, hours and working conditions of its employees, the employer must (1) give notice to the union of its intent to implement the change, (2) provide an opportunity for bargaining prior to making a final decision, (3) *actually bargain*, in good faith, upon request, and (4) bargain to good faith agreement or impasse concerning any mandatory subjects of bargaining. *See Skagit County*, Decision 8746-A (PECB, 2006).

Thirteenth, both Entities are subject to the business-and-occupation taxes levied by the Department of Revenue for "carrying on business" (think CPR training that you charge fees for providing) in Washington State; but only fire districts have a specific exemption from the B&O tax for "fire district activities." *See* RCW 82.04.419.

Fourteenth, both Entities are subject to the regulations applicable to billing for Medicare and Medicaid, and must be aware that an emergency medical services provider may not seek state Medicaid reimbursement for ALS services unless those services were actually *provided* to the patient. *See* WAC 182-546-0450.

Fifteenth, RFAs have the power to enforce the fire codes set forth in RCW 19.27 (the state building code), and are therefore conferred a generalized police power that is otherwise conferred on counties and cities; but fire districts generally must contract with counties to have such a power. *See* RCW 19.27.110; *See Also* RCW 39.34.030; RCW 52.12.021.

Sixteenth, an RFA may provide civil service to its employees as provided under RCW 41.08; for fire districts, only the fully-paid districts qualify to provide civil service. *See* RCW 52.30.040; *See Also* RCW 52.26.280.

Seventeenth, fire districts are statutorily authorized to collect impact fees and SEPA mitigation fees, but must have independent local authority to collect such fees, and therefore the same is applicable to RFAs (provided that the RFA has a member fire district or adopts Title 52 RCW powers in the plan); and of course, prior to obtaining and collecting impact fees, either Entity would have to adopt a capital facilities plan and have that plan adopted by the local government as part of the capital facilities element of its comprehensive plan. *See* RCW 43.21C.060; *See Also* RCW 82.02.050; RCW 52.26.090.

Eighteenth, both Entities may levy a permanent emergency medical services levy (up to $.50), or an initial six-year or ten-year levy, by obtaining a super-majority (60% plus 40% validation); but uninterrupted continuation of the six- or ten- year EMS levies only require a simple majority (similar to FBC above). Both Entities may seek lid-lift elections (requiring a simple majority). *See* RCW 84.52.069; *See Also* RCW 52.26.060; RCW 84.55.050.

Nineteenth, fire districts may execute mortgages with a private bank, or provide a promissory note incurring indebtedness, provided that the debt capacity limits discussed above are not exceeded; logically, an RFA may do the same. *See* RCW 52.12.061.

Finally, both Entities may establish CARES programs. *See* RCW 35.21.930(5). CARES stands for "community assistance referral and education services."

Of course, the list of general laws applicable to fire districts and regional fire authorities is much more extensive, but we hope the above demonstrates some of the minute differences, and similarities, between various important laws applicable to both Entities.

HIPAA and Social Media: A Reminder to Be Careful

The HIPAA Journal, which is a fantastic publication that will alert your agency to the latest hot-button issues in medical privacy, reports that a great many HIPAA breaches occur as a result of lost or stolen electronic devices. But the newest risk for HIPAA breaches is the uncontrolled use of social media.[1] Consider that a record posted to social media effectively

[1] *See* link to HIPAA Journal article on social media: http://www.hipaajournal.com/social-media-huge-potential-cause-hipaa-violations/

becomes permanent, and your agency may not be able to destroy/archive that record in accordance with the records-retention schedules. But your district can monitor its employees.

A policy that prohibits the posting of any medical records, or any record that even moderately resembles a medical record, is absolutely necessary. But a policy that imposes *discipline* in a fair manner, in the event of an intentional or negligent posting of medical records—or any records—to social media, from a public or private account, is just as crucial. The HIPAA journal recommends adopting the guidelines that the Mayo Clinic promulgates for the use of social media. These guidelines include that a person making a post on social media should clearly articulate that this person's views are just that—personal—and are not the views of the agency.[2] Speaking of social media, your agency should harness the power of social media in marketing your brand and expanding public outreach and public input, so long as you *control the message*.

Case Note: Subjective Findings in Worker's Compensation Cases

Often, a Washington court case involving worker's compensation affects our clients. A new case may have interesting consequences. The *Felipe* case,[3] recently decided by the Washington Court of Appeals, Division One, involved the aggravation of a previous injury, and a re-opening of a worker's compensation claim for a head injury originally suffered in 2011. The court of appeals found that a particular worker claiming that a previous head injury has caused *psychological* symptoms, such as major depression and memory issues, need only document such symptoms with a treating physician's *subjective* interpretation of the worker's symptoms.

Under longstanding Washington law, a worker suffering physical symptoms possibly caused by a previous injury generally must present the "objective findings" of a treating physician that documented those physical symptoms, in order to re-open a claim. *See Tollvcraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 432, 858 P.2d 503 (1993). The *Felipe* court noted that "[O]bjective findings of disability are those that can be seen, felt, or measured by a physician." But the *Felipe* court found, in this case,[4] that the worker could claim an aggravated injury based on the "subjective findings" of a physician. "Subjective findings," according to the *Felipe* court, "are those based on the patient's report to the physician about symptoms perceived *only by the senses and feelings of the patient*." (emphasis added).

[2] *See* link to Mayo Clinic guidelines: http://sharing.mayoclinic.org/guidelines/for-mayo-clinic-employees/

[3] *Felipe v. Department of Labor and Industries*, NO. 75232-4-I (Div. One 2016).

[4] The court of appeals specifically found that "the nature of Felipe's injury excuses any requirement for objective findings."

Felipe may have implications for whether or not a worker can re-open a claim for a previous injury, based on his or her own presentation of psychological symptoms, which lead to the "subjective findings"—i.e. the opinion—of a physician. Thus, the employer may more easily be found liable for future contributions to L&I to repay the claim, in the case of psychological injuries, such as major depression, insomnia or memory issues. Of course, the worker must report symptoms to a treating physician in order for "subjective findings" to be issued—in *Felipe* that physician was a psychologist.

And of course, *Felipe* more than likely *does not* have implications for what an employer may require an employee to demonstrate to show that he or she is fit for duty to return to work. And *Felipe* may still be appealed to the Washington Supreme Court. Stay tuned.

Case Note: The Statute of Limitations in Public Records Act Litigation

Recently, the Washington Supreme Court decided *Belenski v. Jefferson County*. In *Belenski,* the Court found that the one-year statute of limitations (SOL) applicable to lawsuits brought under the Public Records Act begins from the agency's "final, definitive response to a records request." Under the plain language of RCW 42.56.550(6), the PRA statute setting forth the one-year SOL, the clock to file a lawsuit generally begins "within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." The plaintiff in *Belenski* argued that the catch-all two-year SOL[5] applied, and began running from the date of the agency's last provision of non-exempt records. The Court disagreed.

Consequently, under the new rule set forth in *Belenski,* when an agency makes a "final definitive response," i.e. closing a public records request or informing a requestor that there are no more "responsive records," the plaintiff has one year—not two years—to bring a lawsuit alleging that public records were wrongfully withheld. *Belenski v. Jefferson County*, No. 92161-0 (2016). Under the strict reading of RCW 42.56.550(6), the SOL begins running in only two circumstances: a final claim of exemption or a final production of records on an installment basis. That is no longer the case. Instead, a statement from a public records officer that "I trust that this responds fully to your public disclosure request" would start the clock—provided that all responsive records have in fact been disclosed.

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[5] Essentially, the two-year catch all statute of limitations applies when no other law specifically sets forth a different statute of limitations. *See* RCW 4.16.130.