Firehouse Lawyer

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Inside This Issue

Supreme Court Affirms in Harris County Case

As we mentioned in the March issue, and discussed briefly in the November issue last year, the U.S. Supreme Court recently heard and decided a significant case involving the relative rights and powers of employers and employees pertaining to use of compensatory time. On May 1, 2000, the Court, in an opinion authored by Justice Clarence Thomas, found that nothing in the Fair Labor Standards Act (FLSA) itself, or the Department of Labor's implementing regulations, prohibits an employer from compelling employees to use their compensatory time.

First, some background is in order. The 1985 amendments to the FLSA allow public employers to compensate employees for overtime by granting them compensatory time at a rate of 1-1/2 hours for every hour worked. There must be an agreement or understanding with the employees to use a compensatory time system, instead of cash payment of overtime. This agreement need not be in writing.

The FLSA provides that an employer must honor an employee's request to use comp time within a reasonable period of time after the request, so long as the comp time use would not unduly disrupt operations. The FLSA limits the number of comp time hours accruable. If that limit is reached, the employer must pay cash for the overtime. The FLSA permits the employer to "cash-out" comp time accruals at any time and entitles the employee to be paid for it upon termination.

In the case of *Christensen v. Harris County*, 529 U.S. _____ (2000), No. 98-1167, The Supreme Court affirmed the 5th Circuit Court of Appeals reversal of the District Court. The District Court had sided with the Deputy Sheriffs, who claimed the employer could not force them to use their comp time, as they approached the cap. Harris County had previously requested and received an opinion from DOL's Wage and Hour Division as to whether it could schedule non-exempt employees' use of comp time. The DOL opinion stated that the employer could do so, "if the prior agreement specifically provides such provision." Absent such an employee agreement, however, the DOL said this was not allowed. Obviously, the Deputy Sheriffs relied partly on the DOL opinion letter in their argument.

After receiving that letter from DOL, Harris County adopted a new policy, under which the supervisor established an accrual cap. (In other words,

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this was not negotiated.) When accrued comp time approached the cap, the employee would be asked to take steps to reduce the accumulation. If they did not, the supervisor was allowed under the policy to order them to use it at specific times.

The Deputy Sheriffs filed suit, claiming that section 207(o) (5) was the exclusive means of using accrued comp time. That is the section referred to above, requiring the employer to allow such use within a reasonable time after request, absent disruption of the operation of the employer. Essentially, it was this argument that the court rejected. The Supreme Court agreed with the 5th Circuit panel, which found that the statute did not directly address the precise question presented in the case. The Supreme Court pointed out that all parties agreed – nothing in the FLSA expressly prohibits an employer from making employees use their accrued comp time. The Court read the above section to mean that the employee simply has a "minimal guarantee" that he or she will be able to make use of earned comp time, when requested. The only reason to deny such a request is the statutory exception – undue disruption of operations. This does not mean, however, that the Congress intended to preclude scheduling of use of comp time by the employer. The section is more of a safeguard to ensure that an employee will receive timely compensation for overtime work. Various other sections of the FLSA also reflect that concern, the Court pointed out. The Court also noted that the employer could always reduce the accruals by paying cash for new overtime worked. The better reading of section 207 (o)(5), the Court said, is that it limits employer's efforts to prohibit the use of comp time when requested. The Court said an employer is always free to decrease the number of hours employees work. Second, an employer can use the money it would have paid in wages to pay accrued comp time. The compelled use of comp time, the Court said in this case, merely involves doing both of the above steps at the same time. When each step is independently lawful, the Court reasoned, it would make little sense to conclude that it is unlawful to use them in combination with each other.

importance of the DOL opinion letter. The Court would not defer to a mere opinion, as that is not the same as an agency regulation adopted after notice and comment rulemaking. Such opinions, like policy statements, agency manuals and enforcement guidelines do not have the force of law. Regulations in the Code of Federal Regulations, adopted after formal rulemaking, do have the force of law. And, as we noted above, the regulations are silent on the question presented. The Court declined to defer to the opinion as the agency's interpretation of its own regulations, in spite of prior cases, as that rule only applies when the regulation is ambiguous.

The end result of the case, we believe, is that the employer's right to schedule compensatory time is recognized by the Court decision. This does not mean that the section 207(o)(5) regulation should not be followed. In other words, this simply means that the right of the employee to use comp time upon request (absent undue disruption) is still protected, but the employer can schedule such use, with or without an agreement establishing such a policy. We suspect there could be a direct collision between these two rights, and possibly the Supreme Court would be called in to decide that issue. Please remember, however, that the above numbered section does not say or mean that the employee can use the comp time whenever he/she sees fit. It simply requires the employer to allow such use within a reasonable time, upon request, absent disruption of the operation. Therefore, we think the Supreme Court decision affirms the general right of the employer to schedule time off and/or pay overtime, absent agreement of the parties.

What's in a Name?

In recent years, there has been a noticeable trend in the state of Washington for fire protection districts to adopt informal names such as "Central Pierce Fire and Rescue" or "North King County Fire Department". I am often asked the question whether fire districts are free under the law to change their names to whatever the fire commissioners decide. I have consistently advised fire districts in Washington that they can adopt informal names through any process

What's in a Name? – cont'd

they desire, but that the statutes imply that fire districts should be named for the county in which the service area lies (or the majority of it) and there should be a number, provided in chronological sequence, when formation of the fire district is approved by the county.

However, some have pointed out that RCW 52.30.060 establishes a procedure by which a fire district can change its name. The statute provides that the name shall be changed as proposed by resolution of the board of fire commissioners, upon the adoption of a resolution approving the change by the county legislative authority. This means the county legislative authority in the county in which the majority of the fire district is located. There are no cases interpreting this statute. I interpret this statute in context with many other statutory provisions; particularly those contained within title 52 on fire protection districts. For example, in RCW 52.06 various aspects of merger of fire districts are covered. RCW 52.06.140 deals with an "inter-county" merger. If districts in two different counties merge, the merger district shall be identified by the name of each county in which the two districts are located, listed alphabetically, followed by a number that is the next highest number available for a fire district in the one of these counties that has the greatest number of fire districts. Suppose, therefore, that King County Fire District 39 merged with Pierce County Fire District 8. The merger district would then have to be named King-Pierce Fire District ____ , and the blank would be filled in by using the next available number in King County, because it has more fire districts than Pierce County. In other words, there is a statutorily required method for including county names and numbers in the naming of that merger district. The chapter on formation of fire districts supports this analysis too. RCW 52.02.070 deals with the final steps in forming a fire district in the first instance. It provides that the legislative authority of the county establishes the name and the number of the district. In the event of a multi-county fire protection district, the county legislative authority where most of the territory is located still must identify the district by the name of each county in which it is located, listed alphabetically, followed by a number, in the same basic fashion as we have discussed above in relation to multi-county mergers.

All of this suggests to me that there is no "wide open" naming of fire districts in the state of Washington, in spite of the language in RCW 52.30.060. So if you wanted to legally name your fire district: "Valley Fire Department" or "Riverside Fire Department", the statutes really do not contemplate that much freedom.

Secure the Emergency Scene

A client recently posed to me an interesting question from which others may benefit. The question revolves around securing an emergency scene to ensure highway safety, and without subjecting your fire department to negligence liability. The question presumed that the state patrol would no longer respond to highway accidents on county roads, which are the legal responsibility of the county sheriff's office. The sheriff's office being badly understaffed, takes quite a while to respond to traffic accidents in remote portions of the county.

Because of these practical problems, sometimes the only emergency service providers at the scene of a fairly serious injury accident may be fire department personnel. In some cases, the fire department will have both volunteer fire fighters and/or paid personnel at the scene. Suppose further that the fire department deals with the injuries and transports the injured from the scene. At what point does it become appropriate for the fire department to leave the scene? What if vehicles or debris remain a hazard on the roadway, or near the roadway? Should the fire department have the responsibility to call a local towing company?

Our answer assumes that fire department personnel will do everything normal and prudent to ensure the safety of the emergency scene while they are in attendance, including but not limited to placement of flares and other warning devices and/or persons to direct traffic. These measures are normally taken not only to protect other motorists on the roadway that

Secure the Emergency Scene – cont'd

might come upon the unforeseen hazard (the accident scene) but also to protect the workers, i.e., the firefighters, and the injured parties. However, once they are finished with their work at the scene and the injured parties are no longer present, why should the fire department hang around waiting for a tow truck or clean up debris, when traffic safety is, after all, the responsibility of law enforcement. One good reason would be to prevent negligence liability on the part of the department. It is my opinion that fire department personnel cannot leave an emergency scene if there are apparent hazards remaining on the roadway, such as debris that has not been cleaned up or vehicles or parts of vehicles in or near the travel portion of the roadway. This would be the case whenever a reasonably prudent person would recognize that these may be hazards to other drivers, given the state of the roadway at that time, such as the time of day, weather conditions and the like. In other words, we feel that the fire department owes a duty of due care to all other users of the roadway in this circumstance.

I have recommended, therefore, that the fire department should leave a volunteer or guard at the scene for safety purposes and should call for a tow truck if no other person has taken care of that item. My recommendation is that fire department personnel should not leave the scene unless law enforcement is present to secure the roadway or all vehicles and debris are removed from the travel portion of the roadway and shoulders. Failing that, the two above measures should be taken. It is not enough to leave flares or similar warning devices near the scene, if there are still hazards, because flares burn out and other warning devices can be removed. Obviously, there can be situations where it is impossible to leave a person at the scene if, for example, the fire department receives another emergency call to which the same personnel must respond. If that is the case then the personnel should call the towing company and should leave a warning on both sides of the emergency scene to alert drivers of the safety hazards.

FMLA Reminder

At least twice in the last couple of months clients have asked me to draft a leave policy under the Family Medical Leave Act, only to find out after discussing it somewhat that the employer did not have 50 employees. Please be advised that the Family Medical Leave Act does not require all employers to have a policy allowing 12 weeks of unpaid leave for family or medical emergencies. The law only applies to private and public employers having 50 or more employees.

Overweight Fire Trucks

Also this month, I have received two questions about the rules pertaining to the weight limits applicable to fire engines. RCW 46.44 allows a maximum weight of 20,000 lbs. on a single axle. However, with a special permit, a fire engine can be permitted on the roadways of the State of Washington with a maximum gross weight of 24,000 lbs. Tandem axles have their own weight limit. It appears to me that the intent of the permit system is not to allow an open-ended waiver of the weight limit. Washington Administrative Code 468-38 implements the above statutory scheme. It is a series of regulations promulgated by the State of Washington. WAC 468-38-050 addresses special permit procedures. WAC 488-38-070, entitled "maximums for special permits-non reducible" seems to establish non-waivable maximums on such permits. The maximum per single axle is 22,000 lbs. and for tandem axle, 43,000 lbs. Thus, it would appear, reading the statute and the WAC together, that fire trucks have a special statutory waiver to exceed the single axle weight limit up to 24,000 lbs. I conclude that this limit is not something that you can get a special permit to exceed, even temporarily. We believe that it would take special legislation to exempt fire engines altogether from the weight limit. It certainly appears that the purpose of this legislation relates more to protection of the roadway surfaces from premature wear and tear than it does to highway safety.