Firehouse Lawyer

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Inside This Issue

Deadline Extended

The editor of the *Firehouse Lawyer* was kind enough to extend our deadline two days so that it did not fall on the weekend. After all, even the Internal Revenue Service gives us until April 17th to file our tax returns. In honor of the tax day, we will endeavor to write as many articles this month about tax issues as possible, even if they are not about income taxes. Just kidding.

ISSUANCE OF WARRANTS BEFORE APPROVAL

Sometimes my readers will comment to me about articles. Many have said they enjoy most the articles relating to actual questions and legal advice given during recent months. I like to write about any novel or new questions, especially if I perceive that others might want to learn about those questions.

This month a client asked me about RCW 42.24.180, a statute I do not recall reviewing ever before, although it was enacted in 1994. This statute authorizes the issuance of warrants or checks before the legislative body has acted to approve the claims, under certain prescribed conditions and circumstances.

Fire districts, like other municipal corporations and political subdivisions of the State of Washington, ordinarily do not pay claims to vendors until (1) the goods or services have actually been received and (2) the governing body has approved the claim or voucher. This statute provides an exception to that general rule. Pursuant to this statute, the Board of Fire Commissioners may establish a process to authorize this "pre-payment", but only if the district has established by resolution that a designated officer may sign the warrants or checks, and other requirements are met. First, the auditing officer and the signing officer (e.g. Fire Chief) shall each have furnished an official bond, such as a fidelity bond, in an amount as determined by the Board, but not less than $50,000. Second, the Board must have already adopted policies and internal controls for contracting, hiring, purchasing and disbursing. Third, the resolution must require review of supporting documentation

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and approval of such warrants or checks at the next regularly scheduled meeting. Finally, the Board must require that if, upon review, claims are disapproved, the officers designated above shall cause the disapproved claims to be listed as receivables of the district and to pursue collection diligently, until the disapproved amounts are collected or the Board is satisfied and approves the claims.

While the statute's implementation might seem a bit cumbersome, and does have many requirements, one can see that on some occasions this statutory authority might come in handy. For example, sometimes it is necessary to cancel one or more meetings due to lack of a quorum. In such instances, bills still must be paid and payrolls met, so having this type of resolution in place might be appreciated, even if it is not used more than once a year.

A REMINDER: WAGE CLAIMS HAVE SPECIAL PENALTIES ATTACHED

While novel questions are important, so too are reminders about issues we have discussed before in the newsletter. A recent Washington Court of Appeals case falls into the reminder category. The public works director, hired in 1996, by the City of Montesano had a clause in his employment agreement providing for three months' salary, payable in a lump sum, if he was terminated without cause. After its initial term expired, the agreement continued on a year-to-year basis. After approximately seven years' employment, the City terminated the director on his anniversary date by letting the contract expire. Apparently, the City reasoned that the severance clause did not apply to a non-renewal.

The trial court ruled otherwise, but said the City's position was taken in good faith so the trial judge did not allow double damages or attorney fees as allowed by the special statute applicable to wage claims. On reconsideration, the trial judge awarded fees for litigating the payment issue. Both parties appealed.

The Court of Appeals, Division II (Tacoma), denied the City's appeal on the merits, but granted the appeal for the employee. The Court found that the City's position on the severance pay was a willful and unlawful denial of wages. Unlike the trial court, the Court of Appeals did not feel the employer's position was reasonable as the agreement was clear and unambiguous. To argue that the severance package only applied during the initial term, and thereafter "dropped out" upon the year-to-year renewal, was a risky position for the City to take, in our opinion.

Why would the language apply all during the term of the contract, and then disappear only upon the anniversary date?

Employers are reminded that wage claims can be expensive when you are wrong, not just because of the wages, but the doubling of the wages due, and then the high cost of attorneys' fees.

See Dice v. City of Montesano, Case No. 32407-5-II (February 22, 2006).

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HEPATITIS C HELD OCCUPATIONAL DISEASE OF FIREFIGHTER

A Philadelphia firefighter was diagnosed with hepatitis C in 1999, after about 15 years' employment with the fire department. He had a tattoo and a history of alcohol problems, both of which are risk factors for hepatitis C. However, his treating physician testified to the workers compensation administrative tribunal that, in his opinion, he must have contracted it through his work as a firefighter, as he ruled out the other factors. Of course, exposure to blood borne pathogens is a factor for firefighters, paramedics or EMTs, who are considered an "auxiliary service" to nursing or processing blood. Although the firefighter had alcohol issues, a biopsy of his liver showed no alcoholic liver disease, and the liver disease was more advanced than experts would expect from a virus contracted through the tattoo. There was also a family history of liver disease. The city's expert, who was a specialist in infectious diseases, opined that he contracted it from using intravenous drugs when he was younger. However, he based that solely on an unsigned note in another doctor's file regarding the medical history. The workers comp judge found the treating physician more credible and found his testimony to be dispositive.

This case shows that making a record at the administrative level is extremely important.

THE DATING GAME – LOVE IN THE WORKPLACE

This article was prompted by an e-mail from a reader in another state. Not infrequently, I am asked if there are any laws or rules pertaining to the growing issue of non-platonic relationships in the workplace. For one client, in recent years, I reviewed the literature in the HR publications to which I subscribe, and found several articles with good suggestions. Several approaches have been tried by employers, to address the issue of dating between co-employees, especially when one supervises the other. So what's an employer to do, when he/she learns that two employees are "in love", or "dating", or enjoying a non-platonic relationship, i.e. they are more than just friends? For discussion here, and to simplify, I will assume that neither person is married, and that the relationship is heterosexual. (Some of the thoughts may apply to other scenarios, but my purpose here is just to give you some ideas that have been tried.)

One approach, which we do not recommend, is a simple policy prohibiting dating or relationships of co-workers. It sounds good, and may be desirable policy, but it defies human nature and will not work.

A second approach is sometimes referred to as the "love contract". When the relationship comes to the attention of the employer, the two employees are asked to discuss the matter with the chief executive. They are required to execute a contract, acknowledging that their relationship is consensual, and that either one of them may terminate the relationship at any time without fear of reprisal, retaliation, or harassment of any kind with respect to their employment. The contract contains an indemnification provision, requiring them to hold the department harmless from any future claim of harassment arising out of the relationship. The point of the contract is obvious. First, the acknowledgment of the consensual nature of the relationship may help protect the employer from a sexual harassment claim as to unwelcome advances in the first instance. Second, it alerts the parties that the "death" of the relationship should also have no ramifications with respect to employment. The indemnification clause may not always work to completely immunize the employer from claims, but it certainly cannot hurt in my opinion.

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A third approach is to require the persons in such a relationship to notify the employer within a short time after the relationship commences. Failure to so notify can result in discipline. The theory of this approach, it seems, is that at least the employer should be aware of the issue or relationship. If the employer is not aware, then it is the fault of the employees. Or at least that seems to be the theory.

When asked about this subject last summer, in addition to surveying the available HR literature on relationships in the workplace, I also developed a model policy combining these approaches. At this point, I am not aware whether any client has adopted my model policy, which in many cases would require bargaining with the union(s), as it represents a change in working conditions for those unionized employees.

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The model policy also relates to the question of nepotism in the workplace. The policy expressly prohibits immediate supervision of a relative, and the word "relative" is defined broadly. Employment per se of relatives of existing employees, officers, or commissioners of the Fire District is expressly permitted.

The policy also flatly prohibits immediate supervision of any person with whom the supervisor has a "personal relationship" (which is another term defined in the definitions). A "personal relationship", when used in this policy, means more than mere friendship, and connotes an intimate (including but not limited to sexual intimacy) or romantic relationship between employees or officers of the District.

The model policy requires that any employee in a personal relationship notify the HR Manager within 48 hours after commencing such a relationship, or face possible discipline. Further, personal relationships of persons serving on the same 24-hour shift or in the same engine company or sharing living quarters are "disfavored". Re-assignment may be necessary when such relationships come to light.

The model policy is not meant to be oppressive or to place employees (it also applies to volunteers, by the way) in an unduly restrictive social straitjacket. It states: "All of these policies are intended to encourage and foster a workplace characterized by professionalism and which is free of harassment, or situations in which workers are unable to focus on their work due to extraneous or personal factors." In other words, we are already multi-tasking, writing e-mails while talking on the telephone, even as our co-workers try to get our attention. Now we have to deal with love too?

I would appreciate your thoughts on this topic and the model policy (which by the way is available for your perusal)…Regards, the Firehouse Lawyer.

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The Firehouse Lawyer newsletter is published for educational purposes only. Nothing herein shall create an attorney-client relationship between Joseph F. Quinn and the reader. Those needing legal advice are urged to contact an attorney licensed to practice in their jurisdiction of residence.