Firehouse Lawyer

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What Is A "Substantially Career" Fire Department?

Washington State House Bill 1756, which is now codified in the Revised Code of Washington at (new chapter) RCW 52.33, presents an issue that some may find perplexing. This statutory scheme establishes some duties for "substantially career" fire departments, including those operated by cities, fire protection districts, and regional fire authorities, to adopt response standards, levels of service, and to report on performance. But a problem arises because there is no statutory definition of "substantially career". The statute does make it clear that the term is used in contradistinction to a "substantially volunteer" fire department, but unfortunately that term is not defined either. This much is clear—the legislature uses the terms in a mutually exclusive fashion, i.e. a department cannot be considered **both** substantially career and substantially volunteer. It must be one or the other under this law, as one type has duties under this law and the other is essentially exempt.

Since "combination" departments are relatively common in Washington (with substantial numbers of volunteers **and** career firefighters), how does one decide upon which side of the line their combination department falls?

I have recently considered this issue for one of my regular clients so I will share the analysis of my opinion letter in this article. Hopefully, it will help those concerned with the issue to make their decision whether they need to start the compliance machinery.

It is well settled that remedial legislation is to be liberally construed to effectuate its purpose. *Doty v. Town of South Prairie,* 155 Wn. 2d 527, 120 P.3d 941 (2005); *McConnell v. Mothers Work, Inc.,* 131 Wn. App. 525 (2006). Liberal construction means that exceptions in the legislation are construed narrowly and all doubts about the scope or the coverage must be resolved in favor of inclusion, not exclusion, from compliance. Based on the clear legislative intent expressed in RCW 52.33.010 and RCW 52.33.030, I would say that HB 1756, which added a new chapter to Title 52 of the RCW on fire protection districts, must be considered remedial legislation. Therefore, in my view a narrow interpretation of "substantially career" would be inappropriate.

The word "substantial" or "substantially" is often used, in various legal contexts, so many court cases might be pertinent to aid us in interpreting that word. Terms such as "substantial compliance", "substantial performance", and "substantial factor" are in common usage in various legal disciplines. My interpretation of those cases is that, while the exact meaning of the word varies somewhat depending upon the circumstances, a good synonym for the word might be "significant" in some cases and "adequate" in others. Suffice it to say that when the word "substantial" or "substantially" is used, it means less than perfect or 100% complete. Therefore, my conclusions herein are conservative; the term could be interpreted even more liberally in this remedial law. In other words, it does not mean 100% career, but just that a significant part of service delivery depends on career personnel.

I have been informed that some experts, including perhaps some within the State Fire Chiefs organization, have been telling fire districts that one should simply count the number of volunteer firefighters, and then compare that with the number of paid or career firefighters and/or EMTs that the district employs. I find that approach unduly simplistic and dangerous from a compliance standpoint. Instead, I would argue that the analyst should examine the call volume statistics to ascertain whether a majority of the calls are comprised of response by career personnel. If a majority of the calls involve some career response, I would say that service provider could not fulfill its mission without the career personnel and therefore that department falls within the legislative intent of "substantially career", when one recognizes the remedial nature of this law.

Another way to look at the same problem is to ask whether the career response is "insubstantial". If, and only if, that adjective can be aptly applied to a department's service delivery, can one conclude that the department is not substantially career. For example, a department whose only career personnel responding to calls is a paid Fire Chief, supplemented by numerous volunteers who instead respond to the vast majority of the calls, is probably not substantially career. But once a department hires a few, or several, paid firefighters or EMTs and they respond to most of the calls, I believe the line is clearly crossed.

It is beyond the scope of this article to discuss the specifics of compliance, once the determination is made that a department is substantially career. We have already discussed this legislation in the *Firehouse Lawyer* before. However, basically substantially career departments are required to develop response standards to which they must conform 90% of the time. Next year—2007—such departments must report for the first time upon their performance under the

established standards. This seems to presume that the standards must be developed and put in place this year, as otherwise one would have no standards by which performance could be measured and therefore reported.

My conclusion is that perhaps too many departments think they are exempt when they are not, simply because they have more volunteers than paid personnel.

WORKERS COMPENSATION CLASSIFICATIONS

This is another article prompted by a client question regarding an area not previously explored by this lawyer.

The question pertains to various administrative code provisions related to job classifications as they affect L&I rates for employers. The relevant provisions are WAC 296-17-749 (on Classification 6904-salaried fire fighters), WAC 296-17-679 (on Classification 5306-administrative employees of taxing districts, and WAC 296-17-545 (on Classification 1501-manual labor employees of taxing districts). It is apparent to me that the intent of these regulations is to classify employees according to the relative risks attendant to their workplace. In other words, the rates and the system take into account that "firefighter" is a more dangerous job than "office worker", as firefighters are exposed to hazardous atmospheres, smoke, fire, etc. and office workers (ordinarily) are not.

Clearly, fire districts could, and do, have all three types of workers employed in these classifications. Districts often have maintenance workers, whose primary duties include the maintaining of vehicles and apparatus, or sometimes buildings. For them, Classification 1501 would be appropriate. I have no problem with the concept explained to us by an employee of the Department of Labor and Industries: You could divide an employee's time between duties that would place him/her in Classification 5306 and also in 6904.

Suppose a Fire Chief or similar administrative employee spends 90% of his/her time in the office, but occasionally (say 10% of work hours) responds to calls or acts as a firefighter or incident commander on the fire ground. It would be appropriate to report and document to the Department of Labor and Industries, that this person's time is split between the two classifications. (I understand that the rate, logically, is much lower for administrative employees than firefighters due to the lower risks; therefore you could save considerable money as compared to how you report these employees now.)

I have been told that many departments just place the Fire Chief and a lot of the middle management chiefs in the firefighter classification just because their job description (and occasional duties) require them to be responders, when in reality 90% of their time is spent on administrative duties. This concept could save those departments some money.

ARE RIDE-ALONGS ENDANGERING YOUR HIPAA COMPLIANCE?

A client inquiry this month alerted me to a nationwide ongoing debate about whether observers and other non-employees ("ride-alongs") create insurmountable HIPAA privacy issues for fire departments and EMS providers. The Washington Times recently reported

that a federal agency investigating a privacy complaint ordered the Washington, D.C. Department of Fire and Emergency Medical Services to discontinue its ride-along program. During the same week, the Modesto Bee reported that a university-based paramedic training program decided to shut down because it could no longer place its students on local ambulances as trainees. The article said the decision resulted from the inability of the parties to agree on liability issues that would arise, should a student violate HIPAA.

Since most of my clients allow various types of ride-alongs, including paramedic trainees, fire commissioners, and many other citizens, this issue certainly needed exploring. These programs serve various beneficial purposes including hands-on training of paramedics and ER personnel as well as public education.

Douglas M. Wolfberg and Stephen R. Wirth of Page, Wolfberg & Wirth, LLC have written a good article on this subject, demonstrating that EMS providers can operate a HIPAA-compliant ride-along program without undue concern for liability, so long as they keep certain key concepts in mind. The program should be governed by detailed written policy reviewed by legal counsel familiar with HIPAA and parallel state privacy laws. All ride-alongs should be trained or briefed on the importance of privacy for patients' protected health information. These personnel should acknowledge in writing that they have received the departmental policies on patient privacy, and agree to abide by them. Obviously, you should ensure that no disclosures other than for treatment, payment, or operations are made without patient authorization; this applies to ride-alongs just like employees. As usually included in policies I have seen already, make sure that provisions are in place to exclude ride-alongs from the scene if they are "in the way" or deemed to be disruptive, or in danger in any way. We suggest disclosing the presence of the ride-along to the patient or other responsible care giver or relative, so that he/she has a chance to express concern or exclude the ride-along if bothered by their participation.

It may well be that the federal interpretations of HIPAA regulations in the Washington, D.C. case were overly broad. We agree with PWW that HIPAA does not indirectly prohibit ride-along programs at all, or call for their abandonment. To the extent that the agency said or implied that non-employees shall not be exposed to HIPAA-protected health information, that is clearly inconsistent with the HIPAA Privacy Rule itself. The HIPAA definition of "workforce" is so broad that it includes volunteers and trainees, as well as others whose conduct, in the performance of "work" for the covered entity, is under the control of that entity, whether they are paid or not. This suggests that ride-alongs should be given some "work" to do, which is not uncommon, even if it is limited to minor tasks such as carrying equipment or cleaning up, and is not a pure pretext to just ride on the ambulance.

Due to the client inquiry, we have made sure that our client's policy includes the right of disclosure and refusal to the patient, as well as a clear direction about the necessity for maintaining confidentiality of all patients' protected health information. Such language should be added to the usual Request for Ride-Along and Liability Waiver that all participants are expected to sign. Hopefully, this storm will be weathered and such programs will continue.

I-747 RULING STAYED BY SUPREME COURT

As expected, the State Supreme Court (Commissioner) issued a stay on August 18, 2006 of Judge Roberts' ruling declaring Initiative 747 (the 1% property tax increase legislation) unconstitutional. Therefore, all taxing districts are "stuck" with I-747 for now, pending the Supreme Court's final ruling. Actually, even prior to the issuance of the stay, we were recommending to all fire district clients that they should assume I-747 is still applicable law, as it is extremely unlikely that the Supreme Court will issue a final ruling before the 2006 levy is made, for collection in 2007.

RELEASES IN ADEA CASES

The recent Ninth Circuit case of *Syverson v. International Business Machines Corp.* points up the dangers of an inadequate release in a case involving the termination of an older worker. To be valid under the federal Older Worker Benefit Protection Act (OWBPA), a release needs to be "knowing and voluntary". To satisfy that test, the release must (1) specifically reference the Age Discrimination in Employment Act (ADEA), (2) advise the employee to consult with an attorney before signing, (3) give seven days to revoke the agreement after signing, (4) give 21 or 45 days to review the agreement before signing, depending upon the exact circumstances (but this notice period is waivable) and (5) be written in a manner calculated to be understood by the average employee.

In *Syverson,* it appears that the main problem was item #5, because the release was confusing. By combining the release with a covenant not to sue, which most laymen would not understand, and then allowing some right to sue under the ADEA, the draftsman caused the release to be "not written in a manner calculated to be understood by the average employee."

Although the language of the OWBPA has not changed since it was adopted in 1990, interpretations of this statute by the courts and by the Equal Employment Opportunity Commission have evolved over time. Therefore, even carefully drafted ADEA releases should be reviewed in every instance by legal counsel to ensure that the release is still consistent with the statute as interpreted by the courts and the agency.

DISCLAIMER