Firehouse Lawyer

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Sexual Orientation Legislation

RCW 49.60.180, and some local municipal codes, such as the City of Seattle's Municipal Code, have long prohibited discrimination on the basis of sexual orientation. But there has to date been no similar federal legislation. The Employment Non-Discrimination Act (ENDA) has now been introduced in both the House of Representatives and the Senate. This legislation, which is similar but not part of Title VII of the Civil Rights Act of 1964, would apply to employers that have at least 15 employees. Primarily, ENDA would prohibit discrimination against employees or applicants on the basis of actual or perceived sexual orientation or gender identity. Similar to the ADA, ENDA would also prohibit "association discrimination". In other words, an employer cannot discriminate against an individual based on the actual or perceived sexual orientation or gender identity of a person with whom the employee or applicant associates. For example, refusing to hire a man because his two roommates are lesbians would be discriminatory.

Reliable sources seem to indicate that this legislation has a good chance of passage this time. The current draft provides for an effective date six months after enactment.

Because Washington State law already prohibits discrimination based on sexual orientation, we would suggest that fire department employers should already include "sexual orientation" in the list of protected classes in their discrimination policies.

FLSA AND "OFF THE CLOCK" WORK

We have dealt before with issues surrounding "telecommuting", a term used for working at home or somewhere other than in the office. But what about working from or at remote locations, when such work is done outside of normal work hours, such as pre-work, post-work, or "off the clock" time? Given the technological advances of the internet and e-mail in particular, this is certainly a modern issue that will not go away, as illustrated by a recent Ninth Circuit Court of Appeals case. In *Rutti v. Lojack Corp.,* Case No. 07-56599 (9th Cir., August 21, 2009), the plaintiff was employed as an alarm installation technician, whose work was often performed at the customer's location rather than at a company work site. The plaintiff normally spent a small amount of time daily before starting work on getting assignments, prioritizing and mapping routes. Then,

after work, he spent time (as did other technicians) using his home computer, using a company-supplied modem, to upload data about the jobs done during the day. Plaintiff considered his pre-work and post-work activities to be compensable work.

Under the FLSA, generally employers do not have to pay for commuting time, to and from work, but of course travel time from job to job during the work day is compensable time. Plaintiff considered his at-home activities both before and after work to be "work time" and therefore reasoned that his time prior to the first job and after the last job must also be properly considered compensable. The trial court dismissed Rutti's FLSA claims, finding that the FLSA does not require payment for commuting to and from work, nor does it require compensation for minor amounts of time spent on tasks before and after work hours.

The Ninth Circuit Court of Appeals sided with the employer for the most part. They noted that in the federal Employee Commuting Flexibility Act Congress had specifically provided that use of an employer's vehicle and related incidental activities do not convert commuting time into paid work time. The court said there could be exceptions not applicable here, such as when the employer required the employee to perform job duties while driving to work (such as running errands or picking up parts, presumably). Similarly, the court found the pre-work activities not to be compensable, essentially regarding that as *de minimis.* In addressing the *de minimis* issue, the FLSA considers the practical problem of recording small added bits of time, how much total time is in question, and the regularity of the practice. In this case, the evidence was that he only spent a minute or two on those pre-work tasks, although he did do that daily. The court said his planning and mapping activities really related to his commute, which they had already found non-compensable time.

The ruling as to the post-work activities was different; the court said a trial was required on that claim. Apparently, it may have been more than *de minimis.* Moreover, it seemed that the employer was requiring that effort to enter data, as the technicians were expected to ensure the data went through successfully, even if that meant trying to transmit more than once.

Thus, the lessons learned in this case are as follows: (1) Commuting to work is still generally not considered work time, but do not expect employees to work during their commute or do errands on the way, as that may change the FLSA result; (2) the *de minimis* rule is alive and well; (3) the concept of "permitting or suffering" the employee to do work in the employer's interests is still applicable, so do not expect employees to do significant work on their own time (off the clock) and not get paid.

While salaried, FLSA-exempt employees are not affected by this discussion, and their out-of-office efforts are the same as in-office efforts, hourly employees should be monitored with respect to their at-home or out-of-office efforts. If you "suffer or permit" them to work at home, for example, writing e-mails and otherwise using their home computers, even if it is done without permission but with actual knowledge of superiors, be aware that you may face an FLSA claim for wages or overtime. Thus, the first step is to be aware of what your hourly employees are doing when they are not in the office, if any of that activity is for the apparent benefit of the employer.

JOB DESCRIPTIONS ARE GOOD TO HAVE (AND FOLLOW)

I am often asked to review, and sometimes to write, job descriptions for firefighters, paramedics, or fire chiefs. Many times my focus is on ensuring that the "essential job functions" are described adequately to provide the employer a measure of protection under the Americans with Disabilities Act. But there are many other good reasons to have job descriptions, to have them reviewed by counsel, and once you have them, to make sure they are observed or followed in actual practice.

A good article on job descriptions by attorney Kara Shea of Miller & Martin PLLC (Nashville, Tenn.) appeared recently in HR Insight, a publication of the M.Lee Smith Publishers LLC. In the article she told the story of an experience I am sure many of us attorneys have had, wherein she had the written job description all set to use as an exhibit in a deposition in a wrongful termination case, only to find out that the employer had not really documented that the description was implemented and actually followed.

It should be abundantly evident that it is better to have a written job description than not to have one. Imagine, if you will, an argument in litigation or elsewhere about some employees acting beyond the scope of employment or doing something not "in the ordinary course" of their job duties. It would be a lot easier to prove your case with a written job description. Even in the context of performance evaluation systems, a job description helps. You can hardly criticize an employee for not doing something, if it simply is not included in their agreed duties. But if it is written down, right in their job description, then the duty is clearly theirs. Obviously the description is also relevant evidence in a discharge or discipline situation. Being able to specify what part of the job description is not being performed competently, or at all, is certainly advantageous. And, as implied above in this article, when an employee files an ADA claim, or asks for an accommodation under the Act for a claimed disability, it is helpful to have the list of essential job functions, in a section denominated just that way, in the written job description. Frankly, it is all but essential to your defense in such ADA matters.

Similarly, if you claim an employee is FLSA-exempt, that should be documented and expressly stated in their written job description. The employer's expectations as to hours worked, and that work time out of the office or at any time, is expected, should be listed in that type of job description. Since there are well known requisites to comply with the executive exemption and the administrative exemption of the FLSA and parallel state laws, that precise language of the regulations should be inserted right into the job description (e.g. "supervises two or more employees", "exercises independent judgment on matters critical to the employer", etc.)

Finally, review your descriptions regularly and at least annually. And get each employee to acknowledge in writing that their job description is accurate and confirm that is what they actually do! The results of a "desk audit" should never be that someone is in fact doing substantially more or less than their job description provides, or you are in trouble.

As usual, the publications of M. Lee Smith have good quality articles.

FOLLOWING THE CANINE CONTROVERSY?

While the issue may be of greater interest to law enforcement officers, my fire service clients with accelerant-detecting canines might be interested in certain FLSA developments as well. Last year, Oliver Springs, Tennessee was ordered by a federal judge to pay back wages and liquidated damages of more than $42,000 to a police officer who handled a K-9 narcotics detection dog during off-duty time. And in New Mexico, a private security firm agreed to pay seven K-9 handlers $115,056 in back wages for unpaid overtime as part of a Department of Labor settlement. Now, just recently, 50 police officers sued the city of Houston for unpaid overtime for the time they spent grooming, feeding, boarding, exercising and caring for their assigned canines while at home. This all goes back to the regulation requiring the employer to pay for the time an employee is "suffered or permitted to work." 29 U.S.C. §203(g). Stay tuned as this issue works its way through the courts.

DISCLAIMER