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Used Sick Leave *Does Not* Carry Over Under the New Law

We were recently asked whether the new sick leave law, RCW 49.46.210, requires that 40 hours of accrued paid sick leave be carried over even if a portion of that 40 hours is used. The answer to this question is no. Hours of accrued but *used* sick leave are not "protected" under the new law (effective January 1, 2018). This is so for the following reasons:

Under RCW 49.46.210 (1)(j), "[*U]nused* paid sick leave carries over to the following year." (emphasis added). The above statute means that if the employee has at least 40 hours of accrued and *unused* sick leave, that unused leave *must* be carried over to the following year (the employer can set a cap of 40 hours of *unused* leave that may be carried over per year). *See* RCW 49.46.210 (1)(j). Consequently, the 40-hour requirement would not apply to the *used* portion of accrued sick leave.

By way of illustration, if an employee works 2080 hours in a given year (40 hours a week), the employee would accrue 52 hours of paid sick leave under the new law (1 for every 40 hours and 2080 divided by 40=52).[1] Pretend further that the employee uses 30 hours of that paid sick leave. That would mean that the employee still has a "bank" of 22 hours of accrued paid sick leave for that year. Pretend

[1] "An employee shall accrue at least one hour of paid sick leave for every forty hours worked as an employee." RCW 49.46.210 (1)(a).

further that the District only carries over 22 hours of this (accrued but unused) leave to the following year. Then the employee cries foul, claiming that the used portion is "protected" under the new law. The answer to the employee's concerns would be that the above law means that only *unused* leave carries over.

Our ultimate interpretation is that 40 hours are not "protected" unless they are *unused*. RCW 49.46.210 (1)(j). To interpret the statute otherwise would lead to absurd results. Such an interpretation would result in public agencies giving gifts of public funds (carrying over used leave as though it had not been used would be compensation for services that have already been rendered).[2]

A side note:

Of course, the employer can elect to permit amounts of accrued and *unused* sick leave to carry over, in excess of 40 hours: "Employers are not prevented from providing more generous paid sick leave policies or permitting use of paid sick leave for additional purposes." RCW 49.46.210 (1)(e). Consequently, an agency could permit 52 hours (or more) of accrued and unused sick leave to carry over. But again, it is our interpretation that the employer "providing more generous benefits" under RCW 49.46.210 (1)(e) would not be carrying over used sick leave as though it were unused (because that could easily be considered a gift of public funds).

Another "wrinkle" however is presented by caps on sick leave.

How does the new statute square with the very commonly used "caps" on sick leave? This presents some very interesting questions. First, there are really two types of sick leave caps in use in Washington: (1) carryover caps and (2) accrual caps. To illustrate, District A has a carryover cap of 720 hours on accrued sick leave, meaning that every January the employee has to have accrued (or reduce to by using) no more than 720 hours or they will lose it. Let's assume that the policy provides for one hour of added sick leave for every 40 hours worked and that District A just front loads the leave, adding all 52 hours anticipated to be accrued in the beginning days of January. (Thus the Employee can have 772 in the bank later in the month. That is OK.)

District B, by contrast, has an accrual cap of 720 hours, meaning that historically they said the Employee's accrued sick leave at any time cannot exceed 720 hours. They also front load 52 hours in January but only up to 720 hours.

Now, how does the new law apply to these facts for Districts A and B? District A would seem to satisfy the new law in all respects since they continue to add accrued sick leave at a rate in excess of the minimum of the new law in the new year, regardless of the carryover cap. I suppose one could argue that the cap meant that an employee at the cap, who used less than the newly accrued sick leave in the previous year,

[2] *See* Article II § 25 of the Washington Constitution: "The legislature shall never grant any extra compensation to any public officer, agent, employee, servant, or contractor, after the services shall have been rendered"; *See Also* Article VIII § 7 of the Washington Constitution: "No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm."

did lose some of the hours accrued, in contravention of the law requiring the carrying over. RCW 49.46.210(1)(j). But what if the policy provided that sick leave is used on a last in, first out basis (LIFO). Would that not make a difference?

District B has a slightly different analysis, because District B seems to deny accrual in the first place, when an employee hits the accrual cap. That arguably creates problems with the basic working of the statute, i.e. that each employee *shall* be afforded one hour of accrued sick leave for every 40 hours worked. But wait just a minute, the employer (District B) argues: "We afford the employee far more than one hour for every 40 hours worked and we allow far more than 40 hours to be carried over from year to year and in fact up to 720. How can we be in violation, when we obviously meet the statutory intent in every way, i.e. to provide reliable and predictable sick leave to employees in substantial amounts?" A pretty good argument, right? But one has to admit that, theoretically, an employee not accruing sick leave because that would exceed his or her accrual cap does conflict with the literal language of the statute, or part of it. I guess we lawyers will have employment in the new year after all.

Upcoming Municipal Roundtable

The Firehouse Lawyer holds a quarterly Municipal Roundtable in which members of the fire service and other municipal corporations gather to discuss issues that are relevant to public agencies. We learn better when we talk to each other about the issues we face. The Firehouse Lawyer did not hold a Municipal Roundtable in the third quarter of 2017 due to legal work volume. However, we will be holding another MR on Friday, January 5, 2018, from 9:00 to 11:00 AM. This MR will be located at South King Fire and Rescue, Station 68, 1405 SW. 312 St., Federal Way, WA 98023. The subject of this MR will be Bid Law Compliance, including but not limited to the use of purchasing cooperatives under RCW 39.34.030 (5).

Legislative Note

The Washington State Legislature has made a change to LEOFF II, which shall apply to fiscal years *2018 and 2019*:

> When an employer charges a fee or recovers costs for work performed by a plan member where: (a) The member receives compensation that is includable as basic salary under RCW 41.26.030(4)(b)(1)[3]; and (b) The service is provided, whether directly or indirectly, to an entity that is **not** an "employer" under RCW 41.26.030(14)(b); the employer shall contribute both the employer and state shares[4] of the cost of the retirement system contributions for that compensation. Nothing in this

[3] The term "basic salary" means "salaries or wages earned by a member during a payroll period for personal services, including overtime payments." RCW 41.26.030(4)(b).

[4] Currently, the member contribution rate is 8.75% of basic salary; the employer contribution rate is 5.43% of basic salary; the state contribution rate is 3.5% of basic salary: http://www.drs.wa.gov/employer/DRSN/drs-email-17-009-new-contribution-rates-2017

> subsection prevents an employer from **recovering the cost** of the contribution from the entity receiving services from the member.

RCW 41.26.450. (emphasis added). Of course, under 41.26.030(14)(b), an "employer" is a government entity:

> (b) "Employer" for plan 2 members, means the following entities to the extent that the entity *employs any law enforcement officer and/or firefighter*: (i) The legislative authority of any city, town, county, district, or public corporation established under RCW 35.21.730 to provide emergency medical services as defined in RCW 18.73.030; (ii) The elected officials of any municipal corporation; (iii) The governing body of any other general authority law enforcement agency[5]; or (iv) A four-year institution of higher education having a fully operational fire department as of January 1, 1996.

(emphasis added).

Under RCW 41.26.450, a fire department must make both state and employer contributions under the following circumstances: (1) the department charges a fee or recovers costs for the provision of services by a LEOFF-II employee; (2) the employee earned "basic salary" for providing the services; and (3) these services were provided to an entity that was **not** an employer under RCW 41.26.030(14)(b).

The question becomes: Would a fire department have to make the state contribution when the department is reimbursed by the Department of Natural Resources (DNR), or reimbursed under an EMAC[6] contract, or a fee-for-service contract with a Washington city or county?

To begin with a Washington city: The department would have to contribute the state portion of LEOFF II (3.5% of basic salary) for services provided to a city, *but only if* that city is **not** an "employer" under RCW 41.26.030 (14)(b). The city would be an "employer" if the city employs firefighters or law enforcement officers (and therefore the state contribution would *not* need to be made).

Furthermore, the department would likely have to make the state contribution when recovering costs from or charging fees to DNR or EMAC. That is because these entities are not LEOFF-II "employers" under RCW 41.26.030 (14)(b), because neither is (1) a municipal corporation or public corporation under RCW 35.21.730, (2) a "general law enforcement agency," or (3) an institute of higher education having a fully operational fire department.[7] Therefore, insofar as the person that provided the services earned "basic salary" when providing services to the DNR or EMAC, the fire department would have to pay 3.5% of his or her basic salary over to LEOFF II.

Take further note, however, that nothing in RCW 41.26.450 would prevent the department from seeking reimbursement of the state

[5] Essentially, a "general law enforcement agency" can be either a local or state agency whose primary function is the enforcement of criminal laws. See RCW 9.41.251 (2)(b).

[6] "EMAC" is the Emergency Management Assistance Compact: https://www.emacweb.org/

[7] In other words, whether the entity employs a law enforcement officer or a firefighter is not the only issue.

contribution from the entity that received the services. In other words, if the department paid the state contribution to LEOFF II, the department is statutorily authorized to seek reimbursement of that contribution from DNR or EMAC, or a city which is not a LEOFF II "employer."

SAFETY BILL

This month's Safety Bill wants to comment on the issues of firefighter safety that may have been presented by the recent Amtrak derailment, which proved fatal to three passengers and injured many other persons when some cars landed on I-5 and at least one other perched precariously off of the railroad bridge.

According to media reports, (1) some bystanders, including two or three military personnel who were on scene before first responders and (2) firefighters engaged in rescue operations *entered the railroad car hanging at a 45 degree angle above the freeway!*

One article described the rescue as taking a long time due to several factors, including the above scenario with that leaning car. The Incident Commander was quoted in media reports about why it takes time and what they do to ensure firefighter safety. The bystanders and military personnel who entered that railroad car right after the accident said they were concerned (and rightly so) about the car falling on the roadway, because several injured persons were lying in the road *directly below that car hanging there.* Thus, job one was to move those injured parties to a safer place, which they did before the firefighters arrived. But then the military folks entered the hanging car. Did they risk their lives by doing so? Probably, but they showed undeniable courage and extricated several people from that car. (One woman was pinned and her husband stayed with her until firefighters entered to extricate her.)

But firefighters, especially those under the jurisdiction of the Department of Labor and Industries, have to consider the safety rules prior to attempting rescue. The old adage is: "We risk a lot to save a lot." It is worth noting that, during the initial phases of such an incident, the requirements are somewhat more lenient than during later phases. Upon learning that a person or persons are (1) trapped inside that railroad car and (2) are still living but seriously injured, we think the regulations clearly allow firefighters to enter the car for rescue purposes after some sort of rudimentary size-up and search, to ensure that the risks are manageable.

Interestingly, good Samaritans are not subject to the safety rules so they can risk life or limb of their own to attempt rescue.