# The Firehouse Lawyer

Volume 16, Number Seven

July 2018

Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to public agencies, which include labor and employment law, public disclosure law, mergers and consolidations, financing methods, risk management, and many other practice areas!!!

Joseph F. Quinn, Editor

Eric T. Quinn, Staff Writer

Quinn and Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

His office is located at:

**10222 Bujacich Rd. NW**
**Gig Harbor, WA 98332**
**(Gig Harbor Fire Dept., Stn. 50)**

Mailing Address:
**20 Forest Glen Lane SW**
**Lakewood, WA 98498**

Office Telephone: 253-590-6628

Email Joe at firelaw@comcast.net
Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at:
firehouselawyer.com

## Inside this Issue



### THE FIREHOUSE LAWYER ON SUMMER BREAK, BUT BEWARE OF THE BID LAWS

There is not very much news to report due to summer vacation. However, for your consideration while poolside, let us pretend that your agency approves what merely appears to be a contract for labor (not a public work) in the amount of $50,000, but which includes the installation of parts (equipment) that total approximately $41,000. Pretend that your agency does so without going out to bid and that no other applicable exemption applies (no interlocal agreement that permits piggybacking or purchase through a purchasing cooperative under RCW 39.34.030 (5); no use of a vendor list under RCW 39.04.190; not a sole source or emergency, or purchase based on "market conditions" under RCW 39.04.280; and equipment not purchased through state bid under RCW 39.26.060). This is likely unlawful under various statutory schemes.

For example, RCW 52.14.110, applicable to fire districts and regional fire authorities, states that purchases of materials and equipment valued over $10,000 must be competitively bid unless an exception applies. Although purchased in connection with a labor contract, the equipment to be installed exceeded $10,000 in this case, and no exception applied. Consequently, approval of what merely appeared to be a contract for labor, without going out to bid, would likely violate RCW 52.14.110.

As an additional example, a water-sewer district must engage in competitive bidding prior to awarding contracts for equipment that exceed $40,000. RCW 57.08.050. The above scenario (equipment above $40,000 and no applicable exemption) would likely violate RCW 57.08.050.

As an additional example, a public utility district must engage in competitive bidding procedures for contracts for equipment exceeding $15,000. RCW 54.04.070 (1). The above purchase (equipment above $15,000 and no applicable exemption) would likely violate RCW 54.04.070 (1).

In other words, if a contract for labor (which is not a public work) involves the installation of parts that exceed the bid law threshold applicable to your agency, consult legal counsel prior to blindly approving such "contracts for services."

**JUST KIDDING - NO TIME FOR SUMMER BREAK**

This article is intended to be a section by section discussion of the New Paid Family Leave Statute adopted by the Legislature and the Governor of the State of Washington in 2017. Since the law has over one hundred sections, we will only deal with the most important ones. Only the most important sections—from the standpoint of municipal corporations—are discussed at length herein.

Section 1 of the bill contains the **legislative intent**, which is fairly obvious. The state wants to promote family stability and economic security of its workers. The law states that it creates a leave "insurance program", and it does provide for premiums funded by employee and employer contributions later in the law.

Section 2 of the bill contains many critical **definitions** including a broad definition of "employer" so that it definitely applies to local government employers such as fire districts and RFA's, as they are political subdivisions and municipal corporations. Even quasi-municipal corporations are included so organizations like South Sound 911 or Jeffcom would have to comply. Also, the definition of "employment" is so broad that, if a person is paid "wages" they may be in an "employment" relationship under this law even if not technically an employee under the common law but more of an independent contractor with a personal service contract. "Employment" does expressly exclude self-employed individuals and contractors not under the direction and control of the employer. The definitions of "family leave" and "medical leave" are not unlike those already contained in the federal and state Family and Medical Leave statutes.

Section 3 provides that benefits must be afforded to **qualified employees** who work at least 820 hours in the qualifying period. Given the definition of "qualifying period" this means basically 820 hours in the last year or so, which equates to an employee averaging only about 16 hours per workweek! This is a very generous bill for those part-time personnel.

Section 4 generally states that the **leave benefits expire** after 12 months and describe how to calculate the 12 months. For birth or

placement of child, the 12 months start upon birth or placement. For an employee's family leave serious health condition 12 months expire starting on the date of application for benefits. An employee's medical leave is the same.

Section 5 contains the employee **disqualifications** from benefits for a long list of reasons. It also has a subsection stating that an employer may (permissive) "allow" an employee who has accrued vacation, sick leave or other paid time off to use that instead of using the family leave or medical leave afforded by this statute. I think this begs the question of whether the employer may require the employee to use their accrued vacation or sick leave (or other leave) before they use the leave claimed under this statute. It does, however, certainly imply that the employer and the exclusive bargaining representative could agree in a collective bargaining agreement (which is voluntary or consensual) to do it that way.

Section 6 deals with **benefit amounts.** No benefits under this law may be used by employees until on or after January 1, 2020, so employers, employees and unions have some time to get ready for implementation. There is a waiting period of seven calendar days before family or medical leave benefits are due and owing but that does not apply to birth or placement of a child. The maximum duration of both family and medical leave benefits is 12 times the typical workweek hours during a period of 52 consecutive calendar weeks. In other words, applying the definition of "typical workweek hours" this means a salaried employee gets the equivalent of 12 workweeks of forty (40) hours and an hourly employee gets the equivalent of 12 workweeks for whatever their average workweek has been during the relevant period of service. If they average 35 hours per week, then that is used to calculate the benefit. I am assuming that shift workers will get the approximate number of hours worked in a week; for example, if their modified Detroit schedule equated to 51 hours per week that should be used. Subsections (4) and (5) deal with the actual weekly benefit amounts.

Subsection (4) deals with **calculating the weekly benefit amount;** it provides that if the employee's "average weekly wage" (AAW) is 50% or less of the state average weekly wage (SAAW) then the employee's weekly benefit amount is 90% of that SAAW. But if the AAW is more than 50% of the SAAW, then the employee gets 90% of the first 50% of the SAAW plus 50% of the part of the employee's AAW that exceeds the SAAW, thus reducing the total percentage. Since we bet that the typical full time public employee is going to be making more than 50% of the SAAW by a pretty good margin, that latter calculation would be most often used. The SAAW is calculated under RCW 50.04.355 and made available January 1st of each calendar year.

Section 7 provides that, absent an employer contest, **benefits must start** within 14 days after the first properly completed application for benefits and continue biweekly thereafter.

Section 8 deals with **premiums.** Employers are required to start paying the premiums for eligible employees on **January 1, 2019.** The premium rate is divided one-third for family leave benefits and the other two-thirds for medical leave benefits. For the first two premium years, *2019 and 2020*, the rate shall be .4 of 1% of the employee's wages. For the family leave premiums (remember that is one-third of the total) the employer may deduct those amounts from wages (meaning the employee is funding that portion). As to the other part—the medical leave premium—the employer may deduct "up to" 45% of that, so the employee would be funding almost half of that too if that option is chosen. Since "may" is used quite a bit here, it appears those rules set minimums for employers to fund, which means employers may give more or negotiate with the employee (or the union if represented employees) for a better deal for employees than the law mandates. Annually, the Employment Security Department Commissioner sets a cap, just like the Social Security cap, and apparently in that same dollar amount, beyond which wages are exempt from this law. **Employers with fewer than 50 employees employed in Washington are exempt from this law altogether, but may participate voluntarily.** Starting in 2021 the total premium rate will be figured differently. It appears to me that it could go up as high as .6 of 1% or it could go down as the calculation is tied to total wages as compared to the balance as of September (starting in 2020) in the "family and medical leave insurance account". Read the bill if you want further detail on that. The section goes on to provide that employers may collect the employee portion by payroll deduction and concludes by adding a sort of pre-emption clause stating that employers cannot provide a different program or local enforcement.

Section 9 just provides for an **out of state waiver**.

Section 10 deals with elective or **voluntary coverage** for those employers not required, but willing, to have this program. It deals mostly with the self-employed or independent contractors, but may apply to a public employer with fewer than 50 employees who desires to implement. It is a three year commitment if elected.

Section 11 simply allows tribes to participate.

Section 12 deals with the needed notice from employee to exercise their rights. No surprises here.

Section 13 deals with application, verification, etc. and is mostly procedural.

Section 14-27 deal with "voluntary plans" and are of no interest to us at this point.

Section 31 has equivalent protections to the federal and state FMLA regarding returning employees to employment. No surprises here.

Section 32 deals with the issue of **overpayment** of benefits and how the Department can get that money back from the employee. Very interesting in light of our past experience with overpayment of benefits.

Section 33 has many employer **recordkeeping requirements** and similar rules of interest. You must keep wage records for six years under this law. We should compare that to prior law, such as the CORE, to see what the law on retention now is.

Sections 34-53 all deal with **appeals**; it appears most appeals will be about benefit amounts.

The next sections deal with compromise, penalties and interest, which are details we do not care about (yet). Most of the intervening sections are the details of enforcement by DES, but...

Section 68 may be of interest as it provides for **penalties** on employers for willful failure to report. Second offense: $75. Third: $150. Fourth and thereafter: $250. (Apparently, you get one free bite.) For failure to pay due premiums, the penalty is basically double the premium plus interest.

Section 69 answers one question: the leaves allowed here are in **addition** to any benefits payable under workers comp laws, however (and this is big) you cannot collect paid leave benefits under this law while getting your $$$ benefits under any other federal or state employment law, such as unemployment or disability laws!

Section 70 seems really to be the same as existing law. While on this leave you must **continue health** benefits and employee pays a portion as before if they did so.

Section 71 requires employers to notify employees of their rights whenever they are eligible (so you need to figure that out, as when you learn of a pregnancy!).

Section 72 makes discrimination unlawful, prohibiting numerous employer acts. The next two sections deal with enforcement and remedies for violations.

Section 75 deals with a **notice** you must post, much like OSHA requirements re: injury history.

Section 78 has some key miscellaneous rights. For example, it allows employers to provide more generous benefits or to supplement benefit payments. But it **prohibits any waiver** of statutory rights under this law by employees. Finally, it states that after January 1, 2020, subject to section 87 of this act (**see below)** employee rights under this chapter may not be diminished by a CBA or employer policy. Does this imply that prior to 1/1/2020 such rights could be "diminished" by CBA or employer policy??

Section 79 is a sort of **coordination** of leave benefits section. The intent seems to be that this leave and federal and state FMLA leave will be concurrent and not stacked, but this does also say that this leave and the FMLA leave are in addition to sick leave or temporary disability leave due to pregnancy or childbirth.

Section 80 is interesting as it relates to federal **income taxes.** Apparently, the drafters did not know yet how the IRS might deal with these paid benefits: are they going to be taxable or

not?! Basically, this section requires DES to follow IRS laws requiring withholding, estimated taxes, and the like and to notify the employee if the amounts are taxable.

Section 81 provides that this law confers no vested or continuing rights.

Most of the remaining sections are about administration of the system by DES, but ...

Section 87 is of great interest. The law does not require re-opening of any existing CBA's that existed on the "effective date of this section". The statute has some deferred effective dates but the effective date of section 87 appears to be the usual 90 days after adjournment so the CBA had to be in effect prior to September of 2017. **The section also implies that such existing CBA's are not overruled by this act. The rights and responsibilities of this act do not apply until the agreement is re-opened or renegotiated.**

Section 88 just creates an **ombuds** so is self-explanatory.

The rest are mostly technical sections of little interest right now.

**SAFETY BILL**

Just a reminder that "[A]ll fire departments shall record occupational injury and illnesses on OSHA Form 300, Log of Work-Related Injuries and Illnesses." WAC 296-305-01501 (3).

Furthermore, all employers subject to OSHA and WISHA must keep records of an exposure to a toxic substance for 30 years from the date of exposure. *See* WAC 296-802-20010. Such exposure records do not need to be kept if the toxic substance was (1) purchased as a consumer product and (2) was used in the same manner and frequency that a consumer would use the substance. *Id.*

**DISCLAIMER**