The Firehouse Lawyer

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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!!!

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Inside this Issue

Upcoming Training Opportunities

We have two upcoming training opportunities that should be of interest to our fire district and regional fire authority clients, and which also may be of interest to other public agencies and/or public clients.

First, we have another free Municipal Roundtable (MR) taking place on April 12 (Friday) from 9 to 11 AM! This MR will relate to the procurement laws and upcoming changes to those laws—one of which is discussed below. This MR can be accessed through this link:

https://us06web.zoom.us/j/85269067636?pwd=UQyFbPB0VPfA7YoNbQOWTnXMPynURY.1

Second, on Saturday, April 20, from 9 AM to 12 PM, we are presenting a seminar sponsored by the Pierce County Fire Commissioners Association. This free session will cover the dynamics between the governing body of a public agency and its administrative head, focusing on:

- The delineation of roles between the commissioners and the CEO (the chief)
- Ethical considerations, meeting conduct, and public perception
- Avoiding common pitfalls

Please see the flier attached to this newsletter for further information on how to attend.

WHAT DOES "PRUDENT UTILITY MANAGEMENT" MEAN UNDER THE FORTHCOMING CHANGE TO RCW 52.14.110?

In 2009, we had an argument with the Washington State Auditor (SAO) over whether a fire department can have its own volunteers/employees conduct a public work, such as building a fire station.[1] A new law that will go into effect July 1, 2024, codifies that a fire district/regional fire authority may commission its regularly employed personnel to perform public works within specified limits.

The new law states as follows:

> *A fire protection district may have its own **regularly employed personnel** perform work which is an **accepted industry practice** under prudent utility management without a contract. For purposes of this section, "prudent utility management" means performing work with regularly employed personnel utilizing **material** of a worth not exceeding **$300,000** in value without a contract. This limit on the value of material being utilized in work being performed by regularly employed personnel **shall not** include the value of individual items of **equipment**. For the purposes of this section, the term "equipment" includes **but is not limited to** conductor [sic], cabling, wire, pipe, or lines used for electrical, water, fiber optic, or telecommunications.*

[1] See the link to the 2009 article here: https://www.firehouselawyer.com/Newsletters/v09n08aug2009.pdf

This law presents the following questions:

1. **Who constitutes your "regularly employed personnel"?**

We would argue that this refers to any and all full-time or part-time employees, regardless of their job classification.

2. **What is an "accepted industry practice"?**

It is not clear what the intent of that language might be, but we believe it relates to the construction industry. In the construction industry, it is not uncommon for small businesses to do projects in which the materials are valued at $300,000 or less, to be done by company employees upon the company's own property, because there is an exception in the general contractor statute providing that, when working on a person's own property, no general contractor is needed. *See* RCW 18.27.090 (13).

3. **What is "material"?**

Material is not defined in this new law, but equipment is. "Equipment" under this statute seems to mean and include all sorts of connection materials such as pipes, wires and lines, but one could argue that the common, ordinary meaning of "equipment" means that large or small tools such as saws would also not be counted toward the $300,000 limit.

Moreover, it goes without saying that the usual meaning of "materials" in public works contracts, such as bricks, wood, drywall, and similar things that get incorporated into a building as part of a project are "materials."

4 What are the individual items of "equipment" exempted from the $300,000 threshold on "materials"?

See above.

5 Do your regularly employed personnel have to be paid prevailing wages for such projects? Yes. Prevailing wages must be paid on public works and this "prudent utility management" is undoubtedly a public work. *See* RCW 39.04.010 and RCW 39.12.020. Of course, one could argue that they are already being paid the applicable prevailing wage or more, if they are on shift. However, take note that having your union-represented employees do such work could create bargaining issues.

6 Do your regularly employed personnel have to be "contractors" to perform public works on your property? Usually not. The contractor-registration laws do not apply to any "authorized representative" of any "municipal or political corporation or subdivision of this state" or the owner of the property having the work performed. RCW 18.27.090 (1) and (13). However, you should consult with your legal counsel in the event that certain specialties are involved, such as electrical work.

7 What if the work requires engineering/architecture prior to the work being performed?

Well, the new law does not mean that RCW 39.80 is inapplicable. If engineering or architectural skills are required prior to proceeding, the new RCW 52.14.110 does not preclude RCW 39.80 from applying. Prepare an RFQ or have your lawyer do it!

8. What about specialties, such as electrical work?

This may well be an exception to the foregoing which regarded the exception to the contractor-registration laws. Check with legal counsel before authorizing your employees to do electrical work, which may be specified by code or law to be done only by licensed electricians.

9. Is *labor* cost taken into consideration in the $300,000 threshold?

No, the $300,000 threshold applies to the materials used in the work. Hypothetically, if the cost of labor was $800,000 but the materials were only valued at $300,000 (and not a cent more), then such work could be done by your regularly employed personnel under RCW 52.14.110 (2).

10. So, like a philosopher, you might ask: What does this all mean?

We conclude that the new RCW 52.14.110 (2) will permit your department to commission its regularly employed personnel to perform substantial public works on your property without going out to competitive bid.

The following is a non-exclusive list of examples of public works that may be performed by your regularly employed personnel, effective July 1, 2024, provided that the materials used do not exceed **$300,000** in value. And recall that the $300,000 threshold does not apply to individual items of equipment:

- Routine upkeep and repairs of the fire station and other government buildings, including but not limited to painting and plumbing.[2]

- Installing smoke detectors, fire extinguishers, and other fire safety equipment within district properties.

- Landscaping, tree trimming, and maintenance of the grounds surrounding fire district properties.

- Replacing or repairing the roof of a fire station or other district building.

- Adding space or rooms to existing fire district buildings, such as new offices or garages.

- Remodeling projects.

- Resurfacing or expanding the parking areas used by the fire district/RFA for vehicles and equipment.

- Installing or upgrading security systems, including cameras and access control systems, in fire district properties.

- Implementing energy conservation measures, such as solar panel installations or upgrading energy-efficient windows and insulation.

- Upgrading training facilities for firefighters, including simulation rooms, training towers, or burn buildings.

- Installing or improving drainage systems around fire district properties to prevent water damage and improve landscape management.

- Implementing traffic control measures on district properties, such as installing signs, speed bumps, or parking lot striping, to enhance safety and organization.

Effective 7/1/2024, the above work *can* be done by your regularly employed personnel provided that the materials used do not exceed **$300,000** in value. And recall that the $300,000 threshold does not apply to individual items of equipment. And remember RCW 39.80 (architects/engineers).

EMPLOYMENT TRANSFERS AND TITLE VII DISCRIMINATION: AN IMPORTANT SCOTUS CASE

In the case of *Muldrow v. City of St. Louis*, the U.S. Supreme Court (SCOTUS) is faced with a nuanced examination of Title VII of the Civil Rights Act of 1964 (Title VII). The central issue revolves around whether job transfers, which do not result in significant material harm to the employee, fall under the purview of discrimination as defined by Title VII.

[2] Take note that much of this routine upkeep may have already been deemed "ordinary maintenance" and therefore not a public work, if performed by your regular employees: https://www.firehouselawyer.com/Newsletters/August2019FINAL.pdf

Petitioner's Central Argument: Broad Interpretation of Discrimination. Jatonya Clayborn Muldrow, the petitioner,[3] argues that Title VII's discrimination clause should be interpreted broadly to include any job transfer based on sex, regardless of the presence of significant material harm. She contends that her transfer within the St. Louis Police Department, allegedly based on her sex, constitutes discrimination affecting her employment terms and conditions. Muldrow's stance is that Title VII should protect employees from any differential treatment in employment decisions that are based on protected characteristics, even if such decisions do not result in clear, material disadvantages or harm.

Respondent's Central Argument: Need for Objective Harm. The City of St. Louis, the respondent,[4] counters that Title VII necessitates a showing of significant, objective harm to establish a discrimination claim related to job transfers. They argue that not every transfer or change in job assignment constitutes discrimination or harm under Title VII. The city maintains that for a job transfer to be considered discriminatory, it must result in a material change in employment conditions that significantly disadvantages the employee. This perspective underscores a narrower interpretation of discrimination, emphasizing the necessity of objective, material harm to sustain a legal claim.

[3] See the petitioner's brief here: https://www.supremecourt.gov/DocketPDF/22/22-193/278337/20230828212608509_Petitioner%20opening%20merits%20brief%20-%208.28.2023.pdf

[4] See the respondent's brief here: https://www.supremecourt.gov/DocketPDF/22/22-193/284695/20231011135701738_Muldrow%20Merits%20Response%20Brief.pdf

SCOTUS's Questions. SCOTUS's examination[5] of these arguments reveals a keen interest in defining the threshold for what constitutes discrimination in the context of job transfers. The justices probed the extent to which Title VII should guard against differential treatment in employment without necessitating a demonstration of substantial harm. The court's inquiries suggest careful consideration of both the broad protective intent of Title VII and the practical implications of an expanded scope of discrimination claims on employers and the judicial system.

In the oral arguments, the justices expressed concerns about potentially overburdening the courts with minor claims if the threshold for proving discrimination is set too low. They questioned how to balance the need to protect employees from sex-based discrimination with the practical realities of day-to-day employment decisions.

SCOTUS's decision in *Muldrow v. City of St. Louis* is anticipated to clarify the scope of discrimination under Title VII, especially in relation to job transfers that do not result in immediate, tangible harm. The ruling will likely have far-reaching implications, shaping future interpretations of discrimination and influencing how employers make transfers and other employment-related decisions. Stay tuned.

[5] See the oral argument transcript from the SCOTUS: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-193_8nk0.pdf

PIERCE COUNTY FIRE COMMISSIONERS' ASSOCIATION PRESENTS

Roles of Fire Commissioners and Fire Chiefs

Date: April 20, 2024

Time: 0900 - 1200

Location:
In person at South Sound 911, 3580 Pacific Ave., Tacoma, WA
or Remotely via Zoom:
https://zoom.us/j/8151456645?pwd=NHFTa2o2ZWMzenU4Qlg2Q2tLejNFUT09&omn=94621885983

Meeting ID: 815 145 6645 Passcode: 123456

Cost: Free

Presenter: Firehouse Lawyer, Eric Quinn

Registration: Please email Denise Ross at dross@centralpiercefire.org
Please state whether you plan to attend in person or remotely so we can plan accordingly.

Join the Pierce County Fire Commissioners Association and other friends in government for a presentation by Firehouse Lawyer, Eric Quinn, on "Commissioner 101": Understanding the roles of an elected official compared to the roles of administrative staff/managerial personnel.

This presentation is sponsored by the Pierce County Fire Commissioners Association and is free to all participants.

Topic: PC Fire Commissioners Attorney Quinn Training
Time: Apr 20, 2024 09:00 AM Pacific Time (US and Canada)

Join Zoom Meeting
https://zoom.us/j/8151456645?pwd=NHFTa2o2ZWMzenU4Qlg2Q2tLejNFUT09&omn=94621885983

Meeting ID: 815 145 6645
Passcode: 123456

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