The Firehouse Lawyer

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Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to fire departments, which include labor and employment law, public disclosure law, mergers and consolidations, and property taxes and financing methods, among many others!!!

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Inside this Issue

Upcoming Municipal Roundtable

On Friday, September 23, 2016, the Firehouse Lawyers will hold our third quarterly Municipal Roundtable, a free discussion group in which we consider issues that are relevant to the fire service and other municipal corporations. Topics lately have included medical records, public disclosure regulations, and unfair labor practices. This roundtable will be held at East Pierce Fire and Rescue, Station 111, located at 18421 Veterans Memorial Drive East, Bonney Lake, WA 98391, from 9:00 AM to 11:00 AM. The topic of this Roundtable will relate to photos and video records made at emergency scenes for any purpose, the legal issues surrounding the same and policies you might want to consider to deal with such issues. The Municipal Roundtable gives us all an opportunity to learn from each other. Make sure to attend: you will be better for it.

A Change in the Fair Labor Standards Act: The "White Collar" Exemptions Fundamentally Altered

As former President Ronald Reagan once said, employers have reached "a time for choosing." Beginning December 1, 2016, employers must pay overtime to administrative, executive and professional employees[1] that earn less than $47,476 a year, for each hour of work over the 40-hour threshold. Beginning December 1, 2016, such employees shall no longer be required to earn less than $23,660 a year to be non-exempt. (In other words, the executive

[1] We shall call these the "white collar" exemptions"

employee whose salary exceeds the threshold figure—now $47,476 per year—is exempt from FLSA overtime requirements.) Again, unless an employee is specifically exempted from the overtime requirements (or is a volunteer), that employee must be paid time-and-a-half of the employee's regular rate of pay for all hours worked beyond 40 hours a week. *See* 29 U.S.C. § 207 (a)(1).[2]

Take note that the Department of Labor (DOL) did not change the types of duties that must be performed by these executive, administrative and professional employees, but only raised the salary threshold for when these "white collar exemptions" apply (from $23,660 to $47,476). Another important aspect governing whether the "white collar" exemptions apply is the degree of independent discretion utilized in performance of the particular job. *See* 29 C.F.R. § 541, setting forth the requirements for the various "white collar" exemptions (salary basis, salary level, duties).

Additionally, the new DOL regulations shall raise the salary threshold to qualify for the exemption for "highly compensated" employees that perform at least one of the duties that are performed by the "white collar" employees. The new threshold for that exemption shall increase from $100,000 to $134,004. Furthermore, the new regulations set forth an unprecedented change: Every three years, starting in 2020, the salary basis threshold shall increase. We trust that this increase every three years shall be based on inflation, and is not arbitrarily assigned. As Ronald Reagan once said, employers have reached "a time for choosing." The employer must now communicate the implications of these new regulations to its employees long before they go into effect, and consider the ramifications of these rules for its workforce.[3]

A final word about the implications of this for our smaller fire districts, which might have contracts with their Fire Chiefs: Suppose you have a Fire Chief now earning between $23,660 and $47,476 annually; he/she has a contract providing they are FLSA-exempt and cannot earn overtime. Totally legal, right? Well, wrong...as of December 1, 2016. They are entitled to overtime and are not FLSA-exempt unless the annual salary exceeds $47,476 (which equates to approximately $913 per week). Does this mean some Chiefs will get raises? Stay tuned.

Another Change in Federal Law: New OSHA Post-Accident Drug Testing Rule

The Occupational Safety and Health Administration (OSHA) recently announced a rule which primarily relates to the electronic reporting of workplace injuries. However, this new rule may also alter the manner in which employers may conduct post-incident

[2] Of course, this is different for employees engaged in fire protection activities. *See* 29 U.S.C. 207 (k); *See Also* a 1998 *Firehouse Lawyer* on this law: http://www.firehouselawyer.com/Newsletters/v02n04apr1998.pdf

[3] For bathroom reading, please see the link to the 295-page DOL report that discusses the impending change to the DOL regulations: https://www.dol.gov/whd/overtime/nprm2015/ot-nprm.pdf

investigations.[4] OSHA is concerned about privacy:

> "Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting [of workplace injuries]."

The new rule limits such post-incident investigations to "situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use." Consequently, the new rule appears to require that an employer have some sort of reasonable suspicion of drug use prior to conducting a post-incident investigation, due to the "privacy concerns" that may arise. In the realm of public safety, this new rule may have unintended consequences.

As the *Firehouse Lawyer* has discussed before, due to the passage of Initiative 502, codified at RCW 69.50.360—legalizing the possession of marijuana for those over 21—the employer should enact procedures for reasonable-suspicion drug testing, particularly with respect to marijuana, to prove impairment.[5] Such testing should be utilized whether the employee has been involved in an accident or not. This is because random drug testing of public employees, without an individualized suspicion of drug use, generally will not survive constitutional scrutiny.[6]

But when a workplace incident—which may include a motor vehicle accident away from the employer's place of business—has actually occurred, the need for a swift determination of its cause is paramount. Importantly, the Department of Labor itself has stated that the new rule "does not prohibit drug testing of employees. It only prohibits employers from using drug testing, or the threat of drug testing, as a form of retaliation against employees who report injuries or illnesses. If an employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer's motive would not be retaliatory and this rule would not prohibit such testing."[7] Fire departments, in particular, have a responsibility to conduct post-accident investigations in the event of serious injuries. *See* WAC 296-305-01503; *See Also* 296-305-01511 (7) ([F]irefighters who are under the influence of alcohol or drugs shall not

[4] See link to the final rule: https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=26789

[5] http://www.firehouselawyer.com/Newsletters/v12n04dec2014.pdf

[6] http://www.firehouselawyer.com/Newsletters/v05n05may2005.pdf

[7] https://www.osha.gov/recordkeeping/finalrule/finalrule_faq.html

participate in any fire department operations or other functions.")

Public Records and Notice to Third Parties: Why Bother?

Under the Public Records Act (PRA), "[A]n agency *has the option* of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested." RCW 42.56.540 (emphasis added).[8] Consequently, when a public records request concerns or is related to a third person, an agency's public records officer has the option of providing notice to that third person.

The fundamental conclusion of this article is two-fold: First, if the public record at issue clearly contains no information about a third party that is exempt under the PRA, we advise that your agency *not* provide notice to third parties; second, if the public record at issue arguably contains information that is exempt, we recommend that you *provide* notice to concerned third parties that these records have been requested and are set to be released. Here is how we reach this two-fold conclusion:

The basis for providing third-party notice is to permit the third party to seek an injunction prohibiting release of public records that concern them, and to demonstrate good faith. *See* RCW 42.56.540. The Model Rules to the PRA, promulgated by the Attorney General, provide necessary guidance for how and when to provide third-party notice, and should be utilized by public records officers across the state. With respect to third-party notice, the Model Rules recommend that "[B]efore sending a notice [to a third party], an agency should have a reasonable belief that the record is arguably exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requestor's access to a disclosable record." WAC 44-14-04003 (11).

The above provisions of the Model Rules most likely exist because the PRA requires that an agency take the "most timely possible action on requests" and make records "promptly available." *See* RCW 42.56.080 and 100. Based on these statutes, and the Model Rules above, when third-party notice results in an unnecessary delay (unnecessary because the record was clearly not exempt), an agency may be accused of wrongfully withholding public records, or unreasonably delaying disclosure.

Ultimately, the question many public agencies wonder about is whether their agency may be found liable for failing to provide third-party notice. Under the PRA, a public agency is immune from liability to third persons for good faith release of a public record. *See* RCW 42.56.060. Furthermore, the Model Rules state that "[A]n agency has wide discretion to decide whom to notify or not notify," despite this requirement that the agency make records "promptly available." WAC 44-14-04003 (11). But the Model Rules also caution that "if an agency had a *contractual obligation* to provide notice [to a third party] of a request but failed to do so, the agency might lose the immunity provided by [RCW 42.56.060] because breaching the agreement probably is not a 'good faith' attempt to comply with the act." WAC 44-14-04003 (11)(emphasis added). Based on this Model Rule, if your agency is in the practice of

[8] Note that agencies *do not* have this option when notice to third parties is "required by law," but such a requirement to provide third-party notice rarely, if ever, comes up. *See* RCW 42.56.540.

providing notice to third parties—by way of contractual agreement or as a matter of policy—when public records requests are made that concern those third parties, your failure to do so in a specific circumstance may be deemed bad faith, therefore forfeiting your good faith immunity.[9] Consequently, your agency should revisit any policies you may have on when third-party notice should be provided. If there is indeed a contract or policy that mandates third-party notice, your agency should enforce and follow that policy or contract, or cancel that policy or contract prior to changing your practices.

Conclusion

Based on RCW 42.56.540, understand that your agency has discretion to notify third parties about the potential release of public records affecting them. But based on the Model Rules, also understand that your agency should not provide third-party notice when the records at issue are clearly not exempt from disclosure. Because of the Model Rules, understand that if your agency decides to provide notice to third parties, that your agency should give them a reasonable amount of time to seek an injunction, as any person to whom the record pertains may do under RCW 42.56.540, prior to disclosing the requested records. A good rule of thumb for many agencies is ten business days prior to release.

Additionally, if your agency decides to provide third-party notice, when your agency sends a five-day letter to the requestor, as required by RCW 42.56.520, be sure to include in your reasonable estimate of when the records shall be produced that you have notified third parties and have given them a specified amount of time to seek an injunction.

A New Law that Requires New Policies

In 2015, the Washington Legislature passed Washington's Electronic Signature and Electronic Records Act ("Act"), which "is intended to promote electronic transactions and remove barriers that might prevent electronic transactions with governmental entities." RCW 19.360.010. The Act, formerly applicable to state agencies only, shall now be applicable to "local agencies," by virtue of Substitute House Bill (SHB) 2427, which became effective June 9, 2016.[10] Without question, a fire department is a "local agency" subject to the Act.

Nothing in the Act *requires* a local agency to send or accept electronic records (e-records), or send or accept electronic signatures (e-signatures). *See* RCW 19.360.020 (2). However, if an agency *elects* to send or accept e-records, or send or accept e-signatures (or is already doing so, which many agencies are), when conducting "governmental affairs" or transacting with other governmental agencies, then the local agency must enact an e-signature and e-record policy. This is because of the following mandate of SHB 2427, which amends

[9] Some agencies have a policy of automatically providing notice to their *employees* when records requests are made which pertain to them. However, the question should always be, prior to providing third-party notice: are these records arguably exempt?

[10] See the attached SHB 2427: http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bills/Session%20Laws/House/2427-S.SL.pdf

RCW 19.360.020, adding a new section (5), which states:

> Except as otherwise provided by law, for *governmental affairs and governmental transactions with local agencies*, each local agency *electing to* send and accept [e-records and e-signatures] *shall* establish the method that must be used for electronic submissions and electronic signatures. The method and process for electronic submissions and the use of signatures *must* be established by ordinance, resolution, policy, or rule…The standards, policies, or guidelines must take into account *reasonable access* by and ability of persons to participate in governmental affairs or governmental transactions and be able to *rely* on transactions that are conducted electronically with agencies.

SHB 2427, pages 2-3 (emphasis added).[11] Well, that was a mouthful..

The Legislature has given local agencies a "blank slate" for enacting e-signature and e-record policies, which local agencies now *must* do because of SHB 2427, when conducting "governmental affairs" or transacting with other governmental agencies via e-signature or electronic submission (emails and text messages, etc.). *See* broad mandate above. This presents us with the question of which laws are applicable that would guide us in creating such policies. *See* broad mandate above.

First, your department should more than likely consider the HIPAA Security rule, set forth at 45 C.F.R. § 164.306, as a model. Second, your department should follow the authentication requirements of the Act itself, particularly RCW 19.360.020.[12] Third, your department should utilize the identity theft laws, set forth at 16 C.F.R. § 681.[13] Fourth, and at the very least, your department should adopt procedures that prevent emails and other electronic submissions from being intercepted by unauthorized persons (addressed by HIPAA security rule). Fifth, your department should have security measures in place to ensure that an e-signature or e-record may not be altered. Sixth, be cognizant of the Public Records Act, and post your policies on e-

[11] The Bill further specifies, on page one, that the intent of the legislature is to "allow local government to pursue modern methods of serving their residents" and provide access to public records.

[12] With respect to e-signatures and e-records, the Act simply seems to require that a reasonable person could understand that the person that signed the record intended to sign the record, and that this person is who they say they are.

[13] These regulations require your agency to (1) identify red flags for your covered accounts; (2) detect red flags identified in your program; (3) respond appropriately to any red flags detected so you can mitigate identity theft; and (4) update the program periodically. For more: http://www.firehouselawyer.com/Newsletters/v09n04apr2009.pdf

records electronically. Seventh, and perhaps most importantly, RCW 40.14.070, setting forth the records-retention requirements, must be considered in enacting any policy with respect to records of your agency, electronic or not.[14] Finally, RCW 19.360.010 makes reference to a federal law, 15 U.S.C. § 7001, the Electronic Signatures in Global and National Commerce Act (Federal Act) as providing support for the enactment of RCW 19.360.010. Hence the digression:

Under the Federal Act, if a particular record must "be retained"—as is the case with respect to various types of records in Washington state, under RCW 40.14.070—then converting those records to an electronic format is feasible if the e-record (1) is an accurate depiction of the original record; and (2) "remains accessible to all persons who are entitled to access by statute, regulation, or rule of law, for the period required by such statute, regulation, or rule of law." 15 U.S.C. § 7001 (d)(1). We will call this the Accuracy and Accessibility Rule (or the "AA Rule" for e-records). What this means is that an original record may be converted to electronic format if the record is accurate, retained for the applicable retention period, and remains accessible to the public. The AA Rule should be reflected in your policy on e-records, which is now required by law.

What about *keeping* the original record after transfer to electronic format? Under the Federal Act, a state or federal agency may not "require retention of a record in a tangible *printed or paper* form" unless (1) there is a "compelling governmental interest relating to law enforcement or national security" for imposing that requirement, and (2) the requirement is essential to carrying out that interest. 15 U.S.C. § 7004 (b)(3)(B) (emphasis added). Additionally, if a statute or regulation requires that a record be kept in its *original* form, "that statute, regulation, or rule of law is satisfied by an electronic record that complies with" the AA Rule, cited in the previous paragraph. 15 U.S.C. § 7001 (d)(3). Of course, as required by many federal laws, states shall not enact laws that are in conflict with § 7001, under 15 U.S.C. § 7004 (b)(2)(A). And as we already demonstrated, a state, such as Washington, may not *require* a record to be kept in a paper format unless certain strict requirements are met.

What does all of this mean? We interpret all of this to mean that if Washington law requires that a record be kept in its original (paper) form, a local agency would still be in compliance with 15 U.S.C. § 7001 and the AA Rule—which preempts inconsistent state law—if the local agency converted an original record to an electronic form and either transferred the original to the Washington State Archivist (if the record is an Archival record) or destroyed that record in accordance with the records retention schedules. *See* RCW 40.14.070

[14] *See* the following Firehouse Lawyer articles discussing the records retention schedules: http://www.firehouselawyer.com/Newsletters/October2015_FINAL%20.pdf; http://www.firehouselawyer.com/Newsletters/May_2015.pdf

(2)(a)(particularly with respect to original records); *See Also* footnote 14.

Aside from that digression, if an agency follows the AA Rule, and implements reasonable safeguards to protect electronic records, the agency has followed RCW 19.360.010, and RCW 19.360.020 (5), which requires local agencies to adopt e-record policies—if e-records are sent or received by your agency. Concerns one through eight, set forth above, should be considered in drafting and enacting policies on e-records and e-signatures.

We are certain that the above-listed concerns one through eight are not exclusive. There are always more. Needless to say, the lawyers at the *Firehouse Lawyer* newsletter are developing a model policy for the clients of our firm.

When Does a Person Have "Standing" to Sue for a Violation of the Open Public Meetings Act? Easy Answer.

Under the OPMA, "[a]ny person" may bring an action to enforce civil penalties against members of a governing body who attend meetings in violation of the OPMA." RCW 42.30.120. The statute does not require that a certain person demonstrate a particular injury to have standing to sue. *See West v. Seattle Port Commission,* No. 73014-2-1 (Div. I 2016). Washington courts have further held that individuals *do not* have standing to sue for violations of the notice requirements to a particular member of a governing body. *See Kirk v. Pierce Ctv. Fire Prot. Dist. No. 21*, 95 Wn.2d 769, 772, 630 P.2d 930 (1981)(finding that fire chief could not invalidate special meeting action terminating his position when one of the commissioners was not notified of the special meeting, and that only the commissioner not given notice would have had standing to sue).

Interestingly, the Washington Court of Appeals in *West,* cited above, stated that "[A]lthough the OPMA declares that'[a]ny action taken at meetings failing to comply with [chapter 42.30 RCW] shall be null and void' [the OPMA] **does not** authorize individual people to annul or invalidate those actions." (emphasis added). Yet, ultimately the appellate court held that West did have standing to sue.

What does this mean? Did the Court of Appeals unintentionally state that although the OPMA explicitly states that actions taken in violation of the OPMA "shall be null and void," that no person may sue to invalidate those actions? We think the comment must be regarded as *obiter dictum*—a passing comment that does not necessarily reflect the ultimate reasoning or result in the case. The *West* court seemed to reaffirm that any person can sue for *civil penalties*, but did not seem to hold similarly with respect to *invalidating* earlier actions taken in violation of the OPMA.[15] Whether the *West* court intended to rule this way or not, we advise that government employers proceed under the assumption that people <u>*can sue to invalidate actions*</u> taken in violation of the OPMA, in addition to being able to sue for civil penalties.

[15] Of course, the OPMA permits a person to sue for the purpose of "stopping violations or preventing threatened violations" of the OPMA, but does not speak specifically to invalidating previous actions. *See* RCW 42.30.130.

(previously a $100 fine to member of governing body, plus attorney's fees)[16]

FIREHOUSE LAWYERS WORKING ON AMICUS BRIEF

A career firefighter was nearly killed on I-5 near Des Moines a few years ago, when a motorist spun out on ice that should not have been there and slammed into him on the shoulder. He and two other firefighters were checking on the status of any vehicle occupants related to another vehicle already on its side on the shoulder. This vehicle had hit the same unforeseeable ice patch and overturned earlier, so motorists kept calling 911.

It was a somewhat frosty morning, but there was no ice on the roadway between Olympia and Seattle, except in that one place. You may know where it is—the water has been seeping up through the southbound lanes of I-5 near the 272nd St. exit (where Military Road crosses under I-5) for many years. Even today, after days without rain, you might find water on the roadway there. Why? Apparently, there is a groundwater seep at that location, and the water comes up between the lanes of I-5.

The firefighter brought a Superior Court lawsuit against the State of Washington, alleging negligent maintenance of the highway and negligence by the state trooper for not marking the overturned vehicle so that motorists would know it was being dealt with, and therefore that those motorists did not need to call 911. The firefighter also sued two motorists.

The trial court dismissed the case outright, without trial, based on the Professional Rescuer Doctrine. This rule disallows firefighter and police officer suits against negligent parties whose negligence necessitated rescue by professionals.[17] We believe it is time for the doctrine to be strictly limited if not abolished, as firefighters and cops deserve better. They are not second class citizens. WFCA, the State Fire Chiefs Association, and the Washington State Council of Firefighters are sponsoring our effort in the Supreme Court.

[16] **TAKE NOTE:** Thanks to Senate Bill 6171, the $100 penalty has been increased to **$500** "for the first violation", and **$1000** for each "subsequent violation": http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bills/Session%20Laws/Senate/6171.SL.pdf

[17] *See* 2005 *Firehouse Lawyer* article on this rule: http://www.firehouselawyer.com/Newsletters/v05n06jun2005.pdf