# The Firehouse Lawyer

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## Inside this Issue



## A SEA CHANGE IN THE PUBLIC WORKS LAWS: "ORDINARY MAINTENANCE" FUNDAMENTALLY CHANGED

Pursuant to Washington State Register (WSR) number 19-15-119, the definition of "ordinary maintenance" under the public-works laws has either become substantially narrow or rendered broad enough to save public agencies lots of money. As we have discussed before, generally, "public works" are all works executed at the cost of a municipality that are not "ordinary maintenance." *See* RCW 39.04.010 (4). Various laws, including but not limited to prevailing wage, applicable to "public works" are *not* applicable to "ordinary maintenance."

But here is the rub: "Ordinary maintenance" *used to be* defined as "work *not* performed by *contract* and that is performed on a *regularly scheduled basis* (e.g., daily, weekly, monthly, seasonally, semiannually, but not less frequently than once per year), to service, check, or replace items that are not broken; or work not performed by *contract* that is not regularly scheduled but is required to maintain the asset so that repair does not become necessary." Former WAC § 296-127-010(7)(b)(iii) (emphasis added).

We have always concluded that this definition of "ordinary maintenance" was fairly narrow, or difficult to satisfy, thus making the scope of "public work" commensurately more broad. But given the change in the WAC discussed below,

has "ordinary maintenance" been broadened somewhat or is it still quite a narrow exception, but just different than before?

Most importantly, the definition of "ordinary maintenance," as of August 23, 2019, is now **"maintenance work performed by the *regular employees* of the state or any county, municipality, or political subdivision created by its laws."** (emphasis added)[1]. WAC § 296-127-010 (7)(b)(ii).[2] This significant definitional change likely arose from L&I's interpretation of a 2000 Washington Court of Appeals case, *Spokane v. L&I*, 100 Wn.App. 805 (2000). In *Spokane*, the court held that "[m]aintenance is 'ordinary'...when it is performed by in house employees of the public entity."

In other words, as of August 23, 2019, if your agency obtains services to your property (buildings and land) from a third party not employed by your agency, no matter how small or "ordinary" those services may seem, such services to your property are *not* "ordinary maintenance" and are likely "public works" under RCW 39.04.010 and WAC § 296-127-010 (7)(b)(ii). This is the case even if those services are not performed by contract, reading the new definition literally.

And of course, a jungle of laws applies to public-works projects for *all* public agencies, such laws including but not limited to the following:

1. Prevailing wages, pursuant to RCW 39.12.020;
2. Contractor "responsibility" criteria, pursuant to RCW 39.04.350 (if bidding is necessary);
3. The notice-and-advertising laws specific to each agency;
4. The bid dollar thresholds applicable to each agency (such dollar limits establishing when competitive bidding is required);
5. Any requirement to award a contract to the "lowest responsible bidder" as applicable to each agency; and
6. Bid protests, as permitted under RCW 39.04.105 (if bidding is necessary).

We do not anticipate that your agency shall face an audit finding for obtaining ordinary maintenance to your buildings and land by third parties without going out to bid or without complying with the above laws, prior to August 23, 2019. But from now on, what used to be "ordinary maintenance" under the L&I regulations *must* be performed by *your* employees.

Henceforth, many of the above laws shall apply to the work performed regardless of the dollar amount of the contract. And of course, the prevailing wage laws shall *always* apply to your public works contracts, subject to some limited exceptions. *See* RCW 39.12.020.

But the question becomes: Has Labor and Industries freed up *your* employees to be separately hired (or just assigned, as additional duties) to perform "maintenance" that would

[1] http://lawfilesext.leg.wa.gov/law/wsr/2019/15/19-15-119.htm

[2] https://apps.leg.wa.gov/wac/default.aspx?cite=296-127-010

otherwise qualify as a "public work" if applying the *old* definition of "ordinary maintenance?"

We argue that yes, it has. Again, a "public work" constitutes practically all services to your buildings and land that are **not** "ordinary maintenance." *See* RCW 39.04.010 (4). However, the word "contract" has been removed from the term "ordinary maintenance." The words "regularly scheduled basis" have also been removed. Instead, the two operative words in the new definition are "maintenance" and "regular."

Common sense would dictate that your "regular" employees are likely to be shift workers and/or full time employees already. (Of course, they could be maintenance mechanics or maintenance workers, part of the time.) We therefore move on to the definition of "maintenance," which is defined as "keeping *existing* facilities in good usable, operational condition." WAC § 296-127-010 (7)(a)(iv) (emphasis added). Under that same regulation, "maintenance" is a "public work." However, "maintenance" is a "public work" *only if* that maintenance is *not* "ordinary maintenance" as defined under the same regulation.

Again, maintenance services to your buildings and land by your employees, whether *by contract or otherwise*,[3] to keep your buildings and land in operable condition, are "ordinary maintenance" under the new definition.

The question becomes: What do your *existing* buildings and land require to be deemed in "good, usable, operational condition," even if the services needed to maintain those conditions do *not* occur on a "regularly scheduled basis?"[4]

Without making policy prescriptions or pretending to know the needs of your individual agency, here are some general examples:

- For 911 dispatch centers: Operational wireless communications towers;
- For fire departments: Functional garage doors;
- For port districts: Operational loading docks;
- For park districts: Well-kept sports fields; and
- For **all** public agencies: Usable cabinets; walls without holes in them; functional existing HVAC systems; roofs that do not leak; toilets that do not clog—requiring plumbers; and tree branches and grass that do not grow too long. The list goes on.

Let us be clear that although the term "ordinary maintenance" has been broadened, there are other types of services specifically enumerated

[3] Again, the term "contract" has been removed from the term "ordinary maintenance." *See* WAC § 296-127-010 (7)(b)(ii).

[4] Again, the words "regularly scheduled basis" have been *removed* from the definition of "ordinary maintenance." *See* WAC § 296-127-010 (7)(b)(ii).

under the L&I regulations that are also "public works."[5] These include the following:

1. Janitorial and "building service maintenance contracts," which cover "only work performed by janitors, waxers, shampooers, and window cleaners" (WAC § 296-127-010 (7)(a)(v); in other words, maintenance services to your property (buildings and land) performed by contract or not by contract by your regular employees—not acting as janitors, waxers, shampooers or window cleaners—still constitute "ordinary maintenance," which are *not* public works; and

2. The fabrication or manufacture of "nonstandard items" for purposes of performing a public works project (WAC § 296-127-010 (7)(a)(vi); this would only come into play if a contractor is tasked by contract to fabricate or manufacture a specified item in order to perform certain work, and of course, only if that work is a "public work" and not "ordinary maintenance."

And of course, the above definition of "maintenance" and "ordinary maintenance" seem to apply to your *existing* buildings and land.[6] Consequently, the construction of a building or facility, such as a communications center, baseball field, library or fire station, or the installation of a *new* HVAC system, still obviously fall under the definition of "public works."

The moral of the story: L&I may have just unintentionally saved public agencies millions of dollars in advertising and other costs associated with soliciting, awarding and managing public-works projects for services to buildings and land that are **not** performed on a "regularly scheduled basis."

To be clear, the question now is *not* whether the work occurs on a "regularly scheduled basis" or is "performed by contract." Instead, the question is whether the work being performed is necessary to "keep *existing* facilities in good usable, operational condition," i.e. the work constitutes "maintenance." WAC § 296-127-010 (7)(a)(iv) (emphasis added), and furthermore:

The ultimate—and major—caveat: The maintenance work must be performed by *your agency's* regular employees. Otherwise, the maintenance work is likely a "public work" regardless of the dollar amount of the work or how "ordinary" it may seem, and regardless of whether the work is performed by contract.

[5] Ultimately, anything that constitutes "work, construction, alteration, repair, or improvement *other than ordinary maintenance*, executed at the cost of the state or of any municipality" is a public work, pursuant to RCW 39.04.010 (4) (emphasis added).

[6] Again, the term "maintenance" means "keeping *existing* facilities in good usable, operational condition." WAC § 296-127-010 (7)(a)(iv)

The above sea change will create innumerable legal questions, but that is why your attorneys are available.

**HEALTH CARE INFORMATION: ENCRYPTION MAY CAUSE A FALSE SENSE OF SECURITY**

Under the Health Insurance Portability and Accountability Act (HIPAA), a covered entity must give notice of a breach of "unsecured protected health information" ("UPHI") to all affected individuals and the Secretary of the Department of Health and Human Services—and to the media under certain circumstances. *See* 45 C.F.R. § 164.404-408—see the "Joe Chart" below. The logical corollary is that a covered entity does *not* have to provide breach notices of "secured" health care information. But that begs the question: What qualifies health care information maintained by a covered entity as UPHI therefore subjecting the covered entity to the breach-notification requirements of HIPAA?

Under HIPAA, UPHI is "protected health information that is *not* rendered unusable, unreadable, or indecipherable to unauthorized persons through the use of a technology or methodology specified by the Secretary in the guidance issued under section **13402(h)(2)** of **Public Law 111-5**." 45 C.F.R. § 164.402. (emphasis added).

Section 13402(h)(2) in Public Law 111-5, cited in the above regulation, states that UPHI means "protected health information that is not secured by a *technology standard* that renders protected health information unusable, unreadable, or indecipherable to unauthorized individuals and is developed or endorsed by a standards developing organization that is accredited by the American National Standards Institute." (emphasis added). The underlying question is: What appropriate "technology standards" must be used to render health care information "secured" after unauthorized access, to ensure that if a HIPAA breach occurs, it is not the sort of breach that must be reported under the regulations cited above?

Certain publications[7] indicate that such "technology standards" approved by the NIST (the National Standards Institute referenced in 13402) require that health care information be rendered unusable/unreadable (i.e. "secured") after the information leaves the agency's firewall, i.e. *after* a person or entity "hacks" into the device.

This means that the use of passwords and encryption to secure particular devices (laptops, phones, tablets etc.) from unauthorized entry *may not be enough* to render the health care information accessed during say, a ransomware attack, "secured." Instead, to more appropriately render salaciously accessed health care information "secured," the covered entity should implement technology that destroys all of the health care information on the device as soon as that device is stolen, lost, or fraudulently accessed.

[7] https://www.hipaajournal.com/hipaa-compliance-checklist/

As to how your agency may implement such technology, that is above our paygrade. But we spotted the issue. On another note, we had a great Municipal Roundtable recently in which we discussed what a health care provider must do in the event of a HIPAA breach of UPHI. See the attached "Joe Chart" documenting a step-by-step method for reporting HIPAA breaches if and when they occur.

## Recovery of Motor Vehicle and Train Accident Costs Under the Model Toxic Controls Act

Under the Washington State Model Toxic Controls Act (hereinafter "MTCA") a remediating party may recoup "remedial action" costs from "[a]ny person" who owned or operated a "facility" at the time of disposal or "release" of hazardous substances from that facility. *See* RCW 70.105D.080; *See Also* RCW 70.105D.040(1)(b).[8] The term "release" means "any intentional **or** unintentional entry of any hazardous substance into the environment." RCW 70.105D.020 (32) (emphasis added). In other words, a person may be found strictly liable under the MTCA without *intending* to release hazardous substances into the environment.[9]

A "facility" includes but is not limited to *motor vehicles* and equipment; and finally, "hazardous substances" include but are not limited petroleum or petroleum products. *See* RCW 70.105D.020 (8); and RCW 70.105D.020 (13)(d). In other words, the MTCA applies to gasoline spills or *potential* gasoline spills, which occur at motor-vehicle accidents.

Importantly, "facilities" do **not** include trains, if the definition of "facility" at RCW 70.105D.020 (8) is given strict interpretation. But the MTCA is a law that may provide a cost-recovery mechanism for various public agencies under unique circumstances.

One final item: Although trains are not "facilities" under the MTCA, a fire department may still pursue "extraordinary costs" incurred in remedying a hazardous-materials incident caused by a railroad company or other train operator, pursuant to RCW 4.24.314.

## SAFETY BILL: Yet Another Setback for Law Enforcement Officers and Firefighters

The Washington Court of Appeals, Division One, recently affirmed a trial-court dismissal of the claims of nine firefighters against Puget Sound Energy for the allegedly negligent decommissioning of a gas pipeline. *See Markoff, et al v. Puget Sound Energy*, No. 77785-8-1 (2019).[10] The basis for the affirmed dismissal: The nine firefighters did not have a claim

[8] Yes, too many quotes in one sentence will anger many grammarians out there, but there are various terms that must be highlighted to fully articulate the issues.

[9] *See Douglass v. Shamrock Paving, Inc.*, No. 94087-8 (2017), discussed in the *Firehouse Lawyer:* https://www.firehouselawyer.com/Newsletters/January2018ExtraFinal.pdf

[10] https://www.courts.wa.gov/opinions/pdf/777858.pdf

because of the "professional rescuer doctrine."[11] Again, we find the treatment of firefighters as second-class citizens under the "professional rescuer doctrine" (hereinafter the "PRD") woefully incorrect.

Under the PRD, when a first responder "is injured by a *known hazard* associated with a particular rescue activity, the rescuer may not recover from the party whose negligence *caused* the rescuer's presence at the scene. Loiland v. State, 1 Wn.App.2d 861, 862, 407 P.3d 377 (2017) (emphasis added). In other words, a first responder assumes various risks in his or her profession and therefore may not sue the person that dialed 911 or caused—even remotely—the first responder to arrive at the emergency scene.

The *Loiland* court reminded us of an exception to the PRD, for *intervening* negligence that is unrelated to the act that caused the professional to be at the scene. In other words, the *Loiland* Court practically wiped out the use of *prior* negligence to establish an exception to the PRD, and the *Markoff* court affirmed that.

Instead, the first responder must establish that some intervening act that occurred *after* he or she responded caused his or her injuries (such as a police officer being assaulted by a third party after responding to a scene). Otherwise, the responder generally may not (successfully) sue the parties that caused him or her to be at the scene.

The *Markoff* court also noted an exception recognized in the original case adopting the PRD in Washington, *Maltman v. Sauer,* 84 Wn.2d 975, 978, 530 P.2d 254 (1975). The *Maltman* Court recognized that certain "'hidden, unknown, [or] extrahazardous" dangers that are not inherently associated with the particular rescue activity fall outside of the PRD. Put another way, first responders may recover for hidden dangers they otherwise would not expect upon arriving or working at a particular scene. However, the *Markoff* court found that the explosion of a gas pipeline, in response to a complaint involving a gas leak, was not a sufficiently "hidden danger" to sweep the nine firefighters outside of the PRD.

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**The Firehouse Lawyer newsletter is published for educational purposes only. Nothing herein shall create an attorney-client relationship between Quinn & Quinn, P.S. and the reader. Those needing legal advice are urged to contact an attorney licensed to practice in their jurisdiction of residence.**

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[11] https://www.firehouselawyer.com/NewsletterResults.aspx?Topic=Civil+Actions&Subtopic=Professional+Rescuer+Doctrine+

https://www.firehouselawyer.com/Newsletters/v02n03mar1998.pdf

# Firehouse Lawyer

**Breach of Unsecured PHI?**

NO → No need to give notice to patient or patient's representative of disclosure of PHI (but do you know enough to know when a HIPAA breach has occurred?)

YES → HIPAA Breach Notice Requirements Apply
See 45 C.F.R. § 164.400-414

Did the breach involve more than 500 individuals?

NO → No need to notify the media of the HIPAA breach

YES → Notify local news media (Tacoma News Tribune) within 60 days of the HIPAA breach and provide notice to Secretary of HHS contemporaneously with notice to affected individual

Is the affected individual's address up-to-date and identifiable?

NO → Give substitute notice of the HIPAA breach to the individual(s) no later than 60 calendar days from discovery of the breach

YES → Provide written notice by first-class mail to the individual's last-known address within 60 calendar days of discovery of the breach

**GENERAL RULES (**See 45 C.F.R. § 164.400-414)

1. Breach notices must be provided to the Secretary of HHS *and* the affected individual, *always* (but see rules for substitute notice for individuals);
2. If the individual is deceased, you must still notify the personal representative or next-of-kin at their last-known address;
3. If individual is *deceased*, no need to give regular *or* substitute notice if you have insufficient, out-of-date contact information for PR or next-of-kin;
4. The same notice requirements apply to your *business associates*;
5. Breach notices must be written in "plain language";
6. Breach notices (including substitute notice) must contain the following: (a) Brief description of what happened, including date of the breach or discovery of the breach, if known; (b) description of the types of PHI disclosed; (c) steps the individual should take to protect themselves; (d) brief description of what you are doing to investigate or mitigate the breach and prevent further breaches; and (e) contact information; and
7. **Substitute notice** for breaches involving **fewer than 10 individuals** may take the form of a conspicuous posting on your website (for as long as you wish to post it), or may be made by "other means"; substitute notice for **ten or more individuals** requires a 90-day web-posting.

**ALWAYS give notice to the Secretary of Health and Human Services, no later than 60 days from the beginning of the year *after* the breach (for a breach in 2019, 60 days after January 1, 2020). NOTE: For breaches involving 500 or more individuals, notice must be given to the Secretary 60 calendar days after breach discovery**

Breach notices to the Secretary must be made at the HHS web portal: https://www.hhs.gov/hipaa/for-professionals/breach-notification/breach-reporting/index.html

Great additional info on HIPAA breaches: https://www.hipaajournal.com/hipaa-breach-notification-requirements/