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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!!!

Eric T. Quinn, Editor

Joseph F. Quinn, Staff Writer

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

Our office is located at:

7403 Lakewood Drive West, Suite #11
Lakewood, WA 98499-7951

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

Update on Paid FMLA

We wrote in January about the Paid Family and Medical Leave Act, which is codified at Chapter 50A.04 of the Revised Code of Washington, last month; but it is already time for an update due to new developments.

We have learned that the Attorney General was asked by a county Prosecuting Attorney to issue a formal legal opinion on the question of whether elected officials are deemed to be "employees" under that law.

Because the AG has invited comment prior to issuing any formal opinion on that question, we have taken the liberty of sending the AG our legal opinion on the question, which we summarized in the January *Firehouse Lawyer*. In short, our analysis is that the original FMLA—the federal law—expressly excluded elected officials not covered by civil service laws from the definition of "employee." Therefore, since the statutes deal with the exact same subject—leave for family or medical reasons—there is no reason to construe the new paid FMLA law in Washington any differently. This is especially true because the new law is ambiguous; it does not contain any explicit language on the subject either way.

Proposed Legislation

Occasionally, we like to report on bills proposed in the Legislature even before they

are enacted into law and signed by the Governor.

Two such bills are worth discussing here. First, there is SSB 5010, which would establish a process to try to annex "islands" of land within the boundaries of a fire district that do not pay a "forest fire protection assessment." The county assessors under this bill would be charged with the duty of providing a list of such parcels that do not pay the fire levy or the forest fire protection assessment.

We were asked whether this bill, if enacted, would help to get counties to pay for fire protection of raw land within a fire district, if they are not otherwise paying pursuant to RCW 52.30.020. In our opinion, this bill would not apply to that situation, as it is only intended to apply to "islands" that by definition are not included within the fire district assessed lands and are not covered by a forest fire protection assessment. The above-cited statute directly applies to the question whether and how state and local governments contract for fire protection provided by the fire districts in which their properties are located, and we believe that is exclusive.

The second bill of interest is SB 5337. It would prevent double taxation. Currently, it seems that a sales tax should be levied when one agency sells property to another as part of a contractual consolidation. If the transaction is structured as a sale of assets, it seems the Department of Revenue might well contend sales tax is due even though such a tax was paid when the first agency bought the equipment in the first place. This bill would clarify that such a second sale would be exempt from paying sales tax.

COMING SOON? A KING COUNTY-WIDE ILA FOR SERVICE TO COUNTY PROPERTIES

We wanted to alert all of our clients, and in fact, all fire service agencies around the state that something historic may be about to happen in King County. For several months, a group of your fire department attorneys have been meeting with King County officials and negotiating a "first of its kind" interlocal agreement pursuant to RCW 52.30.020. The agreement would allow for payment by the county to the fire districts and RFA's located in King County for the services they provide to county properties in their respective service areas.

Over many years, we have noted how difficult it is for fire districts to convince counties, cities, and other municipal corporations (state and local agencies) to realize that RCW 52.30.020 means what it says. In other words, they *shall* enter into contracts for fire service and pay for the same to the fire district that serves them, especially if their facilities lie within the district and actually do get served! The reality has been that in our experience very few counties and not many cities are eager to enter into these contracts. So King County executing such a contract (Interlocal Agreement under RCW 39.34.030) would be historic precedent. Stay tuned.

LATECOMER AGREEMENTS – WHAT ARE THEY?

On two recent occasions, our fire district clients have asked us to review latecomer agreements because the fire district was in the process of dealing with fire station improvements such as sewer or water connections to a municipal sewer or water system. Since the author used to represent the Pierce County Sewer Utility and more recently the Lakewood Water District, we felt it might make sense to explore these unique agreements known as "latecomer agreements."

The discussion needs to start with Chapter 35.91 of the RCW. That statutory chapter provides that water and sewer utilities may require a *developer* to extend the water or sewer lines to the property sought to be developed and then to dedicate the improvements to the utility so that the pipes, etc may become part of the system operated by the utility. This agreement is generally referred to as a Developer Extension Agreement. Thus, the fire district becomes a developer by having the facilities constructed so it may connect to the water or sewer system. The utility bears no costs other than those associated with owning and maintaining the improvements as long as they last.

That is where the idea of a "latecomer agreement" comes in. The above referenced statutory scheme permits the utility to collect from any later property owners connecting to the improvements a "latecomer fee" as defined in the law. Moreover, the utility pays over to the original developer (the fire district, for example) some or all of the latecomer fee so collected. The latecomer fee may be charged, collected and remitted for up to twenty (20) years after the development of the improvements by the developer.

You may never need to know about this, but then again, since two of our clients have been approached about latecomer fees in the last year or so, you might need to know. For more details, just call us. Don't wait until it is too late.

LABOR CONCEPTS: CREDIT CHECKS

Recently, employers have inquired as to the legality of using consumer reports on current employees or applicants.[1] A consumer report is a report designed to establish a "consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" for employment purposes. 15 U.S.C. § 1681a (d). We shall call consumer reports "Checks" for purposes of this article.

Take note that such Checks are lawful so long as the procedures utilized to complete and administer those Checks are fair and in compliance with statutory law. We must remind employers of this because the Washington Supreme Court recently

[1] Insofar as this article relates to current employees, the Washington Fair Chance Act, at RCW 49.94.010, *does not apply to current employees*: https://www.firehouselawyer.com/Newsletters/March2018FINAL.pdf

reminded us that a particular applicant[2] had a "right to pursue the lawful career of her choice" without "arbitrary interference" by the employer, and that this right is a constitutionally protected "liberty interest" under the Due Process Clause of the Fifth Amendment. *Fields v. WA State Dep't of Early Learning*, No. 95024-5 (2019).

Here is an all-important DISCLAIMER: The general obligations of the federal Fair Credit Reporting Act ("FCRA") apply to "consumer reporting agencies" ("CRAs") that may or may not be hired by your agency to ensure compliance with the FCRA. However, because these CRAs are hired and are under contract with your agency, such contracts must ensure that the CRA shall comply with the FCRA. Furthermore, such contracts should ensure that the CRA shall indemnify your agency for the negligence, errors or omissions of the CRA when ensuring compliance with the FCRA.

Back to the general crux of this article: Under Washington and federal law, when a person has a constitutionally protected interest against "arbitrary interference" with current or future employment, that person must be provided with certain procedural protections to avoid the "erroneous deprivation" of their interest. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In other words, because applicants and employees have a protected interest against arbitrary interference to their current or future employment, the employer must have a "rational basis" for taking an adverse action against an applicant or employee. To have such a rational basis denying employment, or terminating employment, typically, the employer must provide notice to the employee/applicant and an opportunity to be heard. *See Id.*

What does this mean in the context of Checks? The FCRA requires that if an employer discovers damaging information regarding an applicant or employee after conducting a Check, the employer—and therefore the CRA, hired by the employer—must provide the applicant/employee with a "pre-adverse action disclosure," which gives the employee/applicant an opportunity to dispute the accuracy of the report. *See* 15 U.S.C. § 1681g. An "adverse action" is "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee." *See* 15 U.S.C. § 1681a (k).

This pre-adverse action notice is an example of a procedural protection that would afford an employer with a "rational basis" to deny employment or take other actions against a current employee on the basis of a Check. Again, ensure that the CRA which you hire to accomplish these tasks is reputable and well-versed in the requirements of the FCRA, and is prepared to indemnify your agency against the negligence, errors and omissions of the CRA when ensuring compliance with the FCRA.

Public agencies, especially those operating in the realm of public safety, have a clear

[2] Take note that the Fair Chance Act, RCW 49.94.010, generally forbids employers from obtaining criminal background checks of *applicants*, but there is an exception for persons who would have unsupervised access to children under 18, vulnerable adults or "vulnerable persons" who lack the capacity to care for themselves. *See* RCW 49.94.010 (4)(a).

interest in ensuring that the employees hired by the agency are fit for duty, and are of good reputation and character. But make sure you do it right. That concludes our *Labor Concepts* column.

SAFETY BILL

A question arose recently about the duty of an incident commander or crew to engage in monitoring a property after the emergency scene has been closed by the incident commander. Of course, the Vertical Safety Standards indicate that emergency scenes must be managed by an incident commander. WAC 296-305-05000 (2). Ultimately, the incident commander is responsible for the safety of all members of the emergency crew and "all activities occurring *at the scene*." *Id.* (emphasis added).

Of course, under the regulations, the term "overhaul" means "the process of final extinguishment after the main body of a fire has been knocked down. All traces of fire must be extinguished at this time." WAC 296-305-01005.

In other words, at a fire incident, when the incident commander or designee has performed the necessary 360 and the fire has been deemed contained—i.e. all traces of the fire are extinguished—we see no further obligation of the incident commander and/or the responding crew to persistently monitor the property in question over a period of days. But the fire must have been extinguished, entirely, and therefore thoroughness is paramount.

Furthermore, if the incident commander has any doubt as to whether the fire has been extinguished, he or she may utilize a fire watch as an option.

DISCLAIMER