The Firehouse Lawyer

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Inside this Issue

No Taxation Without…Public Comment Periods

We generally do not comment on pending legislation. But presently before the Washington State Legislature—and not yet codified law—is a proposition that governing bodies (city councils, fire commissioner and port commissioner boards, etc.) must provide for public comment periods during their *regular meetings*, and may never suspend public comment during their regular meetings, except under emergencies or other limited circumstances. Engrossed Substitute House Bill 1329 (ESHB 1329)[1] states as follows:

> NEW SECTION. Sec. 6. A new section is added to chapter 42.30 RCW to read as follows: (1) Except in an emergency situation, the governing body of a public agency shall provide an opportunity at or before every **regular meeting** at which final action is taken for public comment…Nothing in this section diminishes the authority of governing bodies to deal with interruptions under RCW 42.30.050, limits the ability of the governing body to put limitations on the time available for public comment or on how public comment is accepted, or requires a governing body to accept public comment that renders orderly conduct of the meeting unfeasible.

Based on the above, we find that if and when ESHB 1329 takes effect, governing bodies of a public agency (1) *may* suspend public comment

[1] See the bill here: https://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/House%20Bills/1329-S.E.pdf?q=20220112235532

during *special meetings* for any reason; (2) *must* provide for public comment during regular meetings but may suspend public comments if they are making orderly conduct of the meeting infeasible; and (3) may still place time limitations on public comment periods.

ESHB 1329 also requires that the stated purpose of a governing body for convening into executive session must also be included in the *minutes* of the meeting, which is what we have been recommending to our clients and readers for years.

There are other sections of ESHB 1329 that "encourage" public agencies to take certain actions, such as providing live-streaming options for their meetings. We encourage our readers to exercise their best judgment in this area, as allowing maximum participation in government tends to lead toward positive long-term results, despite potential short-term headaches.

A Note on Alienage Discrimination

Over the years, we have been presented with questions as to the lawfulness of the following question, or the functional equivalent of such a question, on an application for public employment as a firefighter:

"Are you a US Citizen?"

Our answer has been, and still is, that this question should not be asked. We say this for the following reasons:

As public agencies, fire departments are subject to the United States Constitution, which prohibits "alienage" discrimination unless the employment action is rationally related to a legitimate government interest. *See Mathews v. Diaz*, 426 U.S. 67 (1976). This "rational basis" test for alienage discrimination has been criticized[2] as creating a low bar for public agencies to survive such allegations—such as by failing to hire a person on the basis that they are not a U.S. citizen but are otherwise authorized to work in the U.S. But that should not be seen as permitting the non-hiring of applicants for the position of firefighter merely because they are not permanent U.S. citizens:

Under the Washington Pre-Employment Inquiry Guide, at WAC 162-12-140 (3)(c), it is an "unfair pre-employment inquiry" to inquire "Whether [the] applicant is [a] citizen." But it is a "fair pre-employment inquiry" to ask "Whether [the] applicant is prevented from lawfully becoming employed in this country because of visa or immigration status [or] whether applicant can provide proof of a legal right to work in the United States after hire."[3]

One more item: Not only might you have a problem under the state or federal constitution, you might have a problem under the Washington Law Against Discrimination (WLAD). The WLAD states as follows: It is an "unfair practice (discrimination) to refuse to hire any person because of age, sex, marital status, sexual orientation, race, creed, color, national origin, citizenship or immigration status, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or

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[2] https://digital.sandiego.edu/cgi/viewcontent.cgi?article=1851&context=sdlr

[3] Here is the pre-employment inquiry guide: https://app.leg.wa.gov/WAC/default.aspx?cite=162-12-140

service animal by a person with a disability, unless based upon a bona fide occupational qualification." See RCW 49.60.180.

We do not consider US citizenship as being a "bona fide occupational qualification" to becoming a firefighter, and therefore refusing to hire an applicant for a firefighter position because they are not a US citizen may violate the WLAD. With that being said, it is perfectly lawful for a fire department to ask an individual for proof that they are legally authorized to work in the United States. After all, employers are subject to sanctions for knowingly hiring or continuing to employ aliens who are not authorized to work in the United States. *See* 8 U.S.C.A. § 1324 (a)(1) and (2).

The United States Supreme Court (SCOTUS) Continues Injunction of OSHA Vaccinate-or-Test Rule

The SCOTUS blocked the OSHA Emergency Temporary Standard (ETS) from going into effect.[4] The Court found that OSHA empowers "the Secretary [of the Department of Labor] to set workplace safety standards, not broad public health measures."[5]

However, the SCOTUS lifted the nationwide injunction against the CMS Rules requiring vaccination of health care providers—which *do not include providers of emergency medical services*—that work in health care facilities that receive Medicare or Medicaid funding.[6] In ruling that the CMS Rules are enforceable, the SCOTUS found that "ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm."[7]

How do the above rulings impact fire departments that employ more than 100 employees? Truthfully, the above rulings have little impact, whether certain fire departments do or do not employ more than 100 employees. That is because Executive Order 14042, applicable to "federal contractors"—which has also been temporarily enjoined nationally by a federal district court judge[8]—has not yet been ruled upon by the SCOTUS. And we have already discussed why we find that 14042 applies to many fire departments that, for example, receive GEMT funds or otherwise have contracts with the federal government.[9] We will be sure to report here in future articles about the status of EO 14042 before the SCOTUS.

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[4] https://www.nytimes.com/2022/01/13/us/politics/supreme-court-biden-vaccine-mandate.html?referringSource=articleShare

[5] See the SCOTUS opinion here: https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf

[6] See the *Firehouse Lawyer* article discussing why the CMS Rules do not apply to fire departments: https://www.firehouselawyer.com/Newsletters/November2021FINAL.pdf

[7] See the SCOTUS opinion here: https://www.supremecourt.gov/opinions/21pdf/21a240_d18e.pdf

[8] https://www.bloomberg.com/news/articles/2021-12-07/biden-vaccine-mandate-for-federal-contractors-blocked-nationwide

[9] See our article on this here: https://firehouselawyer.com/Newsletters/September2021ExtraFINAL.pdf

Another illuminating aspect of the SCOTUS's ruling on the CMS Rules is a willingness by the Court to rule in favor of vaccine mandates applicable to health care providers. But the SCOTUS may find that 14042's requirement that all employees of a "federal contractor" be vaccinated is overly broad, as did the Court in the OSHA ETS case. We want to be clear that the SCOTUS rulings on the federal mandates have no impact on the applicability or enforceability of Washington State Proclamation 21-14, requiring "health care providers" to be fully vaccinated—by October 18, 2021—unless they receive an exemption based on a disability or a sincerely held religious belief. Stay tuned.

Quick Report on Litigation

As many of our readers know, in the final quarter of 2021, a lawsuit was filed in King County Superior Court by numerous firefighters against many fire departments and cities, alleging discrimination by failing to accommodate them based on their sincerely held religious beliefs.

The litigation is not a direct challenge to Governor Inslee's Proclamation 21-14 mandating that all health care providers be "fully vaccinated" on or before October 18, 2021. Instead, the plaintiffs claim that although they were entitled to apply for religious exemptions (many of which were granted) from vaccination, they were not reasonably accommodated and allowed to treat patients in their jobs as health care providers.

A motion for preliminary injunction was argued on Friday, January 14, 2022 to a King County Superior Court judge. Based on recent information from one of the attorneys who argued the matters before the court on that day, we have learned the following: (1) The court denied the motion for injunctive relief; and (2) that day, the judge indicated that the case was not appropriate for class certification, i.e. the case was not worthy of becoming a class-action lawsuit. That latter ruling makes a lot of sense, because the process of reasonable accommodation requires an individualized analysis of each request.

Based on what we know about the case, it appears that the injunction was denied in part due to the judge's impression that the plaintiffs did not show a great likelihood of probable success on the merits, when the court gets to the point of determining the underlying merits of the claims. We also believe the judge implied in the oral ruling that concern existed about the undue hardship to the employer and to co-employees who have been fully vaccinated, but who would have to work side by side with unvaccinated employees, if these unvaccinated employees were allowed to treat patients and work in close quarters with others. It is also our understanding that the plaintiffs filed a motion with the King County Superior Court to voluntarily dismiss this lawsuit without prejudice, on January 20. We will keep our readers updated.