The Firehouse Lawyer

Volume 19, Number 5

May/June 2021

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Inside this Issue

Labor and Industries Provides New Mask Guidance for the Workplace

On May 21, 2021, the Department of Labor & Industries issued a new guidance[1] to advise employers about mask wearing in the workplace, due to new CDC and Governor Inslee guidelines. The CDC has recommended that masks not be required for fully vaccinated individuals (www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html) and Governor Inslee has adopted those guidelines.

What does this mean, really, for fire departments that have had in place for months strict mask-wearing requirements for workers in their stations and/or on calls (that might be Covid-related)?

First, unless the employer still requires it, fully vaccinated employees need not wear masks at work. Of course, the protocol may differ when treating EMS patients.

Second, before ending the masking and social distancing rules, the employer must require proof that the worker is fully vaccinated. The worker can either attest to their vaccinated status or provide proof of vaccination.

Third, employers must be able to demonstrate they have verified vaccination status for each such worker. Verification could be done by

[1] https://lni.wa.gov/forms-publications/F414-179-000.pdf

creating a log of vaccinated workers—taking appropriate measures to protect privacy—giving their dates of vaccination, or by checking status daily, or marking a worker's badge or credentials, or other methods. Acceptable documentation could be a CDC vaccination card, a photo of the card, or documentation from a health care provider or a signed attestation from the worker, or documentation from the state immunization information system.

It is worth noting that the employer is still within its rights to require masking, with some exceptions relative to religious beliefs or demonstrated disability. And the employer must allow employees to wear a mask if they so choose, vaccinated or not. Obviously, the guidance states that those not fully vaccinated must continue to wear the mask and practice social distancing. The guidance also does not change the rules requiring masks in health care facilities such as hospitals. Finally, employers cannot fire or discriminate against employees who are at high risk of contracting Covid-19 and seek accommodation to protect against exposure.

So what should a fire service employer do with this guidance in hand: to require masks as before or to follow the guidance and allow the fully vaccinated employees (who can prove they are vaccinated) to get rid of their masks?

We have noted that for some reason the ranks of firefighters (at least with those clients we know about) include many people who refuse to get vaccinated or are very hesitant to do so, unless ordered by the public health department or their employer to do so. That means you can expect to have a very mixed workforce with some individuals who are not vaccinated or do not even want to disclose their status. We believe that the proof and log requirements would be a significant burden on the employer, just to allow some employees to go maskless at work. It may also be somewhat ironic that a fire service employer would want to downplay the safety considerations, when firefighter safety is always a high priority, both for labor and management. Finally, we can express some reservations about the liability implications for the fire department or the municipal corporation if an employee is infected at work after the relaxation of the guidelines to allow some employees to go maskless.

If hospitals are health care providers and if fire departments are EMS health care providers (which they are for purposes of HIPAA and the Washington Health Care Information Act) why should they not be treated alike and require masks?

Also, just accepting attestations or affidavits from employees as sufficient proof that they are fully vaccinated seems to be an unnecessary risk to us, and we are somewhat surprised that is acceptable to the Department of Labor and Industries.

In conclusion, we recommend reminding all employees that "we are in the public safety business, and the safety of our employees is our paramount concern." Therefore, a fire department stresses firefighter safety and the safety of all workers by continuing to require masks while on duty.

Ultimately, however, following the guidance or not, the employer can decide the best course for it to follow, based upon the culture of the department and the risks discussed herein.

TAKE NOTE OF THE NEW LONG-TERM CARE LAW

Beginning January 1, 2022, employers must begin withholding premiums for the Washington State "long-term services and support trust program", hereinafter the "LTCP" (long-term care program).

We thought it best to include a synopsis of the relevant provisions of the LTCP here. We will not discuss the substance of the benefits provided under the LTCP, such as what long-term care services would be covered and how they are paid for. Instead, we focus on the requirements for employers to remit premiums and otherwise administer compliance with the LTCP. We may omit entire statutory sections of the LTCP (set forth at RCW 50B) as irrelevant.

We begin with some definitions. The LTCP applies to all "employees" of an "employer." The definition of "employee" is the same as that set forth in the Paid Family and Medical Leave Act:

> "Employee" means an individual who is in the employment of an employer. "Employment" means personal service, of whatever nature, unlimited by the relationship of master and servant as known to the common law or any other legal relationship performed for wages or under any contract calling for the performance of personal services, written or oral, express or implied.

RCW 50B.04.010; RCW 50A.15.010. Put another way, under the LTCP, the term "employee" is broad enough to encompass elected officials and volunteers.

Employers include but are not limited to state agencies and units of local government (such as fire departments, public utility districts and cities, etc.). *See* RCW 50B.04.010.

The premium assessment and collection process is generally going to be enforced by the Employment Security Department (ESD). *See* RCW 50B.04.020. Various other state agencies are involved in the administration of the LTCP but that is not relevant to this article.

The LTCP permits employees of an employer to opt out of being considered individuals qualified for LTCP benefits. In other words, employees are given the opportunity to *choose* whether they may receive LTCP benefits. These individuals that "opt out" of receiving LTCP benefits are referred to as "exempt employees." *See* RCW 50B.04.050 (3).[2] Exempt employees may *never* be considered a qualified individual under the LTCP—opting out is permanent and irreversible, as the law is written now. *See* RCW 50B.04.085. An exempt employee must provide written notification to all current and future employers that they have been approved for exemption from premium collection. And an employer that deducts premiums after being informed about the exemption is obligated to refund those premiums to the exempt employee.

LTCP benefits do not become available until January 1, 2025. It appears that the Legislature contemplated that a "bank" must be filled with at least three years of LTCP premiums prior to

[2] "An exempt employee may never be deemed to be a qualified individual."

the benefits[3] becoming available. "Qualified individuals"—i.e. those who are not "exempt employees"—are the parties that apply for the LTCP benefit, not the employer. *See* RCW 50B.04.060.

The Meat and Potatoes: Premiums (RCW 50B.04.080). Again, beginning January 1, 2022, ESD shall assess for each individual in employment with an employer a premium based on the amount of the individual's wages. The initial premium rate is fifty-eight hundredths of one percent (the "Premium Rate") of the individual's wages.

To articulate this, it is best that we consider real numbers. Assume for example that an employee is paid $5,000.00 per month. One percent of $5,000.00 is $50.00. And 50 x .58 (the Premium Rate)=29. Consequently, the employer would remit to the ESD, on behalf of an individual earning $5,000 per month: $29.00 per month.[4] The employer collects the premiums via payroll deduction and remits the premiums to the ESD.

Collective Bargaining Agreements. The LTCP—and its incumbent premium-collection requirements—does not apply if your agency had a collective bargaining agreement in effect on October 19, 2017 which is still in effect now. *See* RCW 50B.04.080 (3). Otherwise, your agency should assume that, commencing January 1, 2022, it is to begin collecting the LTCP premiums referenced above.

[3] The benefits come in the form of "benefit unit." A single benefit unit is defined as "up to one hundred dollars" adjusted annually for the CPI, and no more than 365 benefit units (totaling up to $36,500.00) may be paid out to on behalf of an eligible beneficiary under the LTCP. *See* RCW 50B.04.010 (3); *See* 50B.04.060 (3)(b).

[4] The ESD may adopt its own rules as to when premiums are remitted (quarterly, semi-annual etc), but we use a monthly basis here for purposes of illustration.

A New Law on Excessive Force May Have Excessive Impacts on Fire Departments

ESHB 1310 (hereinafter "1310")[5] will become effective July 25, 2021. To be clear, we do not opine herein as to the wisdom of this law, but only intend to discuss its impacts on Fire and EMS Agencies (hereinafter "FEAs"). This law pertains to "permissible uses of force" by "peace officers." To be clear and to put it simply, "peace officers" include agents of law enforcement. Fire and EMS employees are not "peace officers." Consequently, 1310 is not applicable to Fire and EMS agencies. However, 1310 may have clear, albeit indirect, impacts on FEAs—which employ First Responders. This is so for the following reasons:

1. 1310 (effective July 25, 2021) repeals RCW 10.31.050, which presently states as follows: "If after notice of the intention to arrest the defendant, he or she either flee or forcibly resist, the officer may use all necessary means to effect the arrest." This means that law-enforcement officers may be afforded substantially less discretion to use deadly force in the event an individual flees after an attempt to arrest. How does this impact FEAs? Without delving into politics, this could mean that there will be fewer patients with gunshot wounds.

[5] http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/House/1310-S2.SL.pdf?q=20210618124535

2. The Legislature makes clear the intent of 1310:

> The legislature intends to address excessive force and discriminatory policing by establishing a requirement for law enforcement and community corrections officers to act with reasonable care when carrying out their duties, including using de-escalation tactics and *alternatives* to deadly force.

(emphasis added). How might this impact FEAs? Although the above is a statement of intent and does not impose any affirmative mandates on FEAs, these agencies will surely be considered in a law enforcement agency's list of "alternatives" to the use of deadly force.

3. When a "peace officer" may use "deadly force" is clearly circumscribed under 1310: "A peace officer may use deadly force against another person only when *necessary* to protect against an imminent threat of serious physical injury or death to the officer or another person." (emphasis added). We will not expand on the definition of "necessary" herein, but sufficed to say that the burden to establish what is "necessary" is stringent. Law enforcement officers, out of a fear of prosecution, may engage less with those in mental health crises (or those that are simply engaged in nefarious behavior). This may lead to circumstances under which an individual in a mental health crisis is dancing on top of a car and spitting at citizens and officers, but the officers refrain from engaging with the individual because their "hands are tied" by 1310. We can only speculate. Based our admitted speculation—as this law has not become effective—FEAs may have no alternative but to leave the scene without engaging with the patient under such circumstances. That is because truly, it is *law enforcement* that has the authority to involuntarily commit a person in a mental health crisis,[6] and it is *law enforcement* that has the authority to detain those who are engaged in nefarious behavior that may or may not constitute a crime.

4.

5. 5. 1310 goes further to state that a peace officer must use reasonable care when "when using *any* physical force against another person." (emphasis added). This law does not impose a "duty of care" on *FEAs* on its own, and that is why FEAs should continue assuming that are they *not* agents of law enforcement—so this particular statutory "duty" could not feasibly attach to an FEA's actions at emergency scenes.

6. Peace officers must use "de-escalation techniques" that include but are not limited to "**leaving the area** if there is no threat of imminent harm and no crime has been committed, is being committed, or is about to be committed." This may lead to circumstances in which law enforcement leaves the scene even if the person is *arguably* committing a crime. Back to our example: A person spitting at others while dancing on top of a car may be engaged in the crimes of assault or "criminal mischief", but their mental health status may deprive them of the necessary "mens rea" to commit such offenses.[7] Under such circumstances, peace

[6] *See* RCW 70.05.153: https://app.leg.wa.gov/RCW/default.aspx?cite=71.05.153

[7] We do not practice in the area of criminal law so our comments are somewhat generic here. We only use these potential crimes as a means to illustrate the potential impacts of 1310.

officers, for fear of prosecution, may simply leave the scene, leaving FEAs to "keep the peace." We simply do not yet—see below.

7. Another "de-escalation technique" includes "calling for additional resources such as a crisis intervention team," i.e. a FEA. Consequently, FEAs are being implicitly directed by 1310 to, at the request of law enforcement, "intervene" and act as "peacekeepers" in lieu of the police using physical force to subdue an individual that is in crisis or otherwise engaged in potentially criminal behavior. This creates liability issues.

At this time—given that 1310 is not yet effective and therefore we have not received many questions about it—we recommend two courses of action to alleviate the indirect impacts of 1310 on FEAs:

1. FEAs may feel it prudent to adopt or strengthen CARES programs, pursuant to RCW 35.21.930,[8] for purposes of *preempting* mental health crises, because under 1310, FEAs may have more difficulty in addressing such crises in the field, due to lack of collaboration (for fear of prosecution[9]) with law enforcement.

2. FEAs should adopt policies and procedures with respect to scene safety in the event of mental health crises or other extreme behavior, arising out of situations in which law enforcement utilizes an FEA as an "alternative" to the use of physical force or as a "crisis intervention" team to avoid physical force—or when law enforcement simply leaves the scene.

[8] https://app.leg.wa.gov/RCW/default.aspx?cite=35.21.930

[9] https://www.reuters.com/world/us/portland-polices-entire-crowd-control-unit-resigns-after-indictment-officer-2021-06-18/

Itching to Get Back: Can Your Agency's Governing Body Conduct In-Person Meetings?

On June 30, 20201, all Washington Counties will move to "Phase 3" on the Roadmap to Recovery.[10] As many of our readers know, traditionally, all meetings of a governing body must be open and public and all citizens must be entitled to attend. And these meetings, traditionally, have been held in one room. That changed with Covid-19 and that change lasts to this day:

Proclamation 20-28-14[11] has been extended until the state of emergency has ended or Proclamation 20-28 has been rescinded, as is set forth under Proclamation 20-28-15[12]—have we had enough proclamations, anyone? Consequently, governing bodies of public agencies in Washington State may hold in-person meetings but only insofar as those meetings comply with the guidelines for "Miscellaneous Venues"[13] referenced in Proclamation 20-28-14 and provide for remote attendance.

[10] https://coronavirus.wa.gov/what-you-need-know/roadmap-recovery-metrics

[11] https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-28.14.pdf

[12] https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-28.15.pdf

[13] https://www.governor.wa.gov/sites/default/files/COVID19%20Misc%20Venue%20Guidance.pdf

In other words, your agency may hold in-person meetings, right now, but not entirely in the same manner as you were able to in February of 2020.

And of course, Governor Inslee could terminate the state of emergency, very soon, or Proclamation 20-28 may be rescinded, very soon, in which case none of the "Miscellaneous Venue" requirements would apply. As we have said dozens of times, Stay Tuned.

Sharing Matters

Effective July 25, 2021, the "office of cybersecurity" shall exist in the State of Washington. This office was created by Engrossed Substitute Senate Bill 5432 ("5432").[14] One aspect of 5432 that impacts public agencies is a provision related to "data sharing agreements," which we will call "DSAs." Under this provision, a public agency such as the Washington State Auditor, *must* have a DSA in place with a public agency when the agency shares certain highly confidential data.

Many of our clients have received DSAs from the Washington State Auditor for purposes of information-sharing during the audit process. We do not take any issue with the DSA being provided by the SAO, and public agencies *should* sign them as they are required by 5432.

A Simplification to Retention Period for "Medical Incident Reports"

In December 2020, the State Archivist adjusted and *simplified* the records retention schedule for medical incident reports.[15] The simplified schedule states as follows:

For non-minors: The retention schedule is 8 years after the services are provided, then destroy. So if EMS services are provided to a 20-year-old on January 1, 2022, the record of those services could not be destroyed until January 1, 2030.

For minors: 8 years + 3 years after the individual turns 18, then destroy. So, if the services were provided to a 1-year-old, you could not destroy the record until that individual turns 21, even though the normal retention schedule for non-minors is 8 years.

Past retention schedules have made it unclear as to what to do with records of care rendered to pregnant women. Now an EMS agency can follow the retention schedule as it is written: The unborn child is not even a "minor" yet, so simply follow the non-minor schedule for pregnant women who receive treatment, and destroy the record after 8 years from when the service was provided.

Who Constitutes the "News Media" Under the Public Records Act?

Under the Public Records Act (PRA), all public records are subject to inspection and copying unless an exemption in the PRA or other statute exempts the record(s) request. *See* RCW 42.56.070. Of course, a 2020 law states that the photographs and month and year of birth of *all* public employees and volunteers are *per se*

[14] http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5432-S.SL.pdf?q=20210611112547

[15] https://www.sos.wa.gov/_assets/archives/recordsmanagement/fire-and-emergency-medical-records-retention-schedule-v.2.0-(december-2020).pdf

exempt unless that information is sought by the "news media." *See* RCW 42.56.250 (8). This law was presumably passed in reaction to the *Freedom Foundation* case that we wrote about back in 2019.[16]

Recently, in *Green v. Pierce County*,[17] the Washington State Supreme Court was called upon to decide whether an "independent journalist" with a Youtube channel constitutes a member of the "news media" who is entitled to receive photographs and the month and year of birth of public employees or volunteers. The court found that he did not because he had not incorporated or formed any kind of legally independent business. In other words, not any "Joe Schmo" with a Youtube channel can obtain photographs (or month and year of birth) of public employees or volunteers. But if that individual forms a legally separate entity, such as a corporation, then the courts would likely recognize him as the "news media" under the holding of *Green.* Put another way, this case is not earth-shattering.

The Affordable Care Act Remains in Effect

Under Washington law, qualified ambulance providers may receive supplemental payments that cover the difference between their actual costs per GEMT transport and the Medicaid base payment, mileage and other sources of reimbursement. *See* RCW 41.05.730. This is known as "GEMT."

As set forth under the guidance of the State Health Care Authority, under GEMT, qualified ambulance providers "receive cost-based, supplemental payments for emergency ground ambulance transportation of Medicaid fee-for-service clients under Title XIX of the federal Social Security Act and the Affordable Care Act (ACA) only."[18] (emphasis added).

Put another way, if the ACA did not exist, then GEMT arguably would not exist either. As of right now, the ACA is alive, having survived a recent challenge from citizens of the State of Texas—and the State of Texas itself—who argued that because the individual mandate had been stricken from the law by Congress, that the ACA may no longer be sustained as a "tax" as was set forth by Chief Justice John Roberts in the *Sebelius* case from 2012.[19]

The United States Supreme Court found that the plaintiffs in the Texas case lacked "standing" to sue because they had not suffered a direct injury.[20] Put another way, the highly conservative Supreme Court, which may overturn the ACA if given a chance, will not do so until the plaintiff can demonstrate that they suffered a direct injury due to enforcement of the ACA. Until that time, GEMT, CARES programs, and "treat and refer services"[21] shall remain.

16 https://www.firehouselawyer.com/Newsletters/November2019FINAL.pdf

17 https://www.courts.wa.gov/opinions/pdf/987688.pdf

18 https://www.hca.wa.gov/assets/billers-and-providers/GEMT-bg-20201001.pdf

19 https://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf

20 https://www.supremecourt.gov/opinions/20pdf/19-840_6jfm.pdf

21 https://app.leg.wa.gov/wac/default.aspx?cite=182-531-1740&pdf=true