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Statute of Limitations On Wage Claims

Suppose your payroll clerk just came to you and said, "I just discovered that we have been underpaying some of our employees for at least ten years!" Of course, you would want to make that right, but is there any way to limit the damage? As in almost all situations, generally speaking, there is a statute of limitations. Actually, we believe there are two different statutes of limitations that could apply to unpaid wage claims. If the claim is based on an unwritten contract, express or implied, then the claim must generally be filed within three years after the failure to pay the proper wage amounts. *See* RCW 4.16.080 (3). On the other hand, if the claim is based upon a written contract, which provides for payment of wages or salary, then the six-year statute of limitations applies. *See* RCW 4.16.040 (1). Since most of our clients employ firefighters and other employees covered by a collective bargaining agreement, then we would expect the applicable statute to be the six-year statute of limitations.

The only exceptions that we can think of would involve some reason to find that the statute of limitations has been "tolled," which essentially means "paused." There is one case holding that an investigation of a wage complaint by the Department of Labor and Industries tolls the applicable statute of limitations, even if the Department closed its investigation because the

complainant filed suit in court.[1] Apparently, the statute of limitations would be a bar to recovery even if the employee had no reason to discover the discrepancy.

The federal Fair Labor Standards Act does not seem to offer a more favorable result to the underpaid employees. It basically provides a two-year statute of limitations on wage claims predicated upon the federal act, which includes both minimum wage and overtime provisions. The only exception to that is if the employer's action is willful, which is not the fact situation set forth above. Certainly, in most cases the underpaid wages would not be intentional, or willful. In such a case, however, the statute of limitations would be three years instead of two.

In this situation, we would advise the employer to notify the employee(s) of the errors and pay the employees either three years' or six years' worth of back pay, depending on their contract status. In other words, we would apply the state law rather than the FLSA to reach a result more favorable to the employee than the employer. We follow this approach as the wage statutes would normally be interpreted more favorably to the employee.

FEDERAL COURT SETS ASIDE FTC RULE AGAINST NONCOMPETE AGREEMENTS

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Some of our readers probably read about the Federal Trade Commission rule, known as the Noncompete Rule, which was to go into effect on September 4th. The rule would have prohibited all new noncompete agreements including those applying to senior executives. Except for those senior executives, the rule would also have invalidated preexisting noncompete agreements except those for senior executives.

However, on August 20th, a federal judge entered a judgment for plaintiffs seeking to enjoin enforcement of the new rule.[2] The court ruled that the FTC cannot implement the Noncompete rule anywhere in the United States, because the FTC exceeded its authority and interpreted the FTC act "arbitrarily and capriciously."

An important rationale for the holding was that the FTC lacks authority to make substantive rules on "unfair methods of competition," although it has that authority with regard to unfair or deceptive acts or practices in commerce.

This case is an application of the principles laid down recently by the U.S. Supreme Court in *Loper Bright Enterprises. v. Raimondo,*[3] in which the Court overruled the *Chevron* doctrine. That doctrine, developed in the 1980's and followed ever since, called for deference to federal administrative agencies in the interpretation of their statutory areas of jurisdiction. The *Chevron* Court believed that the agencies had greater expertise in the fields that they regulated than a judge or judges would have. The current Supreme Court believes otherwise, so we will see more results like this in the immediate future

[1] https://scholar.google.com/scholar_case?case=5347232988733813369&q=%22statute+of+limitations%22+AND+tolled+AND+%22wage+claim%22&hl=en&as_sdt=4,48

[2] https://cases.justia.com/federal/district-courts/texas/txndce/3:2024cv00986/389064/153/0.pdf?ts=1720216729

[3] https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf

throughout the federal court system—and perhaps clever administrative-law attorneys in Washington will begin making the argument.

DRIVING EMERGENCY VEHICLES, SAFETY AND TRAINING

Over many years, we have been asked to advise fire district/RFA clients about their policies and procedures designed to enhance driving safety and compliance with applicable laws and regulations pertaining to the driving of emergency vehicles.

Recently, a client's inquiry got us thinking again about this important topic. In this article, we will set forth the applicable laws and regulations, discuss policies, and generally discuss compliant training on emergency vehicle driving.

First, a bit about the applicable statutes and cases that drive the law in this area. Under Washington law, an EMS provider may be sued in negligence for breaching a duty of reasonable care to third persons when the provider responded to a specific emergency. *Norg v. City of Seattle*, 522 P.3d 580 (Wash. 2023).[4] Specifically, the *Norg* decision clarifies that the public duty doctrine does not automatically shield municipal public EMS providers from liability, emphasizing that once an EMS provider undertakes a response, it owes an actionable, common law duty to use reasonable care in its emergency response efforts. Consequently, EMS providers must promote a full understanding of the laws pertaining to driver training—to avoid situations in which drivers violate the duty of reasonable care established under *Norg*.

The central facts of *Norg* are as follows: Delaura Norg called 911 seeking emergency medical assistance for her husband, Fred. The correct address was provided to the 911 dispatcher, which was only three blocks away from the nearest Seattle Fire Department station. Due to a critical error, the response team went to the wrong location, resulting in a significant delay in arriving at the Norgs' apartment, which adversely impacted Fred's condition. The *Norg* court determined that once the City of Seattle, through its emergency responders, undertook the duty to respond to the Norgs' emergency call, it owed them a duty of reasonable care.

By logical extension—a clever plaintiff's attorney would argue—when a fire department responds to an emergency, through its emergency responders, it undertakes a duty of reasonable care when responding. Part of that duty of reasonable care includes, logically, complying with all applicable laws as to driving an emergency vehicle.

The central statute applicable in this scenario is RCW 46.61.035. Said statute reads as follows:

> *(1) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.*

[4] https://www.firehouselawyer.com/Newsletters/January2023FINAL.pdf

(2) The driver of an authorized emergency vehicle may:

(a) Park or stand, irrespective of the provisions of this chapter[5]*;*

(b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

(c) Exceed the maximum speed limits so long as he or she does not endanger life or property;

(d) Disregard regulations governing direction of movement or turning in specified directions.

(3) The exemptions herein granted to an authorized emergency vehicle shall apply only when such vehicle is making use of visual signals meeting the requirements of RCW ***46.37.190****,*[6] *except that: (a) An authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red light visible from in front of the vehicle; (b) authorized emergency vehicles shall use audible signals when necessary to warn others of the emergency nature of the situation but in no case shall they be required to use audible signals while parked or standing.*

(4) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with ***due regard*** *for the safety of all persons, nor shall such provisions protect the driver from the consequences of his or her reckless disregard for the safety of others.*

(emphasis added). The question becomes: What does "due regard" mean?

In *City of Seattle v. Ashley*, an *unpublished*, non-binding decision of a Washington court of appeals, a jury found that police officers did not act negligently during a high-speed pursuit. *See City of Seattle v. Ashley,* No. 59732-9-I (2008). The jury concluded that while the pursuit did involve high speeds and the running of red lights, the officers maintained a level of care that was appropriate under the circumstances, considering the behavior of the suspect and the need to apprehend him to prevent potential harm to the public. Consequently, the question of "due regard" not only takes into account the

[5] Said "chapter" is RCW 46.61, which sets forth Washington's "Rules of the Road": https://app.leg.wa.gov/RCW/default.aspx?cite=46.61

[6] This law requires that "[E]very authorized emergency vehicle and organ transport vehicle shall, in addition to any other equipment and distinctive marking required by [RCW 46.37], be equipped with at least one lamp capable of displaying a red light visible from at least 500 feet in normal sunlight and a siren capable of giving an audible signal."

behavior of the responder—it takes into account the nature of the emergency.

The Washington Supreme Court has found that "due regard," in the EMS context, constitutes using visual and audible warning signals (lights and sirens), and approaching intersections with caution, even when responding under emergency conditions. *Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 668 P.2d 571 (1983). Due regard included slowing down or stopping at intersections, despite the urgency of the response, to ensure that it was safe to proceed through the intersection. The jury in *Brown* found that the EMS crew acted with "due regard" for the safety of others when responding to the emergency because that is what the crew did—used lights and siren and approached intersections with caution.

In another *unpublished*, non-binding opinion from the Washington court of appeals, the court found that ambulance drivers acted with due regard. *See Hiatt v. American Med. Response Ambulance Serv., Inc.*, No. 674021-I (2012). The facts of *Hiatt* are as follows: On June 1, 2009, around 7:00 a.m., an AMR ambulance crew consisting of driver Rose Washington and crew member Taylor Thornton responded to a multi-vehicle rollover accident blocking three southbound lanes on Interstate 5 near Northgate Mall. The crew parked their ambulance, with activated emergency lights, in the northbound HOV lane and crossed the median to assist the victims. During this time, motorcyclist Cody Hiatt, traveling northbound in the HOV lane while listening to music, collided with the rear of the ambulance at approximately 50 mph without braking, only attempting to maneuver at the last moment. Hiatt sustained severe injuries including fractures and a dislocation. Hiatt alleged that it was negligence of the responders—and therefore negligence of AMR—to park in the northbound land when the accident occurred in a southbound lane. Despite Hiatt's allegations of negligence regarding the ambulance's parking and lack of additional safety measures like flares, the court ruled that the ambulance crew had not breached their duty, emphasizing that their actions were within the scope of emergency response and maintained due regard for safety.

No other Washington case dives further into the parameters of "due regard" for EMS providers—most of the cases interpreting this "due regard" standard related to police pursuits. The unpublished opinions, while non-binding, seem totally consistent with the rather sparse binding precedents, and are persuasive.

Exemption from CDL requirements

Firefighters are exempt from the requirement to obtain a commercial driver's license (CDL) when (1) those firefighters have successfully completed a driver training course approved by the director of labor and industries (L&I) and (2) they carry a certificate attesting to the successful completion of the approved training course. *See* RCW 46.25.050. The question becomes: what driver training course *has* been

approved by the director of L&I? The standard answer is that the EVIP training protocol approved by the Washington State Fire Chiefs has been approved by L&I and is therefore commonly used.

Based upon the case law and other authority cited above, the following is a non-exclusive list of actions during an emergency response, and the training leading up to that response, that would in our opinion demonstrate "due regard" for the safety of others during an emergency response:

1. **Using Lights and Sirens, pursuant to WAC 204-36-040**: Activating lights and sirens when responding to calls to alert other drivers and pedestrians of their approach, helping to clear the path and minimize response time safely. The use of sirens and lights on emergency vehicles is allowed when responding to an emergency call or when necessary to warn other road users of the emergency vehicle's approach. This is in line with RCW 46.37.380, which governs the operation of audible and visual signals on emergency vehicles.

2. **Slowing at Intersections**: Even when lights and sirens are active and even when the vehicle is authorized to exceed speed limits, slowing down when approaching intersections to ensure it's safe to proceed, checking for vehicles or pedestrians that may not have noticed the emergency signals.

3. **Safe Navigation**: Making calculated and safe turns and maneuvers, avoiding abrupt or unpredictable driving actions that could endanger other road users or the firefighters themselves.

4. **Secured Equipment**: Ensuring all equipment on the vehicle is securely fastened to prevent any accidents due to loose gear during rapid movements.

5. **Observing Traffic**: Maintaining awareness of all traffic and weather conditions and road users, adjusting speed and driving strategy accordingly to ensure safety while minimizing delay.

6. **Communicating with Dispatch**: Staying in communication with dispatch and other emergency vehicles to coordinate movements and receive updates on road conditions or additional hazards.

7. **Visibility Measures**: Using additional visibility measures like flashing headlights or a public address system to alert inattentive drivers or pedestrians when approaching from angles where visibility might be

reduced. (Emergency vehicles must have appropriate markings and equipment to ensure they are easily identifiable and visible. This includes the use of lamps and reflective markings as prescribed by WAC 204-36.)

8. **Adopting the EVIP requirements:** To ensure consistency of operations and that responders will not be required to obtain CDL's, the department must adopt a driver training course that is approved by the L&I director, pursuant to RCW 46.25.050. Although WAC 296-305-04505 (8)—referenced in the attached table—states that driver training is specific to each fire department, a department would benefit from simply adopting (or continuing to utilize) the EVIP training module that has already been approved by the L&I director, to avoid the bureaucratic morass involved in drafting a separate process for approval by L&I. That would not prevent the department from *expanding* on the EVIP curriculum in its own capacity. So long as you use the base EVIP curriculum, as approved by L&I, you are in compliance with RCW 46.25.050. You may exceed the requirements of that curriculum, which requires a consideration of the issues referenced herein as to "due regard" for the safety of others.

And remember—if you adopt a policy that is more strict than what is required by law, you will be held to that policy. See the attached table capturing many of the regulations and statutes central to driver-training programs in Washington.

Regulation/RCW	Specific Requirement Description
WAC 296-305-04501	Automotive Fire Apparatus Design and Construction must meet NFPA 1901 standards and DOT standards, focusing on safety features (eg exhaust systems), crew accessibility, driver visibility, and material durability. All apparatus over 10K pounds must be labeled as such in a conspicuous place for the driver to see.
WAC 296-305-04503	Automotive Fire Apparatus Equipment must include secure storage and transportation of sharp tools and equipment, along with requirements for reverse gear visibility alarms.
WAC 296-305-04505 (1)	Rigs must be checked daily and this must be established by written policy.
WAC 296-305-04505 (2)	Apparatus items in need of repair must be reported *immediately* to the officer in charge or the appropriate person (like a maintenance tech)
WAC 296-305-04505 (3)	Apparatus must be brought to a full stop before FFs exit apparatus.
WAC 296-305-04505 (4)	Firefighters must not be in the apparatus hose bed while hose is being run out from the bed.
WAC 296-305-04505 (5)	Headlights must be on at all times when any fire or emergency vehicle is responding to a call.
WAC 296-305-04505 (6)	All apparatus over 20,000 pounds (gross vehicle weight) must utilize wheel chocks, rated for the specific apparatus they are being used with, when parked at an emergency scene.
WAC 296-305-04505 (7)	All apparatus (and those driving the apparatus) must comply with **RCW 46.61.035**
WAC 296-305-04505 (8)	All operators of emergency vehicles must be trained in the operations of apparatus before they are designated as drivers of such apparatus. The training program must be established by each fire department
WAC 296-305-04507	Specifies maintenance and repair protocols, including reporting of unsafe conditions and repairs by qualified personnel. If vehicle found by driver or duty officer to be in unsafe condition, the vehicle must be taken out of service.

Regulation/RCW	Specific Requirement Description
WAC 296-305-04510	*Aerial* apparatus must be constructed and maintained following NFPA 1901 standards, including stability tests and nondestructive testing every five years.
RCW 46.61.500	Any person that drives with willful or wanton disregard for the safety of others has engaged in reckless driving, a gross misdemeanor—regardless of whether they are operating an emergency vehicle with lights and siren or not.
RCW 46.37.184	Requires fire department vehicles to be equipped with red flashing lights visible from 500 feet and optional rear-facing blue lights, used only at the scene of an emergency.
RCW 18.73.140	Ambulances, aid vehicles, and similar vehicles must be licensed, subject to specific equipment and operational standards.
RCW 18.73.150	Requires sufficient staffing including at least one EMT on ambulances, outlining responsibilities and qualifications for personnel. All personnel on the ambulance must be capable of providing emergency care and all personnel on the ambulance must be properly certified (except in the case of rural fire EMS providers, not applicable here).
RCW 46.29.090	An owner of a vehicle must insure that vehicle in amounts not falling below $25,000 for injury to one person in any one accident or $50,000 for two or more persons in any one accident.