FIREHOUSE LAWYER

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Retroactive Pay Increases-Be Careful

Three times in the last six months public employer clients (municipal corporations in Washington) have asked me whether there are any problems with providing retroactive pay increases to public employees. In one instance, it was the very first collective bargaining agreement for a new bargaining unit of firefighters that had been voluntarily recognized a few months earlier. The question was whether they could make the pay increases retroactive to the date of voluntary recognition or the date that the bargaining unit petitioned for representation.

In the other two cases, the public employees' contract had expired at the end of 1999 without successfully negotiating a renewal. A few months had passed and now negotiations were getting close to completion, including a pay increase. In those two instances, the clients were calling to see if there were any problems with giving the public employees a retroactive pay increase to January 1, 2000.

Depending upon the factual circumstances, there may well be a problem with providing such retroactive pay increases. The well settled law, which we will discuss herein, is that there must be some sort of an agreement entered into prospectively to cover the interim period before consummation of the new collective bargaining agreement. In essence, the agreement can be quite simple, providing that the employees will continue to work without disruption, strike, or slow downs, despite the lack of a current collective bargaining agreement. Their compensation increase for that period is effectively deferred until the agreement is consummated, but it is understood that they may well receive more pay at a later time. The absence of such an agreement creates problems as set forth below.

The leading Washington case on the question is *Christie v. Port of Olympia,* 27 Wn. 2d 534, 179 P. 2d 294 (1947). In that case, an increased rate of compensation decreed by a war-time arbitration authority for the defendant port district employees was applied retroactively to the expiration date of a prior labor contract. The court found, however, that an express agreement had been entered into at the time of expiration of the prior contract. Pursuant to that express agreement, the employees agreed to continue to work after that date on condition that the pay currently being received by them was not to be considered full compensation and that the new rate, when determined through arbitration, would apply to such work. The court therefore concluded that the additional payments reflected by this retroactive application of the new contract did not constitute gifts under Article VIII, Section 7 of the Washington State Constitution. The payments also did not constitute extra compensation, the court said, for previously rendered services within the meaning of Article II, Section 25 of the Constitution.

Retroactive Pay Increases- Be Careful (continued)

Instead, these payments were held to be a form of deferred or previously agreed to compensation. The court pointed out that the payments represented compensation which accrued in strict pursuit of a contract made before the work was done. In short, in the *Christie* case itself they "did it right" but in many situations since that time the public employer and the union "did it wrong" by not having any such agreement.

In Attorney General Opinion 51-53, No. 96, the Attorney General applied the reasoning of the *Christie* case. The Attorney General stated that an increase in pay to city employees, retroactive to the previous October, could only be made for the city railroad employees if there was in effect, during the period for which the increases were to be granted, an agreement to the effect that the compensation for that period would be adjusted when a settlement was arrived at. This particular opinion does not state whether there was any such agreement, as apparently that fact was not made known to the Attorney General.

In Attorney General Letter Opinion 1973, No. 10, the Attorney General's office again reiterated the rules and the exceptions. The AG also noted that if an employee is required to continue in the service of the employer for some period of time after a pay raise is granted in order to qualify for receipt of that raise, the constitutional prohibition against extra compensation for services already rendered (Article II, Section 25) would not be violated. See *Aldrich v. State Employees*, 49 Wn. 2d 831, 307 P. 2d 270 (1957).

Finally, in AGO 1974, No. 19, the Attorney General directly addressed the situation where an initial collective bargaining agreement was executed under 41.56 RCW between a municipal corporation and the bargaining representative of its employees. The opinion states that such an agreement may contain a provision whereby the salary or wage rates therein agreed upon will be payable for services previously rendered, from and after a designated date prior to its execution, but only if there was in existence during that previous period some kind of agreement that the wages received for work performed between the date of such agreement and the execution of the collective bargaining agreement are not to be considered to be their full compensation. The AG stressed that no such agreement or understanding can be found from the mere act of certification by the Public Employment Relations Commission or voluntary recognition of a bargaining agent under the statute.

In conclusion, therefore, it is our advice to public employers and public employees' unions that such an agreement be entered into at the time of certification or recognition, or else no salary or wage increase can be effectuated for the interim period between certification or recognition and the actual execution and ratification of a collective bargaining agreement. It would simply be unconstitutional.

Frankly, qualified and professional labor negotiators for public employees in the State of Washington would be negligent or not competent if they did not become aware of this doctrine. It should not be incumbent upon the public employer to bring this issue forward, whether we are speaking of a new collective bargaining agreement or speaking of a renewal of an expired collective bargaining agreement. It is unpleasant news indeed for the union and for the employees to find out this limitation after the fact, because at that point the employer's hands are tied. The employer should not have to risk an audit finding (or worse) simply because some other party was not aware of the law. In most instances, we feel that the public employer would have no objection to making the pay increase retroactive, but it cannot

do so without a proper agreement.

FLSA: Administrative Exemption

A good article in Thompson Publishing Group's Fair Labor Standards Handbook for May 2000 discussed the challenges of applying the administrative exemption. As most of our readers know, the FLSA provides an exemption to the overtime requirement for hours worked over 40 in a week if the employee qualifies for the administrative exemption. The difficulty in applying the exemption rests primarily with the duties test. The Department of Labor often finds that "production" workers do not fit within the exemption. In the public sector, where "production" is not really the goal, the doctrine is still applied by DOL to find that operational personnel do not qualify as exempt administrators.

For example, Deputy County Sheriffs whose primary functions involve day-to-day activities such as serving warrants, being on patrol and providing security are not administrative personnel. FLSA experts stress that the emphasis should not be on "skill and experience" but whether the person exercises discretion and judgment in their work. For example, a personnel official who decides whom to hire is exercising discretion and judgment, while an employee who screens job applicants using predetermined criteria would not be doing exempt administrative work.

Often, employees are lumped into the administrative exemption category because employers are not sure where they fit. Simply because employees are performing administrative work, such as administrative assistants who perform many clerical duties, that does not mean that they are exempt under this administrative exemption. The exemption does apply to employees who exercise control over a department but who work alone or supervise only one other worker and therefore don't qualify for the executive exemption which requires supervision of at least two workers. It is helpful to ask how closely the worker is supervised, in applying the administrative exemption. While everyone has a boss, employers may want to consider whether a worker is free to exercise the authority they are given or whether they must constantly check with supervisors in completing their work. Persons afforded considerable independent exercise of discretion and judgment may well qualify as administrative exempt employees.

FLSA: On-Call Pay

Another good article in the May 2000 Fair Labor Standards Handbook by Thompson Publishing covered on-call pay. Since our fire department clients sometimes utilize on-call pay or have employees who are either on-call or subject to responding when paged, we felt this article might be worth summarizing. The article discussed a recently released study of employer on-call pay policies prepared by N.E. Fried & Associates, Inc. of Dublin, Ohio. The study illustrated a growing popularity of on-call pay plans among employers. The issue from an FLSA perspective is whether on-call time becomes compensable working time, which must of course be paid at the minimum wage and counts as work time toward the 40 hour week or other work period.

On-call time is time spent by employees, usually away from the employer's premises, during which the employees are free to pursue their own interests, but must remain available to respond on short notice if such a need arises. The basic rule is that on-call time is compensable if spent "predominately for the employer's benefit". Making that determination is the problem in most cases. Obviously, if the employer and the employee agree that the time will be compensated, such compensation is permissible as long as it equals the minimum wage. If employees are required to remain

in a fixed location while on-call,

FLSA: On-Call Pay (continued)

the Department of Labor and the courts will generally consider this time to be compensable under the FLSA. Having to wear a beeper or leave a phone number where the employee can be reached generally has not been determined by DOL to render the time compensable, standing alone. Courts have also frequently denied compensation to employees who are on-call at home.

Many factors are considered. DOL and the courts consider the length of time by which the employee is expected to respond to duty. The basic goal is to determine the employee's ability to use that on-call time predominately for their own benefit. Another factor to consider is whether an employee is only expected to respond to a share or percentage of the calls. If the employee is allowed to ignore a certain percentage of calls, thereby retaining a degree of flexibility in their schedules, then compensation is generally not required. DOL and the courts also consider the frequency of actual calls responded to. If employees are on-call a lot but rarely called in, the time often has been held non-compensable. Obviously, if an employee has been called to service, employers must ensure that actual work time is compensated.

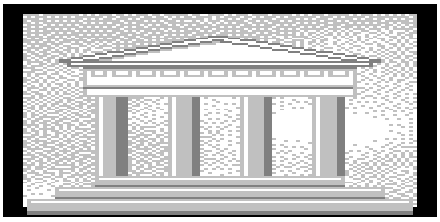
It is worth noting that DOL regulations do not address the question whether home-to-work travel time, after being called back to work, is compensable. If an employee is called to a work site far from his or her home and the normal work place, this substantial travel time should be compensable.

Finally, on-call time payments will alter an employee's regular rate of pay for overtime calculation purposes. "Regular rate" is an important calculation in all overtime settings, because the "regular rate" is what drives the calculation of time-and-a-half for overtime. We could do an entire article discussing what types of pay or benefits are appropriate to include in the calculation of "regular rate" and which types of pay or benefits are not appropriate to include in the "regular rate" calculation. But that is a good subject for an article on another day.

Fire Department Patches and Photos

Some weeks ago Travis Osborne, a ninth grader from Tacoma School District asked for our help in obtaining Fire Department patches and/or photographs from our clients in the state of Washington. Travis is the son of Jim Osborne, former Assistant Chief of the Fircrest Fire Department. Travis is interested in a fire service career, and we felt his project deserved some assistance. Therefore, I have agreed to collect any patches or photographs that any Fire Departments are willing to send me to help Travis with his collection. Frankly, we think this is a neat idea and want to encourage this young man.

Therefore, if any of you are willing to mail or deliver such patches or photographs to my office, both Travis and I would be more than appreciative.



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