

# Firehouse Lawyer

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## Firehouse Lawyer Returns

From April 1997 to May of 2000 we published the *Firehouse Lawyer* newsletter, to educate and inform fire service personnel on the legal aspects of the fire service. In May of 2000, I pared down the office to a one-man operation. With no secretary, I figured it would be next to impossible for me alone to keep up with legal work for more than 20 fire departments, a water district, and a few private clients, while publishing a free newsletter.

Now, more than four years later, I have found it to be not only possible but enjoyable, as long as there are no major undertakings for any one client at one time, such as a lengthy trial. By avoiding major litigation, and acting as more of a consultant and counselor in the office, as opposed to a trial attorney, I am able to provide general counsel now to over 25 fire departments, and have even added a major client—Federal Way Fire Department. Now that I am actually a tenant *in a fire station itself* (for seven years, Lakewood Fire has subleased me an office in one of their leased buildings, but not a station), I thought the "Firehouse Lawyer" name was even more apt.

The new *Firehouse Lawyer* will be much like the old, but somewhat different. I will still emphasize Washington law and developments, as that is where I am licensed to practice. But I will also discuss federal statutes and issues that apply to the fire service, such as the Fair Labor Standards Act and the Americans with Disabilities Act. My plan is to limit each monthly issue to four pages of articles and/or letters or editorials. Of course, the newsletter is free as before. The jury is out on whether I will offer any Q&A column. In the old newsletter, I developed the Sector Boss. While we received questions from all over the country, and in fact the world, it was difficult to deal with all the questions, as it was tempting to start e-mail dialogues with correspondents, in order to help them. I was very careful to avoid giving legal advice to non-clients, but the whole exercise was somewhat frustrating. Thus, if readers insist on a Q&A column, I will have to strictly enforce limiting the response to the two or three that get published monthly.

One thing that is new and different this time is that I have decided to "go it alone" by posting the *Firehouse Lawyer* on its own web site. Please peruse the other pages to study the full scope of what I do and who I am. As we have set this up, you can "opt in" by responding to an e-mail. Then when the newsletter is posted on the web monthly, those

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who have opted in will receive an e-mail so notifying them, and offering the link to view the newsletter. The rest is up to you. The final “new thing” this time is that we will have advertising. Space is available for up to twelve ads. On sale for \$75.00 per year, these ads are only intended to defray some of the web site costs. In 2005, we are proposing to offer “exclusive” ads like the two shown on the sidebar on this page.

I am hoping readers will find this to be an effective way to reach out to potential clients in the fire service.

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## IN MEMORIAM:

As this newsletter takes shape, on December 28, 2004, I have just returned from a memorial service for a humble but distinguished public servant—Thomas Leroy Kalani Kanno. We know him as just “Tom”. I met him in 1987 I think, when I joined Lakewood Rotary and he was a member of that service club, undoubtedly because he was Lakewood Fire Chief.

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Then, as I got more and more involved as an attorney for fire districts, including Lakewood Fire, I got to know Tom a bit better. Those of you who knew him will know what I mean when I say the overriding impression of Tom was as a wise and humble ordinary guy, who quietly accomplished the extraordinary. Tom would never take the credit, but it was no accident that, on his watch as Fire Chief here, the Medic One (paramedics) program became a reality and that Lakewood Fire was instrumental in starting “FireComm”. This fire and EMS dispatching facility, using civilian dispatchers, now dispatches emergency responders to more than twenty (20) fire districts and small cities in the region. Tom was so self-effacing he’d probably point out that he did not accomplish these major steps alone, and that is true, but he was a big part of these major strides.

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The fitting sendoff that was afforded Tom today was one of the most moving memorial services I have ever attended, with a beautiful blending of themes to honor his firefighter’s life and his Hawaiian heritage. He will long be remembered fondly, here at Lakewood Fire, and by all those who knew him.

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## FEEDBACK:

Before we get started on the articles regarding legal subjects, I wanted to say one thing more about this new version of the *Firehouse Lawyer*. Since the goal is to provide a free newsletter for you—the fire service and EMS “constituency”—it only makes sense to find out what you want to learn. Please take the time to send an e-mail to me at the address shown on the masthead, requesting an article on a subject of interest. Let’s say, for example, that your department anticipates having issues relating to returning veterans. You could ask for an article on that subject, and if time and space permits, I will include that in an upcoming newsletter.

## NOW LET THE WRITING BEGIN:

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## Developments-2004:

### Washington Legislation-

Probably, the most significant legislation for the fire service was the adoption of a statute providing for regional fire protection authorities to be created. For years, there was a perception that the Interlocal Cooperation Act, RCW 39.34, was simply not sufficient enabling legislation to confer all of the needed power or authority for regional cooperation in the fire service.

Unlike an entity created solely by an interlocal agreement, a regional fire authority would be a new municipal corporation. Of course, fire districts and other municipal agencies such as cities or port districts could have, under RCW 39.34, formed nonprofit corporations. It remains to be seen whether this statute will bring any real changes to the various organizational structures we have seen over the years, through which inter-agency cooperation has been effected.

Also, RCW 39.34 itself was amended. The Legislature changed the procedures slightly with

regard to what we call “piggybacking”. When an agency wishes to use another agency’s bid specifications, in lieu of seeking bids on its own specifications, there are ordinarily two requirements. First, the original specs must allow other agencies to use their bid documents. Second, there must be an interlocal agreement between the first agency and the second. Now, a third requirement has been added. By chapter 190 of the Laws of 2004 (H.B. 2615) the Legislature now requires also that the notice for bids must have been posted on the first agency’s web site, or alternatively, on a linked web site. Of course, the first agency must have complied in all respects with its own statutory requirements for notice.

### Some Significant Cases:

Mike M. Johnson, Inc. v. Spokane County, 150 Wn. 2d 375 (2003). A sewer contractor encountered significant delays due to alleged changed conditions. While the Contractor notified Spokane County of the delays and anticipated costs, it did not comply with the formal, detailed claim provisions of the public works contract. The county used the WSDOT standard specs. The Court ruled that strict compliance is required and that actual notice is not enough. While many commentators feel this holding is somewhat of an aberration, it is still good advice to owners (public agencies) that they should follow the notice requirements to the letter, for example, when terminating a contractor. And don’t forget to notify the surety too!

Compare *Johnson* with *Weber Construction v. Spokane County*, 122 Wn.App. 1043, 98 P.3d 60 (ordered published-9/21/2004). The contractor presented evidence it had complied with the same claim provisions as in *Johnson*. However, the Court was deferential to the contractor. This case seems to represent the norm, based on past cases, as it applies more of a “substantial compliance” rationale. So, at least when it is the contractor making the claim

expect substantial compliance rather than strict compliance to be the expected result in court.

The Open Public Meetings Act seems always to create fodder for criticism. Here's a case that vindicates what I have often said about meetings in which final approval is effected. Some City Council members met with consultants regarding financing or construction of a public parking garage. It appears these meetings violated the OPMA. However, the meeting at which the final action was taken to adopt the ordinance approving the financing did comply. So what is the result—should the ordinance be held invalid? As I have often opined, the Court replied in the negative. Although prior meetings on the same subject were not in compliance, that does not invalidate the final action if that action was taken at a meeting where the OPMA was satisfied. See *Eugster v. City of Spokane*, 118 Wn. App. 383 (2003).

Of course, it is still possible that the Court would sanction the violators for the actual violations. The OPMA does provide for monetary penalties as well as the invalidation of actions taken.

## ON CALL CASE:

The Washington State Minimum Wage Act, like the FLSA, contains an exemption for employees whose job requires them to sleep at the job site or who spend a substantial part of their work time on call. While the Court in *Berrocal v. Fernandez*, 120 Wn. App. 555 (2004) called this exemption a "model of legislative inexactitude", the Court lent some clarity to the always difficult "on call" status.

The Court held that the exemption excludes time when the employee is not engaged in the performance of active duties. The test for that is very similar to what we are used to seeing in FLSA cases. The four-part judicial test scrutinizes (1) the parties' agreement, (2) whether the employees are required to remain on premises or at a particular place, (3) the degree to which they are free to engage in personal activities, and (4) if the arrangement is primarily for the employer's benefit.



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## DISCLAIMER

The Firehouse Lawyer newsletter is published for educational purposes only. Nothing herein shall create an attorney-client relationship between Joseph F. Quinn and the reader. Those needing legal advice are urged to contact an attorney licensed to practice in their jurisdiction of residence.

## CONCLUDING REMARKS

This first issue of the "new" Firehouse Lawyer does not contain as many articles or ads as you will probably see in the future. Our goal this year is to retain a four-page format, but all four pages will ordinarily be devoted to articles about laws or cases of interest to the fire service and EMS community.

I just thought it might be helpful with this first issue to set forth the goals and parameters of this new publication, while retaining a personal touch with those readers familiar with the newsletter.

Don't forget to write.

Yours in service,

Joe Quinn