# FIREHOUSE LAWYER

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## OSHA ADOPTS NEW RESPIRATORY PROTECTION STANDARD

On January 8, 1998 OSHA announced the adoption of the final rule and final standard on respiratory protection applicable to many industries, and occupations, including fire fighting. The new respiratory protection standard, contained at 29 C.F. R. Parts 1910 and 1926, replaces the former OSHA respiratory standard adopted some 25 years ago. During the month of February, we will be doing a comprehensive review of the new standard, to try to list any differences between this new standard and the requirements of Washington Administrative Code 296-305, primarily with respect to the rules on respiratory protection.

Section 18 of the Occupational Safety and Health Act (OSHA) expresses Congress' clear intent to preempt state laws relating to issues on which federal OSHA has promulgated occupational safety and health standards. Under the Act, however, a state can avoid preemption by submitting and obtaining federal approval of its own plan for the development of such standards and their enforcement. Occupational safety and health standards developed by those "plan states" must be at least as effective in providing safe and healthful employment and places of employment as the federal standards.

In general, the new OSHA standard is written in performance oriented terms and so there is considerable flexibility for state plans to require, and for affected employers to use, methods of compliance which are appropriate to the working conditions covered by the standard. There may be some portions of the standard, however, which are more stringent or require more than the protections offered under the current state plan in a particular state.

There are 25 states and territories with their own OSHA-approved occupational safety and health plans. They must adopt a comparable standard within six months of the publication date of the final standard. Washington is one of the 25 "plan states".

At first glance, it appears to me that Washington's newly revised "vertical standards" set forth in WAC 296-305 are generally in accord with the new OSHA standard as they are generally at least as effective in providing a safe and healthful workplace. WAC 296-305 was just revised and the new revisions made effective early in 1997, so it is relatively current.

One particular aspect of the new OSHA rule is sometimes referred to as the "two in, two out" rule, which states that two firefighters must be on standby whenever two firefighters are engaged in interior structural fire fighting in a burning building, to provide safety. Following the "at least as effective" standard applicable to a plan state such as Washington, we compare this with the newly revised vertical

## OSHA (continued)

standards. WAC 296-305-05001(10) provides as follows:

> "In the 'initial stage' of a structure fire-incident where only one team is operating in the hazardous area, at least one additional firefighter shall be assigned to standby outside of the hazardous area where the team is operating.
>
> (a) The responsibility of the standby firefighter shall be the (sic) maintaining awareness of the status of firefighters in the hazardous area.
>
> (b) The standby firefighter shall remain in positive communication with the entry team, in full protective clothing with SCBA donned, in the standby mode.
>
> (c) The standby firefighter shall be permitted to perform other duties outside the hazardous area, provided constant communications is maintained with the team in the hazardous area."

Also, WAC 296-305-05001(8) provides that firefighters operating in hazardous areas at emergency structural fire incidents shall operate in teams of two or more.

"Initial Stage" is defined in WAC 296-305-01005 as follows:

> "Shall encompass the control efforts taken by resources which are first to arrive at an incident requiring immediate action to prevent or mitigate the loss of life or serious injury to citizenry and firefighters."

Therefore, the initial stage is limited to rescue actions to prevent imminent loss of life or serious injury to persons inside the building. It is not a part of the structural fire fighting attack designed to prevent property damage. Therefore, the apparent two in, one out rule of WAC 296-305-05001(10) might not necessarily conflict at all with the new OSHA regulation, even though part of it requires two standby firefighters outside for the two firefighters (minimum) that might be inside attacking a structure fire.

This is especially true because the new OSHA standard, in one of the notes to paragraph (g) states: "Nothing in this section is meant to preclude firefighters from performing emergency rescue activities before an entire team has assembled." While the matter is not free from doubt, one should not assume from the short hand description of this portion of the rule that Washington's vertical standard needs to be changed. The emphasis should be on the fact that the initial stage is only meant to be a rescue operation.

I will be taking a closer look at all of the relevant vertical standards in Washington's WAC 296-305 to see if any others are affected by the new OSHA rule. It may well be, for example, that WAC 296-305-04001 "Respiratory Equipment Protection" will also need to be updated. A side by side comparison needs to be done to ensure that -04001 is at least as effective as the new standard.

According to OSHA, this final respiratory protection standard covers an estimated five million respirator wearers working in an estimated 1.3 million work places. OSHA's benefits analysis predicts that the standard will prevent many deaths and illnesses every year. The annual costs of the standard are estimated to be $111,000,000.00, or an average of $22.00 per covered employee per year.

More detailed questions concerning compliance with the new standard will have to await further review. In the meantime, you may access the new OSHA standard on the Internet at http://www.OSHA.gov.

## NEW HEALTHCARE LEGISLATION

Just when you thought you were beginning to understand the Americans with Disabilities Act, the Family and Medical Leave Act, COBRA, etc., Congress has been active in the last couple of years passing more healthcare

## HEALTHCARE (continued)

legislation. In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA), the Mental Health Parity Act (MHPA) and the Newborns' and Mothers' Health Protection Act (NMHPA). The first of these three went into effect in 1997. HIPAA is probably the broadest of the three Acts. The other two laws go into effect as of the first plan year which begins on or after January 1, 1998, so now it is time to consider these statutes.

One of the problems is that Department of Labor regulations are still to be issued on much of this legislation. As noted by many commentators already, there are potential conflicts between federal laws and even the Equal Employment Opportunity Commission is concerned of conflicts with the Americans with Disabilities Act and Title VII of the Civil Rights Act. Therefore, EEOC has already made comments urging the Department of Labor to issue regulations to clarify potential conflicts between federal healthcare laws and the civil rights laws. Otherwise, an employer could violate one law when implementing the other law.

For example, HIPAA imposes non-discrimination rules for group health plans with respect to premiums and eligibility to enroll in the first place. HIPAA prohibits a plan from establishing eligibility rules, or imposing differential premium rates, for similarly situated individuals, based on a "health status related" factor. Health status related factors include medical conditions, claims experience, medical history, genetic information or evidence of insurability. Probably during 1998 applicable federal agencies, responsible for implementing HIPAA will be issuing detailed regulations.

Both the ADA and HIPAA apply to employer provided health benefits. Since the two sets of regulations overlap, there are chances for inconsistencies. Each Act also covers some aspects of health benefits that the other does not cover. Therefore, meeting the standards of one Act does not mean you necessarily meet the standards of the other Act. HIPAA rules prohibit discrimination based on conditions that would not even be considered disabilities under the ADA. Thus in one sense HIPAA is more broad than the ADA. In a different sense, however, the ADA is more broad. It prohibits disability based discrimination in areas beyond enrollment and premiums, the only two areas containing non-discrimination rules under HIPAA.

Needless to say, the EEOC is asking the DOL to clarify the relationship between HIPAA's non-discrimination rules and the ADA.

The Mental Health Parity Act prohibits a health plan from establishing annual or lifetime dollar limits on plan coverage unless the plan sets the same types of limits on substantially all medical and surgical benefits covered under the plan. Just as the term "mental health parity" implies, Congressional intent was to treat mental illnesses just like physical illnesses.

The EEOC has recommended to the DOL that the regulations contain a warning to the effect that the ADA generally prohibits disability based distinctions in employer provided health plans.

The Newborns' and Mothers' Health Protection Act generally requires employer sponsored group health plans that provide hospitalization benefits for childbirth to provide coverage for at least a minimum hospital stay after childbirth. With a normal birth, at least a 48 hour hospital stay is required and after a Cesarean section at least a 96 hour hospital stay is required. The only exception is when the attending healthcare provider in consultation with the mother decides that an earlier release for the mother and/or newborn is appropriate then the plan may limit its coverage to that short a period. It should be noted that

## HEALTHCARE (continued)

Title VII requires that the same plan terms and provisions applying to non-pregnancy medical conditions apply to those costs incurred for pregnancy related conditions. Title VII prohibits a plan from excluding hospitalization benefits for childbirth if the plan provides such benefits for other medical conditions.

Stay tuned for further Department of Labor regulations on these various new statutes. Specific questions regarding the applicability of any these acts should be directed to your legal counsel.

## EXEMPT WORKERS - HOURLY OR SALARY PAY?

In previous articles in *The Firehouse Lawyer*, I have discussed the recurring issue of exempt employees who are generally paid on a salary as opposed to an hourly basis. If qualified and meeting, both the salary basis test and the duties test, these employees do not receive time and a half for overtime under the FLSA.

What is discussed somewhat less frequently, is the exceptions in the regulations for certain specific occupations. Employees working in the traditional professions of law, medicine or teaching (or the motion picture producing or videotape industry) are not required to meet either the salary basis or fee requirement and instead may be paid on an hourly basis. In the medical field, this exception applies only to physicians and does not apply to nurses.

Payment on a salary basis also is not required for certain workers in computer related occupations. Computer professionals may be paid hourly as long as they meet the duties test and are paid at least $27.63 per hour for every hour worked, including the overtime hours.

Sometimes, an employee's status as hourly or salaried is less than clear cut. For example, in Allen v. Fairfax County Virginia (4th Cir. #93-1152, Jan. 11, 1994) certain fire and rescue lieutenants worked one of three set cycles - of 96, 120 or 144 hours - during a biweekly pay period. Their pay was calculated by multiplying their hourly wage by the number of hours worked. Therefore, their pay fluctuated from one period to another, even though it was constant over any given 18 week period. Since their pay fluctuated, they were not receiving regularly a predetermined amount and therefore the Court concluded they were non-exempt, i.e., hourly. The Court noted also that their pay was subject to a one hour deduction whenever shifting to daylight savings time.

In another case, Atlanta Professional Firefighters Union, Local 134 v. Atlanta, 920 F.2d 800 (11th Cir. 1991) the plaintiff fire department captains were scheduled for nine or 10 day cycles. Their pay fluctuated depending on hours worked but they were paid a fixed amount for each shift of the same duration. The 11th Circuit panel noted that it was mathematically impossible for the fire department to schedule each captain for the same number of hours each pay period. Because they knew at the beginning of the year the amount they would receive for each pay cycle, the plaintiffs were paid a predetermined amount as required by the salary basis test. The Court's determination then is contrary to the 4th Circuit's ruling in the Allen case.

Similarly, in Simmons v. City of Ft. Worth, 805 F.Supp. 419 (ND Texas 1992), fire department employees who performed shift work received biweekly paychecks that fluctuated according to the number of shifts worked in pay period. The workers were deemed exempt, unlike the Allen employees. The Court noted that the employees were entitled to at least $250.00 per week, without possibility of

## EXEMPT EMPLOYEES (continued)

reduction based on quality or quantity of work performed. They were also guaranteed work for an 80 hour period regardless of the number of hours worked. This latter provision ensured that these shift employees "regularly received" no less than the proper "predetermined amount" under the salary test.

A similar confusing area relates to additional compensation. In Spradling v. Tulsa, Oklahoma, 95 F.3d 1492 (10th Cir. 1996) additional compensation for firefighters was addressed. In addition to a predetermined amount of pay some of the plaintiffs received overtime at a straight time hourly rate for hours worked outside their regular shifts. Their paychecks displayed the number of hours they had worked in a pay period. Quoting Aaron v. City of Wichita, 54 F.3d 652 (10th Cir. 1995), the Court found this did not indicate hourly status, even though the Court found they were paid hourly on other grounds. The Court said: "Since overtime is not inherently inconsistent with one's status" as a salaried employee, the fact that the firefighters' paystubs indicated the number of hours covered is also not inconsistent with salary status. Such an accounting of hours is necessary to compute overtime compensation."

The Department of Labor has stated in several opinion letters not only that additional compensation may be paid to exempt employees for hours worked beyond their standard work week, but also that this overtime can be paid at any rate - time and one half, straight time, half time, etc. As with many FLSA issues, the issue of salary versus hourly compensation for many exempt employees is somewhat unclear. As shown above, court and agency ruling yield conflicting results. Probably the cautious public employer would want to minimize any of the "hourly" attributes or record keeping for those employees who are classified as exempt. Particularly, employers should avoid calculating or docking pay along hourly lines or even accounting for employee time by the hour.

## EXCESSIVE ABSENTEEISM OR FMLA VIOLATION

A recent federal district court case points up the sometimes difficult fact situations for employers who have employees with excessive absenteeism, related to a chronic medical condition. In Victorelli v. Shadyside Hospital, 3rd Cir. #96-3597, Nov. 3, 1997, the 3rd Circuit Court of Appeals held that an employer must consider the employee's medical history in determining whether there is a serious health condition as defined in the FMLA. The employee had a history of peptic ulcers and other stomach conditions. The lower court found that the employee's stomach problems were minor but the appeals court found she may have met the regulatory standard for a serious health condition and remanded the matter back to the lower court. The employee requested only a one day medical leave but it was attributable to a chronic serious health condition, she maintained. The employee was discharged because of previous attendance problems and what they deemed to be an abuse of sick time. According to the employer's testimony, although she had good job evaluations beginning in April of 1993 she was issued several written and verbal warnings concerning tardiness and absenteeism. The trial court granted a summary judgment dismissing her case under the FMLA. The lower court said she failed to establish that she suffered from a qualifying "serious health condition." The Court found her condition minor because it did not meet the requirements for continuing treatment as defined in the regulations.

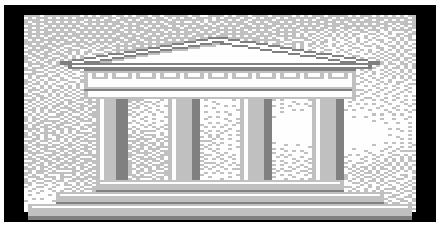
Under the DOL interim FMLA regulations continuing

**EXCESSIVE ABSENTEEISM (continued)**

treatment by a healthcare provider included treatment two or more times for the same illness or injury, treatment two or more times by a provider of healthcare services or continuing supervision by a healthcare provider due to a serious or chronic condition that cannot be cured. The lower court concluded that this ulcer was a condition to be treated pursuant to an employer's sick leave policy as a minor ulcer. The appellate court disagreed. They found it was a material issue as to whether the ulcer was an FMLA qualifying serious health condition. The condition might qualify as serious under either of the first two conditions because she had received treatment at least twice before her discharge and several times afterwards. Also, the employer, Shadyside Hospital, never did request a second or third opinion as allowed under FMLA. The employer failed to present any evidence challenging the medical adequacy of her claim. Even under the final DOL rules, her condition may have qualified as a serious health condition, the appellate court said. Therefore the case was remanded to the lower court to determine whether the condition was serious, whether the one day absence was qualified FMLA leave and whether the discharge violated the FMLA.

## FIREHOUSE LAWYER ONLINE

As this edition of *The Firehouse Lawyer* goes to print, we are in the final stages of planning a website on the Inferno home page. That fire service related website can be found on the Internet at www.ifsn.com. In fact, you may be reading this edition of *The Firehouse Lawyer* online. If you are not, and have access to the Internet, you may want to connect to that home page. All back issues of *The Firehouse Lawyer* are available there. Moreover, you might find Inferno useful for various reasons, inasmuch as the Washington State Fire Chiefs Association and other groups are also hosts on that site.



Joseph F. Quinn

7509 Grange St. W., Suite A

Lakewood, WA 98467

(253) 475-6195

(253) 475-6470 FAX

e-mail:
firehouselaw@earthlink.net

NOTA BENE:

Since January 1, 1997, I have developed a fire department safety checklist and a set of forms for safety officers. Designed to help fire departments comply with the new WAC 296-305 safety standards, these materials are available to fire departments throughout the state, subject to payment of $50.00 to defray reasonable copying and mailing costs.

In June, 1997, a model Safety Resolution and complete set of operating instructions (SOPs) were completed, to comply with the "vertical standards". Cost $100.

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