FIREHOUSE LAWYER

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Firefighters Held Volunteer, Not City Employees

In the City of Virginia Beach, Virginia, paid city firefighters often volunteer to perform emergency medical services (EMS) for private rescue squads. Obviously, this means that they frequently perform similar tasks during their firefighter work for the city as they perform for the private rescue squads.

A group of firefighters sued the City of Virginia Beach alleging FLSA violations. The plaintiffs claimed they were entitled to payment for the hours they spent as rescue squad members, even though it was undisputed that the work was understood by them to be volunteer work. On June 8, the Fourth U.S. Circuit Court of Appeals affirmed the district court's decision holding that the plaintiffs were not entitled to such payment.

The FLSA defines "employ" as "to suffer or permit to work". The word "employment" has been defined by the U.S. Supreme Court as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer".

The Fourth Circuit noted that the definition of "employee" under the FLSA was not intended to cover persons who without promise or expectation of compensation worked in activities carried on by others. The court ruled that the city did not exercise control sufficient to make the plaintiffs' city employees during their work with the private rescue squads. Even though the city had established the Department of Emergency Medical Services (DEMS) to coordinate the fire department and rescue squad response to emergencies, the DEMS employed no one to perform EMS -- it only accepted volunteers. The plaintiffs argued that the medical services they provided necessarily and primarily benefited the city. The court determined, however, that the city's involvement through the DEMS was not sufficient to make the firefighters' volunteer work "employment". Although the department did to an extent supervise the way EMS was provided, that did not compromise the independent nature of the rescue squads. The city did not control the rescue squads and the plaintiffs were not coerced to volunteer. While the city required rescue squad members to be certified as EMS providers, and although the DEMS oversaw the certification of EMS providers, the rescue squads retained the ultimate authority to accept or reject volunteers. The squads had their own membership requirements such as minimum service and training standards. The rescue squads disciplined the volunteers in accordance with their own rules. The city's involvement in the day-to-day work of the rescue

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squads was not sufficient. The city did not own the ambulances used by the rescue squads. Although some financial assistance in the form of loans or grants was provided, that was not held sufficient.

The court specifically looked at the FLSA provisions regarding volunteerism. A person is not an employee if they volunteer services to a public agency, as long as they receive no (or very limited) compensation and do not volunteer the same type of services they are employed to perform for that same public agency. In this case, the agencies were not the same due to the separate nature of the rescue squads.

Apparently, the Department of Labor filed an amicus brief in the case asking that the plaintiffs' volunteer EMS work be characterized as effectively performed for the city, which benefited from the services.

It is worthy of note that an FLSA hearing on volunteerism among firefighters was recently held before Congress. A lot of the discussion centered around a DOL opinion letter dated June 23, 1993, from DOL's Philadelphia office. In that letter, DOL held that paid firefighters employed by a county could not volunteer unpaid services for a private volunteer fire unit in the same county, because even though they were technically not the same agency, the work did benefit the county directly. Certainly, it appears that the DOL and the Fourth Circuit do not agree on the importance of "benefit" to the local government employer. It appears that the Fourth Circuit would require both benefit and a significant degree of control over the work performed by the volunteers for the other agency, whether it be public or private.

Undoubtedly, we have not heard the end of this issue.

Supreme Court Holds States Immune from Private FLSA Suits

On June 23, 1999 the Supreme Court held in Alden v. Maine, No. 98-436, that state government employees can no longer sue their unconsenting employers for FLSA violations in state court. Since the Supreme Court had held in 1996 that such employees could not sue in federal court, this leaves no private enforcement of the FLSA available to state employees, and means essentially only the Department of Labor can seek to rectify such violations.

This landmark decision is a controversial and closely divided 5-4 opinion. Obviously, therefore, the rule could change in the event of a vacancy and appointment on the U.S. Supreme Court. In the meantime, however, this important decision casts doubt on private enforcement actions of all federal labor laws, insofar as the plaintiffs might be state government employees.

We mention the case briefly here because our focus is primarily not on state employment relationships, but rather local governments. Significantly, this decision is not believed to have any impact on private FLSA actions, or suits under other federal labor laws, against counties, cities or other municipal governments. It only applies to state governments.

FMLA - Back to Basics

Occasionally, we like to do a brief article on the fundamentals of a particular law, as our clients deal with those on a day-to-day basis. This month we focus on the Family and Medical Leave Act, by asking and answering some frequently asked questions.

FMLA - Back to Basics (Continued)

As most employers covered by the Act know by now, the law entitles covered persons to 12 work weeks of leave during any 12-month period. Determining the 12-month period, in a given case, is frequently the primary problem. The 12-month period can be designated by the employer from among four alternatives: (1) the calendar year; (2) any fixed 12-month period such as the organization's fiscal year or a year starting on the employee's anniversary date of hire or the like; (3) a 12-month period measured forward from an employee's first FMLA leave; or (4) a rolling 12-month period measured backward from the date an employee first uses FMLA leave. Of course, if the employer fails to designate a method for determining the 12-month period, the employee has the right to choose the method most advantageous to them.

The following could be considered a list of frequently asked questions:

Q. What if the employee does not want an absence to count against their FMLA entitlement?

A. The employer designates the absences which count against the leave entitlement. DOL rules state that the employer is responsible for designating leave as FMLA-qualified leave. If the reason for the absence meets one of the conditions described in the statute, the employer is acting within the law regardless of the employee's wishes.

Q. What about light duty?

A. If the employer provides light duty while the employee still suffers from a serious health condition, the employer may not compel the worker to accept that alternative. If, however, the employee agrees to return to work on light duty basis, such periods of work do not count as FMLA leave. Although this might be looked upon as an accommodation, as the employee is not performing their normal job, the fact remains that they are working and not on leave.

Q. What if employer and employee agree that the employee can work at home for some reason, such as caring for a new child or sick relative?

A. It is not appropriate for the employer to count such hours worked (or days worked) against the FMLA entitlement. After all, those hours are being worked for the benefit of the employer and therefore count as hours worked, not leave time.

Q. What about compensatory time?

A. According to the Department of Labor, comp time is not a form of accrued paid leave and is different from vacation and sick leave. Use of compensatory time, therefore, may not be counted against an employee's FMLA entitlement, even if the comp time is taken for FMLA-qualifying reasons.

Q. Do holidays count as part of the 12 work weeks?

A. If a holiday falls within a week of FMLA leave, the occurrence of a holiday during a full week of leave has no effect. It does not expand the quantity of leave to 12 weeks and one day.

Q. Are there any limitations on the size of the increment of leave that an employee may or must take?

A. With respect to intermittent or reduced schedule leave, the DOL rules provide no limit. For purposes of administration, employers sometimes limit leave increments to the shortest period of time used by the payroll system; this is allowable under the DOL rules. Generally speaking, employees may not be required to take more FMLA leave than is necessary to deal with the condition that led to their need for leave.

FMLA - Back to Basics (Continued)

Q. But how does intermittent or reduced schedule leave affect the employee's 12-week entitlement?

A. The employer must examine the employee's hours worked and hours spent on leave, by a comparison to the individual's regular work schedule. If an employee works a 32-hour week spread over four days and takes one full day off each week to receive therapy, they are using one fourth of a week of leave during each work period. In a similar situation, a 40-hour work week employee who misses one day per week is only charged with 1/5th of a week.

Seminars and Publications

The 1999 Seminar Series has been finalized according to the schedule below:

August 26, 1999 --
Insurance and Risk Management/Liability

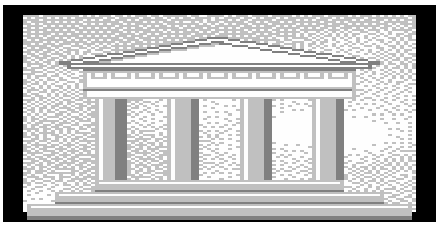
October 28, 1999 --
Labor/Management Issues

December 16, 1999 --
Annexation and Incorporation Issues

Seminars are open to all authorized fire district personnel of the State of Washington. The admission price for non-contract parties is $75.

Mr. Quinn also has available various papers or monographs that might be of interest to special purpose districts, such as "Procedures and Rules for Board Meetings" (January 1996-$10) and "Working Together: The Board and the CEO" (January 1996-$10). Also, in 1995 he published: "Handbook for Local Government Elected Officials," with five chapters, including the Open Public Meetings Act, the Open Public Records Act, Ethics/Conflict of Interest, Public Works/Public Bidding Laws and the Fair Labor Standards Act (29 pages, with 45 page Appendix=$25).

In order to obtain further information, you may contact us at either the e-mail address or the telephone number listed below



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