

Firehouse Lawyer

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Supreme Court Denies Review in 207(K) Exemption Case

The United States Supreme Court recently declined to review the 3rd U.S. Circuit Court of Appeals ruling in *Lawrence v. City of Philadelphia*, in which the 3rd Circuit panel ruled that paramedics are not exempt from the overtime law, the Fair Labor Standards Act, under the Section 207(k) exemption. Ruling that the paramedics had no responsibility to fight fires, the 3rd Circuit had denied the applicability of the exemption, thus requiring overtime pay after 40 hours of work.

In *Lawrence*, the medics were expected to engage in fire suppression when directed to do so by their supervisors, and were trained and certified in fire protection, but fire protection was not listed in their job descriptions, which listed only medical duties. They were not dispatched to fires, and never disciplined for not fighting fires. The appeals court held this illustrated fire fighting was not part of their jobs and they were not *responsible* for fighting fires.

Similarly, in our local Ninth Circuit Court of Appeals, in 2005 the judges reached the same conclusion about paramedics in *Cleveland v. Los Angeles*. In that case, the plaintiffs were dispatched to fire scenes only to perform life-saving services and did not wear fire protection gear at such times.

By contrast, the 11th U.S. Circuit Court of Appeals ruled in *Huff v. DeKalb County*, 516 F. 3d 1273 (11th Cir. 2008) that paramedics were responsible for firefighting, because it was listed in their job descriptions and they could be disciplined for refusing such work.

Superficially, it may appear that there is a split among the circuit courts, but we would argue that the cases are factually distinguishable, and there is no irreconcilable difference in the actual reasoning of these circuit courts of appeal. We believe that a rule of law is emerging, to the effect that paramedics are only exempt from the overtime requirement and eligible for the partial exemption if fire fighting is included in their job description and they are required to obey an order to fight fires or they are actually dispatched to fire scenes to fight fire, not to perform life-

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saving or emergency medical services. A fire service employer who employs paramedics would be well advised to include fire fighting in the paramedic job descriptions, and to ensure that they are well trained and continually certified to fight fires. Nonetheless, if they never actually fight fires and do not even carry bunker gear (personal protective equipment) do not count on their being considered “fire protection” employees, at least in the Ninth Circuit.

Note: The author argued a case in the Supreme Court of the United States in 1986, when there was a genuine split between the U.S. Circuit Courts of Appeal, with two circuits ruling one way and two more ruling the opposite way, in interpreting the Comprehensive Employment and Training Act. The reasoning of the courts in those cases could not be reconciled.

DEADLINE FOR RED FLAG RULES FOR PREVENTION OF IDENTITY THEFT IS NOW HERE

As previously mentioned in these pages, the FTC regulations now include a requirement that creditors, such as ambulance services (public and private) that charge patients for transports and ancillary medical services, implement programs to discourage and detect identity theft. These are informally called “the Red Flag rules” because certain red flags can and do suggest that identity theft may be occurring. These new regulations went into effect April 1, 2009 and do apply to public agencies that charge for such services, whether they use a billing agency or not.

Page, Wolfberg & Wirth, LLC, (hereinafter PWW) the EMS law firm headquartered in Washington, D.C. has published a Red Flag Rules Survival Kit for Ambulance Services, which includes a Model Program for agency compliance with these rules. I purchased a copy of this copyrighted publication, and if your department needs to comply because you maintain “covered accounts” you should also purchase a copy, as the price is quite reasonable.

The Survival Kit includes a concise step-by-step overview of the procedures necessary to get your program in place. The first step is to identify covered accounts. The second step is to develop and write your identity theft prevention program. The regulations (See 16 C.F.R. Section 681(d)(i)-(ii)) state that such a program must contain four elements. You must (1) identify red flags for your covered accounts; (2) detect red flags identified in your program; (3) respond appropriately to any red flags detected so you can mitigate identity theft; and (4) update the program periodically.

We highly recommend that public agencies charging ambulance transport fees purchase this PWW product. You can contact PWW and actually use a credit card to purchase this useful model program. That is what I did. It is not too expensive and may be all you need. See www.pwwemslaw.com. If you still have questions after you see their model program, feel free to call. Even if you use a billing service to process your accounts for ambulance transports, the responsibility lies with the agency, not with your agent, to comply with these new regulations.

SOME USEFUL POLICIES OR PROTOCOLS

Frequently, the best feedback I receive from the *Firehouse Lawyer* articles, from clients and others in the fire service, relates to articles where I discuss policies or just legal issues that I have dealt with often in my law practice (over 23 years serving fire departments). This is another in that series of articles; I hope you find it useful.

What does your department do when faced with a subpoena for a firefighter, EMT or paramedic to testify in a trial or deposition? Or maybe it is just a request for an interview, but you are concerned about letting that attorney or private investigator talk to your employee without anyone there to assist. The following is what I call my “witness protocol”. It is simply a procedure that I recommend when faced with that situation. If you follow the protocol, you have a

better chance that your employee/witness will not have a negative experience “in the courtroom” so to speak. Here it is.

This protocol or procedure is intended to apply whenever the fire department receives a subpoena for testimony, for trial or deposition (or hearing of any kind) from any party to litigation, or attorney, requiring a department “witness” to testify about any matter arising from their employment with the department. In fact, the protocol should be followed even for informal requests by insurance adjusters, private investigators, and the like, or when the “witness” is not an employee but a volunteer. Although most of such requests will relate to providers of emergency medical services, the protocol can be used for all instances where an outside person wishes to interview any department personnel in connection with any type of legal matter, such as a fire or burn complaint.

This protocol is triggered by, or starts with, the receipt by the department or any of its agents or personnel, of a request for patient records or any other type of official records of the department, or just a request to interview department personnel. Whenever such a request, oral or written, is received by **anyone** connected with the department, such person shall immediately notify the Privacy Officer [or delegee], who shall be the department’s coordinator for this protocol and all such requests. The person contacted shall **not** discuss the matter at all with such requestor prior to following this procedure.

The Privacy Officer [or delegee] shall then immediately retrieve or order a copy of any written reports or data regarding the matter relating to the request. The Privacy Officer [or delegee] shall also notify the “witness” or witnesses of the request, ask the witness to review the report, and direct the witness **not** to speak with the requestor until first speaking with the Fire Chief [or delegee]. The Privacy Officer shall also suggest to the witness that he/she should contact by telephone the department’s legal counsel (who shall also be forwarded a copy of any records) prior to speaking with any attorney, insurance adjuster, private investigator, or other

outside interviewer about the matter. The Privacy Officer [or delegee] should also provide the witness with a copy of the witness preparation document on file at the department.

This protocol does not apply to discussions at the scene of a call, such as talks with law enforcement, regarding what the department personnel observed at the scene independent of their patient contacts or discussions. The protocol does not apply on scene, for example, when EMS personnel have reported observations of probable child abuse or criminal neglect pursuant to the applicable statute.

Is there a similar policy applicable to the analogous (but not at all the same, really) situation when the department receives a claim for damages or a legal action/lawsuit, naming the fire district, city, or similar agency as a defendant? Brian Snure, who serves as *Of Counsel* to my firm, shared this policy with me. It is reprinted here with his permission:

Claim Response Policy. In the event a formal claim or summons and complaint is served against the district, districts should have a formal procedure established to insure that the claims are properly addressed in a timely manner. The following checklist may help a district in establishing a procedure of this nature:

1. On receipt of service of summons and complaint or claim record date, time and name of person served.
2. Notify commissioners, chief and secretary of district.
3. Notify attorney for district.
4. Notify insurance carrier.
5. Locate and preserve all applicable records.
6. Obtain identification of district personnel involved in incident.
7. Caution all personnel not to disclose information unless authorized by board of commissioners.

8. Obtain confidential reports from all involved district personnel for immediate transmittal to attorney.
9. Establish contact representative to communicate with attorney for district and insurance carrier investigator or attorney.
10. Establish procedure for response to news media and public inquiries.
11. Tender defense of claim or suit to insurance carrier in writing.
12. Arrange meeting with attorney for district and insurance carrier representative.
13. Contact insurance carriers of individuals that are named as defendants.
14. Tender of defense by individuals to private insurance carriers.
15. Schedule meeting of board of commissioners for appropriate action.
16. Review district policies and procedures that are involved in claim.
17. Enact corrective policies and procedures.
18. Review action of district insurance carrier with district attorney. Insurance carrier response could include:
 - 18.1. Unqualified acceptance of defense,
 - 18.2. Denial of coverage, or
 - 18.3. Acceptance of defense with reservation of rights.
19. Board of commissioners action regarding the following:
 - 19.1. Challenge of insurance carrier decision, or
 - 19.2. Approve additional actions by district to provide defense.
20. Monitor progress of claim or litigation.

(Editor's Note: While there may be similarities between the two foregoing policies [see e.g. #8

above] the first applies only to department employees as witnesses; the second is intended for use when the department/district is actually a named defendant.)

FIREHOUSE LAWYER AVOCATION

We all need a hobby, right? I have told many clients and friends about my decision to cut back on golf a little bit, to find time for a somewhat more strenuous hobby. At age 62, last year I decided to get in shape and pursue my old hobby (from the 1960's) of Olympic Weightlifting. Just over a year ago I joined the same weightlifting club in Sumner, Pierce County, that is proud to call Melanie Roach –2008 Beijing Olympian—a member. My goal all along has been to compete in the age 35 and over Masters Division.

I am pleased to report that, after a year of hard training marred only by a pulled muscle or two and some bad knee tendonitis, I competed in the National Masters Olympic Weightlifting Championships, at Fort Bliss, El Paso, Texas earlier this month. I brought back a bronze medal, competing in the 85-kilo bodyweight group and the 60-64 age group. If my webmaster can do it, I am going to paste in the space below, a picture or two of me doing the Olympic lifts.





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.