Top Legal Issues in the Fire Service, and Civil Rights in the Workplace: A Potpourri of Legal Issues

Presented to the Washington Fire Chiefs Administrative Section

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Presenter Bio

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Managing a government agency is no easy task. Every day you address many challenges. Quinn and Quinn, P.S. will help you solve them. We understand that the ultimate goal of the fire service is to ensure the safety and wellness of every citizen. But that does not come without a cost to management. You may face an employee who alleges discrimination; a citizen who makes numerous public records requests; or the passage of an excess levy, which requires not only political will, but financial and organizational knowledge. The list goes on. Without guidance in these circumstances, you may face financial difficulty. We can help you avoid that, through a rigorous practice of collaboration and communication, whether it be speaking with you directly or updating our monthly newsletter, The *Firehouse Lawyer*. We understand your issues.

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i. Rights Do Not Arise from Words, Rights Arise from Actions and Custom

The crux of this presentation is that civil rights do not occur in a vacuum. Civil rights are not merely defined by the Framers of the Constitution, or by lawmakers. Your agency not only enforces pre-existing rights. Your agency may create rights by way of policy or contract that did not previously exist. But it is important to understand what rights are guaranteed to public employees, to discern whether your policies protect those rights presently, or whether you have "gone too far" in the protection of otherwise non-existent civil rights. This requires review of the basic civil rights enshrined in our Constitution, and of course…

ii. The Constitution Establishes the "Floor" of Civil Rights

Long ago, the United States Supreme Court extended the Bill of Rights to the States, relying on the Fourteenth Amendment to the United States Constitution. The "incorporation" of the Bill of Rights extended basic fundamental rights such as the Freedom of Speech and the Right to Bear Arms beyond restrictions imposed by the federal government.

The great Justices of the Supreme Court viewed the Constitution as an "outline," i.e. a document that enumerates basic rights and powers, leaving the "gray areas" to be interpreted by the courts. There are proponents of an "original meaning" application the Constitution, who view the Constitution not as a "living document" but as a set of principles enshrined in writings; and these writings should be interpreted in the manner that a person living at the time would have interpreted those writings. Then there are proponents of the "living constitution" theory, i.e. those that think that the rights enumerated in the Constitution are fluid and amenable to change based on modern realities.

And of course, the Tenth Amendment to the Constitution stated that the powers and rights *not* enumerated in the Constitution were to be defined by the individual States, meaning that states could adopt constitutions that are *more* protective of civil rights. Washington is certainly one of those states.

iii. Employers (and State Legislatures) Can *Create* Rights that did not previously exist

When an employer enacts policy, the employer is not merely enacting rules. The employer is creating *expectations*. When an employee has a legitimate claim to a certain right, based on expectations created by employee handbooks or policies, the courts are loathe to ignore that claim.

For example, in 1984, the Washington Supreme Court found that employers may give otherwise at-will employees cause protections by making unilateral promises of specific treatment in employee handbooks, even if the handbooks stated only that terminations would be processed in a manner which "will at all times be fair, reasonable and just." Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984).

But how did "cause" protections first develop? Believe it or not, "cause" protections evolved from the United States Constitution. Clever employment lawyers argued that the Thirteenth Amendment to the Constitution prohibits "involuntary servitude," and that "at will" employment was the functional equivalent of "involuntary servitude." Although the Thirteenth Amendment was written during the abolition of slavery, the courts accepted this argument and began finding that employees may be granted expectations of continued employment even though they were otherwise at-will. In other words, civil rights pervade through the workplace in innumerable ways that we do not realize.

II. CIVIL RIGHTS IN THE WORKPLACE

Governments may be sued for violating another's civil rights under color of law. See 42 U.S.C. § 1983 (hereinafter "§ 1983"). That is the basis for this presentation. Employers should not consider civil rights in an academic context, but understand the basic civil rights to avoid substantial liability.

i. Fire in A Crowded Theater: First Amendment Problems

a. No Establishment of Religion v. Free Exercise of Religion

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or the free exercise thereof." This protection was extended to the States via the Fourteenth Amendment

As a preliminary matter, the "establishment" of religion is applicable to the actions of the **employer**; the "free exercise" of religion applies to actions by **employees.**

No Establishment of Religion

> The Establishment Clause requires that public employers are neutral as to religion and not prefer one religious sect over the other. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). An employer rule burdening religion or a specific religious group will be held invalid. An employer may enact policies which make reasonable efforts to accommodate employee religious practices—so as to permit the "free exercise" of religion—but enacting a policy which states, for example, that all employees need not work on the Sabbath would be impermissible because the policy would have the primary purpose of advancing religion. *Thornton v. Caldor*, 472 U.S. 703 (1985).

We do **not** recommend the employer enacting any sort of policy that is specifically aimed at the practice of religion in the workplace. Typically, discouraging the use of insignia to advance religion may be addressed in a grooming policy.

Here are the sorts of behavior that would tend to "advance religion" and therefore violate the Establishment Clause:

1. A chief asking an employee if she has accepted Jesus Christ as her savior;
2. An employer placing a crucifix in a break room;
3. Providing aid to outside religious organizations—which would also constitute a gift of public funds

At the risk of being vague, a Code of Conduct which balances the needs of employees to exercise their religious beliefs with the employer's need to avoid establishing religion would not constitute an Establishment Clause violation. The language in the Code of Conduct could read as follows:

> "The Department encourages employees to freely exercise their beliefs, so long as exercising those beliefs does not encroach on the employer's interest in efficiency or inhibit the performance of the employee's duties. To that end, the Department hereby enacts a policy of prohibiting the use of Department property for personal business, provided such use is *not* de minimis in nature. The Department hereby enacts a policy of prohibiting employees from collectively voicing a preference of one religious belief over the other."

Of course, take note that your department restricts the speech—religious or otherwise—of its employees in a "viewpoint-neutral" manner. The Washington Courts have found that a fire department's "interest in avoiding an establishment clause violation does not outweigh [an employee's free exercise] interests under the First Amendment." *Sprague v. Spokane Valley Fire Department*, No. 93800-8 (2018). In other words, an employer's worry about the excessive presence of religion in the workplace is not enough to

restrict religious views. Any restrictions must be applicable to *all employees* and not be related to religion, as the Washington Supreme Court was saying in *Sprague* above.

Free Exercise

The First Amendment prohibits public employers from favoring one religion over another *and* preventing its employees from expressing their sincerely held religious beliefs. To be clear, an employee enjoys Free Exercise protection even if that employee's religious beliefs are non-conventional but "sincerely held." In other words, the employee need not be Christian, Jewish, Muslim or Buddhist, or espouse a belief in a "Supreme Being" to enjoy Free Exercise protections. *See Torcasco v. Watkins,* 367 U.S. 488 (1961). To be "sincerely held," the belief need only "occupy a place in the believer's life parallel to that occupied by orthodox religious beliefs." *United States v. Seeger,* 380 U.S. 163 (1965).

The employer cannot *punish*—i.e. discipline—an employee based solely on the exercise of that employee's sincerely held religious beliefs, but to the extent that the practice of those beliefs would inhibit the performance of the employee's essential functions—such as wearing a yarlmuke underneath firefighting equipment, inhibiting the fit of the equipment—then that expression enjoys less protection.

The fire department in *Sprague*, cited above, disciplined an employee for using department equipment for sending out a slew of emails for personal business, which happened to be of a religious nature. But the department did not choose its words carefully in discouraging this behavior, including the following language in a disciplinary letter to the employee:

> "The inappropriate and prohibited behavior involved written content that was of a religious nature, including religious symbols. . . . The inappropriate and prohibited behavior involved the use of language and written content that was of a religious nature, specifically the quotation of scripture."

If you want to avoid a free-exercise problem, do not use such language in letters to your employees, but instead point to your policy pertaining to the use of employer property to conduct personal business.

b. Freedom of Speech

The freedom of speech of public employees is a contentious issue, not amenable to an easy answer. The United States Supreme Court essentially laid out a balancing test in *Pickering v. Board of Education,* 391 U.S. 563 (1968):

> The problem in any case is to arrive at a **balance** between the interests of the [public employee], as a **citizen**, in commenting upon matters of **public concern** and the interest of the state, as an employer, in promoting the **efficiency** of the public services it performs through its employees

Like we said, there is no easy answer. The *Pickering* test has been criticized because it is not able to be applied consistently. The High Court has expanded on this balancing test, and found it essential that the employee spoke, as a private citizen, on a matter of "public concern." *Connick v. Myers*, 461 U.S. 138 (1983). Washington courts have added to the *Pickering* balancing test factors such as (1) whether the employee has a position that requires **loyalty**; (2) the amount of **disruption** the statement may cause in the employee's daily responsibilities; (3) the **time, place and manner** of the statement, and (4) the effect the statement may have on staff **morale**. *White v. State*, 131 Wn.2d 1, 11 (1997). Ultimately, Washington courts decide whether the employee's right to exercise their freedom of speech is greater than the employer's right in promoting "efficiency in the public service it performs." *See White.* Consider the following exchange between Freddie the Firefighter and other members of Blackacre Fire District on Facebook:

- Pamela Paramedic: Please share! We need to get the word out that our fire department needs our help. 6 Likes
- Freddie the Firefighter: This fire district needs to figure out how to balance the checkbook and organize the personnel. If they do there would be no need for a special fire levy. 10 likes.
- Donna the District Secretary: Freddie, I understand that you are angry about how we changed our compensation for volunteers and spreading out the assignments which resulted in you receiving less money. 4 likes.
- Freddie: It has nothing to do with money and it never has. It has to do with working my ass off for almost 7 years for a fire department that could care less and made it impossible for some of its long-time members to meet the NEW minimums. 10 Likes.
- Blackacre Fire District (as the group administrator): As laws change, so do the policies that the fire department imposes to follow those laws…Unfortunately, this has decreased the number of folks that are available to put the needed time in to be first responders. 8 Likes (two from Craig and Christy the Commissioners)

- Freddie: To say I am bitter and angry about the direction the district has gone would be an understatement…[T]his is all about a very rural district that wants big-city funding. 7 Likes.

- Christy the Commissioner: I would encourage you to please use your chain of command if you have issues with things going on in the department that you have issues with. 5 Likes (one from Donna the District Secretary)

Can Freddie be disciplined for these comments? Because Freddie communicated this "speech" on Facebook, not to a higher-up in the chain of command, and anyone who had an opinion about the matter could comment as well, his speech is probably upon a matter of public concern. Compare the facts here to those in a Washington district court case, *Aldrich v. Knab*, 858 F. Supp. 1480 (1994). In *Aldrich*, volunteer employees at a radio station disagreed with a program director's views on programming issues. They had formed a group called "Censorship Undermines Radio Station Ethics," or CURSE, in response to the radio's manager telling them that "on-air criticism of proposed programming changes would not be tolerated." *Id* at 1487. This had in fact become a policy at the station. Id. Tensions escalated. One of the volunteers drafted a letter. *Id*. The letter was directed "to the community to let them know of several changes taking place at KCMU. KCMU management says that these changes will help serve you better. We think it's dead wrong." *Id*. After this volunteer was fired, another volunteer stated on the air that he was a proud member of CURSE. This volunteer was fired for insubordination. *Id*. at 1489. The *Aldrich* court found that these particular volunteers had been fired in violation of their constitutional rights: in the context of a community radio station, this was not a matter of "internal concern." So what about Freddie? Like the employees in *Aldrich*, Freddie addressed his concerns about the low pay afforded to firefighters, and how that was affecting response time, in a public forum. The employees in *Aldrich* may have engaged in a more collective effort, but the content of Freddie's statements is of the kind that would be subject to "rigorous debate." This could also be inferred from the circumstances: Other guests on Facebook engaged Freddie immediately about his concerns, with opinions of their own, and "liked" his comments. Therefore, Freddie was speaking on a matter of public concern. Thus, we now have to ask whether Freddie's comments impeded the efficiency of the public services performed by Blackacre.

Let's use the four factors laid out in *White* to analyze this problem. Certainly, Freddie is in a position that requires loyalty, because the fire service, as a para-military organization, places a high premium on respect. As far as the "disruption" factor, the statement that Freddie has been working his ass off for seven years and the district does not care may be inflammatory, but probably does not rise to the level of being unduly disruptive to Freddie's work or the work of others. He makes no claim that he will work less, or encourage revolt. Instead, he is voicing an opinion about how the district acquires and spends revenue. In regards to the time, place and manner of the statement, Freddie is commenting in an open public forum on Facebook. Facebook essentially eviscerates the idea that certain statements have less First Amendment protection depending on when and where they are said. When one posts a comment on Facebook, it is going to stay there until someone removes it. And finally, the likelihood of this effecting staff morale is more than likely minimal. Freddie has not made any specific threats to anyone. He has not claimed that he and others should not work, or that they should bring this up with their union rep

(and what if he had?). Therefore, it would appear that Freddie's interest in speaking freely outweighs the district's interest in promoting efficiency, as he has not made any statements that go to the core of the district's mission. Instead, he sounds like an angry employee getting something off of his chest.

Consider another example:

- Paula the Probationary Employee: I hear there was an assassination attempt on President Trump.

- Ben the Boyfriend of Paula: Really? That is crazy!

- Paula: If they go for him again, I hope they get him.

Paula was fired for these comments. A conversation nearly identical to the above occurred in a private room at a sheriff's office—albeit about President Reagan in 1981, long before Facebook showed up. In that case, *Rankin v. McPherson,* 483 U.S. 378 (1987), the United States Supreme Court found that Paula, an employee of the sheriff's office, did not intend her comments to "inform public debate"; but she was still speaking on a matter of public concern because she was implicitly voicing criticism about President Reagain's policies. Therefore, Paula was fired for exercising her First Amendment rights and therefore her termination was *unlawful*. Justice Antonin Scalia famously said, in disagreeing with the majority, that one should not be permitted to "ride with the cops and cheer for the robbers." That may well be true, but when a public employee speaks as a private citizen on matters of public concern, their speech is more likely to be deemed protected by the First Amendment.

Fighting Words

However, threats of violence, "fighting words" and epithets or personal abuse are not generally protected by the First Amendment. "Fighting words" have been defined as "those which by their very utterance inflict *injury* or tend to incite an immediate breach of the peace." *United States v. Alvarez,* 617 F.3d 1198 (9th Cir.[1] 2014). Pretend that Paula, instead of saying "I hope they get him", said "I am going to blow his brains out." Or pretend that Freddie said, when speaking about a fellow employee, that "next time I see him I am going to kick his ass." This is more than likely not protected speech, but instead is closer to being "fighting words." Remember, if the words used by an employee on Facebook, or any social media, such as Twitter, do not relate to a matter of public concern, but are purely personal, then the speech is not protected. Consequently, expressions that are merely hateful or aggressive, and have absolutely nothing to do with the employment relationship or expansion of the employer's mission, are **not** protected by the First Amendment.

[1] "9th Cir." Stands for Ninth Circuit Court of Appeals, which is the federal circuit with jurisdiction over the State of Washington, meaning that its precedent is persuasive in Washington Courts.

Speech Related to Official Duties

Not all speech is protected. When public employees make statements pursuant to their official duties, they are not speaking as *citizens* for First Amendment purposes, and therefore their speech is not protected. *Garcetti v. Ceballos,* 547 U.S. 410 (2006). The High Court in *Garcetti* opined that public employees "do not surrender all their First Amendment rights by reason of their employment." But the Court further noted the requirement set forth in *Pickering* that the speech of a public employee must be made in one's capacity as a private citizen. Washington courts have held to this interpretation. For example, in the *Wilson* case, the Washington Supreme Court found that a statement made to an internal audience without any intention to expose it to public view was not protected speech. *Wilson v. State,* 84 Wn.App. 332 (1996). After all, in *Wilson,* a pharmacist issued an internal "white paper" indicating his opinion of the most desirable way to organize the pharmacy department, and this was held not to be protected speech. But that is the issue with social media, isn't it? The frequency of commentary on social media almost automatically transforms any matter discussed in social media into one of public concern. However, as shown by *Wilson* and *Garcetti,* if the intent of the speech is meant to reach an internal audience, one cannot always use the banner of "public concern" to shield their speech from discipline. *Tyner v. State,* 154 P.3d 920 (2007). The argument could be made that in the hypothetical above, that Freddie the Firefighter sought to use Facebook to air out an issue that was otherwise addressed to an internal audience.

Defamation

The First Amendment does not give a public employee the right to tell bald-faced lies about his or her fellow employee or superior that would damage that person's reputation. However, no Washington court has found that a *public agency* has a "reputation interest" that would permit the *agency* to sue the employee. Instead, in the public context, defamation law would be limited to claims between the employee and the person allegedly defamed—such as a chief, district secretary, mayor or rank-and-file employee.

To establish a case of defamation, a *rank-and-file employee* must prove that (1) the statements were false, whether the defendant knew the statements were false or otherwise, and were published to a third party; (2) the statements were unprivileged, meaning generally that the defendant made the statement to a person with authority to act to protect the public interest, a third party, or a person sharing a common interest, such as a paramedic; (3) the defendant was at fault, essentially meaning that it was the defendant's intentional or unreasonable actions that led to the disclosure, and (4) the statements proximately caused the employee damages, meaning that he or she suffered a damaged reputation and or emotional distress. *Life Designs Ranch v. Sommer,* 191 Wn.App. 320 (2015); *See Also Yarbrough,* 105 Wn.App. 632 (2001) (defining the limits to "privileged" defamatory speech). Take note that the burden of proof to establish a prima facie claim of defamation is *much higher* for a "public figure," because of the protections of the First Amendment.

A "public figure", such as a chief, mayor, city manager or district secretary—not a rank-and-file employee—has even less protections against defamatory speech, due to the protections enumerated by the United States Supreme Court in *New York Times v. Sullivan,* 376 U.S. 254 (1964). The Court in

Sullivan reasoned that First-Amendment protections are much higher when the speaker is publishing facts that, although not true, relate to a public figure, not a private person. When the false speech relates to a "public figure," under *Sullivan,* that public figure must be prepared to present evidence that the speaker published the speech with "actual malice"—the defendant *knew* the statement was false but published it anyways—or "reckless disregard of the facts." In other words, prior to disciplining an employee for false speech against a higher-up—who would be the persons that can sue, *not* the employer—the employer should be prepared to prove that (1) the employee *knew* the statement was false and (2) was not making that statement with a qualified privilege to make it, i.e. to protect a third party or the public interest. If those two facts are met, the employee not only may be disciplined. The employee *should* and perhaps *must* be disciplined.

The First Amendment and Social Media Policies

The National Labor Relations Board fairly recently found that a prohibition in a social media policy against "harassing" or "discriminatory" language was *lawful*, but that prohibitions in the same policy against spreading "incomplete, confidential, inaccurate, false, misleading (or) disparaging" information were *unlawful. See Chipotle,* 364 NLRB No. 72 (2016). Rulings of the NLRB apply to employment in the *private sector* but the Washington Courts and the Public Relations Commission have used NLRB decisions as persuasive authority. Consequently, Washington Courts may, but are not required, to apply *Chipotle* to either invalidate or uphold the lawfulness of a social-media policy. The employer should be conservative and prohibit employees from spreading "knowingly false, misleading or disparaging" information on social media, using employer equipment or otherwise. Note the addition of the word "knowingly." The author adds this word to address the malicious dissemination of patently false information, as the policy in *Chipotle*—according to the NLRB—*did not*.

c. The Rights of Petition and Assembly

These rights do not receive as much attention by the courts as those above, but the right of assembly protects the rights of individuals to form unions, as does Washington law under RCW 41.56. Furthermore, the right of petition is generally limited to filing lawsuits, and therefore the right of appeal in the workplace context is generally limited to employer policies that permit such appeals, with one important caveat: Individuals with a property right to continued expectation of employment, whose rights to that particular employment are threatened by suspension, demotion or termination, are entitled to what is called a *Loudermill* hearing, which we shall address below.

ii. Tons of Guns: Second Amendment Issues

The United States Supreme Court, in *Heller v. District of Columbia,* definitively opined as to the Second Amendment right of citizens to "keep and bear arms" for self-defense, unconnected to service in any militia, but placed a clear line on that right in certain circumstances:

> Like most rights, the right secured by the Second Amendment is not unlimited…nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.

The Ninth Circuit found in 2016 that "the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public," and the United States Supreme Court has not overruled that finding. *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016).

In other words, the public employer has the discretion to (1) ban concealed weapons in the workplace altogether, loaded or unloaded, and (2) enact regulations that prohibit members of the public from entering or remaining on employer facilities with a loaded handgun. The employer should enact such policies to protect personnel and the public. Of course, the employer could not enact regulations that prohibit personnel from carrying firearms while off-duty and not on employer premises.

iii. Marijuana, Privacy and Prerogatives: Fourth Amendment Concerns

Again, governments may be sued for violating another's civil rights under color of law. See 42 U.S.C. § 1983 (hereinafter "§ 1983").

General Legal Principles

The Fourth Amendment, applied to the states via the Fourteenth Amendment, protects "persons, houses, papers and effects" from unreasonable searches and seizures. To raise a challenge under the Constitution, one must have "standing" to do so. *See Katz v. United States*, 389 U.S. 347 (1967). To have standing in the Fourth Amendment context, one must have a subjective expectation of privacy in the place being searched (the person searched must consider the place or thing private). *See Katz*. In addition to this subjective expectation, the Constitution only protects those expectations of privacy that society would recognize as reasonable. *See Katz; See Also O'Connor v. Ortega*, 480 U.S. 709 (1987). In other words, determining whether an employee should have a privacy expectation, in most circumstances, turns on your common sense.

In *Ortega*, cited above, the Supreme Court held that a warrant or probable cause standard does not apply when a government employer—not a law enforcement officer—searches an employee's office, desk or file cabinet to retrieve government property while investigating work related misconduct. Under *Ortega*, a workplace search is reasonable if it is justified at its inception and reasonably related in scope to the circumstances that prompted the search.

Washington Law in this area

Unlike the Fourth Amendment, the word "unreasonable" does not appear in the Washington Constitution, Article I § 7, which mandates that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." In other words, arguably, Article I § 7 is more protective than the Fourth Amendment, and is certainly *not* less protective. *See State v. Snapp*, 174 Wn.2d 177 (2012). Importantly, Washington courts have not recognized a constitutional cause of action for invasions of privacy by government agents, such as suits based on violations of the Fourth Amendment. *See Youker* at 797. In other words, in Washington courts, neither the Fourth Amendment or Article I § 7 have been applied to workplace searches. However, under Washington law, a person may sue the government for *common law* invasion of privacy, if the government "intentionally intrudes upon his or her solitude, seclusion, or private affairs." *Youker v. Douglas County*, 178 Wn.App. 793, 797 (2014). This intrusion must be highly offensive or objectionable to a reasonable person. *See Mark v. Seattle Times*, 96 Wn.2d 473, 497 (1981). And of course, an employee could still sue under § 1983.

The Above General Principles Applied

Again, the key word under the Fourth Amendment is *reasonable*. Ultimately, if the employer suspects an employee of looking at pornography in the workplace, it would be unreasonable for the employer to search the employee's car, but it would be reasonable for the employer to examine the employee's search history on his or her web browser without that employee's consent. If the employer receives information that the employee brings a handgun to work, it would be reasonable for the employer to search the employee's locker and workspace, but it would not be reasonable for the employer to search the employee's car. Finally, if the employer learns that an employee may have been drinking a beer in her car prior to reporting for duty, it would be reasonable for the employer to search her car.

Although the word "reasonable" does *not* appear in Article I § 7, the Washington court of appeals, in *Robinson v. City of Seattle*, 102 Wn.App. 795, 811 (2000), found that "the ultimate inquiry is whether the government has unreasonably intruded upon private affairs." This can be cured by policy. The employer may manage employee expectations of privacy by way of clear policies on the use of employer facilities. Of course, a public employee does not surrender his or her civil rights by virtue of public employment, but a search in the employment context, whether under the Fourth Amendment or Article I § 7, is not governed by a standard of probable cause—which is a heightened suspicion of criminal wrongdoing. Therefore, so long as the employer establishes a policy that employees have no reasonable expectation of privacy when the employer has an individualized suspicion of workplace misconduct, that person's workspace,

and even that person, is subject to search without the employer violating the Fourth Amendment or the Washington Constitution. Ultimately, whether a search is constitutional turns on the facts, and the employer should always consult legal counsel prior to engaging in a search.

Workplace Searches of personal email and social-media accounts: RCW 49.44.200

Under RCW 49.44.200 (1), an employer cannot (1) coerce or require an employee to disclose the login information for their personal social networking account (personal account); (2) force the employee to access their personal account in the employer's presence for purposes of monitoring the account; (3) force the employee to add the employer as a contact in the employee's personal account; or (4) force the employee to alter the settings of their personal account in such a way that affects a third party's ability to view it. Furthermore, an employer cannot take an adverse action against an employee for refusing to do any of the above.

Under RCW 49.44.200 (2), the above prohibitions do not apply when the employer asks for or demands access to a personal account if (1) the employer seeks to make a factual determination in the course of conducting an investigation; (2) made in response to a receipt of information about the employee's use of their personal account; (3) the purpose of the investigation is to (a) Ensure compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct; or (b) investigate an allegation of unauthorized transfer of an employer's proprietary information, confidential information, or financial data to the employee's personal social networking account; and (4) the employer does not ask for the login information for the employee's personal account.

Therefore, if a complaint is made about an employee's use of their social media account and the employer conducts an investigation into use of that account to prevent misconduct or violations of law, then the employer may take actions that are otherwise prohibited by RCW 49.44.200 (1) to ensure the employee is properly using—and not using—social media, without running afoul of the Fourth Amendment.

Most importantly, the prohibitions of RCW 49.44.200 (1) do not apply "to a social network, intranet, or other technology platform that is intended primarily to facilitate work-related information exchange, collaboration, or communication by employees or other workers." RCW 49.44.200 (3). In other words, this law does not prevent the employer from monitoring an intra-net that is established for employees to communicate with one another. What this law prohibits is the employer conducting arbitrary searches of employee computers or electronic devices without individualized suspicion, or without conducting such a search within the confines of the employer's own "social networks" or employer-owned communication devices (intra-nets and employer-owned cell phones etc.).

Furthermore, this statute does not "prohibit an employer from enforcing existing personnel policies that do not conflict with" RCW 49.44.200 (1). Consequently, an employer may more actively monitor the use of social media tools when used in the context of workplace communication to prevent harassment and discrimination, or otherwise enforce existing personnel policies. This is particularly true, given the language of RCW 49.44.200 (3), in the context of intranets or social networking accounts set up exclusively for work use between employees. Furthermore, it appears, from the language of RCW 49.44.200 (3), quoted above, that an employer may monitor employee workplace email, especially in the context of investigating workplace misconduct—as that is measured by a standard of reasonableness under the *Ortega* case, 480 U.S. 709 (1987). But remember, do not go on a fishing expedition, but base any search on, at the very least, an individualized suspicion of wrongdoing.

Speaking of individualized suspicion…

Marijuana in the Workplace

Under Washington law, "[T]he possession, by a person twenty-one years of age or older, of useable marijuana or marijuana-infused products in amounts that do not exceed those set forth in RCW 69.50.360(3) is not a violation of this section, this chapter, or any other provision of Washington state law." RCW 69.50.4013 (3). This statute permits an individual to possess up to one ounce of "useable marijuana" (this is marijuana in plant-form). We will not discuss here what other types of marijuana-infused products have been legalized. Despite this legalization, a person is guilty of driving under the influence (DUI) if that person, as demonstrated by an analysis of their blood, has, "within two hours after driving, a THC (tetrahydrocannabinol) concentration of 5.00 or higher." RCW 46.61.502 (1)(b). A person's THC concentration "shall be based upon nanograms per milliliter (ng/ml) of whole blood." RCW 46.61.506 (1)(b). **Furthermore, evidence that a person had a THC concentration below 5.00 (but above 0.0) ng/ml within two hours of driving may be considered with "other competent evidence" that the person was DUI. RCW 46.61.506 (1).**

We will not dwell here on the science behind determining this THC concentration (5.00 ng/ml or higher). But to test whether a person is DUI of marijuana, that person's blood must be tested by a person licensed by the state toxicologist to make such a determination. RCW 46.61.506 (3). This gives rise to constitutional privacy concerns. Prior to addressing these concerns, it should be noted that the exclusionary rule, which operates to exclude evidence obtained unlawfully by law enforcement (agents of the state) in criminal cases (hence our reference to DUI laws), has been found to apply in civil actions and disciplinary proceedings as well. Consequently, a detailed Model Policy delineating how and when blood should be drawn from a firefighter suspected of marijuana use (or impairment) while on duty is crucial to ensure that the results of these blood

draws may actually be used in disciplinary proceedings. This is so because, in the system of American jurisprudence, constitutions trump statutes.

Again, to truly establish "impairment" from marijuana in Washington State, the person's *blood* must be tested. The extraction of blood from a person suspected of DUI is a search under the Fourth Amendment to the United States Constitution and article I section 7 of the Washington State Constitution. *See State v. Martines*, No. 69663- 7-I (Wash.2014). Analyzing that blood sample is a second search. Id. Searching an individual generally requires a warrant. Id. The United States Supreme Court (the High Court) has held that it would be unreasonable to impose a warrant requirement before public employers could conduct work-related searches. See *Ortega*, supra. The High Court in *Ortega* held that searches designed to uncover work-related misconduct should be judged by a standard of reasonableness, not by the heightened standard of probable cause, in which case a warrant would be required to conduct a work-related search. Id. For that reason, warrantless reasonable suspicion drug testing of public employees is a common practice across the country.

Furthermore, under Washington law, "employer-employee relations tend to be heavily regulated" and are therefore subject to "independent state constitutional analysis"—i.e. different than the constitutional analysis applied to the every-day citizen going about her way. *Robinson* at 811. For that reason, general constitutional principles may not be viewed the same way in the workplace; different rules apply there, particularly in the domain of public employment. For example, pre-employment drug testing, without individualized suspicion, survives Article I § 7 scrutiny if the employment genuinely implicates public safety. *Id.* at 823.

Therefore, we must consider the intrusion necessary for a blood draw balanced against a fire department's concern for ensuring an efficient and safe workplace. In doing so, we might reasonably conclude—reading *Robinson* and *Ortega*, cited above, together—that although something like reasonable suspicion may be required to draw blood from a firefighter suspected of using marijuana in the workplace, the heightened standard of probable cause should not control. Because some suspicion is surely necessary, a marijuana-use policy should include a two-tiered inquiry into whether a firefighter might be impaired by marijuana in the workplace: First, establishing reasonable suspicion that the firefighter is impaired; and second, establishing a procedure for substantiating that suspicion by performing a blood draw and analyzing that blood (as indicated above, the analysis of the blood is a second search). If such a Model Policy contains this two-tiered inquiry, a fire department will not (in our opinion) run afoul of constitutional mandates when drawing blood from a firefighter suspected of marijuana use in the workplace, or impairment while on duty. What is crucial is that management enact blood-draw procedures that are reasonably related to the objectives of the blood draw: discovering evidence of marijuana use in the workplace. Such procedures will withstand constitutional scrutiny.

iv. What Process is Due? Fifth Amendment Conundrums

a. The "Liberty" Interests

Under the Fifth Amendment, no person may be deprived of "liberty" without due process. The Supreme Court has construed the "liberty" interest to confer a right to "privacy," which has been used to confer individuals with the right of abortion, gay marriage and contraception. The "liberty" interest also confers the right for a person to travel from place to place, perhaps meaning that, in the public-employment context, employers cannot unduly restrict their employees from taking breaks or otherwise infringe upon their freedom of movement.

b. The "Property" Interests

Under the Fifth Amendment, no person may be deprived of "property" without due process. This is the area where public employers can get in a lot of trouble based on the "property rights" that you confer upon a particular individual. Ultimately, whether a person has been deprived of "property" without due process requires a two-tiered inquiry: (1) whether the person even has a "property right" in the first place and (2) if such a property right exists, whether the process afforded to the employee was proper under the circumstances.

First: Does the Employee have a property right?

"Property rights" are defined by state, not federal, law. Under Washington law, "property interests are created and defined by existing rules or understandings that stem from independent sources such as state law." *Danielson v. City of Seattle*, 108 Wn.2d 788, 795 (1987). This means that "property rights" are created by (1) statutes, (2) contracts and/or (3) policies.

Ultimately, public employment alone does not create constitutionally protected property interests. A "mere abstract need or desire" or a "unilateral expectation" in a benefit does not create a property right. *See Kitsap County Deputy Sheriff's Guild v. Kitsap County*, No. 89344-6 (2015).

As an example, take note of *Schlosser v. Bethel School District*, 183 Wn.App. 280, 287 (2014), in which the court of appeals found that a teacher was not entitled to a pretermination hearing for a decision not to renew her contract because a state statute only afforded her a right to a post-termination hearing.

Again, in the absence of a statute conferring a property right, Washington courts have found that protected property interests can arise from express or implied contracts for continued employment, or collective bargaining agreements. *Washington Educ. Ass'n v. State*, 97 Wn.2d 899, 908 (1982). This means that the courts have not conferred on employees an expectation of continued employment: such expectations must arise from a statute, contract—express or implied—or policies.

Importantly, "property rights" are not impacted by an employee receiving an oral or written warning, because such employer actions do not impact the employee's "pocket book." Instead, questions or "property rights" arise when the employee is facing suspension, demotion—resulting in a reduction in pay—or termination.

Second: If the employee has a property right, what process is due to her prior to depriving her of that right?

Determining what "process is due," unfortunately, is not subject to a bright-line rule, but instead is subject to a balancing test. After determining that a property right exists, pursuant to *Matthews v. Eldridge*, 424 U.S. 319 (1976), the courts would consider the following factors to decide whether the process afforded to the employee was proper:

1. The importance of the individual interest involved (i.e. the right to keep working);

2. The value of procedural safeguards to protect that interest; and

3. The governmental interest in fiscal and administrative efficiency

The above is a balancing test—no factor is given more weight than the other—because, as the *Eldridge* Court found, due process is "flexible" and turns on the facts of the individual case.

You can simplify this process by specifying what processes are due to an employee facing suspension, termination or demotion. Many departments have an informal process for providing what is called a "*Loudermill* Conference."

In the now-famous case of *Loudermill v. Cleveland Board of Education*, 470 U.S. 532 (1985), the United States Supreme Court held that a public employee, if entitled under state law to a property right in public employment—i.e. termination "for cause"—is entitled to a pre-termination hearing of some sort, as an element of procedural due process. But we use the term "hearing" lightly. The *Loudermill* Conference does not constitute a full-blown evidentiary hearing in which the person facing termination—which courts across the country have extended

to suspension and demotion—may cross-examine witnesses. This is really a mere opportunity for the person to make a presentation to the necessary person—typically the chief or other lead of the agency—on why that person should not be terminated, suspended or demoted. Of course, a public employee facing termination is not entitled to an unbiased *Loudermill* decisionmaker. *See Walker v. City of Berkeley,* 951 F.2d 182, 184 (9th Cir.1991).

Ultimately, the *Loudermill* court found that "[t]he *tenured* public employee is entitled to oral or written notice of the charges against him, an explanation of the employers evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* at 546. In other words, *Loudermill* procedures are very basic, and are afforded to employees with "cause" protections, not to at-will or probationary public employees. Furthermore, *Loudermill* procedures do not require the sort of *Eldridge* referenced above. Instead, the "due process" afforded to a public employee with cause protections is automatically afforded by (1) notice of the charges, (2) a presentation of the employer's evidence, and (3) an opportunity for the employee to tell his side of the story.

A Brief Note on Weingarten Rights

In the case of *NLRB v. Weingarten*, 420 U.S. 251 (1975), the United States Supreme Court found that in the *unionized* setting, where public employees are represented by an exclusive bargaining representative recognized by the employer as representing a bargaining unit, that those employees may request the presence of a union rep during a disciplinary interview, and if so, the employer must either (1) grant the request; (2) discontinue the interview; or (3) allow the employee to continue the interview without representation. If all of these are a "no," the unionized employee's discipline will be invalidated under *Weingarten.*

NOTE: *Weingarten* rights do not apply in the non-union context (yet), meaning that non-unionized public employees are *not* entitled to have a representative with them when being investigated for conduct that could lead to discipline. *See IBM Corporation*, 341 N.L.R.B. 1288 (2004). Of course, if the employer grants non-unionized public employees this right by way of policy or contract, then those employees have the same *Weingarten* rights as unionized employees.

c. "Double Jeopardy" and the Privilege Against Self-Incrimination

Double Jeopardy

Under the Fifth Amendment, no person may "be subject for the same offence to be twice put in jeopardy of life or limb." This is known as "double jeopardy." The "double jeopardy" prohibition applied in the criminal context, originally. However, the prohibition against double jeopardy has been enshrined in labor law for decades. The double jeopardy concept has typically been applied when an employee has been suspended or terminated after receiving a lower level of discipline

for the same conduct. Double jeopardy arises in the following context: two Disciplines, A and B. Discipline B is based on the same underlying conduct giving rise to Discipline A. Arbitrators have found that an employer generally may not impose Discipline A then issue a new more-severe Discipline after discovering facts that necessitate Discipline B, if those facts relate to the same conduct. *Gulf States Paper Corp*., 97 LA 60 (Welch, 1991).

To avoid a double jeopardy problem, we recommend that an employer not issue Discipline A until a thorough investigation is complete, because if the employer uncovered additional facts that would have been uncovered with thorough investigation, and the discovery of these facts lead to Discipline B, then a reasonable arbitrator would find that Discipline B should be invalidated because of double jeopardy. If Discipline A was thoroughly investigated and remained Discipline A, then there is no double jeopardy problem.

Of course, the concept of double jeopardy has typically been employed in the area of labor law—i.e. in the unionized setting—but crafty attorneys could easily argue that a public employee's freedom from double jeopardy, which is a *civil right*, may be applied generally in the employment context.

The Privilege Against Self-Incrimination

Under the Fifth Amendment, no person may be compelled to be "a witness against themselves." Believe it or not, but the *Miranda* rights—the privilege against self-incrimination—in a limited sense, apply in the public employment context.

In *Garrity v. New Jersey*, 385 US. 493 (1967) the U.S. Supreme Court addressed the issues presented when a public safety officer is sought to be interrogated in various types of investigations that might lead to criminal charges against them. Police officers were investigated for alleged traffic ticket "fixing" in municipal courts. No offer of immunity was made. They answered the questions and were later convicted of conspiracy to obstruct justice. Despite the officers' objections that the statements were made under threat of discharge, the New Jersey Supreme Court upheld the convictions. But the U.S. Supreme Court reversed, holding that the Fifth Amendment freedom from self-incrimination, which had not been waived, required the Court to set aside the convictions. The Court found that because the officers were placed in a position where they would either be terminated or incriminate themselves, their statements were coerced.

A year later, in *Gardner v. Broderick*, 392 U.S. 273 (1968), the Supreme Court ruled that not only is it unconstitutional to use involuntary testimony of a public employee in a subsequent criminal prosecution, but also it is unconstitutional to base a discharge upon refusal to waive the immunity conferred by the privilege against self-incrimination. The officer was warned that he would be questioned and informed of his right to claim the Fifth Amendment privilege against

self-incrimination. However, he was also asked to sign a waiver of immunity and told he would be discharged if he refused. After he refused to sign a waiver, he was charged with violating the disciplinary regulations, given a hearing and discharged. Again, as in *Garrity*, the Supreme Court found **coercion** and held the discharge unconstitutional. But the Court's decision did show it recognized the need to vindicate the employer's interest in investigating employee misconduct. The *Gardner* Court stated in dictum that if the policeman had been asked to answer questions specifically, directly, and narrowly related to performance of duties and without being required to waive immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, then the privilege would not have been a bar to dismissal.

The doctrine developed further in *Leftkowitz v. Turley*, 414 U.S. 70 (1973), when the Court held that testimony regarding one's job may be compelled where the government offers an immunity broad enough to supplant the rights the employee must relinquish, or in other words, use immunity as to later use in a criminal case. The Court stated that although an individual's rights must be protected, the threat of discharge may be employed since the government must have some means to protect its interests where an employee refuses to testify despite an offer of immunity. **Public employees are not given an unqualified right to refuse to account for official actions and still maintain their**

By the way, later cases have made it clear that the fundamental doctrines of *Garrity* apply as well to **off-duty conduct** that may not relate directly to official performance of duties, but does relate to fitness to serve in public office, such as allegations of theft or lack of moral character. In *Broderick v. Police Comm'n of Boston, 368 Mass. 33, 330 N.E. 2d 199 (1975), cert. den.* 423 U.S. 1048 (1976), the court affirmed the denial of a declaratory judgment sought by police officers, that they not be compelled to answer questions about their conduct at an off- duty Law Day celebration. At that out-of-town convention, it was alleged the officers acted in a rowdy and riotous way, used offensive language, and broke into a hotel liquor cabinet. They refused to answer the internal investigation questionnaire. **The court held that the requirement that they answer questions regarding off-duty, non-criminal conduct did not violate the Fifth Amendment, the Fourth Amendment, or the right to privacy protected by federal or state constitution or law.** The court explained its interpretation of the *Gardner* limitations by noting that the conduct related to fitness to perform the public's business. Therefore, we conclude that whenever off-duty conduct is work-related, the *Garrity* principles do not bar the inquiry any more than when the conduct is on duty.

Why does all of this matter? Well, because public employers, especially in the employment context, do not want to employ convicted criminals! And if a public employee’s statements were coerced by the employer—threatening discharge for failure to answer questions while at the same time *not* offering immunity—then that public employee’s potential conviction may be deemed invalid on the basis of a *technicality*, rather than the merits of the charge. And if the

employee's potential conviction is dismissed, it shall be much harder for the employer to *discipline* that employee on the basis of off-duty misconduct. To comply with *Garrity*, when the public employer is conducting an investigation into misconduct—on or off-duty—that could potentially lead to criminal prosecution, the employee should sign the following *Garrity* "Advisement of Rights":

ADVISEMENT OF RIGHTS: A charge of misconduct, while on duty or off duty, has been filed against you. During this investigation, you have a Fifth Amendment (constitutional) right or privilege not to incriminate yourself by answering one or more questions that may be asked. The answers you provide to the investigator's questions, and the fruits or results of those answers, may not be used against you in any criminal proceeding in which you are a defendant, under our state's laws. However, your refusal to answer, or to cooperate in this investigation, may result in discharge or discipline, because our policies require all personnel to cooperate in disciplinary investigations. Do you understand your rights, as they have been explained to you?

If the employee refuses to sign this Advisement of Rights/offer of immunity, the employee may be subject to discipline, without the employer violating the Fifth Amendment.

v. Knowing What You Did Wrong and Confronting Your Accusers: The Sixth Amendment and Workplace Investigations

The Sixth Amendment states that "in all criminal prosecutions," the accused has the right to be informed of the nature of the accusations against him, and to confront the witnesses against him.

The Washington Supreme Court has found that the Sixth Amendment and the Washington Constitution, Article I § 22 (Washington's equivalent of the Sixth Amendment), are not applicable in civil cases, i.e. are only applicable in criminal cases and are therefore not applicable to workplace investigations or other civil matters. *Chmela v. Deo't of Motor Vehicles,* 88 Wn.2d 385 (1977). Consequently, a public employee would have to rely on other constitutional amendments to raise a claim that she was not entitled to fair process.

Put another way, keeping the identity of a particular complaining party anonymous during a workplace investigation would *not* violate the Sixth Amendment. However, the employee could argue that she was deprived of "due process"—i.e. fairness, in the sense that the employee could not possibly respond to allegations when she did not know who made them—as a result of preserving the anonymity of a complaining party. Therefore, model policies we have crafted on workplace investigations state that **anonymous complaints will not be investigated,** unless anonymity is specifically required by law.

vi. The Fourteenth Amendment: Equal Protection Under the Laws

Under the Fourteenth Amendment, "similarly situated people should be treated alike," because all persons shall be afforded "the equal protection of the laws." *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). This principle of constitutional law has been enshrined in innumerable laws pertaining to discrimination in the workplace and protections for individuals with disabilities.

a. Title VII

Of course, harassment is a form of discrimination. Title VII is the preeminent federal law on general employment discrimination, including sexual harassment.[2] Under Title VII, it is an unfair employment practice of an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex,[3] or national origin." 42 U.S.C. § 2000e.

The United States Supreme Court, in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1983), held that "Title VII comes into play before the harassing conduct leads to a nervous breakdown," and that whether or not harassment occurs is judged by a "reasonable person" standard, depending on the circumstances. Title VII does not prohibit all verbal or physical harassment in the workplace. Instead, as in cases brought under the WLAD, harassment must be based on the person's status in a protected class (race, color, religion, sex3, or national origin). The courts will consider the circumstances, and look to "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

To establish a case of discrimination based on a hostile work environment under Title VII, certain unwelcome harassing conduct must be so severe or pervasive as to affect the terms, conditions or privileges of employment. *Burlington Industries, Inc. v. Ellterth*, 524 U.S. 742 (1998). Employers may be found vicariously liable (found negligent for the acts of their employees), through concepts of agency, subjecting them to liability for harassment conducted by subordinate employees. *See Burlington*.

But the Supreme Court in *Burlington* found that an employer can assert an affirmative defense to such claims. Such a defense has two requirements: (1) The employer must have exercised reasonable care, promptly, to prevent and correct any sexually harassing behavior they knew or reasonably should have

[2] Sexual harassment includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" which creates "an intimidating, hostile, or offensive working environment." 29 CFR § 1604.11(a).

[3] Same-sex harassment has also been deemed discrimination on the basis of sex. *Oncale v. Sundower*, 523 U.S. 75 (1998).

known about, and (2) the plaintiff employee must have unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. This affirmative defense does not apply when harassment culminates in a "tangible employment action", such as discharge, demotion, or undesirable reassignment. In those circumstances, the employer is *strictly liable*—the employer therefore cannot rely on the above "reasonable care" defense. Consequently, the standard of liability in a hostile work environment claim under Title VII depends on the harasser.

For example, where the harasser is a co-worker, the vicarious liability/negligence standard would apply. When the harasser is a supervisor, the standard may be strict liability, depending on the disciplinary authority of the supervisor. An employee is a "supervisor" for Title VII purposes if they are empowered by the employer to take tangible employment actions. *Vance v. Ball State University,* 133 S.Ct. 2434 (2013) (finding no harassment where African-American female alleged harassment by a co-worker having no disciplinary authority and the employer took affirmative steps to address the problem; the court applied a negligence, not strict liability, standard). To determine whether an employee is a supervisor, ask yourselves the following questions: Does the employee have the authority to hire, fire, demote, promote, transfer, or discipline other employees? As a side note, the federal courts have found that a demotion without change in pay or benefits is not a tangible employment action, nor is a reassignment to a more inconvenient job.

As to the second requirement of the affirmative defense—that the employee did not avail themselves of preventive or corrective opportunities—the federal courts have held that clear and effective policies must be in place to report harassment, otherwise there is nothing for the employee to "avail themselves" to. *Gentry v. Export Packaging,* 238 F.2d 842 (7th Cir. 2001). Furthermore, the courts have found that there must be alternative channels for reporting harassment, for those cases where the person to whom an employee would normally report harassment is the person who actually committed the harassment. But the onus is on the employee alleging harassment to speak up. Unexplained delays in reporting harassment are not favored. *Gawley v. Indiana University,* 276 F.3d 301 (7th Cir. 301). An unsubstantiated fear of retaliation, or the assumption that the employer will do nothing about the report, is not a good reason for failing to report harassment. *Leopold v. Baccarat,* 239 F.3d 243 (2d Cir. 2001).

Hostile work environment claims, by their very nature, involve repeated conduct, not isolated incidents. Therefore, the employer must take affirmative steps—by enacting specific policies against harassment in the workplace—to prevent harassment. Harassment is a cultural, not merely a personal, problem.

b. The Americans with Disabilities Act

As referenced above, federal laws—including but not limited to the Constitution—establish the "floor" of civil rights and states may therefore establish the "ceiling," here we review the Washington Law Against Discrimination ("WLAD") rules on cases of failure to accommodate

disabilities, because in many respects, the WLAD is more protection of persons with disabilities than the ADA:

1. Under WLAD, to establish a prima facie case of disability discrimination for failure to accommodate a disability, the plaintiff must show that (1) he has a disability; (2) he can perform the essential functions of the job with or without accommodation; and (3) he was not reasonably accommodated. *Easley v. Sea-Land Serv., Inc.,* 99 Wn.App. 459, 468 (2003).

2. A "disability" under the WLAD means "the presence of a sensory, mental, or physical impairment that: Is medically cognizable or diagnosable…Exists as a record or history…or Is perceived to exist whether or not it exists in fact." RCW 49.60.040 (7).

3. Additionally, "a disability exists whether it is temporary or permanent." *Id.*

- To discern whether the individual has a disability, the ultimate question is whether the individual is suffering from an ailment that substantially impairs his ability to perform the job. Having a cold is not a disability. Having the flu and being unable to work for a month is not a disability. But in the end, this inquiry occurs on a case-by-case basis, and ultimately hinges on whether the ailment of the individual could reasonably be perceived as preventing the individual from performing the essential functions of his job.

4. The WLAD requires that the employer reasonably accommodate a disabled employee unless that accommodation causes an undue hardship; and it is the employer's burden to prove such a hardship. *Pulcino v. Fed. Express Corp.,* 141 Wn.2d 629 (2000).

- The courts often weave the "undue hardship" analysis into the "reasonable accommodation" analysis; therefore, if the court finds that the accommodation requested is reasonable, then it is likely that providing the accommodation would not cause an undue hardship.

5. An employer "cannot discharge its affirmative obligation to reasonably accommodate a disability by merely providing temporary accommodations." *Erwin v. Roundup Corporation,* 110 Wn.App. 308, 316 (2002).

- In other words, the accommodation process is ongoing; the employer should engage with the individual at all stages and document every interaction with the individual with respect to his disability

6. The best way for the employer and disabled individual to determine a reasonable accommodation is through a flexible, interactive process. *MacSuga v. Spokane Cnty.*, 97 Wn.App. 435 (1999).

   - This is where the "Three P's" come into play: Process, Paper and Patience. When an individual requests accommodation, the employer should establish a clear line of communication with that individual at every phase of the individual's progress (every email, every doctor's note etc…) and most importantly, have patience because this process takes time.

7. The prohibition against disability discrimination does not apply if the disability prevents the employee from performing the "essential functions" of the job. *Dedman v. Wash. Personnel Appeals Bd.*, 98 Wn.App. 471, 483 (1999).

   - Pretend that an individual would have to wear a colostomy bag while firefighting. This would prevent the individual from climbing stairs, lugging hose, or performing strenuous activities that would result in the bag becoming dislodged. Essentially, this would prevent the individual from performing the "essential functions" of firefighting.

8. To reasonably accommodate an individual, an employer is not obligated to reassign that individual to a position that is already occupied, create a new position, or eliminate or reassign essential job functions. *Frisino v. Seattle School District No. 1*, 160 Wn.App. 765, 778 (2011).

   - Currently, there is a split in the federal courts over whether providing time off to a disabled individual is a reasonable accommodation. Our position is that the federal courts have innumerably found that providing an indefinite amount of leave to a particular employee is not a reasonable accommodation. We typically hate to use what are called "string cites" in our training materials, but see the following cases that have found that providing an indefinite amount of a leave to an injured employee is not a reasonable accommodation: *Hudson v. MCI Telecommunications Corp*., 87 F.3d 1167, 1169 (10th Cir.1996); See Also *Peyton v. Fred's Stores of Arkansas, Inc*., 561 F.3d 900 (8th Cir. 2009); *Stanley Kieffer v. CPR Restoration and Cleaning Services*, LLC, No. 16- 3423 (3rd Cir. 2018); *Dick v. Dickinson State University*, 826 F.3d 1054 (8th. Cir. 2016) (finding that to provide a "reasonable accommodation," an employer is not required to "give the disabled employee indefinite leave.") Based on the above, we opine in such cases that an employee must be able to provide the employer with a definitive date upon which the employee shall return to work or otherwise face termination of their employment for failure to perform the essential functions of the position. This would be addressed in a return to work policy.

9. Under Washington law, "[T]he employer shall not permit employees (which include volunteers under WAC 296-305) with known physical limitations reasonably identifiable to the employer, for example, heart disease or seizure disorder, to participate in physically demanding activities unless the employee has been released to participate in such activities by a physician or other licensed health care professional (LHCP) who is qualified by training or experience as determined by the fire department to evaluate firefighters." WAC 296-305-01509 (7). *See Also Doty-Fielding v. Town of South Prairie*, 178 P.3d 1054 (2008) (finding that a *volunteer* firefighter could sue an employer for negligence on the basis of not following WAC 296-305).

   - This author has often referred employers to the above law for the proposition that a particular volunteer/employee may have a "known physical limitation" that would prevent him from performing the essential functions of firefighting. In those circumstances, the employer must continue the "interactive process" required under the *MacSuga* case and obtain a release from an LHCP prior to permitting the individual to fight fires.

   - Of course, the applicability of the safety regulations comes into effect in the context of occupational or non-occupational injuries, in which the employee injures herself and therefore is not able to perform the essential functions of the position. The employee is typically placed on a light-duty assignment in which they perform administrative, non-physical functions until cleared to resume their normal job duties by a physician.

10. Take further note that an applicant or individual may sue the employer for being "perceived" by the employer as having a disability, whether or not that disability "exists in fact." *See* RCW 49.60.040 (7)(a). For example, the employer in a case called *Clipse* told an applicant that he should "clean up" after having discovered that the individual took Methadone, as a *prescribed medication*, for chronic shoulder pain. The Employer lost. The Court in *Clipse* found not only that the applicant had a disability. The court also found that the applicant was being "perceived as" being disabled by virtue of the "clean up" comment and therefore the applicant had a cognizable WLAD claim. *See Clipse*, No. 45407 - 6-II (2015).

The Washington courts have raised the "ceiling" in the area of obesity. In 2019, the Washington Supreme Court found, in *Taylor v. Burlington Northern Railroad Holdings, Inc*. No. 96335-5, that obesity is a cognizable "disability" under the WLAD.

Special ADA Considerations

1. Under 29 CFR § 1630.13, "it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability." However, under 29 CFR § 1630.14, the employer may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

   - That is why employers across the country include the following question, or one substantially like it, on all of their job applications: "Are you able to perform the essential functions of the position for which you are applying, with or without reasonable accommodation?"

2. The ADA comes into play in the area of fit-for-duty assessments when an employee seeks to return to work following a disability. With respect to current employees, under the ADA, "the employer may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity." 29 CFR § 1630.14 (c). In other words, the employer may make reasonable inquiry into the present status of an employee with a disability who is currently in an indefinite leave status, or even when the employee has a definitive return-to-work date. However, this inquiry must be reasonable and must actually relate to the employee's ability to perform the essential functions of *her* position, not *any* position. Furthermore, again, the inquiry must be consistent with business necessity, meaning generally that the inquiry must be made to ensure the safety of the individual and other employees. *See* 42 U.S.C. § 12113 (a)-(b).

c. Hostile Work Environment Claims based in the WLAD

The WLAD is essentially Washington's "Title VII," with additional protected classes. For purposes of this presentation, we are going to focus on one sort of WLAD claim, as the WLAD parallels Title VII in this area: hostile work environment claims.

A "hostile work environment" is essentially one where the employee is pervasively harassed based on their status in a protected class. To establish a case of discrimination resulting from a hostile work environment under the WLAD, the employee must show that (1) the harassment was **unwelcome**, (2) the harassment was **because of** his or her status in a **protected class**, (3) the harassment affected the **terms and conditions** of his or her employment, and (4) the harassment was **imputable** to the employer. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 45 (2002).

As to the first element of these kinds of claims, harassment is essentially "unwelcome" when it is not consented to, expressly or impliedly. If the complaining employee does not solicit or incite the conduct,

and finds it undesirable or offensive, the conduct is unwelcome. *Kahn v. Salerno*, 90 Wn.App. 110 (1998). Of course, conduct is not unwelcome if the employee participates in the conduct. *Reed v. Shepard*, 939 F.2d 484 (7th Cir.1991).

As to the second element of these claims, the following constitute protected classes under the WLAD: those persons who are age 40 and older[4]; sex; marital status; sexual orientation; race; creed; color; national origin; honorably discharged veteran or military status; a person with any sensory, mental, or physical disability; or a disabled person using a trained dog guide or service animal. RCW 49.60.180 (3). But a person alleging a hostile work environment must demonstrate that the harassment was *because* of their status in a protected class. To do so, the complainant must show that their status was a motivating factor for the conduct. *Doe v. State Dep't of Trasnp.*85 Wn.App. 143 (1997). In *Doe*, a man complained that he was subjected to a hostile work environment because a male co-worker constantly engaged in vulgar behavior with sexual overtones directed at him. But the court found that the alleged harassment only occurred because the complainant seemed particularly offended by it, not because he was male. Therefore, he could not prove he was harassed because of his sex, and his claim failed. Beware of gender stereotypes. In *Kahn,* a woman complained of a hostile work environment because a male co-worker used the words "bitch", "fucking bitch" and "god damn bitch" in her presence. The male claimed that he used the word "bitch" around all employees, male or female. But the court looked to historical interpretations of the word "bitch", and found it to be predominantly a pejorative term for female. The court did not accept the man's interpretation of the word "bitch" to mean "anything especially unpleasant or difficult," or "to behave spitefully or angrily toward." The court found, at least, that the jury should be able to consider whether the woman was called a "bitch" because of her sex.

As to the third element, harassment affects the terms and conditions of employment when it is "sufficiently pervasive" so as to alter the conditions of employment and create an abusive working environment. *Kahn v. Salerno*, 90 Wn.App. 110 (1998). Working conditions are intolerable when there is a continuous pattern of discriminatory treatment. *Allstot v. Edwards*, 116 Wn.App. 424, 433 (2004) But casual, isolated, or trivial manifestations of discrimination do not create a hostile work environment. *Alonso v. Qwest Comm.*, 178 Wn.App. 734 (2013). Again, the conduct must be sufficiently pervasive. It must be both objectively abusive and subjectively perceived as abusive by the victim. *Clarke v. Office of the Attorney Gen.*, 133 Wn.App. 767 (2006). The conduct is not pervasive if it is merely offensive. *Adams v. Able Bldg. Supply, Inc.*, 114 Wn.App. 291 (2002). However, it is incumbent on the employer to prevent an environment in which employees can freely engage in overly offensive conduct, without fear of any consequences. Otherwise, what is "merely offensive" may easily become "harassment."

As to the fourth element of this claim, to impute liability to an employer for a discriminatory work environment created by an employee's coworker, the employee must show (1) that complaints were made to the employer through higher managerial or supervisory personnel, **or** that harassment at the

[4] See RCW 49.44.090

work place was so pervasive that it creates an inference of the employer's knowledge or constructive knowledge of such harassment, **and** (2) that the employer's remedial action was not of such nature as to have been reasonably calculated to end the harassment. *Glasgow v. Georgia-Pacific Corp.,* 103 Wn.2d 401, 405 (1985). In other words, it must be shown that the employer knew or had reason to know of the harassment. Accordingly, the employer should have clear policies in place that set forth that one must report harassment, and where to make such a report. Furthermore, the employer should take immediate action to remedy the harassment, even if the employer doubts whether the harassment is actually taking place. Always investigate further.

Finally, an employer may not terminate a worker for complaining about behaviors that are forbidden by the WLAD. RCW 49.60.210 (1). No employee or employer may encourage or provide aid for the commission of harassment and/or discrimination. RCW 49.60.220.

What if the conduct in question is not legally cognizable "harassment" in the sense that a person was not being harassed based on their status in a protected class? The answer is that your **Code of Conduct** should cover such situations. Just because certain conduct is not unlawful does not mean it should be permitted.

vii. States Establish the "Ceiling" of Civil Rights: The Ninth and Tenth Amendments

The Ninth Amendment indicates that the rights conferred on people within the Constitution will not impact other rights "retained by the people." The Tenth Amendment states that the powers not conferred on the federal government by the Constitution are reserved to the States. In other words, the Constitution left it to the individual states to establish other civil rights of its citizens, and to define the scope (floor to ceiling) of pre-existing civil rights. To this end, Washington law has established a "ceiling" in certain areas that bear mention here:

a. The Washington Fair Chance Act

HB 1298, informally known as the Washington Fair Chance Act, effective June 7, 2018, amends RCW 49 by adding a new chapter at RCW 49.94. What this bill purports to do is prohibit questions in employment applications, hiring announcements, and the like, which ask about criminal history. Under this new law, questions about arrests and convictions are now totally off limits. The apparent legislative intent was to give past offenders who have rehabilitated themselves a "fair chance" at employment. However, (and this is a big however) section 2 of the bill in subsection (4) exempts from the law persons who will or may have unsupervised access to minors and vulnerable adults. It also exempts employers seeking nonemployee volunteers. The upshot of those two exemptions, in our opinion, is that this law does not prevent public

employers from doing background checks or asking application questions pertaining to relevant and recent convictions, with respect to firefighters, EMTs, paramedics and their parallel volunteer responders such as firefighters and EMTs. It does, however, seem to require a different approach and a whole different application for any employee who does not meet those exemption categories, such as administrative personnel or a mechanic or maintenance employee. We might also note the "Pre-employment Inquiry Guide" contained in the administrative regulations promulgated by the Human Relations Commission to implement RCW 49.60 has, for years, prohibited questions about arrests, so we have long recommended that fire department employers not ask about mere arrests without convictions. See WAC 162-12-140. That WAC also limits conviction questions to more recent convictions and seems to require the questions to be business-related. Many years ago court cases noted that many minority persons have a higher incidence of arrests without convictions than non-minorities and so any law allowing such questions about arrests might have a disparate impact on minorities and therefore violate the Equal Protection Clause of the federal and/or state Constitution. We are advising clients to change their applications for the non-exempt persons to remove any questions about arrests or convictions at all, and that no criminal background checks are done on the nonexempt personnel.

Take note, however, that HB 1298 also states that "[O]nce the employer has initially determined that the applicant is otherwise qualified, the employer may inquire into or obtain information about [the applicant's] criminal record."

b. The Pre-Employment Inquiries

Bearing the Fair Chance Act in mind, the pre-employment inquiry guide states that employers may only inquire into convictions pre-employment when those inquiries "reasonably relate to job duties." Ultimately, "inquiries concerning convictions (or imprisonment) will be considered to be justified by business necessity if the crimes inquired about relate reasonably to the job duties, and if such convictions (or release from prison) occurred within the last ten years. *See* WAC § 162-12-140." So, the question becomes: What sorts of convictions "reasonably relate" to job duties? We would argue that the conviction of certain crimes, such as identity theft or forgery, implicates the employee's honesty, and employers, particularly in the public sector, must worry about the truthfulness of their employees. Consequently, a question pertaining to convictions that implicate an employee's honesty would be fair under the pre-employment inquiry guide—after the applicant is deemed "otherwise qualified" for the position

c. The Equal Pay Act

The Federal Court of Appeals for the Ninth Circuit (Washington is in the Ninth Circuit) found that "past salary" cannot be relied on when the employer is setting an initial wage, even "in

conjunction with less invidious factors," such as performance-related issues. *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018). The *Rizo* court found that prior salary "is not a legitimate measure of work experience, ability, performance, or any other job-related quality," insofar as that relates to setting an initial wage. The court presumably ruled this way because historic pay disparities between men and women should not define the parameters of future employment, but instead, the court found, the setting of an initial wage should solely relate to past performance—not past salary—and present ability.

Although the *Rizo* court was interpreting a federal law, Washington courts tend to issue rulings in favor of disparately impacted employees, such as women, frankly, and therefore the *Rizo* standard—past salary cannot be used to set an initial wage—would be fully enforceable in any Washington court.

d. Affirmative Action

Washington law, pursuant to Initiative 200, passed in 1998, prohibits "preferential treatment" of individuals or groups on the basis of race, sex, color, ethnicity, or national origin. *See* RCW 49.60.400. Initiative 1000[5] ("I-1000"), recently passed into law by the Washington Legislature, amends RCW 49.60.400. I-1000 creates what is known as the Washington State Diversity, Equity, and Inclusion Act.

I-1000 adds the following protected Classes who may *not* be granted "preferential treatment": age, sexual orientation, disability, or honorably discharged veteran or military status. More importantly, I-1000 enables—but does not require—the "state"[6] or any "state agency" to enact affirmative action laws and/or policies. In other words, I-1000, by itself, does not *require* employers, at this time, to enact affirmative-action policies.

Importantly, under I-1000, no "state" or "state agency" may enact an affirmative action law or policy that uses quotas or results in "preferential treatment" of any individuals or groups in the protected Classes above. Ultimately, membership in any of the Class above can only be used as *a* "factor" in an employment[7] decision; under I-1000, said membership in a Class may *not* be the "sole qualifying factor" used when making an employment decision.

[5] http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Initiatives/Initiatives/INITIATIVE%201000.pdf

[6] The term "state" under RCW 49.60.400 includes Washington State itself, but also includes "special districts," which logically include but are not limited to port districts, water-sewer districts or fire protection districts; the term "state" also includes counties and cities. *See* RCW 49.60.400 (8).

[7] We speak here only of affirmative action in the *public employment* context, while admitting that affirmative action policies and I-1000 have impacts extending beyond the employment arena.

Based on the above, your public agency need not enact affirmative-action policies, and your public agency need not amend any collective-bargaining agreement currently in effect. But stay tuned.

Furthermore, citizen groups and/or political action committees may seek to place a referendum on the November ballot, in an effort to repeal I-1000.

On another note: why not enact an affirmative-action policy? This is a policy question for your agency, and we voice no opinion one way or the other. Washington State has now legally sanctioned affirmative action, effective July 28, 2019[8]—within the bounds set forth under I-1000—unless and until I-1000 is repealed by the people.

III. THE BIG PICTURE

If you should take anything from this presentation, it is that civil rights are not created in a vacuum. Civil rights are defined not only by constitutional mandates, but by conduct, custom and past practice. Inherent in all of the civil rights is a central concept: All administrative employees should be treated with dignity and respect, being responsible of course, when those employees fail to treat others with dignity and respect.

IV. TOP LEGAL ISSUES IN THE FIRE SERVICE

i. HIPAA and Medical Records (March FL 2019)

One important item of clarification: Washington law, specifically RCW 70.02, is more protective of patient privacy rights than HIPAA, meaning that if there is a permissive disclosure that exists under HIPAA, it may not exist under RCW 70.02. Consequently, to determine whether a medical record may be disclosed without redaction under certain circumstances, consult with your agency's attorney.

(a) Important Washington Case: In *Volkert v. Fairbank Construction Co, Inc.* No. 77308-9-1 (2019), the Washington State Court of Appeals, Division One, noted that RCW 70.02.060(1) provides the procedure to follow when attorneys request health care information. Basically, this statute requires (1) a 14-day notice to the health care provider and the patient of the request for the records, followed by (2) a subpoena. Unless a protective order is obtained, the health care provider must produce the records. If a requestor complies with these requirements and the records are not produced, the provider can even be liable for damages. *See* RCW 70.02.170. But if the attorney fails to follow this procedure and the agency discloses the records to the attorney without redaction, then the agency has violated RCW 70.02, the Washington State Uniform

[8] https://app.leg.wa.gov/billsummary?BillNumber=1000&Initiative=true

Health Care Information Act. This case was not entirely groundbreaking but it does stand for the proposition that if a health care provider retains health care records that *it did not create*, it must still comply with the UHCIA when a request for those records is made.

(b) HIPAA Rights Survive Death

Under the HIPAA "Privacy Rule," a covered entity generally may not disclose "protected health information" to third parties without the patient's consent, unless a narrow exception applies. *See* 45 C.F.R. § 160.502. "Protected health information" under HIPAA *excludes* "individually identifiable health information…Regarding a person who has been deceased for *more than* 50 years." 45 C.F.R. § 160.103 (emphasis added). In other words, the protections of the HIPAA Privacy Rule apply to those who have not been deceased for *over* 50 years. Some agencies have voiced confusion about this, but to be clear: A deceased patient still has HIPAA (and RCW 70.02) rights!

(c) Right of Access

Be aware that the Office of Civil Rights recently entered into a major settlement with a health care provider pertaining to a violation of the "right of access" requirements of HIPAA. Under HIPAA, patients are afforded a nearly unfettered right to obtain copies of their medical records on request. HIPAA-covered entities are required to honor those requests. The covered entity must provide patients with access to PHI or copies of health data contained in a 'designated record set' within 30 days of the request being received. 45 C.F.R. § 164.524 (b)(2). A covered entity is permitted to charge a reasonable, cost-based fee for providing a copy of the individual's PHI, which can include the cost of certain labor, supplies and postage. However, this reasonable cost-based fee must be supported by documentation demonstrating the actual costs incurred in searching out medical records. If the agency fails to provide such information, then the agency must charge a flat fee of $6.50 for providing *electronic copies* of medical records, as per 45 C.F.R. § 164.524 (c)(4).

Of course, this makes things easier. Imposing a flat fee of $6.50 will most likely eliminate quibbling with patients or their attorneys over the amount of a cost-based fee imposed by your agency. Think about it this way: If you impose a cost-based fee of $25.00 and spend $50.00 of your time (or $50.00 of the agency's attorney's time) arguing with the patient over the amount of the fee, then your agency has technically *lost* money as compared to imposing the $6.50 flat fee and providing electronic copies of the records.

(d) HIPAA Breaches

HIPAA is a "self-reporting" law, and if the agency fails to report a breach of protected health information to the Office of Civil Rights and the affected individual, the agency can face substantial fines. Here are the general rules for reporting breaches of protected health information, which are set forth in detail at 45 C.F.R. § 164.400-414:

1. Don't panic;
2. Determine whether there has been a "breach" of unsecured protected health information";

    - Essentially, a breach is disclosure of PHI to a third party that is not authorized under the HIPAA Privacy Rule, which is an entirely different subject for presentation;
    - Essentially, "unsecured" PHI is information that is *not* rendered unreadable or unusable to a third party that gains access to the information

3. If a "breach" of "unsecured" PHI has occurred, then follow the procedures set forth in the attached "Joe Chart" on HIPAA breaches. Most importantly, breach notices must (1) be written in "plain language," (2) be sent to the affected individual within 60 days of the discovery of the breach, and (3) be provided to the Secretary of Health and Human Services 60 days after the beginning of the calendar year after the breach occurred (for a breach in September 2019, the Secretary must be notified no later than approximately March 1, 2020)

ii. The Paid Family and Medical Leave Act

On January 1, 2020, the benefits afforded by the Washington State Paid Family and Medical Leave Act—for which we are sue your agency has been paying premiums throughout 2019—go into effect. Under RCW 50A.04, Washington employees who have worked for 820 hours in the last four quarters (16 hours a week per year) are entitled to the following benefits, *in addition* to all other benefits afforded under Washington law and any other benefit conferred by the employer:

1. A maximum of 12 weeks of paid family leave;
2. 12 weeks of medical leave[9] but up to 14 weeks if the employee experiences a serious health condition with a pregnancy that results in incapacity;

[9] "Medical leave" is "leave taken by an employee from work made necessary by the employee's *own* serious health condition." RCW 50A.05.010 (14) (emphasis added).

3. Up to 16 weeks of combined family *and* medical leave, which may be extended to 18 weeks if the employee experiences a serious health condition with a pregnancy that results in incapacity;
4. A maximum weekly benefit of $1,000.00 if the employee earns approximately $1,500 per week, and the minimum benefit being approximately $534.60—if the employee earns approximately $594.00 per week—subject to adjustment in future years by the Employment Security Department (1-4 set forth under RCW 50A.15.020)
5. Returning to work to a position with the same pay and benefits, or the same position (RCW 50A.35.010);
6. To take such leave *concurrently* with FMLA leave (former RCW 50A.04.250), meaning that an employee may not "stack" WPFMLA leave on top of FMLA leave for a total of up to 30 weeks of paid family and medical leave;
7. To receive these benefits within 14 days from the first application for benefits, whether those benefits are being provided by the employer under a voluntary plan, or the Department of Employment Security

Another general rule: If your agency adopts a *voluntary plan* pursuant to RCW 50A.30.010, that plan must meet or exceed the requirements of the state-administered WPFMLA, meaning that you must at least provide the benefits above.

If your agency has *not* adopted a voluntary plan, you do *not* need to worry about calculating the weekly benefit amount; that will be Employment Security's job. However, whether you enact a voluntary plan or otherwise, you must adhere to the employment-protection benefits set forth above. Of course, if the employee is taking his or her WPFMLA leave concurrently with FMLA leave—as is required by law—then your employment-protection responsibilities have not changed in any meaningful way.

iii. Public Records Act Issues

1. We have seen an uptick in public-records requestors that tend to treat administrative staff with blatant disrespect. In the event that your agency responds fully to a public-records request but the requestor continues to badger your agency for additional information, understand that the Public Records Act does not require your agency to respond to requests for information; put another way, provided that you have responded fully to a public-records request, do not further engage with gadflies who have no interest other than harassing administrative staff;

2. In a decision handed down on September 17, 2019, Division II of the Court of Appeals, in *Health Pros Northwest, Inc. v. State of Washington and Department of Corrections*, No. 52135-1-II held that the Public Records Act requirement in the former version of RCW

42.56.520(3) with respect to providing an estimate of time to respond, does not refer to the time to *fully* respond, but at least with a large request for documents produced in installments, may only refer to the estimated time to produce the *first installment.* The salient facts were these: After the Department of Corrections received a lengthy records request for voluminous documents, it acknowledged receipt of the request in a timely manner but did not provide an estimate of the time needed to respond to the request. It merely stated it "will respond further as to the status of your request within 45 business days…." The DOC produced the first installment of records within that 45 day time frame. HPNW filed a legal action, contending that DOC was violating the PRA by not fully responding within a reasonable time and asked the court to find that the DOC time estimate was unreasonable.

The superior court ruled that DOC did violate the statute by not responding to the PRA request within five business days by producing records, denying records, or providing an estimate of time when it would respond. Actually, all the DOC did was state that it would deal with the request within 45 further business days. The court in effect held that an estimate is required in the acknowledgment letter produced within the first 5-day period. Interestingly, however, the court did rule in favor of the DOC with respect to the plaintiff's contention that the PRA requires the estimate to be the time for full and complete compliance, i.e. the time when all of the request would be completely fulfilled. Instead, the court held (especially with such large, voluminous records requests) that the responding agency must complete the first installment of records production within the estimated time. Thus, there are two lessons to be learned from this case: (1) The agency must provide an estimate in the initial "5-day letter" acknowledging receipt of the PRA request; and (2), if the request is a large one, it will probably suffice if the estimate of time relates only to the first installment, i.e. batch of records produced. But do not ever fail to give an estimate or you risk a penalty finding.

iv. Contracts for Fire Protection Services: RCW 52.30.020

Under RCW 52.30.020, a fire district—and a regional fire authority that adopts the powers of fire districts—may compel a municipal corporation, not including the federal government, school districts and Indian Tribes, to enter into a contract for fire protection services.

Recently, various King County Fire and EMS agencies, with assistance from our firm and other attorneys representing such agencies, finalized the *first* interlocal agreement between all fire and EMS agencies within a county with the county itself.

But here is the rub: RCW 52.30.020 does not establish a valuation method for determining a contract price. Instead, this is left to the parties to decide. We will not delve herein into the various methods that may be used to value a contract for fire protection services, but we will state that perhaps the time has come for fire and EMS agencies to press the Washington State

Legislature for definitive guidance on valuing such contracts. Because the Legislature specifically excluded publicly owned tax-exempt property from being assessed, as of 2014, pursuant to RCW 84.40.175, then using assessed valuation to establish a contract price may not be a viable option. We voice no opinion about that here.

v. Ambulance Up-Coding: ALS v. BLS

Fire departments may be investigated for Medicaid fraud under RCW 74.66.005, Washington's Medicaid Fraud False Claims Act ("Act"), and may face steep financial penalties under this law. However, ambulance billing is predominantly the responsibility of a third-party contractor, not the fire department itself. Consequently, be sure that contracts with third-party ambulance-billing agencies contain hold-harmless clauses that will protect your agency in the event that the billing company intentionally—or un-intentionally—bills a patient service as advanced life support when it should have been billed as basic life support, in accordance with the regulations set forth at WAC 182-546. For further detail on ambulance up-coding and the issues surrounding that, see the following *Firehouse Lawyer* article: https://www.firehouselawyer.com/Newsletters/June2016FINAL.pdf

Speaking of the *Firehouse Lawyer*, this is our firm's *free* monthly newsletter that addresses a plethora of issues that impact your fire department and other municipal corporations in general. To subscribe to this newsletter, go to firehouselawyer.com, and scroll to the bottom left of the home page and click "Subscribe."