



PELRAS UPDATE

Public Employer Labor Relations
Advisory Service



414 North Second Street ◇ Harrisburg, PA 17101 ◇ (800) 922-8063 ◇ www.pml.org

INSIDE THIS ISSUE:

NLRB Overturns Independent Contractor Test 2

Register Now!

2019 PELRAS
Annual Conference

March 20-22
Penn Stater Hotel
and Conference
Center

Register online
[here!](#)

Senate Committee Report Sounds the Alarm for Volunteer Firefighter Crisis

by Jessica B. Michael, Esq.

Volunteers have been the backbone of Pennsylvania’s fire departments ever since Benjamin Franklin founded the very first volunteer company in 1736 in Philadelphia. Today, 90.3 percent of Commonwealth fire departments are volunteer, according to the U.S. Fire Administration. But this historical structure is crumbling as fire companies and communities struggle to recruit and retain a sufficient number of volunteers. Where once there were 300,000 volunteer firefighters in the 1970s, there now are about 38,000. The increased burden on fewer volunteers to provide services places a significant burden on municipalities to provide emergency services.

The Pennsylvania General Assembly formed a commission to identify critical problems and issue recommendations, and released its findings in November in its Senate Resolution 6 (“SR6”) report. Unfortunately, none of the recommendations fully address the most important challenge facing

municipalities—how to provide monetary recruitment incentives while avoiding an employment relationship. As the *Emmaus* case taught us, municipalities must carefully measure how much control they exert over their volunteer departments or else risk a ruling that these volunteers are your employees.

The SR6 report, which can be found in its entirety at <http://pehsc.org/wp-content/uploads/2014/05/SR-6-REPORT-FINAL.pdf>, contains 27 recommendations. Some seek to build on existing legislation, such as expanding existing tax credits and creating incentives for employers to allow volunteers to attend training during work hours. However, the majority of proposals must be implemented at the state level. Some of the more notable proposals that could aid in recruitment or ease the burden of municipalities include:

- Expand, modernize, and incentivize recruitment and retention efforts. The report proposes creating school and

The PELRAS Update is a bimonthly publication of the Public Employer Labor Relations Advisory Service, a program of the Pennsylvania Municipal League. It is published in February, April, June, August, October, and December. PELRAS membership information requests and other inquiries should be directed to 800-922-8063.

college programs to spark interest and to offer credit for community service, as well as enlisting local colleges to create a competitive program to develop marketing tools.

- Use financial and non-financial incentives to recruit and retain first responders. Proposals include creating a statewide training program, expanding tax credits, and offering free tuition for active first responders.
- Fund basic fire and EMS training at Commonwealth level. This would also include developing an online training course.
- Reassess the fireworks law adopted in 2017 that allows Pennsylvania residents to purchase consumer grade fireworks. Or, use the tax revenue from the sales to reinstate the reimbursement for public safety training courses at community colleges that kept these courses low cost or free.
- Protect and restore funding for Volunteer Loan Assistance Program, and open eligibility to all fire service providers.

One proposal included setting the professional certification standard as the minimum training standard for all firefighters. The standard would emulate the National Fire Protection Association's Firefighter Certification I requirements, which are

currently voluntary unless incorporated into a collective bargaining agreement at a paid department. Although this standardization seeks to avoid injuries and potentially deaths of civilians due to inadequate training, the high cost and potentially prohibitive requirements could outweigh the actual risk of danger.

According to the Insurance Information Institute, structure fires have been trending downward the past 40 years because of sprinkler systems and fire detectors. The NFPA's data show that 2016 had the lowest number of fires since 1977. And according to FEMA's National Fire Incident Reporting System, in 2016, fire calls amounted to only 8.9% of total incidents in Pennsylvania. EMS calls topped the list at 53.9%, followed by "good intent" calls, 13.1%, and false alarms, 10.4%.

Advocates for paid firefighters, which includes the IAFF, are using this volunteer recruitment challenge as an opportunity to expand paid fire employment, and with it, unionization. But there is a high cost to pay for professional firefighters as advocates push expensive standards that are unrealistic for today's cash-strapped municipalities. In the meantime, for municipalities wanting to avoid a paid fire department, they must be very careful in providing any benefits directly to volunteers or else risk a Pennsylvania Labor Relations Board ruling that these volunteers are your employees.

NLRB Overturns Independent Contractor Test

by Bradley Betack, Esq.

In a recent decision, the National Labor Relations Board ("NLRB") made it easier for employers to consider certain workers to be independent contractors, and thereby preventing those workers from unionizing or accessing other protections provided by the National Labor Relations Act ("NLRA").

The January 25, 2019 decision, *Supershuttle DFW, Inc.*, overturned an Obama-era precedent, which sought to put the primary emphasis on whether workers

were "economically dependent" on the organization. The Obama-era precedent greatly narrowed the number of workers who could be classified as independent contractors, directly resulting in the dramatic increase of the number of individuals eligible to unionize throughout the country.

Supershuttle DFW examined drivers who provided ride-sharing services to and from the Dallas/Fort Worth International Airport through Supershuttle. A bargaining unit sought to represent the drivers.

Supershuttle objected, and argued that the drivers were not employees, but rather independent contractors.

The NLRB agreed and in a 3-1 decision, outlined 10 common law factors that determine whether a worker is an independent contractor or employee:

1. The extent of control which, by the agreement, the alleged employer may exercise over the details of the work;
2. Whether the individual is engaged in a distinct occupation or business;
3. The kind of occupations, referencing whether, in the locality, the work is usually done under the direction of an employer or by a specialist without supervision;
4. The skill required in the occupation;
5. Whether the alleged employer or the worker supplies the instrumentalities, tools, and the place of work;
6. The length of time for which the individual is engaged;
7. The method of payment;
8. Whether the work is part of the regular business of the alleged employer;
9. Whether the parties believe they are creating an employment relationship;
10. Whether the individual is or is not in business.

In the majority opinion, the NLRB placed particular emphasis on a worker's "entrepreneurial opportunity" for financial gain to properly classify a worker as an independent contractor or employee, reasoning that "entrepreneurial opportunity, like employer control, is a key principle in evaluating the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." The opinion rejected the prior Obama-era ruling that had shifted the independent contractor test away from the traditional common law factors to one of "economic dependence."

The *Supershuttle DFW* is a victory for employers who seek to use contract labor and will strengthen an employer's ability to fight off unionization from workers who fall in the gray area of independent contractor/employee status.
