

## MEMORANDUM OF LAW

DATE: December 14, 1995

TO: Councilmember Barbara Warden

FROM: City Attorney

SUBJECT: Benefit Coverage for Fire Personnel While Performing Duties  
as Federal Emergency Management Association Volunteers

### QUESTIONS PRESENTED

You have asked for a legal opinion on two issues pertaining to fire personnel when they are performing as Urban Search and Rescue Task Force team members ("US&R") under the auspices of the Federal Emergency Management Agency ("FEMA"). Those questions are:

1. If a US&R member is injured while activated by the federal government through FEMA, from which agency will the employee receive worker's compensation benefits?
2. If a US&R member is injured seriously enough to force him or her into retirement, is he or she entitled to a disability retirement, including all of the disability retirement benefits offered by the City, and are there any additional federal benefits to which these individuals would be entitled?

### SHORT ANSWERS

1. Workers' compensation benefits arise through an employer/employee relationship. FEMA is the employer for US&R members while they are activated and, therefore, the agency responsible for workers' compensation benefits.
2. US&R members are not eligible to receive a City Employees' Retirement System disability retirement if they are injured while activated by FEMA, and there are currently no additional disability benefits offered by the federal government.

### BACKGROUND

In 1974, Congress adopted the "Robert T. Stafford Disaster Relief and Emergency Act" (the Act). 42 U.S.C. Sections 5121 through 5201. FEMA is the governing agency charged with carrying out the mandates of the Act. It was the intent of Congress, through adoption of the Act, to provide for an orderly and continuing means of assistance by the federal government to state and local governments in carrying out their responsibilities to alleviate the suffering and damage from disasters. 42 U.S.C. Section 5121(b).

An integral part of the overall disaster relief process established

under the Act through FEMA is the National Urban Search and Rescue Response System. In 1991 San Diego was selected by FEMA to be a sponsoring agency for US&R. Subsequently, by Resolution No. R-279396 adopted in 1992, the City entered into an agreement with FEMA and the California Office of Emergency Services ("OES") to act as the sponsoring agency for a county-wide task force. The task force includes search, rescue, medical and technical functions and is coordinated locally by the San Diego Fire Department.

Earlier this year, pursuant to the terms of the agreement with FEMA and OES, The City of San Diego sent fire personnel to the site of the federal building bombing in Oklahoma City to assist in the search and rescue effort. Questions concerning which entity is responsible for workers' compensation and other benefits were prompted by the City's involvement in that effort.

#### ANALYSIS

##### 1. Workers' Compensation

The statutory authority for workers' compensation in California is found in the California Labor Code sections 3600 through 5279. The statutory scheme ensures that:

Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment . . . .

Cal. Labor Code Section 3600(a).

Historically, employers were not responsible for all work-related injuries. An employee, injured on the job, who sued his or her employer could be denied compensation if it were found that the employee was guilty of contributory negligence, had assumed the risks inherent in the job or where the injury was due to the contributory negligence of another employee.

The statutes, however, provide that employees are covered for all injuries incurred on the job, even if one or more of the above-cited conditions are present. Except in rare circumstances, the statutes also provide that workers' compensation is the exclusive remedy for injuries incurred on the job. Cal. Labor Code Section 3601(a). Where a third party is responsible for the injury, the employee and the employer, if employer has paid out monies, may recover from the third party.

The employer/employee relationship is the basis for workers' compensation liability. Cal. Labor Code section 3300 defines "Employer" as:

- (a) The State and every State agency.

(b) Each county, city, district, and all public and quasi public corporations and public agencies therein.

(c) Every person including any public service corporation, which has any natural person in service.

(d) The legal representative of any deceased employer.

"Employee" is defined in pertinent part as "every person in the service of an employer under any appointment or contract of hire or apprenticeship." Cal. Labor Code Section 3351. Additionally, Cal. Labor Code section 3357 provides that "any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."

Courts have indicated that "for liability to arise under workmen's compensation, there must be an employment relationship, which is necessarily a two-party relationship." *Farmers Ins. Exchange v Geyer*, 247 Cal. 2d 625 (1967). The relationship may be defined contractually, either in a written contract or by an implied contract. "The traditional features of an employment contract are (1) consent of the parties, (2) consideration for the services rendered, and (3) control by the employer over the employee." *Barragan v. Workers' Comp. Appeals Bd.*, 195 Cal. App. 3d 637, 643 (1987). In California, public employment is held by statute. However, the terms and conditions of that employment are memorialized in a memorandum of understanding which is, in essence, an employment contract.

The Barragan analysis cites three (3) basic elements which make up an employment contract. The first element, the consent of the parties, is evidenced here by a written agreement. The City has entered into a memorandum of agreement ("MOA") with the federal government which outlines the parameters for the use of City personnel in emergency situations. Section IX(B) of the MOA provides that FEMA "shall be responsible for funding a Workers' Compensation Insurance Policy to cover injury to Task Force Team members." The plain language of the MOA which describes the intent of the parties imputes workers' compensation liability to the federal government. Even if the plain language of the MOA did not specifically designate FEMA as the entity responsible for workers' compensation, other factors reinforce FEMA's role as the employer.

As the Barragan case notes, the second traditional employment contract component is compensation. Compensation is the consideration given to the employee in exchange for his or her services. Salary is the most common form of compensation. Here again, the terms of the MOA provide that FEMA shall be responsible for compensation. Monies expended by the City for personnel expenses are reimbursed by the federal government. This includes expenses not always considered as part of a compensation package, such as travel expenses. Additionally, the MOA specifically provides that FEMA will reimburse the City for costs incurred by the City if it must fill a task force member's

position while the member is activated. Thus, while the US&R member is activated his or her salary, or compensation, is paid by FEMA. FEMA therefore, fulfills the second element of the employer role under the employment contract analysis.

Workers' compensation benefits paid to members while activated are not, however, the only benefits that should be considered. A more difficult question to resolve is: which entity, if any, is responsible for workers' compensation injuries incurred while US&R members are training? Training is a prerequisite for US&R membership. MOA Section IV(D)(3). Additionally, training is conducted pursuant to the standards set forth in the Urban Search and Rescue Response System description manual. MOA Section IV(D)(1). However, during training, US&R members are not called to active duty nor compensated by either agency. Members in a sense volunteer their time for training purposes. A final anomaly is that the City, as the sponsoring agency, is responsible for providing training to task force members even though FEMA dictates the parameters of the training to be provided. Thus, there is no clear indication of who is the employer. In such cases, the courts look beyond strict contractual guidelines and follow "the legislative directive for a liberal statutory interpretation favoring the protection of the worker" when determining if sufficient consideration can be found to infer an employment relationship. *Laeng v. Workmen's Comp. Appeals Bd.*, 6 Cal. 3d 771, 780 (1972).

Uncertainty regarding the precise nature of the employment relationship may be found in a number of different contexts. For example, volunteers do not meet all employment contract requirements. Under ordinary circumstances, volunteers for purely gratuitous purposes are not employees and, therefore, not eligible for workers' compensation benefits. *Barragan v. Workmen's Comp. Appeals Bd.*, 195 Cal. App. at 646. However, the courts have often said that "it has also long been a rule that for purposes of workers' compensation, the consideration or compensation for an employment contract need not be in the strict form of wages or money." *Id.* The courts have found acceptable consideration in a number of forms. See, for example, *Union Lumber Co. v. Indus. Acc. Com.*, 12 Cal. App. 2d 588, 594 (1936) (instruction as compensation); *Gabel v. Industrial Acc. Com.*, 83 Cal. App. 122, 125 (1927) (services as compensation); and *Morales v. Workers' Comp. Appeals Bd.*, 186 Cal. App. 3d 283 (1986) (release from jail confinement as consideration).

Although volunteer cases are similar, they are not directly applicable to the US&R scenario because training time, while uncompensated, is not really voluntary. As noted, training is a requirement for membership on the US&R team. It is, therefore, more akin to those cases where some form of preemployment participation by the prospective employee is required. A similar, noncompensable participation is performed during try-outs or rehearsals for a position. Such participation may create an employment relationship if an injury is

incurred during the trial period. The courts have reasoned that when the claimant "was at the time of the injury acting at the instance and inducement of the defendant and in pursuance of the arrangement for employment, although without pay while qualifying for actual service, he was an employee of the defendant and his injury was compensable sic." Laeng v. Workmen's Comp. Appeals Bd., 6 Cal. 3d at 780. US&R team members train pursuant to the terms of the MOA in order to maintain team membership. This is a noncompensable condition imposed by FEMA. Thus, the federal government remains the responsible entity for injuries incurred while US&R members are training.

The final element of the traditional employment contract, control of the terms and conditions of the work being performed, is clearly in the hands of the federal government. The MOA provides that services are rendered at the request of the federal government in conjunction with a presidential declaration of disaster. It also provides that the Department of Defense is the primary coordinating agency and that the Director of FEMA, a federal position, is the manager of the overall operation. Each of the operational elements involve control at the federal level. Thus, since the federal government, rather than the City, controls the emergency forces, it meets the third criterion as employer and, therefore, is responsible for workers' compensation.

## 2. Disability Retirement

Generally, US&R team members are not eligible for a City Employees' Retirement System disability retirement. As US&R team members, they are federal employees and do not meet the service requirements for a CERS retirement. US&R team members may, however, be eligible for a service retirement if they have a sufficient number of service years. See the attached memorandum for a more detailed analysis of this issue from Deputy City Attorney Lori Chapin, who advises the Retirement System.

## CONCLUSION

Workers' compensation benefits stem from an employee/ employer relationship. City firefighters, when performing as US&R team members, have an employee relationship with the federal government. The three (3) elements of an employment contract consent, compensation and control are clearly between the team members and FEMA as evidenced by the written MOA. Thus, the federal government is the entity responsible for workers' compensation benefits.

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By

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Attachment

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