

INDEPENDENT BUSINESS ASSOCIATION

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SMALL BUSINESS REPORT SMALL BUSINESS REPORT SMALL

IBA SMALL BUSINESS REPORT - June 20, 2016

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NOTICE: The information contained in the publication is intended to alert the reader to issues, laws, regulations and events which may affect the operations of a small business. The information is presented in a summary form and is not intended to assure compliance with laws or regulations which may apply to any specific business. The information is not intended as legal advice. The reader is advised to seek the advice of a qualified attorney, accountant or other advisor to obtain specific compliance advice with respect to the laws, regulations or other issues which may apply to a specific business.

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IBA SMALL BUSINESS REPORT



June 20, 2016

Important Election On August 2nd

On August 2nd you will be asked to vote for the candidates you want on your state's November 2016 general election ballot. You will vote for Governor and other Executive Office holders, state Senator (in some areas of the state) and your state Representatives.

This is an important vote as it decides who will be on the November 2016 statewide ballot.

As we explained in our May IBA Small Business Report, NOW is the time for you to meet with the candidates who are campaigning to represent you. They truly want to meet with you now. IBA has prepared a new Special Report that lists ALL of the candidates by legislative district and it is available via the Internet at: www.ibaw.net/2016candidates.pdf

This report includes information to help you contact the candidates in your legislative district and interview them. Remember, these candidates are the people you will hire "through your tax dollars" to represent you and your small business. It is important for you to interview these people now to make an informed preliminary hiring decision in August. **Your vote on August 2nd is critical!**

Interesting State Presidential Primary Results

We all had an opportunity to vote in our Washington State Presidential Pri-

mary in late May. Some results you may find interesting follow.

802,754 people voted Democrat, and 602,998 people voted Republican. Candidate Clinton got 420,461 votes, 48% of the votes cast for either Clinton or Trump, and Candidate Trump got 455,023 votes, 52% of the votes cast for either Clinton or Trump.

The biggest news was the large number of Republicans who did not vote in the May primary. That is very important. While Candidate Trump appears that he would beat Candidate Clinton, based on the head-to-head Primary results, Candidate Clinton would likely win in November with up to 58% of the vote (Clinton + Sanders May primary) to Candidate Trump's (plus other Republicans) approximate 42% of the total vote.

The biggest question from the May Primary is, why did so few Republicans vote? If this trend continues in November, 2016, small businesses are in serious trouble as pro-small legislators now in office will not get re-elected.

While the May Presidential Primary was more of a likeability contest than an election, the **August 2nd Statewide Primary Election is EXTREMELY IMPORTANT FOR SMALL BUSINESSES** and will set the two candidates you will have to choose between for each state office in November 2016. The August 2nd statewide primary is like the beginning of the playoffs for the Seahawks, the Sounders or the Mariners. Please vote!

New Salary Overtime Exemption Rule

On May 19th, the U.S. Department of Labor announced its new regulations that exempt salaried workers from overtime. These new regulations go into effect on December 1, 2016. A summary of the final rule is available via the Internet at:

www.dol.gov/whd/overtime/final2016/general-guidance.pdf

Increases the minimum salary level for the overtime exemption for a qualified executive, administrative, or professional salaried worker from \$455/week or \$23,660/yr. to \$913/week or \$47,476/yr. (40th percentile of full-time salary workers (more details of which salaried workers this applies to, below) in the lowest wage Census region (currently the South region) and the salary level for the Highly Compensated Employees (HCE) increased from \$100,000 to \$134,004.

□ The new rule is a bit of a surprise in that the salary level for exempt salaried workers is lower than what the U.S. Department of Labor had originally proposed \$970 (proposed) v. \$913 (final) per week) due to the benchmark used by the US DOL for this rule.

The Department also sets the total annual compensation requirement for an exempt Highly Compensated Employee (HCE) equal to the annualized weekly earnings of the 90th percentile of full-time salaried workers national-

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ly. Highly Compensated Employees are defined as:

- a. An employee who earns total annual compensation that exceeds the US DOL required wage; and
- b. The HCE employee’s primary duty includes performing office or non-manual work; and
- c. The HCE employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee. See:

www.dol.gov/whd/overtime/fs17h_highly_comp.pdf

In order for a salaried employee to be exempt from overtime, the employee must meet three tests (available below via the Internet to help you understand what is required):

- Salary Level Test—
www.dol.gov/whd/overtime/final2016/index.htm
- Salary Basis Test -
www.dol.gov/whd/overtime/fs17g_salary.pdf
- Duties Test - are available at:
www.dol.gov/whd/overtime/fs17b_executive.pdf
www.dol.gov/whd/overtime/fs17c_administrative.pdf
www.dol.gov/whd/overtime/fs17d_professional.htm

It is important for employers to understand that any salaried employee they deem exempt from overtime must meet all three of these tests.

Independent Contactor or Employee?

Some employers will attempt to rede-

fine their salaried workers as independent contractors to avoid this new salary regulation. IBA strongly advises employers NOT to get caught in the “independent contractor” trap by doing this. Once a worker is an employee, it is almost impossible to legally convert him/her to an “independent contractor.” The penalties for misclassifying employees as independent contractors are very costly.

Below is a chart by the U.S. Department of Labor to help employers to guesstimate if an individual is an employee or an independent contractor. The laws to make this determination are much more complex than this chart. It is almost impossible to try to wiggle around any item on this chart and still be legal.

| Factors used to determine a worker’s status under the common-law test | | |
|---|--|--|
| Factor | Worker is an employee if— | Worker is an independent contractor if— |
| Right to control | Employer controls details of the work | Worker controls details of the work |
| Type of business | Worker is not engaged in a business or occupation distinct from employer’s business | Worker operates in business that is distinct from the employer’s business |
| Supervision | Employer supervises worker | Work is done without supervision |
| Skill level | Skill level need not be high or unique | Skill level is specialized, is unique, or requires substantial training |
| Tools and materials | Employer provides instrumentalities, tools, and workplace | Worker provides instrumentalities and tools of and works at a site other than the employer’s workplace |
| Continuing relationship | Worker is employed for extended, continuous period | Worker is employed for specific project or for a limited time |
| Method of payment | Worker is paid by the hour, or other computation based on time worked is used to determine pay | Worker is paid by the project |
| Integration | Work is part of employer’s regular business | Work is not part of employer’s regular business |
| Intent | Employer and worker intend to create an employer-employee relationship | Employer and worker do not intend to create an employer-employee relationship |

Disclaimer The following information is not legal advice and should not be considered or relied on as legal advice to determine if a person is an employee or an independent contractor. The reader is advised to consult with a qualified employment law attorney for how to define an employee versus how to define an independent contractor as this is a very complex subject of law and requires the advice of a qualified employment law attorney.

State and federal laws are very complex about who is an "independent contractor" and who is an "employee". Both the federal U.S. Department of Labor and the Washington State Department of Labor and Industries are aggressively looking for employers who misclassify their employees as "independent contractors."

The U.S. Department of Labor and the Washington State Department of Labor and Industries look very closely to see if an individual is an employee or an independent contractor. The assumption is that an individual working in a business is an employee unless the business can provide extensive proof the individual is an independent contractor. Even Microsoft was caught misclassifying many of its workers as independent contractors and failed to win a court appeal against the ruling that their independent contractors were not employees.

In Washington State alone, there are five different definitions of who is an employee and who is an independent contractor. These laws are very complex. An individual can be an independent contractor under one definition, and the same individual can be an employee under another definition.

According to the U.S. Department of Labor, The courts have developed three tests to be used in determining a

worker's status: the common-law test, the economic realities test, and a hybrid test that incorporates various elements of both of the first two tests. More details are available via the Internet at:

www.bls.gov/opub/mlr/2002/01/art1full.pdf

Common Employee Misclassification Errors

Contractors can only be an independent contractor under Washington State Industrial Insurance law if the independent contractor meets all of the following:

- Has been, and will continue to be, free from control or direction over the performance of the service, both under the contract of service and in fact;
- Is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is doing the work that is eligible for a business deduction for federal income tax purposes other than that furnished by the employer for which the business has contracted to furnish services;
- Is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting;
- Has an active and valid certificate of registration with the department of revenue, and an active and valid account with any other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by

employers and businesses and has registered for and received a unified business identifier number from the state of Washington;

- Is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting; and
- Has a valid and current contractor registration under chapter 18.27 RCW or an valid and current electrical contractor license under chapter 19.28 RCW

Non- Construction Contractors can only be an independent contractor under Washington State Industrial Insurance if the independent contractor meets all of the following:

- Is free from control or direction over the performance of the work, both under the contract of work and in fact; and
- The work is either outside the usual course of business for which the work is *performed*, or the work is *performed* outside all of the places of business of the enterprise for which the work is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the work is performed; and
- Is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; and
- Is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and

- Has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has received a unified business identifier number from the state of Washington; and
- Is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

The wage and hour tests for who is an employee and who is an independent contractor in Washington State are different than the tests described above. The U.S. Department of Labor's test is still different than the Washington State test.

IBA Advises: The reader is advised to consult with a qualified employment law attorney for how to define an employee versus how to define an independent contractor in any specific situation. The reader is also advised that this is a very complex subject of law and requires the advice of a qualified employment law attorney.

Revised OSHA 300 Reporting

In years past, OSHA required employers of ten or more employees to maintain an OSHA 300 form to track all workplace injuries and illnesses incurred by the workers, even if none occurred. This has always been a paper form but will now be required to be submitted electronically for many businesses.

OSHA just recently adopted its new electronic reporting rule for OSHA 300's. This new electronic report applies to firms with 20 or more employ-

ees in certain industries. There are 71 listed industries that include:

- Agriculture
- Forestry
- Fishing
- Hunting
- Construction
- Manufacturing
- Wholesaling
- Automotive Parts
- Building material suppliers
- Most retailers
- Most trucking and hauling
- Most transportation services
- Most vehicle and equipment rental firms
- Most health care providers
- Laundry and dry cleaning services

Readers should review the complete list at:

www.ibaw.net/OSHA300ereportingC.pdf

Melissa Bailey at the law firm of Ogletree Deakins advises that the new regulations also include provisions designed to prevent employers from retaliating against employees for reporting work-related injuries or illnesses. To abate alleged violations of these provisions, OSHA may order employers to reinstate employees or pay them back pay. The changes will allow OSHA and other stakeholders—including labor unions and plaintiffs' attorneys—to access injury and illness data and also create a new cause of action for employees who claim their employer retaliated against them for reporting a work-related injury or illness. The final regulation also raises serious questions regarding whether OSHA has the authority under the Occupational Safety and Health Act to enact these changes. You can review Attorney Bailey's complete discussion of this new regulation at:

www.ibaw.net/osha300ereportingB.pdf

You can view the final rule via the Internet at:

www.ibaw.net/OSHA300erreportingA.pdf

Initially, firms that have 20 or more

employees in the listed industry must submit their OSHA 300A summaries electronically by July 1, 2017.

The new rule phases in additional requirements as follows:

- **In 2018, covered employers will be required to submit their OSHA 300, 301 and 301A form via electronic reporting by July 2018.**
- **In 2019, covered employers will be required to submit their OSHA 300, 301 and 301A form via electronic reporting by March 2019**

The rule still requires covered employers to post their paper OSHA 300A form at the end of the year.

Pro-Small Business Candidate For Governor

You already know what Governor Jay Inslee does for small businesses. Meet a small business candidate for Governor in Washington State.

You can meet small business Candidate for Governor, Bill Bryant, on June 25th at 1:30 pm in Tacoma.

Bill Bryant - is a great candidate for Governor for Small Business in Washington State.

IBA's Gary Smith has met Bill Bryant.

"He's terrific!" says Gary

As a small business owner, Bill knows what you have to go through every day.

Bill has proven he can cut government spending and waste and reduce taxes at the same time as he has led the Port to reduce its taxes on homeowners and businesses while he has reduced the Port's spending over the past seven years.

Bill has already been elected twice in King County and Seattle to the Port of Seattle Commission. This means Seattle and King County voters like him and trust him and will vote for him. Winning Seattle and King County votes is critical to be elected Governor as the Seattle - King County vote has a big effect on the statewide vote. There are only four other Republicans elected in Seattle and King County, and they are not running for Governor.

Bill strongly believes that Washington State has a spending problem and not a tax revenue problem. He does not believe that Washington State needs the \$1.5 billion in new taxes, including a new state capital gains income tax, that Gubernatorial Candidate Jay Inslee proposed in 2015.

Bill Bryant says:

If I'm elected Governor:

- On day one, I will install a whole new administration. The current anti-business administration, the Inslee administration of "no," will be gone and a new pro-business administration will be installed. A new administration who will help businesses grow, help businesses create jobs and help strengthen our state's economy.
- On day one, I will begin the process of a four-year initiative to create a zero-based state budget to ensure that Washington State taxpayers get the most from each of their hard earned tax dollars.
- On day one, I will impose a new moratorium on all new state regulations until the agencies can justify the regulations they already have on the books and we will require a sunset date on all of the current and new regulation in

Washington State.

You can hear Bill Bryant background, his ideas, his plans, why he wants to be Governor, his vision of the future for Washington via the Internet at; www.youtube.com/watch?v=Sc3v7wVH80U

On June 25th, you can see, hear and meet Bill Bryant - **FOR FREE**. He will tell you how he will make your life and your small business better!

If you want a pro-small business Governor in Washington State, you need to attend his June 25th kickoff event to show the press that Washington State is ready to elect a new, pro-small business Governor.

If you can't attend, please send someone in your place. Please bring as many people with you as you can - everyone needs a **FREE TICKET** to attend.

Please send this message to every other small business owner you know and invite them to attend this great event for small businesses

You need a **FREE TICKET** to attend this event. You can get that **FREE TICKET** via the Internet at: www.billbryantforgovernor.com/kickoff

Is The Affordable Care Act Coming Apart?

There are now signs that the Affordable Care Act, aka Obamacare is now starting to fall apart.

In the past few months, there have been three big announcements:

- UnitedHealthcare will stop selling health care plans in the Washington State market through the state's health care Exchange. UnitedH-

healthcare has been one of the few insurance companies in Washington State that has offered individual health care insurance and small business health care insurance in all 39 counties, but that will end on January 1, 2017. Besides Washington State, UnitedHealthcare will also stop offering health plans in 26 other states on January 1, 2017.

In May, the Washington State Insurance Commissioner announced that thirteen health insurers have filed 154 individual health plans to be offered in 2017 both inside and outside of the Exchange, aka **Washington Healthplanfinder**. The average requested rate change based on enrollment is 13.5 percent. Some are higher, and some are less. Nine of the 13 insurers intend to sell individual plans inside the Exchange and four will only sell plans outside of the Exchange. *"The requested rate changes are not a surprise, as we expected insurers to make adjustments based on their earlier predictions compared to who actually signed up and what services they used,"* said Insurance Commissioner Mike Kreidler. *"Clearly, some of the insurers guessed better than others. We know that no one wants to see their rates go up. We will review each plan carefully over the next several months to make sure that any rate changes are justified."*

- The Federal District Court in Washington DC has ruled that part of the federal Affordable Care Act is illegal. This is pretty involved but stick with us here. Part of the federal Affordable Care Act provides subsidies for individual under 250% of the federal poverty level to qualify for premium tax credits to offset some of their health care premium costs. Former Speaker of the House, John Boehner filed a lawsuit on behalf

of the House of Representatives claiming that this individual tax credit was not legally authorized. In a complicated 38 page decision the Court agreed with the House of Representatives and enjoined any further reimbursements under Section 1402 (of the Affordable Care Act) until a valid appropriation is in place. However, the Court will stay its injunction pending any appeal by the parties. An appeal has been filed. Striking down this provision of the Affordable Care Act will effectively destroy its operation as 57% of the individuals enrolled in the various state and federal exchanges are receiving these tax credits to lower their monthly premiums. Without those tax credits, many of these people will no longer be able to afford their health insurance coverage.

UnitedHealthcare is leaving the Affordable Care market primarily due to higher than expected claims costs under the Affordable Care Act. UnitedHealthcare projects to pay over \$650 million in excess claims costs as compared to premiums. United Healthcare provides healthcare insurance to over 47 million people in the USA, of that, it provides 800,000 people with health care insurance under Affordable Care Act approved policies. UnitedHealthcare will not be dropping its other non-Affordable Care Act health care plans.

The other BIG shock is the 13.5% average rate increase insurers are requesting for individual health care plans offered in Washington State under the Affordable Care Act. That double-digit premium increase is another indicator that the Affordable Care Act plans are much more costly than insurers originally thought.

With an average 13.5 percent average premium increase and one of the larg-

est health insurers in the nation dropping out of much of its health insurance business under the Affordable Care Act, it signals some serious problems ahead for the future of the Affordable Care Act. Once premiums start to rise significantly, and 13.5% can be considered a significant increase, healthy people start to drop their health care insurance plan while the less-healthy people keep their insurance. The insurance industry calls this a "death spiral," as more people drop and the less healthy stay in, the insurers are never able to catch up, so their premiums match their claims costs. The higher they raise rates, the more people drop their insurance.

Clearly, the Affordable Care Act is now very challenged to meet its purpose, affordable health care.

Next Step For Small Businesses

Small businesses insured by a UnitedHealthcare plan through the Washington State Health Care Exchange aka WAHealthPlanFinder will have to start shopping around in the Fall for another carrier as UnitedHealthcare will cease offering small business health care plans through the Washington State Exchange as of January 1, 2017.

Plus, small businesses can only qualify for the federal small business health care tax credit if they purchase their small business health care plan through a state-operated Exchange.

IBA's Gary Smith Appointed To State Small Business Health Options Council

IBA Gary Smith has been reappointed to the Washington State Health Care Exchange's Small Business Options Program Advisory Council. Smith was reappointed based on his extensive background with small businesses, his knowledge of small business health insurance, and his position as Executive Director of the Independent Business Association.

"This will be a very interesting endeavor, now that the only statewide insurance carrier for small business has announced it is ceasing to sell small business health care plans through the Washington State Exchange to small businesses," said Smith. "We can't change the federal Affordable Care Act aka Obamacare law to entice insurers to come into Washington state and offer health care plans to small businesses through the Washington State Health Care Exchange," Smith continued.

Smith will attend his first meeting of the Council in a month or so. The Council meets quarterly.

IBA will keep you informed.

Eyman's I-1366 Found Unconstitutional

Last November, voters approved Initiative 1366 proposed by Initiative maverick Tim Eyman by a vote of 51.5% to 48.5%. Initiative 1366 directed the Legislature to pass a constitutional amendment to require a 2/3s vote of the Legislature to increase state taxes, or the state's sales tax rate would drop 1% on April 15, 2016.

A 1% drop in the state's sales tax rate would put the state into financial chaos by cutting state revenues by \$8

billion over the next six years.

In late 2015, opponents of Initiative 1366 challenged the constitutionality of I-1366. In January 2016, the King County Superior Court ruled I-1366 was unconstitutional.

Mr. Eyman and the Washington State Attorney General, who is obligated to defend voter-approved initiatives, appealed the King County Court ruling to the Washington State Supreme Court.

There were three key arguments against the King County Superior Court ruling:

- That the parties opposing I 1366 did not have standing in the Washington State Supreme Court
- That the issue of I-1366 was not Justiciable – meaning, does the Supreme Court have the authority to consider this case?
- Third, is I-1366 unconstitutional? The state's constitution requires that any legislation or initiative be limited to one subject, and that subject must be stated in the title of the legislation or initiative. The state's constitution reads: Article II Section 19 *"No bill shall embrace more than one subject, and that shall be expressed in the title."*

The Court quickly rejected the first two arguments.

The Court then addressed the last issue. The Court ruled, *"We also hold that I-1366 contains two operative, unrelated provisions and does not constitute valid contingent legislation. Thus, we hold that I-1366 violates the (state constitution's) single-subject rule and that it is void in its entirety."* (parenthetical language added by IBA.)

You can review the State Supreme Court's 27-page decision on I-1366 via the Internet at:

www.courts.wa.gov/opinions/pdf/927081.pdf

L&I Issuing BIG

Fines For Safety Violations - Too Many Fatal and Serious Injuries

The Washington State Department of Labor & Industries recently cited Olympic Siding Inc., for four repeat-serious and four serious violations, and assessed penalties of \$135,800.

Falls from ladders, roofs, and other elevated work spaces are the leading cause of construction worker fatalities and hospitalizations. Last year, six construction workers died from falls, the highest number since 2006.

So far this year, three construction workers have fallen to their deaths.

This company was also cited for other safety violations.

The Olympic Siding inspection began in January when an L&I compliance officer observed two workers without fall protection on the roof of a residence in Vancouver.

Three of the repeat-serious violations carried a penalty of \$33,600 each. The other repeat-serious citation was for not ensuring employees wore eye protection when using power tools. That violation has a \$21,000 penalty.

As a result of these repeat-serious violations, Olympic Siding Inc. is now considered a severe violator and will be subject to follow-up inspections to determine if the conditions still exist in the future.

Avoid Getting Sued

Most businesses and homeowners don't know they can get sued if they hire a contractor or other firm to do work at their home or business and the firm they hire, does not have state Industrial Insurance coverage.

Coverage under the state's industrial insurance program is the ONLY way a homeowner or business is protected if a worker for a firm the homeowner or business hires, is injured or killed on their job.

The State law RCW 51.04.010 reads:

The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy

Without state industrial insurance coverage, an injured worker working for a firm hired by a business or a homeowner can sue the business or homeowner they are doing the work for.

Be aware, the trial lawyers know this law very well and if a worker is injured while working at a home or business and that worker is not covered by state Industrial Insurance, the lawyers will sue everybody they can to get the maximum award possible for the injured worker.

Businesses and homeowners can and should get a certificate of coverage for a firm they hire to do work for them. You can access a certificate of coverage via the Internet at:

<https://fortress.wa.gov/lni/crpsi/>

- Start by putting in the name or UBI number of the firm you are hiring. It is best to use the firm's UBI number to avoid getting them confused with another firm.
- Next, you will see the details about the firm you are hiring
- Scroll down the information and look for:

Certificate of Workers' Comp Coverage

Click on **Certificate of Workers' Compensation Coverage** and it will show if the firm you are considering

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