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IBA SMALL BUSINESS REPORT



March 18, 2016

2016 Legislature Goes Into Special Session

On March 10th, the regular 2016 Legislative Session ended as required by the state's constitution. One of the main goals for the 2016 Legislature is to adopt a supplemental budget. The supplemental budget is expected to pay for:

- The forest fires that occurred in late 2015 that were not funded in the budget passed in July 2015. The Legislature needs to pay for those firefighting efforts.
- Washington State is under federal court orders to expedite their treatment of the mentally ill. The U.S. District Court in Seattle ordered the State of Washington to cease violating constitutional rights of and provide timely mental competency services to pre-trial detainees incarcerated in jails. The court ruled on December 22, 2014, that persistent delays in providing mental competency services to people in state criminal cases violates their constitutional due process rights. The Court noted that "Defendants (Washington State) have demonstrated a consistent pattern of intentionally disregarding court orders ... and have established a de facto policy of ignoring court orders which conflict with their internal policies."
- The number of citizens qualifying for social services has increased and additional funding must be provided to provide them the services these people have qualified for.

It was expected by many that the House and the Senate budget writers would work out a compromise budget by late last week, but that did not happen. More details follow below.

Why the Legislature

Didn't Finish On Time

The Senate, holding the line on new or increased state taxes, is the reason the Legislature did not finish on time.

Both the House and the Senate have passed their 2016 supplemental budget proposals. Those proposals are much different and have different spending levels of nearly \$400 million. Some of the big differences are:

- The House supplemental budget has proposed \$119.5 million in new state revenues from revising current tax preferences. Estimated revenues are shown:
 - Apply the real estate excise tax to certain foreclosures (\$34.4 million),
 - Limit the sales tax exemption for nonresidents to purchases over \$25 (\$21.9 million),
 - Apply the sales tax to bottled water (\$23.2 million)
 - Increase the business and occupation (B&O) tax rate for resellers of prescription drugs (\$17.6 million),
 - Increase the B&O tax rate for travel agents and tour operators (\$6.1 million), and
 - Increase the B&O tax rate for international investment services (\$16.3 million).

The House Budget vote was 50-47-1

The Senate Budget Vote was 25-23-0-2

The House supplemental operating budget proposal would increase spending by \$466 million.

Some of the major spending items include:

- \$99 million for recruitment and retention of public school staff (including increasing the beginning teacher salary to \$40,000),
- \$49 million for mental health,
- \$47 million for long term care and developmentally disabled programs and services.
- The House proposal would use \$338 million from the state's budget stabilization account (BSA, or the rainy day fund) for several spending items. It would:
 - Appropriate from the BSA \$190 million for fires and other disasters,
 - \$91 million for the local effort assistance account, and
 - \$37 million for homeless services and programs.
- Additionally, the proposal assumes enactment of HB 2968, which would annually transfer to the education construction fund half of the 1 percent of general state revenues that are transferred into the BSA (about \$149 million in 2015-17).
- The proposal would transfer \$64 million from other funds to the state's General Fund.

The Senate's supplemental budget does not propose any spending from the state's emergency rainy day account to fund any state programs

Both the Senate and House budgets were passed by each chamber on February 26th. The House and Senate budget writers have been meeting extensively since then to resolve the dif-

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ferences in the two passed budgets.

No agreement was reached on March 10th. It takes two or three days of administrative and legislative process to do what is necessary to adopt a supplemental budget. Given that fact, the Legislature finished its 2016 regular legislative session on March 10th about 10 pm. Then Governor Inslee immediately called them into special session at 10 pm March 10th so they could continue to negotiate and reach a budget agreement.

Where Does The Legislature Go From Here?

On Friday, March 11th, the Senate announced a new state supplemental budget proposal that addresses a number of the differences between the previously passed House and Senate supplemental budget proposals. A hearing was held on March 11th by the Senate's Ways and Means Committee. It is expected that the Senate's Ways and Means Committee will approve this new Senate Supplemental Budget on Monday, March 14th.

Given this new Senate supplemental budget proposal, it is clear the Legislature is getting closer to an agreement on a 2016 state supplemental budget. During the hearing on SB 6667, several of the leading Democrats in the Senate commented that this new Senate supplemental budget was much more palatable to Democrats (House of Representatives is controlled by the Democrats) so this is very encouraging that an agreement on a state supplemental budget can be reached soon. The Senate Democrat budget leader commented during the hearing that if this new Senate supplemental budget had been on the table earlier in the week, there would have been no need for a special legislative session as the 2016 state supplemental budget would have passed the Legislature by March 10th. Clearly, more encouragement for a quick end to this special 2016 legisla-

tive session.

This new Senate supplemental budget proposal makes a number of significant changes from the earlier passed Senate supplemental budget. More details are available via the Internet at:

www.ibaw.net/2016senatebudget.pdf

The Governor's Vetoes

As you likely heard or read that the Governor vetoed 27 bills late on March 10th in keeping with his threat of vetoing bills if the Legislature did not finish on time. These vetoes have angered mostly the Senate as the Senate sent bills to the Governor earlier in the week of March 6th. Bills sent to the Governor early in the week of March 10th require the Governor to act within 5-days of receiving the bills, or the bills become law without his signature. So the Governor created a set of criteria to determine which of the 5-day bills he would sign or veto. He selected 10 bills to sign and vetoed 27 bills – again angering most Senators.

Because the House of Representatives slowed down their process and did not send any bills to the Governor during the week of March 6th, there were no House Bills that needed the Governor's action within 5-days. The House of Representatives has now sent the Governor a large number of bills that the Governor has under the state's constitution, 20-days to act on.

Supreme Court Hears Constitutionality of I-1366

I-1366, a Tim Eyman initiative, was passed by voters in November 2015. I-1366 required the Legislature to pass a constitutional amendment by

April 15, 2016, to require a 2/3s vote of the Legislature or a vote of the people to raise taxes or enact new 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 on April 15, 2016, would reduce state revenues by \$8 billion over 6 years and put the state into financial chaos.

The Senate voted on a constitutional amendment to require a 2/3's vote of the Legislature or a vote of the people to increase taxes or impose new taxes. The vote was 26 to 23 with all Republican Senator and two Democrat Senator voting "yea" and 23 Senate Democrat Senators voting "nay." A constitutional amendment requires a 2/3s vote of the Senate to pass—or 33 votes

I-1366 was ruled unconstitutional by the King County Superior Court earlier this year. That decision was appealed to the Washington State Supreme Court. Thus the hearing before the Washington State Supreme Court on Tuesday.

This is a very big deal to every taxpayer in Washington State. IBA will be keeping you advised.

The Legislature expects that the Washington State Supreme Court will find I-1366 unconstitutional. IBA expects the Court to issue a verbal decision before April 15, 2016, to eliminate the 1% reduction in the state's sales tax rate on April 15, 2016. A verbal decision is unusual but the Court has done this in the past like when it issued a verbal ruling in 2015 when asked about the legality of putting I-1366 on the November 2015 ballot.

New Overtime Pay Requirements For Salaried Employees Expected Soon

On March 15, the U.S. Department of Labor (DOL) sent the long-awaited overtime rule to the White House's Office of Management and Budget (OMB) for final approval. OMB review typically takes a month or two, which in this case means the final rule, would likely be made public in April or May, several months ahead of the previously expected release date of July. Employers need to start now to prepare for a major change in overtime pay laws for salaried employees likely to be adopted before July 2016. Executive, Administrative, Professional, and Outside Sales employees have been exempt from overtime pay if they met federal salary and duty test requirements. In 2014, President Obama directed the U.S. Department of Labor to make some **BIG** changes to all of this – and the changes are likely to occur in July 2016. Once adopted, employers will have 60-days to implement the new requirements. Currently, salaried employees who are classified as Executive, Administrative, Professional or Outside sales do not need to be paid overtime wages (working more than 40 hours in 7 days) **if they are paid \$455 per week** (equivalent to \$23,660 annually) **or more**. President Obama has proposed that the **\$455 per week** be increased to **\$921 per week** (equivalent to \$47,892 annually – it could be more as the final decision about the amount has not been made yet). The salary requirement does not apply to “outside salespeople.”

This is a HUGE change that will affect many small businesses that employ salaried workers.

Remember, there are four requirements that must be met for a salaried employee to be exempt from overtime pay:

- The employee must be paid a salary, not wages or paid hourly.
- The employee must be in an occupation that is qualified for the overtime exemption.
- Currently, the employee must be

- paid \$455 per week or more, **and** Meet the salaried employee overtime exemption Duty Test of the federal wage and hour law. You can find the “duty tests” and other information on his overtime proposal for exempt salaried workers via the Internet at:

www.ibaw.net/OTsalariedworkers2015.pdf

If all of these criteria are not met, the salaried employee must be paid overtime for working more than 40-hours in a 7-day pay period.

IBA Strongly recommends you carefully review the “duty tests” to make sure you are in compliance with them. Many employers are not.

What Affected Employers Must Do NOW!

Employers who pay potentially exempt workers a salary have some big decisions to make about whether to continue to pay those employees a salary or switch them to hourly employees because of this new rule change. The decision and changes to their employee's pay may be required by September 2016. For example, say you have a salaried manager who earns a salary of \$40,000 per year. That manager usually works about 50 hours per week and is now exempt from overtime pay. Under the new regulations likely to be adopted before July, 2016, you must pay this salaried manager overtime pay for 10 hours per week of overtime, cut the manager's hours to 40 hours a week, or switch that manager to an hourly employee because the manager is being paid \$769/week and not being paid \$921/week as will likely be required by the new federal salaried worker regulation to be exempt from overtime pay. Your manager is actually being paid about \$15.38 per hour. So your manager will now earn \$40,000 in regular annual pay plus \$14,999 in overtime pay after the adoption of the new federal salaried worker regulation.

So the decision you need to make for

your manager in our example above is, how you will pay your manager after this new federal salaried worker regulation is adopted. Your options are:

- Continue to pay your manager \$40,000 in salary but limit their work week to 40 hours per week. **Total earnings would be about \$40,000 at an hourly straight-time pay rate of \$19.23.**
- Increase your manager's pay to \$47,892+ so they will continue to be exempt from overtime. **Total earnings would be about \$47,892+ for an average hourly pay rate of \$18.42.**
- Continue to pay your manager \$40,000 in salary, have the manager continue to work 50 hours a week on average and pay the employee an additional \$14,999 in overtime pay per year. **Total earnings would be about \$54,999 at an hourly straight-time pay rate of \$19.23 and average hourly pay rate of \$21.53.**
- Change your manager from a \$40,000 salary to an hourly employee earning \$19.23 per hour and limit their work hours to 40 hours a week. **Total earnings would be about \$40,000 at an hourly straight-time pay rate of \$19.23.**
- Change your manager from a \$40,000 salary to an hourly employee earning **\$13.98 per hour** and allow the manager to work 50 hours per week. **Total earnings would be about \$40,000 at an hourly straight-time pay rate of \$13.98.**

Clearly, this can be an extremely challenging HR issue.

- If you choose options “a” or “d”, there is almost no challenge other than filling the 10 hours per week your manager does not work.
- If you choose option “b” it means a pay raise for your manager that you have to incorporate the new cost into your operating budget, but it avoids the challenges of cutting hours, cutting the manager's rate of pay or having to pay overtime.
- If you choose option “c” you must clearly incorporate this cost increase into your operating budget.
- If you chose option “e,” you have a

big HR challenge to explain to your manager why you are changing the manager to an hourly employee at \$13.98 per hour. The manager will quickly figure out that he/she is currently being paid \$15.38 and will likely see this as a pay cut. The key to explain is, that they will take home the same pay they have been taking home if they continue to work the same number of hours they have been working due to the new overtime pay requirement. IBA recommends you not have this discussion with your salaried employee until after the new regulation has been adopted as the regulation has already been delayed six months and may be delayed further. Once it is adopted, you can show the salaried worker that the pay laws have changed and explain why this change is being made.

The challenge you have is to make this decision before July 1st so you are prepared to implement your plan if the U.S. Department of Labor adopts this new regulation before July 2016. Remember, we still do not know if the new rate of pay for a salaried worker to remain exempt from overtime pay will be equivalent \$23.03 per straight time hour or higher. We will not know that until the U.S. Department of Labor releases its final regulation. Once the regulation is released, you will have 60-days to comply. IBA strongly recommends you start now to prepare for how your company will implement this new regulation.

Employment law attorneys and HR experts are advising employers to:

1. Review current salaries for all exempt salaried employees.
2. Determine which employee salaries you can raise to \$47,892 or more depending on the final decision by the U.S. Department of Labor to retain the worker's overtime exempt status and continue to work the hours they usually work and which salaried employees you can't continue on salary, based on your company's labor budget.
3. Decide how many hours each of your salaried employees usually work per week and if you can cut the number of hours your exempt sala-

ried employees work so their overtime costs after the adoption of this new regulation can be reduced and minimized.

4. Analyze how many hours exempt employees now work and what it would cost if their current salary is converted to an hourly figure and they continue to work the same number of hours.
5. Decide whether you will lower the hourly rate when you convert from exempt to hourly status so that total earnings remain the same.
6. Don't forget to consider morale if you plan to reduce a worker's hourly rate of pay.

Avoid The Independent Contractor Trap

Some employers will attempt to redefine their salaried workers as independent contractors to avoid this new salary regulation expected to be adopted in 2016. IBA strongly advises employers to NOT 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.

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."

Following are some of the common criteria used by the U.S. Department of Labor and the Washington State Department of Labor and Industries to determine 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 employees as independent contractors and failed to win a court appeal against the ruling that their independent contractors were not employees.

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. The reader is also advised that this is a very complex subject of law and requires the advice of a qualified employment law attorney.

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 those tests. More details are available via the Internet at: <http://www.bls.gov/opub/mlr/2002/01/art1full.pdf>

Below is a chart by the U.S. Department of Labor to help businesses 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.

New State Policy On Rest Breaks

One of the most common employer wage and hour errors is failing to document rest breaks and not paying employees for missed rest breaks. Employers are required to provide each employee a 10-minute paid rest break during any 4-hour work period. The challenge employers' face is how to document if the employee took a rest break and if not, how much pay the employer must pay the worker for missed rest breaks.

This gets more complex. If you have a full-time employee who works 40 hours

in a 7-day week and the employee misses some or all of his/her rest breaks, the missed rest breaks must be paid at an overtime rate of pay. Say an employee works 40 hours a week and is paid \$10.00 per hour. For every rest break the employee misses, the employer must pay the worker an additional \$2.50 for the missed rest break. If the employee missed all of his/her rest breaks during the week, the employer owes the worker \$25.00 in additional pay for that week – equivalent to a 6.25% pay increase.

This might seem like a trivial issue for most employers but there have been one state Supreme Court decision and one Federal Court Decision in Seattle on this very issue where workers sued their employer for back pay for missed and unpaid rest breaks and the employer was held liable for the additional

breaks during every 4 hour work period. One of those cases was in California and the other one was in Washington State.

In the Seattle case, the employer settled with the workers claiming unpaid wages, including pay for missed rest breaks. The settlement was for \$850,000, \$350,000 will go to cover lawyer's fees and the remaining \$500,000 will be divvied up between roughly 1,200 eligible workers who were employed between 2010 and 2013

In response to the Seattle Court decision, the Department of Labor and Industries is starting a process to determine how much employers must pay a piece-rate worker who misses a rest break. This is a big issue for the construction industry and other in-

sis. IBA is at the table at L&I working on this issue for you.

IBA has prepared a special report about this rest break pay issue, including the piece-rate issue, that is available to IBA members at: www.ibaw.net/restbreakpay.pdf.

Is Your Cell Phone Spying On You??

There have been a number of recent news reports about our cell phones spying on us. How? Through some bad APPs we download on our phones. One woman reported that her ex-boyfriend seemed to know everywhere she went. He would text her while she was dining in a restaurant and ask her how the food was. He could listen in on her phone conversations. He could

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

compensation for failing to ensure their employees took their 10-minute rest

dustries who pay on a piece-rate ba-

even listen in to her conversations at

the dinner table or anytime.

One report tracked the cell phone spying being sent to Beijing, China. Another report explained that when you take a picture of a check you want to deposit electronically, the app sends a copy of the picture to the cyber-thieves.

Some APPs are great, but many come with hidden features none of us want.

One woman had her bank account drained because the APP on her phone provided the Cyber-thief all, and we mean all, of her banking relationships. Banking online using your cell phone is risky business if you have APPs on your phone.

Security experts say, don't download any APP on your cellphone that you have not thoroughly checked out. Be sure to check the APPs your children might have downloaded on their cell phones as they may be spying devices that are watching your children and know where your children are at all times, but they may also be spying devices in your home that are listening in, and telling the cyber-snoops where you are, even when the phone is charging.

One of the more common Apps with spyware/malware are flashlight Apps that turn on the flash on your phone camera to be used as a flashlight.

IBA does not know of any source to assure that the APPs on your phone do not contain spyware or other malware that can snoop or spy on you. Your phone provider may be the best place to get that kind of help.

Security experts suggest that deleting and reloading your phone's operating system is one of the ways to eliminate most of the spyware/malware APPs and to be very careful about the APPs you download after that. Minimal APP downloads is recommended.

Big New Tax Proposal Likely For Nov. 2016 Ballot

Businesses and citizens in King, Pierce and Snohomish counties will likely see a BIG new set of tax proposal on the November, 2016 ballot. These new taxes will be used to expand the Sound Transit light rail system to Everett, Tacoma and likely the Bellevue/Redmond area. The 2015 Legislature gave the counties the authority to seek these new taxes based on a vote of the people in 2016. Government officials in King, Pierce and Snohomish counties are already preparing to put these new taxes on the 2016 November ballot.

The new taxes will total about \$15 billion dollars over 15 years and will be raised using the following increased and new taxes:

- Sales tax of up to 0.5 percent (\$.50 on a \$100 purchase) in addition to the 0.9 percent currently collected.
- Motor vehicle excise tax (MVET) of up to 0.8 percent of vehicle value (\$80 annually on a \$10,000 vehicle) in addition to the 0.3 percent MVET Sound Transit is currently collecting through 2028.
- Property tax of up to 25 cents for each \$1,000 of assessed valuation (\$75 annually for a \$300,000 house). A property tax was identified as a new way to establish a more progressive revenue source for regional transit investments that reduces reliance on the sales tax.
- Fares: Funds raised from pass and ticket sales will cover an estimated 40 percent of light rail operations costs and 20 percent of bus operations costs.

If you have thoughts about these new and increased taxes, **NOW** would be the time to start expressing your comments to your county elected officials.

One last note. The Legislature gave the authority to raise these funds for 15 years. The three counties are already

talking about asking the Legislature to extend this taxing authority for 20 or 25 years.

Great Example of Legislative Cooperation

Unfortunately, long-time state Representative Sam Hunt (Democrat) had a health episode three weeks ago. He was immediately hospitalized and was later sent home to rest and recover. Yet, some key votes were being taken on the state budget after Representative Hunt's health episode.

With Representative Hunt's absence, the House was then 49 Democrats and 49 Republican. House Republicans gave the House Democrats one courtesy vote to replace Representative Hunt's vote so the House Democrats could pass their supplemental budget proposal.

While you hear about all of the bickering back in Washington DC and elsewhere in politics, this is a great example of Democrats and Republicans cooperating with one another and not taking political advantage of an unexpected situation.

Good news, Representative Sam Hunt is now back in the Legislature and voting.

Lt. Governor Brad Owen, A Small Business Friend, Retiring

Lieutenant Governor Brad Owen has announced his retirement from serving as Lt. Governor for the past twenty years at the end of his current term, January 2017.

IBA's Gary Smith has known the Lt. Governor since he was first elected to the House of Representatives in 1976.

Brad Owen was elected to the House but his real job – his primary income was from being the owner and operator of Brad's Quick Stop in Shelton and Hoodport. Brad's Quick Stop were small, family owned, gasoline stations and convenience stores. This was just after the great oil crisis in 1973 when gasoline

service stations were struggling to survive. Brad and his wife Linda then went through the misery gasoline service station operators were having to deal with, leaking underground gasoline storage tanks and the mound of environmental regulations and costs to deal with those requirements. Brad and his wife also had to deal with the dictates from the large petroleum suppliers who effectively decide if your gasoline station was going to get gasoline at a competitive price or not.

Brad Owen was later elected to the Washington State Senate as a Democrat, a moderate Democrat. A Democrat who was willing to vote his conscientious and even buck the Democratic party to do so. Representative Owen and later Senator Owen and IBA's Gary Smith created a great friendship and pro-small business relationship. Some called him a Maverick but IBA called him a great friend. Representative, Senator, and Lieutenant Governor Brad Owen was always a champion and supporter of small businesses. Following his announcement of his retirement to the Senate, both Senate Democrats and Senate Republicans spoke on the Senate floor expressing their appreciation for his ethics, fairness and high standards of decorum that Brad Owen brought to the Senate during his time as Lieutenant Governor.

IBA's Gary Smith has expressed his appreciation to Lieutenant Governor Brad Owen's for his forty years of service to the citizens of Washington State.

There are now four current legislators and others who are interested in running for Lieutenant Governor of Washington State that voters will be selecting from in November 2016.

Most citizens don't really know what the office of the Lieutenant Governor does. The Lieutenant Governor presides over the state Senate, serves as the Governor when the Governor is out of state, represents the state on trade missions and diplomatic missions, and participates in events to

promote the State of Washington. Presiding over the Senate is a very significant job as the Lieutenant Governor rules on many questions of the application of the rules and procedures of the Senate and on the contents of bills. The Lieutenant Governor also casts a tie-breaker vote on amendments when there is a tie vote in the Senate. It is a very important position in state government and Lieutenant Governor Brad Owen has carried out that office ethically, with dignity, and great fairness. It will be difficult to find a new Lieutenant Governor who can serve with the same dignity and fairness and avoid the influence of politics into this important office as Lieutenant Governor Brad Owen has done.

You will decide on the person who will replace Lieutenant Governor Brad Owen next November 2016. May we all hope and pray we get another individual with the ethics, fairness and professionalism of Lieutenant Governor Brad Owen.

You can view a biography of Lieutenant Governor Brad Owen's 40-year career serving the citizens of Washington State via the Internet at:

<http://www.ltgov.wa.gov/wp-content/uploads/2016/03/biography.pdf>