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.FLSA Rule on Independent Contractors Will be More Restrictive

Effective March 11th the rule for deciding if a worker is not an employee but an "independent contractor" under the Fair Labor Standards Act will change. It appears that satisfying the Department of Labor that a person is an independent contractor will be more difficult, as the rule includes a six-factor test keyed to economic reality.

Heretofore, the exercise of control by the employer over the employee's work and the chance for profit or loss from that work were core factors, but now there will be six equally important factors in the analysis.

We paraphrase the six new factors as follows:

1. **Profit or Loss.** Relevant questions are: (1) does the worker determine, or help determine, the pay for the work? (2) does the worker accept or decline other job opportunities or schedule the work? (3) does the worker engage in marketing, advertising or other efforts to expand the business; and (4) does the worker engage in hiring decisions or purchasing materials or equipment, or renting space?

2. **Investments.** Only worker investments that are capital and entrepreneurial will count toward a finding of "independent contractor. They cannot be imposed by the employer.

3. **Permanence.** If the relationship appears to be permanent and/or exclusive, that militates in favor of the person being deemed an employee rather than an "independent contractor." If it is temporary or project-based, the contrary inference is strong.

4. **Control.** Setting the employee's work schedule, compelling attendance, or directing or supervising the work are all emblematic of employee status. The right of the employee to decline work or maintain a flexible work schedule tends to favor independent contractor status but is not alone determinative.

5. **Integral Part of Employer's Business?**

   Could the employer function without this work? The court should consider whether the work is important, critical, primary or necessary. If it is an integral part of the business, the worker is probably an employee.

6. **Skill and Initiative.** Specialized skill or initiative, by itself, does not demonstrate independent contractor status, but it is a factor. If no prior experience is required or if training of job requirements is provided, that militates in favor of employee, not independent contractor, status. The same applies if no training at all is needed to do the work.

The Final Rule[1] stresses that these six factors are not exclusive. The determination all comes down to discerning the economic reality of the relationship.

1 https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking

LEGISLATION: BILLS OF INTEREST

There was a time when the *Firehouse Lawyer* was reluctant to write on these pages about bills that might never become law. But in recent years we have decided that it is helpful for us to write articles about bills that should be of interest – either for or against—to our readers. Here is a quick sample of bills that have made it this far in the legislative process without being abandoned, although we cannot be sure they will be enacted into law and signed by the Governor.

ESHB 1932: This bill would change the current law, which requires that fire commissioner elections be held in odd years, so that all local office elections will be held in even years. Apparently, the current thinking is that turnout would generally be higher in the even years. Higher voter participation is especially important in elections that require "validation" such as those statutes that require approval of at least 60% of a number equal to 40% of the total number of district voters in the last general election. See Article VII, Section 2 of the Washington State Constitution.

HB 2044: This bill would standardize the limitations on voter-approved tax levies. The main purpose seems to be to remove the "may not supplant" language from the current version of RCW 84.55.050, i.e. the lid lift statute. We do not think most lid lift elections are an attempt to supplant the regular tax levy, but rather to supplement the existing levy. In other words, the "may not supplant" language was, for the most part, superfluous in the first place.

E2SHB 2354 (SB 6230): This bill,[2] as currently drafted, would provide a modicum of relief to fire districts and regional fire authorities facing cities, counties, or port district proposing to create "tax increment areas" that would divert taxes from the fire district, RFA, or hospital district to the sponsoring city, county or port district.

As our readers know from prior articles in the *Firehouse Lawyer*, tax increment financing as enabled in chapter 39.114 provides for the financing of tax increment areas (TIA) to facilitate development of underdeveloped parts of the municipal entities who can use it.[3] Now, cities, counties, and port districts can finance large public works projects and then get their money back, at least in part, by first creating a TIA.

In a TIA, for a period of years, tax receipts attributable to the new development facilitated by the public work are diverted from the junior taxing district to the sponsoring municipal entity. Tax increment financing has little or no upside for the junior taxing districts, despite what consultants to the cities might say.

The **original** draft of this bill[4] would have provided substantial relief to the junior taxing districts, but the substitutes have removed those provisions, illustrating the power of the city lobby. There was an "opt in" provision in the original bill, which would have allowed junior taxing district to opt out.

The current version of the bill, now known as the "Engrossed Second Substitute House Bill 2354" would insert some greater possibilities of mitigation of the impacts on the junior taxing districts by these TIA's. The latest language states that, if the TIA impacts at least 20% of a junior taxing district's assessed value, <u>or</u> if the annual report or the capital facilities plan of the junior district shows a direct impact on the level of service by that district, directly related to the new development, then the sponsoring jurisdiction must enter into negotiations for a mitigation agreement.

And if negotiations do not lead to a satisfactory agreement, then binding arbitration is required. 60 days are allowed between the demand for arbitration and the formation of the arbitration panel, and if the first two named arbitrators cannot agree on the third (neutral) arbitrator, then a local Superior Court judge appoints the neutral arbitrator.

SSB 5770: This bill, which failed to advance last year, will probably not move forward in 2024 either. It would, essentially, raise the 1% limit on tax levy increases, year over year, to 3%. It appears to be inactive.[5]

SSB 5925: This bill would affect fire commissioner compensation, but only in those districts having an annual operating budget of 10

[2] https://lawfilesext.leg.wa.gov/biennium/2023-24/Pdf/Bills/House%20Bills/2354-S2.E.pdf?q=20240229104349

[3] https://firehouselawyer.com/Newsletters/October2023FINAL.pdf

[4] Here is the original bill: https://lawfilesext.leg.wa.gov/biennium/2023-24/Pdf/Bills/House%20Bills/2354.pdf?q=20240229135105

[5] https://app.leg.wa.gov/billsummary?BillNumber=5770&Initiative=false&Year=2023

million dollars or more. It would establish a cap on the number of per diem payments at 144 payments per year. (The current law, by setting out the dollar limits, averages out to 8 days per month, or in other words, 96 days per year.)

The bill would leave RCW 52.14.010 otherwise unchanged. The bill report suggests that only about 20 fire districts of about 400 in the state have such large budgets. Frankly, we would be surprised if the number were not higher, just judging by the number of Eric Quinn clients who have larger budgets than that.

The substitute bill was scheduled for a hearing before the House Local Government committee on Friday, February 16th, so it may advance.

DIVERSION OF PROPERTY TAXES MAY BE UNCONSTITUTIONAL

An interesting decision came down on (February 27 from Division 2 of the Washington Court of Appeals. In *Building Industry Association of Washington v. State of Washington and Thurston County Auditor,*[6] the appellate court addressed the BIAW's contention that the latest recording fees (fees for recording documents of all kinds with the county auditor) statutes are unconstitutional. The BIAW was attacking the pertinent recording fee statutes because a large portion of the money now collected by the auditors goes to affordable housing and other homeless initiatives.

The BIAW contended that the recording fees in question are property taxes and therefore Article VII, Sections 1 and 5 were violated by collecting these fees and then using the money for affordable housing needs. The argument was rejected by both the trial court and the appeals court because the statutes enable and establish an excise tax, not a property tax.

By way of background, Article VII, Section 1 is the well-known rule that all taxes must be uniform upon the same class of taxpayers within the taxing district. We will not discuss that section herein.

We want to discuss Section 5 of said artcile in depth, because it is discussed in detail in the *BIAW* case cited above. In discussing the Section 5 argument made by the BIAW, the Court of Appeals panel noted that "an action [statute] is unconstitutional when it diverts taxes, originally designated for specific purposes stated in the enabling law, towards a wholly unrelated project or fund."

In support of this proposition, the Court of Appeals cited *Ley v. Clark County Public Transportation Benefit Area,* 197 Wn. App. 17, 386 P.3d 1128 (2016) and *Sheehan v. Central Puget Sound Regional Transit Authority,* 155 Wn. 2d 790, 804, 123 P.3d 88 (2005).

Although the Court of Appeals found no such unconstitutionality in the amended statutes on recording fees, with the funds going largely for affordable housing and the homeless, there might be some application of this argument to the statutory scheme set out in Chapter 39.114 on Tax Increment Financing. We start out with the enabling statutes that authorize fire district to levy regular (not excess) property taxes up to $1.50 per thousand of assessed valuation, i.e. RCW 52.16.130, RCW 52.16.140 and RCW 52.16.160. These statutes authorize fire district to levy taxes

[6] https://www.courts.wa.gov/opinions/pdf/D2%2057502-7-II%20Published%20Opinion.pdf

to "carry out the purposes for which fire protection districts are created." Those purposes are set out in other statutes but include, importantly, the provision of fire prevention, fire suppression, emergency medical services (EMS), and for the protection of life and property. These specific purposes are quite different from the purposes of other municipal corporations, such as cities, counties and port district.

Yet, it seems that on its face and as applied, the tax increment financing scheme outlined in RCW 39.114.010 and RCW 39.114.020 would divert (for very long periods in some cases) regular property taxes levied by fire protection districts (and also public hospital districts, park districts and probably other junior taxing districts) to repay a city, county, or port district for funds spent pursuant to an ordinance or resolution establishing a tax increment area.[7] While the laws in chapter 39.114 RCW may refer to the diverted taxes as "allocated," the working of the statutes is a diversion.

We believe that this diversion of taxes, specifically and lawfully designated for specific purposes under Title 52 for fire protection districts (or others under similar enabling legislation) could well be unconstitutional pursuant to Article VII, Section 5, which deals with property taxes. We think a legal action should be brought by a coalition of junior taxing districts, asking for a declaratory judgement that these two laws—RCW 39.114.010 and RCW 39.114.020—are either unconstitutional on their face or as applied.

We represent fire districts that are being subjected to tax increment areas and diversion of taxes. The currently proposed amendment to the TIF scheme[8] will not do enough to stop these diversions. Providing for a need to negotiate toward mitigation agreements and for mediation and arbitration if negotiations fail does not guarantee that **all** diverted taxes will be paid back by agreement. Why would a city do that, as that would negate the attempt to divert the money to reimburse them for their outlays for the improvements desired to be financed?

We have previously argued in these pages (see footnotes above) that the TIF statutes seem inconsistent with RCW 43.09.210, a state auditor's accountability law. That law was designed to do exactly what section 5 addresses—to ensure that property taxes are used for the explicitly stated purpose for which they were levied in the first place. The whole idea of tax increment financing, at least as provided for in these two TIF statutes, is contrary to that basic principle.

[7] https://firehouselawyer.com/Newsletters/NovemberDecember2023FINAL.pdf

[8] See footnote 2 above for a copy of the bill.