FIREHOUSE LAWYER

Vol. 3, No. 8 **Joseph F. Quinn, Editor** **August 31, 1999**

Initiative 695 -- Its Effects and its Defects

On November 2, 1999, the voters of the State of Washington will have the opportunity to vote on Initiative 695. While much has been written in the general media about I-695, most of the commentary is related to the reduction of the motor vehicle excise tax (MVET), as section 1 of the Initiative would reduce the license tab fee to $30.00 per year. Undoubtedly, this would impact state and local governments greatly, as a large percentage of some local government's annual budgets comes from the distribution of the MVET through the sales tax equalization process.

The focus of this article, however, is on section 2 of the Initiative, which has received somewhat less attention in the general media. Section 2 of the Initiative provides that any tax increase imposed by the State shall require voter approval. While that may seem innocuous or limited, the word State is defined so broadly as to include all local governments and special purpose districts. The word "tax" and the term "tax increase" are also defined so broadly that they really do not refer just to taxes, but to all governmental fees or charges of any kind. The definition of the word "tax" covers property taxes, business and occupation taxes, excise taxes, fuel taxes, impact fees, license fees, permit fees, and any other monetary charge by government.

Obviously, most of the clients of the author of this article, are fire protection districts. Therefore, we wish to make it clear that this Initiative's definition of the word "tax" prevents any increase in benefit charges under RCW 52.18, burning permit fees authorized under RCW 52.12 or ambulance or emergency medical fees frequently charged by fire districts, if this Initiative is enacted.

Due to the breadth of the language, it appears that a service charge, connection charge, or a rate for utility services, such as sewers or water would also be a "tax". The term "tax increase" is also defined broadly. The term includes at least any new taxes, monetary increases in existing taxes, tax rate increases, extensions of expiring taxes, and "an expansion in the legal definition of a tax base", whatever that means.

Section 3 of the Initiative makes reference to various statutory sections that are repealed, but the law makes no specific reference to Chapter 84.55 RCW, the legislation known as Referendum Bill No. 47, which amended the long-standing 106% lid law a couple of years ago. Nonetheless, as discussed below, this Initiative would significantly impact the Referendum 47 processes now employed by local governments.

Section 4 of the Initiative provides that the Initiative shall be liberally construed to effectuate its policies and purposes. Section 5 is a typical severability clause, providing that if any provision of the act or its application is held invalid, the remainder of the act is

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not invalid. Finally, Section 6 of this relatively short legislative act states that it shall take effect January 1, 2000.

The Impacts of I-695.

While the impact of Section 1 would be tremendous, the focus of this article is limited to the discussion of the drastic impacts of Section 2 of the Initiative.

If enacted, I-695 would definitely impact the Referendum 47 procedures and processes relating to property tax revenues. Currently, under the Referendum 47 procedures, a fire protection district, for example, can increase property taxes, including EMS levies in excess of inflation (see implicit price deflator) by passing appropriate resolutions. Through this method, a municipal corporation may increase property tax revenues within the taxing district up to the full 106% lid allowed by prior law. In essence, the previous 106% lid law allowed growth in property tax revenues by 6% annually without a vote of the people. To exceed 6% growth in overall property tax revenues, the constitution and applicable statutes require voter approval already, in a so-called "excess levy" election.

Under I-695, however, a local government could not pass a resolution or an ordinance (in the case of cities or counties) "overriding" the implicit price deflator and calling for increased tax revenues up to the 106% lid without voter approval. In other words, I-695 makes all increased levies excess levies.

One might reasonably ask, however, about the natural growth in a taxing district's overall tax levy resulting from new construction added to the tax rolls during the year, or an increase in assessed valuation of properties resulting solely from increased assessments caused by routine reevaluation of property done by the county assessor pursuant to statutory authority.

Some commentators have stated that these "natural increases" would also not be appropriate without a vote of the people under I-695. I question, however, the correctness of that opinion, or in fact how it could possibly work. Suppose a large corporation opens a manufacturing plant in your county and within your fire protection district, adding $50,000,000.00 in new construction to the tax rolls. If this construction occurred and was added after the 1998 levy but before the 1999 levy, the assessor would have added the property to the rolls appropriately, exercising their statutory authority. How could it take voter approval to add that to the tax rolls and therefore the levy of the applicable taxing district?

Similarly, if the assessor did a routine reevaluation cycle in a portion of your county or fire protection district, increasing the assessment on land and improvements for a segment of the properties, that would ordinarily increase the total tax levy for the applicable taxing district without any formal action of those local governments. In other words, the assessor has performed his or her statutory duty. How can that be required to be done only after voter approval? There is a well-settled canon of statutory construction that a statute is not construed to lead to absurd consequences. We believe that it would be an absurd reading of the Initiative to construe it to mean that the assessor cannot perform their function of revaluing property or adding new property to the tax rolls, as a result of growth.

Actually, a careful reading of the Initiative does not suggest that these are the type of actions that should require voter approval. While certainly these events do lead to an increase in the tax base, they are not a "tax increase" as they are not a change in the legal definition of the tax base nor do they meet any of the other definitions of the term
"tax increase". The definitions

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do not prohibit property from increasing in value, and we do not conceive of any way in which that could be legislated. The intent of the Initiative must be to prevent governments from taking certain actions, such as increasing the amount of a levy from $1.00 per thousand to $1.50 per thousand or, alternatively, imposing a tax on an activity or property which either they legally could not do before, or which legally they were authorized to do but had not yet exercised that authority. It would make no sense, however, to construe the Initiative to mean that hundreds of thousands of people could move into the state or area, imposing obvious demands for governmental services, but without any corresponding increase in the tax base of the government needing to provide those services.

Some concern has been expressed as to the impact of the Initiative on mergers and annexations, and resulting "tax increase" on some property owners that may result from such actions. Mergers of fire protection districts under RCW 52.06, and annexations of cities into fire protection districts for fire services, both require a vote of the people. We submit that an informed electorate taking part in either of those two ballot propositions would be deemed to have approved such a "tax increase" by voting for the merger or annexation.

What will be the effect of I-695 on taxes levied in 1999 but collected in the year 2000? It is fundamental that regular and special levies of real property taxes are levied one year and collected the next. However, the mere fact that a property tax is collected after the effective date of the Initiative is not a problem, so long as the property tax is levied before the effective date. Interestingly, there is some confusion about the effective date of the Initiative. While Section 6 does provide that the Initiative shall be effective January 1, 2000, the State Constitution provides otherwise. It states that initiatives are effective 30 days after the election. We assume that the Constitution will override Section 6. Therefore, readers are cautioned that they should assume, if enacted, this Initiative will be law on December 2, 1999. It follows that real property levies by the counties should be accomplished no later than December 1, 1999, or they will be subject to the Initiative. In that event, any property tax levy that is higher than the previous year's levy could be called into question.

While we believe that the natural increases in the taxing district's levy resulting from new construction added to the rolls or increases in individual assessments would not be subject to the Initiative, that is certainly debatable. Moreover, any increases under Referendum 47 (RCW 84.55) or any changes in the level of taxation such as an increased EMS levy would be subject, under this scenario, to the impacts of I-695. In any event, due to the potential questions about any increase in the levy from last year's levy, we would suggest that taxing districts urge county assessors and other county officials to ensure that the levy does take place on or before December 1.

Because December 2 is the effective date of the Initiative, we recommend that any taxing district contemplating increases in fees or charges pass the appropriate resolution or ordinance and make it effective on or before December 1, allowing adequate time for publication requirements, if any. We recommend that fire protection districts, for example, review their needs for the next year or two and if it is apparent that increases in benefit charges, burning permit fees, or ambulance transport charges will be needed in that time period, the district may as well impose those increases before December 2 or else voter approval will be required.

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Defects of I-695.

In addition to Section 6 specifying the wrong effective date, there are some other defects or problems with this Initiative.

Article II, Section 19 of the Constitution provides: "No bill shall embrace more than one subject and that shall be addressed in the title." According to Attorney General opinions, this constitutional provision has a dual purpose. First, it is to prevent "log rolling" which means pushing legislation through by attaching it to other necessary or desirable legislation. Second, this constitutional provision is intended to assure that members of the legislature and/or members of the public are generally aware of what is contained in proposed new laws. In other words, there should not be any hidden subjects.

This legislation may be a "double subject" bill and very possibly could be a "hidden subject bill". It certainly does a lot more than drastically modify the MVET. It also prevents, without voter approval, any kind of fee increase by government. The legislation attempts to encompass everything within one subject by describing in the title the Initiative as legislation dealing with and limiting taxes and tax increases.

Yes, the drafters could argue that there is really only one subject. They accomplish this sleight of hand by disregarding decades of Washington Supreme Court opinions. Numerous cases have held that some of these other kinds of charges are not taxes. For example, in *Morse v. Wise*, 37 Wn.2d 806, 226 P.2d 214 (1951), the Washington Supreme Court held that a sewer charge was imposed to protect the health, safety and welfare of the community, not for raising revenue, and therefore was not a tax but a regulatory measure. In *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1985), the Supreme Court analyzed storm drainage charges imposed under RCW 36.89 and RCW 35.67. The result was similar to that in *Morse v. Wise*, with the Court holding that these were not special assessments or taxes.

These charges in both cases were imposed under the police power as regulatory measures and were not taxes. Under I-695 those cases are in effect overruled for purposes of this Initiative at least. Similarly, in *King County Fire District v. Housing Authority of King County*, 123 Wn.2d 819, 872 P.2d 516 (1994), the Supreme Court held that benefit charges assessed under RCW 52.18 are not taxes or assessments and therefore the Housing Authority was not exempt as it would have been if the charges were taxes. The Court held that the Housing Authority was authorized to contract for service with the fire district and should so contract. The Housing Authority was not immune from paying for services or benefits received. The Court stated that "taxes are defined by statute and case law".

The Supreme Court cited RCW 84.04.100 provided that the word "tax" and its derivatives shall be held and construed to mean the imposing of burdens upon property in proportion to the value thereof for the purpose of raising revenue. Not only does I-695 overrule the *King County Fire District* case, but it also seems to repeal or modify the above-referenced RCW which defines the word tax. Instead, as mentioned above, this Initiative defines a tax to include any governmental charge. (Under this logic, I suppose we could define the word "cougar" to include house cats and then ban all cougars from family homes.) In other words, the drafters have turned 40 years of court decisions on their head by this statutory definition. More importantly, they may have impliedly repealed various statutes without any reference to those statutes. While we believe that this legislation may well be a bill containing more than one subject,

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based upon the case law interpreting that constitutional provision, the argument is not a foregone conclusion. Many court cases have held that if the title is broad enough, there really are not two subjects contained in the legislation. We evaluate this constitutional challenge as perhaps having a 60% chance of success.

Another more compelling challenge might be based upon Article II, Section 37 of the Constitution. It provides: "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." It certainly could be argued that this legislation seems to revise or amend Referendum 47, *i.e.*, RCW 84.55, the modified 106% lid law. Of course, it makes no reference to the title, but certainly seems to either impliedly repeal that act or modify it. The purposes, of this constitutional section, as discussed in Attorney General opinions are to avoid the uncertainty created by the need to refer to existing law to understand the effect of the new enactment, to apprise those who are affected by an existing law of any important changes in it, and to clearly disclose the status of existing law and the effect of a proposed amendment upon it. Various cases have discussed these purposes and in a few instances overthrown legislation for violation of Article II, Section 37. A long list can be made of the statutes that this Initiative amends or revises. By defining the word "tax" to include impact fees, it seems that the Initiative amends the Growth Management Act. It also effectively amends the benefit charge legislation under RCW 52.18, and any legislation having to do with rates and charges imposed by municipal utilities. While existing laws allow those rates and charges to be increased without voter approval, this Initiative would change all of that.

There may be other legal defects and challenges to this Initiative. For example, it could be argued that the Initiative violates the "separation of powers doctrine" because of its complete disregard for judicial decisions. The Initiative may also violate the constitutional prohibition on laws that impair the obligation of contracts. *See* Article I, Section 23. If legislation would necessarily cause the breach of a valid contractual obligation of the government or entity, such as the issuer of municipal bonds, then it may be unconstitutional to some degree. Frequently, bond covenants require that the bond holders be entitled to the unfettered revenue streams of the municipal issuers. This type of law may jeopardize their position or violate those covenants.

In conclusion, there may be numerous successful legal challenges to this legislation. In the meantime, since such challenges are always uncertain and/or unpredictable, it would be prudent for local governments to plan preventive actions.

If a taxing district contemplates any type of increase in the next two years in rates, fees, charges or taxes, they should consider doing it before December 2, 1999. All government officials should urge their county assessor and other county officials to levy all regular and special levies before December 2, 1999. Local governments should inform the public through all legitimate needs, without violating the Public Disclosure Act and in particular RCW 42.17.130, of the full impacts of I-695.

As we know, it is not just an innocuous piece of legislation to lower the MVET to $30.00. If this law is approved by the voters, local government officials should make their case to the legislature with respect to modifying this initiative. Only as a last resort, local government officials should consider joining coalitions or parties that will seek to have this Initiative declared unconstitutional if it is enacted.

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Initiative 695 is not only poorly drafted, it is also bad public policy. Just as a legislature should not pass laws imposing "unfunded mandates" on local governments, the people of the State by initiative should not enact legislation that attacks a problem such as the unfair MVET, without also providing a solution. It is shortsighted, from the standpoint of public policy to repeal legislation that provides millions of dollars not only to the State but to local governments, whose budgetary sources and powers are so limited. It has been widely reported that some local cities would lose 35 - 40 percent of their budget and would necessarily have to lay off employees. Therefore, it seems self defeating, just to limit the MVET, to pass legislation that would cause such drastic cuts in public services. We hope that the voters will be more intelligent than that and vote against this Initiative. Nonetheless, it behooves local governments to plan for the worst and hope for the best.

FLSA: Delay Equals Damages?

The village of Ridgefield Park, New Jersey routinely delayed payment of police officers' overtime pay for up to six weeks. In 1997 a federal district court found that the delay in payment violated the FLSA and awarded the police officers $55,000.00 in liquidated damages. The Third Circuit recently affirmed, holding that the employer violated the FLSA. However, the appeals court set aside the liquidated damage award because the police officers had actually received their overtime pay in full already; they simply received it late.

In the case, the delayed payment schedule was established pursuant to a collective bargaining agreement. It was apparently agreed that the employer would pay the overtime separate from the regular compensation and would pay it monthly. The officers received their regular pay weekly, and then received their overtime pay on a monthly basis, but sometimes as long as six weeks after they earned it. While the deferral of payment was negotiated with the union, some officers did not want their overtime pay to be delayed.

The FLSA itself does not specifically state when overtime compensation must be paid. However, a 1972 Department of Labor Interpretive Bulletin interpreted the Act to mean that payment may not be delayed for a period longer than is reasonably necessary to compute and arrange for the payment. In no event should the payment of overtime compensation be delayed beyond the next pay day after the computation has been made. The Third Circuit Court of Appeals accepted the DOL's inter-pretation. The Third Circuit affirmed the trial court holding, that the provisions of the FLSA are not waivable even by collective bargaining. The Third Circuit stated that the District Court was correct in finding the FLSA violated, because the employer simply did not pay the overtime as promptly as it could have, given the weekly pay schedule of these employees.

The next question related to liquidated damages. Ordinarily, in FLSA cases, there is some back pay, *i.e.*, overtime pay, due to the employees. The statute allows the back pay to be awarded, plus an equal amount in liquidated damages. The anomaly in this case was that the employees had received their overtime compensation and were not seeking back pay. The court stated that a trial court may choose not to award liquidated damages if the employer shows that the act or omission giving rise to the violation was in good faith and the employer had reasonable grounds for believing that his act or omission was not a violation of the FLSA.

FLSA: Delay Equals Damages (Continued)

In this case, the court noted that the employer was aware of its obligation but believed there was nothing wrong with the delayed overtime schedule. This was partly because the police officers union had requested that schedule and then approved it. Moreover, two labor attorneys, one representing the employer and the other representing the union, had been consulted for advice on the labor contract containing the payment schedule. The involvement of the attorneys indicated that the employer showed a good faith effort to meet its obligations under the FLSA.

The appeals court, noting that the only prompt-payment guidance was not in the statute or the regulations but in an "obscure interpretive bulletin" held for the employer on the liquidated damages issue. The court noted that the deferment of overtime actually originated with the plaintiff and their union. For these reasons, the court vacated the trial court's award of liquidated damages and sent the case back to the district court for reconsideration. *See Brooks v. Village of Ridgefield Park*, 3rd Circuit, No. 98-6357, July 21, 1999.

Sector Boss

Disclaimer

We need to clarify the purpose of this question and answer column. Like the Q&A column in any newspaper, the purpose of the Sector Boss column, and indeed the purpose of the Firehouse Lawyer newsletter, is to educate with respect to the law, but not to give legal advice to any particular client. There is no attorney-client relationship, simply because an agency or person has sent in a question to the newsletter editor. The Sector Boss column is not a free legal clinic for those submitting questions, even if they happen to be clients of Joseph F. Quinn. In other words, the purpose of this column is to answer short legal questions if there is room in the newsletter. A question may or may not be selected for publication. There may simply not be room. Joseph F. Quinn is not practicing law in any state except Washington, and therefore materials in the Firehouse Lawyer are not a substitute for obtaining legal advice for a particular situation. Therefore, readers are advised to consult with a qualified and competent attorney in their state or with respect to the federal questions sometimes discussed here.

Now that we have cleared up any confusion, let's try to educate and answer some interesting questions!

Q: Our fire department has been averaging payroll checks for years. After looking at the fluctuating annual hours worked (depending on which shift you are on) we have been dividing the annual pay by 2,912 hours to get the hourly rate. Since one shift works less than the other two each year, the calculation of hourly rate fluctuates with the hours worked in a year. We are now planning to calculate the hourly rate on a 27-day work period (all shifts working 216 hours). My question is: Can we pay firefighters using a 14-day cycle (paying overtime for more than 106 hours in 14 days) even though we used the 27-day work period to calculate the hourly wage? Or must we use the 27-day cycle for payroll as well?

Captain D. Crockett

P.S.: We are a small suburban non-union fire department.

A: There are two fundamental concepts under the FLSA that you must understand in order to do this correctly. From the description of your department in the question, I am assuming that you are subject to the Act, as you must have more than five full time employees to operate these shifts.

Sector Boss (continued)

As I think you understand, firefighters may qualify for the partial overtime exemption under Section 207(k) of the Act available only to police and firefighters. If you have established a 27-day "work period", overtime must be paid whenever more than 204 hours are worked during that work period.

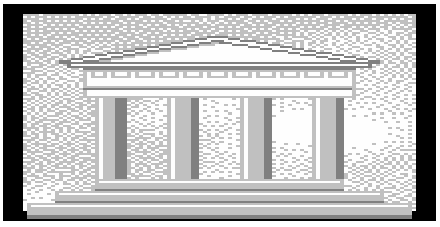
Establishing the work period should be at least by administrative declaration and should be noted in the payroll records, with specific reference to Section 207(k) and with reference to 29 CFR part 553. Technically, if you do not formally establish this work period, the DOL could possibly claim that overtime must be computed on a 40-hour work week basis, like other employees. The work period chosen does not have to coincide with the pay period. As long as the work period conforms with the maximum hour standards and remains the same, the FLSA is satisfied. Of course, if additional hours beyond the maximum allowed by the 207(k) exemption were worked, the appropriate amount of overtime compensation would have to be paid on the next regularly scheduled payday after sufficient time to compute the overtime. *See* above article.

It is not appropriate to pay Section 207(k) employees for an average number of hours worked. The DOL found impermissible a city's plan to pay a firefighter on a 27-day work schedule for 112 hours every two weeks or 224 hours for the work period at a straight-time rate when the firefighter actually worked 216 hours. The DOL struck down that plan noting that the 12 overtime hours (the difference between 204 and 216) must be based on time and one half the firefighter's regular rate of pay. *See* Wage and Hour Opinion Letter, January 23, 1986.

A part of your misunderstanding relates to the calculation of "regular rate". As with all employees, including those not under the 207(k) exemption, you must compute an employee's regular rate in order to determine what rate to pay under time and a half for overtime. Your problem relates to the determination of "regular rate" because apparently your personnel are paid an annual salary.

Assuming you establish a 27-day work period, you have approximately 13.5 work periods in a year. The annual salary divided by 13.5 would tell you how much a firefighter earns per work period. Suppose a firefighter earned $36,000.00 annual salary. Dividing that by 13.5 work periods, I conclude they earn $2,666.67 per work period. Dividing that by 216 hours per work period, would result in an hourly rate of $12.35. That would be their regular rate. However, since overtime is due after 204 hours, the 12 hours of overtime in every work period would entitle them to $74.10 overtime pay each work period, using the "half time" method for calculating overtime. *See, e.g., Aaron v. City of Wichita*, 54 F. 3d 562 (10th Circuit, 1995).

I am not sure if I have answered your question as to why it must be done this way. essentially, the FLSA requires overtime to be based on time and one half times the firefighter's regular rate of pay. Overtime pay is calculated for hours worked in excess of the 207(k) maximum for the work period. At least with 207(k) employees, they are considered "salaried" and you may use the half time method of calculating overtime. Hopefully, you are not now thoroughly confused.



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