INDEPENDENT BUSINESS ASSOCIATION

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IBA SMALL BUSINESS REPORT - August 16, 2019

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Paid Family Leave Reporting And Premium Payments Due August 31st.

Your Company's Paid Family Leave (PFML) report for the fist quarter of 2019 and the second quarter of 2019 are due by August 31, 2019.

IBA is hearing reports of IBA members having problems with the Employment Security Department's Paid Family Leave (PFML) reporting website.

The Department has advised IBA that it's working hard to make its Paid Family Leave (PFML) reporting website more user friendly and the Department's reporting it's website will be periodically off-line as the Department corrects software problems it discovers while the reporting period moves along.

IBA successfully submitted its PFML report on July 2, 2019 after some problems. IBA sent out an IBA Special Report about PFML reporting on July 3, 2019. You can view the July 3rd IBA Special Report via the Internet at: www.ibaw.net/pfmlreport.pdf

IBA has been in close communication with the Department about employers who try to report but run into problems.

The Department has assured IBA that any employer who tries to report but is unable to complete its reports, that the Department will not impose penalties on that employer.

Keep records (including screen shots) of when you try to set up your account and when you tried to make a report to support your claim that you tried to report but ran into problems.

A great way to protect yourself is to contact the Department's help line at **(833) 717-2273** or email at: paidleave@esd.wa.gov and explain your problem. Be sure to provide the Department your company's UBI number to identify who you are. Keep a copy of any emails or document any phone calls.

IBA recommends that IBA members try sooner than later to set up their PFML account and file their first report as soon as possible. The closer you get to August 31st, the more challenges you are likely to encounter.

Things You Must Know About Paid Family Leave Reporting

- This is a **totally separate report** from your state unemployment insurance report.
- Your PFML account will have a totally different and **separate number** from your state unemployment insurance account.
- **File two reports,** one for the first quarter of 2019, and a second report for the second quarter of 2019. Combining the reports will result in significant problems.
- If your firm has fewer than 50 employees, only report the worker's premium 0.253% of gross wages paid to each worker (0.00253 x worker's gross wages). You do not need to report or pay any employer premiums 0.147% (0.00147 x worker's gross wages).
- The Department says that "gross wages" includes pay such as:
  - Salary or hourly wages
  - Cash value of goods or services given in the place of money
  - Commissions or piecework
  - Bonuses
  - Cash value of gifts or prizes
  - Cash value of meals and lodging when given as compensation
  - Holiday pay
  - Paid time off (vacation, sick leave, associated cash outs)
  - Bereavement leave
  - Separation pay such as severance pay, termination pay, or wages in lieu of notice
  - Value of stocks at the time of transfer to the employee (if part of a compensation package)
  - Compensation for use of specialty equipment, performance of special duties or working particular shifts
  - Stipends and per diems (unless provided to cover a past or future cost incurred by the worker as a result of the worker's expected job functions) .
  - Etc.
- Do not retroactively deduct premiums from workers if you have not been deducting the PFML premiums from your workers' pay. Before deducting workers' premiums you must notify your workers one pay period in advance before you begin to deduct Paid Family & Medical Leave premiums from your worker's pay.

ESD requires your company to report electronically via the Internet using the Washington State "Secure Access Washington" (SAW) system. If you don't have Internet, don't use the Internet, or your computer will not establish a SAW account, you need to contact the Employment Security Department (ESD) at **(833) 717-2273** or email at: **paidleave@esd.wa.gov** and explain why you can't report electronically and they will discuss providing you another way to report and pay your Paid Family Leave premiums. This is only available on a one-on-one basis and you should contact the Department as early as possible to avoid penalties for non-reporting and non-payment of premiums.

New Employment Law Effective July 28th

Disclaimer: The following information is general business information to alert the reader of major business issues in Washington State affecting small businesses and this information does not include every requirement of every law or rule. This presentation is not legal advice and should not be used as legal advice and does not assure compliance. The reader should contact a qualified attorney for legal advice on how to comply with these state laws and rules.

A new Washington State employment law took effect on **July 28, 2019** that prohibits employers of all sizes from requesting a job applicant to provide his/her wage or salary history, except under certain circumstances. An employer may confirm an applicant's wage or salary history only if:

If the applicant has voluntarily disclosed the applicant's wage or salary history; or

After the employer has negotiated and made an offer of employment with compensation to the applicant.

The law also makes it illegal, in most cases, for employers to request wage or salary history from a previous employer before offering an applicant a job and negotiating salary.

Under the changes, current employees who are offered an internal transfer to a new position or a promotion must be shown the new jobs wage scale or salary range if they request it.

If no wage scale or salary range exists, the employer must show the employee the minimum wage or salary expectation that was set before the job was posted or a transfer or promotion was offered.

Employers must also show job applicants the minimum wage or salary of the position they are applying for if they request it after being offered the position.

The ban on requesting salary history applies to all Washington employers, regardless of the size of the business. The requirement to disclose salary information to certain applicants and employees applies only to Washington employers with 15 or more workers.

Washington joins California and Oregon in adopting this type of law prohibiting such wage or salary history inquiries.

WA Equal Pay Opportunities Act

These new wage inquiry requirements are added to Washington's existing Equal Pay and Opportunities Act.

The Equal Pay and Opportunities Act requires employers to:

- Provide equal pay and career advancement opportunities to their employees, regardless of gender.
- Provide equal compensation to "similarly employed" workers, except for some specific reasons unrelated to gender. "Similarly employed" means the same employer and similar working conditions, skills, effort and responsibility. Acceptable reasons for a difference in pay may be acceptable if the difference is not based on gender, and is solely based on business necessity. Acceptable factors for differences in pay may include:
  - Differences in education, training, or experience
  - Seniority
  - Merit/quality of work
  - Measuring earnings by quantity or quality of production
  - Regional differences in compensation
  - Differences in local minimum wages
- Employers bear the burden of proof to justify why pay differences exist. An employee's previous wage or salary history cannot be used to justify gender pay differences.
- Provide equal career advancement opportunities. Employers must not limit or provide career advancement opportunities based on gender.
- Allow open wage discussions. Employers cannot stop employees from disclosing their wages to other workers or require agreements with employees that stop them from disclosing their wages.
- Protection from discrimination, retaliation and firing. Employers cannot take any negative action against an employee for:
  - o Asking or talking about wages with other workers.
  - o Asking the employer to provide a reason for the employee's wages or lack of opportunity for career advancement.
  - o Helping or encouraging a fellow worker to take an action

protected by the Equal Pay Opportunity Act. - Filing a complaint.
- o Taking any action prohibited by the Equal Pay Opportunity Act.

Enforcement. Employees may submit complaints to the Department of Labor & Industries (L&I). L&I will investigate complaints, and can charge employers fines, damages and interest for violations. Employees also have the right to take legal action against an employer. Once a civil complaint is filed in court, L&I cannot investigate the complaint.

Governor Jay Inslee said. "The protections established in this law are the next step toward finally leveling the "equal pay for equal work" playing field."

Employees can file a complaint if their current or former employer has:
* Provided them with unequal compensation compared to other employees who are similarly employed, based on gender.
* Limited or denied their career advancement opportunities, based on gender.
* Prohibited them from discussing wages.
* Not provided wage or salary information for a new position upon request.
* Retaliated against them for filing a complaint or exercising protected rights under the Equal Pay and Opportunities Act.

Job applicants can file a complaint if an employer has:
* Sought their wage or salary history.
* Required that their wage or salary history meet certain criteria such as requiring a minimum salary amount in a previous position to apply for a new position.
* Not provided minimum wage or salary information upon request for a position offered to them.

IBA and the Department of Labor and Industries recommend that Washington employers review job applications and other hiring processes to confirm that any requests for or references to job applicants salary history are removed. Employers should also ensure they can provide specific information about the minimum wages or salaries, or wage scales or salary ranges to applicants and employees upon request.

Costly New State EAP Overtime Wage Increase Proposed

For executive, administrative and professional (EAP) employees, the Washington State Department of Labor and Industries is proposing to **TRIPLE** the state's overtime exempt pay thresholds for EAP salaried workers over 6 years. EAP workers are exempt from overtime pay if they meet a minimum weekly pay threshold and also meet the duties test of being an executive, administrative or professional employee which are proposed to align closely with the federal duties tests.

Currently, the state uses the federal EAP pay threshold which is $455/week which equal $23,660 per year.

Currently, the federal Department of Labor is proposing to increase the federal EAP employee pay threshold to $35,308 annually or $679/week with inflation increases of about 2% per year with adjustments every 4 years.

The proposed Washington State EAP overtime pay thresholds are shown in the table below. There are two different threshold rates, one for employers with **50 or fewer employees**, and one for **employers with 51 or more**.

You can view the Department's explanation of this proposed rule at: www.ibaw.net/eaplniexplain.pdf

Your Comments Are Needed!

Every small business should submit comments to the Department of Labor and Industries. The Department will be taking comments on the proposed rule until September 6, 2019:
- By US Mail to: **Employment**

Year	≤50 Employers	≥51 Employers	Federal EAP Wage Proposal - 4 year adjust.
7/1/2020	1.25xSMW ~$675/wk ~$35,110AW	1.75xSMW ~$945/wk~$49,140AW	~$679/wk~$35,308AW
1/1/2021	1.75xSMW ~$955/wk ~$49,660AW	2.0xSMW ~$1003/wk~$52,156AW	~$679/wk~$35,308AW
1//2022	2.0xSMW ~$1,127/wk ~$58,604AW	2.25xSMW ~$1,268/wk~$65,936AW	~$679/wk~$35,308AW
1/1/2023	2.25xSMW ~$1,296/wk ~$67,392AW	2.25xSMW ~$1,296/wk~$67,392AW	~$721/wk~$37,4690AW
1/1/2024	2.25xSMW ~$1,324/wk~$68,848AW	2.25xSMW ~$1,324/wk~$68,848AW	~$721/wk~$37,4690AW
1/1/2025	2.25xSMW ~$1,352/wk~$70,304AW	2.5xSMW ~$1,503/wk ~$78,156AW	~$721/wk~$37,4690AW
1/1/2026	2.5xSMW ~$1,536/wk ~$79,872AW	2.5xSMW ~$1,536/wk ~$79,872AW	~$765/wk ~$39,762AW
x= times SMW = State Minimum Wage ~ = estimated projection /wk = per week AW = Annual Wage			

Standards Program, P.O. Box 44510, Olympia, WA 98504-4510

- By email at:
- **EAPRules@Lni.wa.gov**
- By fax at: **360-902-5300**

IBA urges that comments include:

The New EAP Threshold Is Excessive

The new proposed state threshold for EPA employee overtime exemption will put Washington State business out of sync with the rest of the nation (except California) that will likely use the federal EAP wage threshold (see chart below). The new threshold will put Washington businesses at a competitive disadvantage with other businesses across the nation.

Unfair Impact On Small Businesses

Small businesses are unfairly affected by the proposed Washington State EAP employee overtime exemption threshold. Small businesses (<20 employees) have historically paid EAP workers 56% less than large businesses (>500 employees) pay (Department of Labor and Industries data), yet, the EPA overtime exemption threshold for small businesses is the same as it is for large businesses in 2026. While the lower phase-in for <50 businesses is appreciated, it only temporarily eases the unfair burden this new rule imposes on small businesses.

Unfairness To Rural Parts of Washington State

Rural small businesses are unfairly hammered by the Department proposed increase in the EAP employee overtime exemption threshold. Data provided at the request of IBA from the Department of Labor and Industries demonstrated that the weekly median wage in King ($1,202) and Snohomish ($1,001) counties was over $1,100 per week, but those were the highest counties. The lowest counties, Chelan, Douglas Grant, Adams and Franklin had median weekly wages of $670, 55% lower than King County. Yet the Department's EAP overtime wage threshold is the same for all 39 counties, including those that pay 55% of what the highest county pays. Even California's EAP overtime exemption threshold recognized the difference between higher cost cities and lower cost cities with a higher EAP overtime threshold in Los Angeles, San Jose, San Francisco, Berkeley and other cities than the rest of California. WA's Department of Labor and Industries needs to do the same with its rule.

Inappropriate July 1st Effective Date

A July 1, 2020 effective date for these new EAP overtime exemption threshold wages is also unjustified and wrong. The state's minimum wage changes take effect on January 1st of each year. This new EAP overtime exemption will take effect on July 1, 2020 but should take effect on January 1, 2021 not July 1, 2020. A July 1st effective date imposes an unfair administrative burden on small businesses, it is out of sync with federal taxes, it will change withholding tax amounts mid year, and it affects many other issues and is totally unnecessary.

Voters Support New Overtime Proposal

The Washington State Department of Labor and Industries is currently seeking comments on its proposed 3+ time increase to the pay threshold for salaried executive, administrative and professional (EAP) workers before those workers are exempt from overtime pay. In a recent poll of voters, 2/3's of those polled supported the Department's proposal.

Income Tax For YOU?

On July 15, 2019 a Washington Court of Appeals, the second highest court in Washington State, issued a very surprising opinion on the constitutionally of a Washington State income tax.

In 2017, Seattle passed a city income tax to retest the constitutionally of a income tax in the Courts.

The Court of Appeal ruled that Seattle can impose a tax on income but the Court stated it was *"bound by the Washington Supreme Court's precedential decisions that a tax on income is a property tax and that a graduated income tax violates the uniformity provision of state constitution article VII, section 1. Because Seattle 's enacted a graduated tax on income, it is unconstitutional."*

You can view this 30-page Court of Appeals decision via the Internet at: www.ibaw.net/seattleincometax.pdf

New Paid Sick Leave Policies Released

On July 30th, the Washington State Department of Labor and Industries issued a new set of proposed Washington State Paid Sick Leave policies about how the Department intends to implement that law. The draft policies contain 63 proposed policies ranging from ***Employee Entitlement and General Compliance Questions*** to ***Unlawful Use of Paid Sick Leave.***

The Department's 63 Draft Policies are a good "How To Comply" manual for the Washington State Paid Sick Leave law. IBA has highlighted key elements of the Draft Polices employers should be aware of.

You can access these draft policies via the Internet at: www.ibaw.net/pslpolicies.pdf

The Department is seeking comments about its proposed paid sick leave policies by October 18, 2019.

No Sick Leave Cash-Out

Many small employers have decided

to pay (cash-out) employees for their earned sick leave when they earn an hour of sick leave to avoid all of the recordkeeping and notice requirements.

The new Paid Sick Leave Policies prohibit cashing-out paid sick leave when earned. It is in Section 1 item I of the draft policies.

Sexual Harassment and Small Employers

In recent years, the Washington state Legislature has passed five significant sexual harassment legislative bills that are now laws. Employers can face lawsuits and possible fines for non compliance.

Small employers need to comply with these new laws.

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Below are summaries of these new laws.

SB 6471 (2017) directed the Washington State Human Rights Commission must develop model policies and best practices for employers and employees to keep workplaces safe from sexual harassment. The polices and practices include:

- How to create and protect anonymous reporting channels;
- Ensure human resource departments are accountable for enforcing sexual harassment policies;
- How to protect against retaliation;
- Providing the opportunity for employees to establish affinity groups to share concerns and provide mentoring regarding sexual harassment;
- The use of exit and employee engagement surveys to improve retention and promote an inclusive work environment;
- Using new employee orientation to emphasize inclusion of sexual harassment prevention and using required training for all employees in a classroom environment;
- Evaluating executives and supervisors on their efforts to support an inclusive workplace and prevent sexual harassment; and
- How to create an internal communication plan for communicating a commitment to inclusion and sexual harassment prevention.

You can view the state's model sexual harassment policy for employers via the Internet at: https://www.hum.wa.gov/sites/default/files/public/publications/Sexual%20Harassment%20Model%20Policy.docx

You can view the state's model sexual harassment procedures for employers via the Internet at: https://www.hum.wa.gov/sites/default/files/public/publications/Sexual%20Harassment%20Model%20Procedures.docx

SB 5996 (2018) prohibits employers from requiring an employee to sign a nondisclosure agreement that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events, or between employees, or between an employer and an employee outside the business. Any nondisclosure agreement signed by an employee is void and unenforceable.

SB 6313 (2018) Makes an employment agreement void and unenforceable if it requires an employee to waive their right to file a complaint for sexual harassment, federal antidiscrimination law, or if it requires a claim of discrimination be resolved using a dispute resolution process that is confidential.

HB 2661 (2018) Victims of domestic violence, sexual assault, or stalking (victims) are able to seek and maintain employment without fear of discrimination and to have reasonable safety accommodations in the workplace. An employer may not:

- Refuse to hire an otherwise qualified individual because the individual is an actual or perceived victim; or
- Discharge or in any manner discriminate or retaliate against an individual with respect to any terms, conditions, or privileges of employment because the individual is a victim or perceived victim.

HB 1728 (2019) Requires every hospitality, retail, behavioral health care, or custodial employer, or labor contractor who employs a custodian, security guard, hotel or motel housekeeper, or worker who spends a majority of working hours alongside two or fewer coworkers at a location that is not the employee's home to:

(1) Adopt a sexual harassment policy;
(2) Provide training to the managers, supervisors, and employees;
(3) Provide a list of resources for the employees to use; and
(4) Provide a panic button to each worker that spends most working hours alongside two or fewer coworkers at a location that is not the employee's home.

IBA has prepared an IBA Special Report about these new laws that includes some employment law attorney recommendations to comply with these laws. IBA members can access this IBA Special Report via the Internet at: www.ibaw.net/sexharrassmentlaws2019.pdf

Obesity Is A Disability In Washington State

On July 11, the Washington State Supreme Court issued a 7 - 2 ruling that obesity is a disability and is protected under the state's employment discrimination law. This decision affects small businesses with eight or more employees.

This extreme decision has made national news because of its unusual and far reaching application.

The Washington State Supreme Court even recognized its extreme ruling by saying, "*This court usually provides narrow answers to certified questions from federal courts. This court recognizes this broad holding that obesity always qualifies as an impairment under the plain language of the WLAD (Washington Laws Against Discrimination) has potentially far-reaching consequences beyond those considered in this case.*"

The Issue

The case was about a job applicant. Taylor, who had been given a conditional job offer from Burlington Northern Santa Fee Railway Company (BNSF) as an electronic technician. The job offer was contingent on a physical exam and a medical history questionnaire. Taylor met minimum physical demands of the essential functions of electronic technician. Taylor's medical exam found that Taylor's is 5 feet 6 inches tall and weights 256 pounds, resulting in a BMI of 41.3. A BMI over 40 is considered 'severely' or 'morbidly' obese, and BNSF treats a BMI over 40 as a 'trigger' for further screening. BNSF offered to reconsider if Taylor did medical testing he paid for. Taylor refused to do the tests due to costs. Taylor was not hired

In 2010, Taylor sued BNSF alleging that BNSF violated the WLAD by refusing to hire him because of a perceived disability—obesity.

How This Affects Small Businesses

Clearly, this WA State Supreme Court Decision changes how employers with 8 or more employees (when the Washington State Employment Discrimination Laws apply) hire and take negative employment actions against an employee. Employers with eight or more employees should check with a qualified employment law attorney about hiring, disciplining or discharging an obese worker before taking any action.

For more details and important information via the Internet at:
www.ibaw.net/obesitydisability.pdf

How To Avoid Fines Of $13,260 to $132,598

A contractor faces **$789,200** in safety fines since fines for safety and health violations that are now up to **$13,260** per serious violation and **$132,598** per willful or repeat violation. IBA is providing information each month on one of the top safety and health violations small business owners commit.

One of the most common safety and health violations is failure by a contractor to do an asbestos survey of any area they are going to remove or renovate. State safety and health laws require an asbestos survey of any area where a contractor is going to remove or renovate, including roofing, drywall, floor coverings, siding, tiles and the list goes on and on.

One Seattle contactor faces penalties for improper and unsafe handling of asbestos at a Seattle area home-flipping site that put workers and neighbors at risk, and has left two business owners and their companies facing **$789,200** in safety and health violation citation fines from the Department of Labor and Industries.

More details via the Internet at:
www.ibaw.net/safeasbestos.pdf

Easy No-Risk Way To Avoid $13,260 Fine

There is a simple way for you to avoid a penalty of up to **$13,260** per serious violation or **$132,598** for a repeat or willful violation. It is:

FREE – No-Citations Consultation
YOU can get a FREE – No Citations safety and health consultation from the Department of Labor and Industries to help you avoid a penalty of up to $13,260 or $132,598.

IBA strongly recommends you use this FREE – No-Citations Safety and Health Consultation Service.

IBA has prepared a Special IBA Report about how to access this service. It is available at:
www.ibaws.net/safetyconsult.pdf

Small Business Fair Sept. 21st Renton

The **FREE** 2019 Small Business Fair will be held in Renton on September 21st from 8am to 3:30 pm at the Renton Technical College at 3000 NE 4th St. Renton, WA.

IBA strongly recommends small business owners and those thinking about opening a small business to attend this outstanding event.

The Fair will include: 19 workshops designed just for small businesses and presented by small business experts.

The Fair also has 52 exhibitors including state and federal agencies, vendors to help your small business and many others. You can get FREE help from these vendors.

Firing An Employee For Harmful Social Media Posting?

Social media postings have become very challenging for employers of all sizes.

When can you discipline or terminate an employee for social media postings and when can't you?

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This is still an area of developing employment law based on various state laws, state rules, state courts, federal laws, federal rules, and federal courts.

Below is a summary of recent discussions about this from various sources.

Some HR people are adding social media guidelines to their employee handbooks or job descriptions. The HR people say that such guidelines must protect a person's First Amendment Rights to Free Speech, but can also protect the employer's interests. They should include a definition of poor judgment spelled out as part of a job description or employee handbook with examples and with the caveat that the examples are not inclusive. Training in this area may be a more effective way to reduce incidents of social media postings that harm the employer and the reputations of your businesses.

An example of one of a recent case:

A Lakewood, Washington construction contractor terminated several employees after several of them appeared in an Internet video complaining of unsafe working conditions. The workers filed a complaint with the NLRB. The NLRB regional director found that the video was a protected activity because the employees used it to voice safety concerns.

Following an investigation, the NLRB Regional Director determined that the YouTube video was protected because they acted together and voiced concerns about workplace safety. The public airing did not lose the Act's protection because they accurately described their concerns about working conditions. The contractor agreed to rehire all and give all five workers full back pay from their discharge date.

For more details via the Internet at: www.ibaw.net/badsocialmedia.pdf

How Prevailing Wage Laws Cost YOU!

You're paying more in taxes because of two laws you probably have never heard about. These two laws greatly increase what you, a taxpayer, must pay for public construction work. These two laws effectively set a super minimum wage for construction workers working on public construction projects. Both the state and the federal governments actively enforce these super minimum wage laws.

The Federal Government adopted the Davis Bacon act in 1931 to help the USA recover from the Great Depression of 1929.

Washington State's prevailing wage law, much like the federal Davis Bacon Act, was adopted in 1945.

Both laws have been revised over the years.

Below are examples of what these laws require contractors to pay on public construction projects as compared to the average Washington State pay for those same occupations.

For more details via the Internet at: www.ibaw.net/costprevailingwage.pdf

Occupation title (click on the occupation title to view details)	WA Median Industry Wage	WA Mean Average Industry Wage	State Prevailing Wage in Seattle	Federal Davis-Bacon Wage
Carpenters	$29.50	$31.41	$60.04	$40.12
Construction Laborers	$23.13	$24.57	$41.45 to $50.42	$15.11
Construction Equipment Operators	$35.56	$35.16	$60.16 to $66.98	$40.25
Drywall and Ceiling Tile Installers	$28.88	$29.85	$58.48	$35.10
Glaziers	$28.76	$31.40	$64.56	$16.77
Plumbers, Pipefitters, and Steamfitters	$34.77	$35.81	$85.69	$22.46
Roofers	$26.93	$26.91	$53.27 to $56.27	$27.82