# The Firehouse Lawyer

Volume 18, Number 8

August 2020

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## Inside this Issue



## LABOR CONCEPTS: DIVERSITY AND EQUITY IN THE WORK FORCE, AND WHAT THAT MEANS

We begin this article with a disclaimer: The purpose of this article is to neither support nor oppose hiring policies that utilize race as a factor in hiring decisions.

Under Washington law, "[T]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. RCW 49.60.400 (1).[1] This law was a codification of Initiative 200 and will therefore be referred to hereinafter at "I-200."

In April 2019, the Washington Legislature enacted Initiative 1000 ("I-1000") which permitted one's membership in a "protected class" to be used as a qualifying "factor" in hiring decisions.[2] In other words, the purpose of

[1] Under I-200, the "state" includes but is not limited to any "political subdivision" of the State of Washington, and of course, fire districts and regional fire authorities are "political subdivisions" and municipal corporations. *See* RCW 52.12.011.

[2] https://www.firehouselawyer.com/Newsletters/May2019FINAL.pdf

I-1000 was to legalize affirmative action, without permitting employers to use quotas or grant otherwise "preferential treatment" to those persons in a protected class.[3] But I-1000 did not become law because it was struck down by the people under Referendum 88 in November 2019 (by a majority of approximately 50.56%).

Consequently, I-200 remains in effect and no political subdivision may grant "preferential treatment" to individuals on the basis of race, sex, color, ethnicity, or national origin.[4] However, under the Washington Administrative Code, "[A]n employer or employment agency may make inquiries as to race, sex, national origin, or disability *for purposes of affirmative action*, when the inquiries are made in the manner provided in WAC 162-12-170." WAC § 162-12-160 (emphasis added).[5]

Therefore, the question becomes, for an attorney drafting a hiring policy or job application process for public employer-client: To what extent may a hiring policy promote diversity and inclusion—i.e. take all applicants' *socioeconomic background* (which race, national origin, ethnicity, and perhaps sex are intertwined with)—without granting preferential treatment based on race, color, national origin or ethnicity in violation of I-200?

To begin, the use of racial quotas is unlawful under I-200 and cases from the United States Supreme Court.

But again, an employer may make certain "inquiries" into race, sex, national origin, or disability "for purposes of affirmative action." Importantly, an applicant's status in any of the above protected classes "shall not be recorded on any record that is kept in the applicant's preemployment file, nor shall such data be kept in any other place or form where it is available to those who process the application." WAC § 162-12-160 (2).

More importantly, the employer may only make inquiries into race "for purposes of affirmative action" when (1) the employer has adopted an equal-employment opportunity policy which authorizes such inquiries to monitor the enforcement of the policy, and (2) the form on which the inquiry is made indicates (a) that the answer is strictly voluntary, (b) the reasons for the inquiry, (c) how the answer to the inquiry will be used and (d) how the answer to the inquiry will be safeguarded." WAC § 162-12-170.

Of course, statutes (I-200) trump regulations. Regulations may be used as guide but they may be superseded by statutes. WAC § 162-12-170 may be used as a guide but I-200 is the law of the land. Ultimately, the legality of a public employer (1) making inquiries into an applicant's status in the above protected classes,

[3] http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Initiatives/Initiatives/INITIATIVE%201000.pdf

[4] To be clear, I-200 is a law that pertains to affirmative action, while the Washington Law Against Discrimination precludes discrimination against a broader swath of protected classes: age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or use of a trained dog guide or service animal by a person with a disability.

[5] https://apps.leg.wa.gov/wac/default.aspx?cite=162-12-170

and (2) using that information in its hiring decisions, shall hinge on I-200 and cases from the United States Supreme Court.

Below are affirmative-action policies that have been ruled unconstitutional by the United States Supreme Court:

1. Using race as a "tie-breaker" in a decision to admit a child to a particular school. *Seattle School District No. 1*, 551 U.S. 701 (2007);

2. Automatically adding 20 extra points (1/5th of all points available) in a school-application process to "underrepresented minorities." *Gratz*, 539 U.S. 244 (2003);

3. Establishing racial quotas for purposes of school admissions. *Bakke*, 438 U.S. 265 (1978)[6];

4. Utilizing race as a factor in a school-admissions decision without first considering race-neutral alternatives. *Fischer*, 570 U.S. 297 (2013).

One might ask: What sorts of questions may be asked for purposes of establishing a diverse workforce without making inquiry into a person's race?

This issue may be alleviated by considering *economics alone*. If questions pertaining to one's economic background have only a tangential connection to one's race,[7] then those questions are not discriminatory under Washington or federal law. That is because race is *not even a factor* in questions that relate exclusively to financial means. The pre-employment inquiries do not prohibit questions regarding economic background. Consequently, the agency's attorney might consider the following (non-exhaustive) model questionnaire in a job application:

ANSWERS TO THE FOLLOWING QUESTIONS ARE STRICTLY VOLUNTARY. YOU ARE NOT REQUIRED TO ANSWER THEM. THE REASON FOR THESE QUESTIONS IS (1) TO ENFORCE THE EMPLOYER'S EQUAL OPPORTUNITY EMPLOYMENT POLICY AND (2) TO ESTABLISH YOUR SOCIO-ECONOMIC BACKGROUND. YOUR ANSWER SHALL BE USED TO ENCOURAGE A DIVERSIFIED WORKFORCE, ONE WITH VARYING PERSPECTIVES AND DEMOGRAPHICS. YOUR ANSWERS TO THESE QUESTIONS SHALL BE KEPT STRICTLY CONFIDENTIAL. PLEASE ANSWER THE FOLLOWING QUESTIONS TRUTHFULLY AND WITH A "YES" OR "NO":

[6] Importantly, there was a case called *Bollinger*, 539 U.S. 306 (2003), which found promoting diversity for purposes of remedying past discrimination to be a compelling government interest in *that particular case*, which was supported by a narrowly tailored policy.

[7] According to 2018 US Census Data, 25.4% of Native Americans, and 20.8% of African American and 17.6% of Hispanic citizens lived below the federal poverty level, as compared to 10.1% of Caucasians: https://www.povertyusa.org/facts

(The *Firehouse Lawyer* does not support or oppose povertyusa.org but we are using statistics promulgated on its website for purposes of this article.)

1. Were you raised in a household in which the annual family income fell at or below the federal poverty level during that time?

2. Were you raised in a single-parent household?

3. Were you ever forced to resort to using public transportation for financial reasons?

4. Have you or your family of upbringing ever received food stamps or welfare?

5. Have you ever lived in a food-insecure household?

6. Have you ever lived in low-income housing?

Assume that you used affirmative answers to the above questions and added five points to the applicant's final application score. This would be constitutional because (1) the above questions are race-neutral and (2) the five points being added are not being awarded to "underrepresented minorities," but instead are being awarded on the basis of past economic hardship.

Assume further that you have an applicant who, after being awarded the additional five points, ties with another applicant who was not awarded the five points (for a total of 90 points each), but you award the job to the five-pointer. This would also be constitutional because *race* is not being used as a "tie-breaker," as was the case in *Seattle School District*, cited above. Instead, the challenges a person faces when being raised in a single-parent or food-insecure household, and the depth of character arising from those challenges, is the "tie-breaker."

Ultimately, your agency should consult an attorney to ensure that your hiring policies promote diversity while at the same time surviving challenges alleging "reverse discrimination." Finally, we do not suggest here that the questions above are intended as concrete examples of what should be included in our hypothetical questionnaire. These issues are resolved based on the law and the client's needs and circumstances. Again, the Firehouse Lawyer takes no negative or positive stance on the subject of "affirmative action."

**FAQs ON BENEFIT CHARGES**

This year we have been doing a lot of work on the benefit charge, which is a revenue tool that more and more fire districts and RFA's are utilizing to develop a more sustainable revenue base than just relying on property taxes. One of the clients is proposing to adopt the benefit charge program for the first time in their history. The other client is proposing to "update" their benefit charge system, which has been in place longer than almost any other district in the state of Washington.

This article is written to show our answers to frequently asked questions about the benefit charge. Here are the questions:

1. What is the benefit charge (BC) exactly?

2. Is the BC workable anywhere, regardless of how much commercial property lies in my district?

3. What are all of the exemptions from the BC?

4. Are there partial exemptions and discounts?

5. What other limitations and prohibitions apply under the statutes?

6. What is the step by step process to impose the BC?

7. Is there an election? If so, is it simple majority or a supermajority? What about "renewals" in future years?

8. Does the county charge for administering the BC?

9. Can you use the BC money for any current expense budget item, or is restricted?

10. How does the BC get figured or calculated on any particular property? Is there a statutory formula to help us calculate?

11. Can a property owner appeal their BC?

12. Does the BC typically apply to "farms", "crops" or "farming equipment?"

13. Does the BC have to be itemized or can it be lumped into one charge on any given property?

Below, in this article, we will do our best to address these questions based on our experiences over the last 30 years or so.

The answers (in our opinion):

1. Case law has made it clear that the benefit charge is not a tax of any kind; it is essentially a charge for service. The legislature made an effort to lay down some basic principles that mean the BC is intended to be another revenue source for fire districts, and now RFAs as well. The basic idea is that the BC should be designed to reflect the benefit that the fire department confers on each property. Taxes, on the other hand, are determined strictly by the value of the property itself.

2. Although it was once believed that the BC program would not work in a district that had little or no commercial or industrial properties, the more modern thinking is that a BC can be used anywhere, even in an exclusively residential area.

3. There are a lot of exemptions so we will here simply try to list them without discussion. The following are totally exempt:
   a. Properties owned by religious organizations, unless used for business or profit;
   b. Tax-exempt properties such as those owned by public housing authorities, nonprofit very low income housing, nonprofit homes for the aging, nonprofit housing for the developmentally disabled, transitional housing for the homeless or victims of domestic violence, property of state housing finance commission, nonprofit sheltered workshops for the disabled. RCW 52.18.010 (2)(b). Also exempt are properties covered by contracts such as those with other government agencies or private properties covered by a fire protection contract. RCW 52.18.020. Finally, although not exactly exemptions, there are some personal property aspects of farms that are excluded by definition. Oh yes, we

almost forgot. There is a little-utilized exemption for any entity that is "maintaining a fire department" *and* whose fire protection and training system has been accepted by a fire underwriter with an inspection service authorized by the state insurance commissioner to do business in this state.

4. Partial exemptions include some reduction for those low-income property owners who qualify for tax relief under RCW 84.36.381. These properties can have their BC reduced by 25%, 50% or even 75% depending on just how low their income is. Many jurisdictions that have the BC provide a reduction, discount or partial exemption for properties with working fire sprinklers. Typically, these are 10% or 20% discounts.

5. An important limitation on the BC is that the amount collected through BC cannot exceed 60% of the operating budget. Presumably, this means the revenue side of the current expense budget (not the expenditure side). Another important limitation is that if you use the BC system, you forego the "third fifty cents" of property tax authorized by RCW 52.16.160. Suppose that would be of no concern if you only levy $1.00 per thousand AV under the other statutes.

6. Well, there are numerous steps set out by statute and even more when analyzed from the standpoint of best practices. I would recommend starting with a study by a reputable consultant with experience with the BC to learn if it is a good revenue solution for you, i.e. a good fit.

The key procedural statutes are RCW 52.18.050 and .060. Let's start with .060. Not less than 10 days nor more than six months before the chosen election date, the board must hold a public hearing to discuss its specific proposal to establish a BC system. A report of this hearing must be filed with the county treasurer; we recommend a resolution as a big part of that "report." Let's assume you are shooting for a November election on the question. We recommend starting about (at least) one year before that for the study and a rough attempt to create what we call an assessment roll. This would be a sort of spreadsheet showing how much you intend to raise with the BC and at least roughly what categories of properties you will designate with a formula to apply to all properties to be assessed.

But the first public hearing is usually just an explanation of how a BC system works, what you are trying to accomplish, and answering citizen questions. The result of that hearing can be a decision by the board to proceed to an election as evidenced by the resolution calling for an election. Since there is another (annual) public hearing required before November 15th, in the year of the election (setting the stage for year one of the BC in the ensuing calendar year) it gets tricky to schedule that hearing. In later years it is not so tricky and we recommend that annual hearing be held in October. It is tricky at first though, because you may be holding this second public hearing when you are not certain of the election results. Since an election to approve the initial imposition of a BC requires 60% voter approval, that is a bit of a challenge as well. If it looks as though you clearly have voter approval then you go forward with that hearing. And if not, you cancel it. Immediately after that second hearing you must file your resolution

fixing and imposing the charges along with your record with the county treasurer. RCW 52.18.060. Then the county notifies each property owner affected of the amount of their assessed charges. After that notification, you must form a review board to hear any appeals and that must be convened for at least a two-week period. RCW 52.18.070.

7. As mentioned above, the initial imposition of the BC requires a supermajority—60% of those voting must approve or it is a "no go." Due to recent changes in the law, the "renewal" of the BC or continuation after the six years have expired (or earlier if you choose) may be for six years, ten years or permanently. The six and ten year renewals now require only a simple majority, but the permanent renewal will require the 60% approval.

8. RCW 52.18.040 appears to require the county to charge a percentage of the total BC as an administrative fee, but we aware of one county that historically has not charged, although they may have a contract that provides some alternative consideration from the fire district.

9. Money raised through the BC is unrestricted, as RCW 52.18.010 provides that the BC is to provide revenue "for fire protection district purposes authorized by law." Since Title 52 allows fire districts to provide many services other than those related to fire suppression or fire prevention, such as emergency medical services, we conclude that BC money is unrestricted and can be deposited directly into the current expense fund of the district. Indeed, although most agencies using the BC call it a "fire benefit charge" or FBC, we do not use that term but instead prefer the statutory wording—it is a benefit charge and not a fire benefit charge due to RCW 52.18.010.

10. Typically, the actual benefit charge assessed to a particular property is calculated using a complex formula, chock full of fancy coefficients and equations. The goal appears to be to attempt to quantify the cost of suppressing a fire on the particular class of properties, such as commercial, residential or multi-family. The statute, however, provides little guidance on developing a formula or method for determining the amount of the charges. RCW 52.18.010(6) essentially states that the BC shall be "reasonably proportioned" to the measurable benefits to property resulting from the services afforded by the district. It does state that it is acceptable to use the values of the county assessor as modified by the reduction of insurance rates due to the services, presumably using the Washington Surveying and Rating Bureau system of ratings assigned to fire districts. We generally recommend not using assessed values at all, since a court case long ago determined that the BC is not a tax.

    The statute goes on to state that any other method that "reasonably apportions" the BC to the actual benefits resulting from the service is acceptable. Some factors that the statute suggest using in the calculation process are:

    - Distance from fire protection equipment;
    - Level of services provided;
    - Need of the property for special services;

The board may even determine that certain properties or classes of properties are not receiving measurable benefits "based on criteria they establish by resolution." For example, the board might determine that accessory structures measuring less than 500 or 200 square feet are so small that they shall be disregarded in the benefit charge calculation as presenting no particular need for service over and above the service needs of the main structure on the property.

11. A property owner can appeal the benefit charge on their property, once notified of the charge. RCW 52.18.070 actually requires that a review board be convened for at least a two week period, so we recommend that the notice of charges include a sentence apprising property owners of their appeal rights and when the review board will be considering appeals. The review board need not be the board of commissioners and often consists on three or more staff members, but the statute implies that any adjustment of the charge must be done by the elected board of commissioners. Therefore, we recommend a resolution to which is attached a summary or list of all properties for which adjustments are made.

12. What about farms and related equipment or crops? Christmas tree farms may be charged a limited BC. See RCW 52.18.010(4). The BC, however, may not exceed the reduction in property tax that the property enjoys due to the aforementioned loss of the "third fifty cents" of RCW 52.16.160. In the definitions section of the statute, RCW 52.18.020, the legislature made it clear that personal property used for farming, field crops, farm equipment and livestock are not within the definition of "personal property" under the BC law, so all of those are exempt. Actually, we have not encountered any agency using the BC that applies it to any kind of personal property, restricting its application to real property and improvements thereon. The upshot of all these provisions is that the BC on farm or agricultural property should be limited to a house or barn "improvement."

13. RCW 52.18.010(7) specifically provides that the BC imposed on any individual property may be "compiled into a single charge" but that upon request from an owner it shall provide an itemized list of charges for "each measurable benefit" included in the charge. We have only had the question asked once in the last twenty-five years, but I must say the client and I struggled with a determination of what the statute means. I suppose the issue boiled down to what "measurable" means.

In conclusion, those are our answers to questions we have encountered over the years. Surely, with more and more agencies moving to usage of the BC, there will be some new questions arising in the coming years.