A Little of This, A Little of That...
New Washington Laws Impacting Employers in 2020

By Susan Stahlfeld
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The COVID-19 pandemic notwithstanding, earlier this year the Washington Legislature passed and Governor Inslee signed several bills impacting Washington employers. In addition to our detailed article on the changes to the Paid Family Medical Leave statute, here are a few other changes employers should know about.

Each of these changes is effective June 11, 2020.

WASHINGTON LAW AGAINST DISCRIMINATION (RCW 49.60)

"Citizenship or immigration status"
The new protective category of "citizenship or immigration status" is added to the Washington Law Against Discrimination (WLAD), making it an unfair employment practice to refuse to hire, discharge, or treat differently an employee based on the employee's citizenship or immigration status. The new bill appears, however, to recognize that federal law prohibits employers from employing noncitizens who do not have authorization to work in the United States, as it provides that a distinction or differential treatment based on citizenship or immigration status that is authorized by "federal or state law, regulation, or government contract" is not an unfair practice. Employers should consider revising discrimination and harassment policies to include this new category.

Washington Human Rights Commission complaint alleging pregnancy discrimination
Current law allows an employee alleging discrimination or retaliation to file a complaint with the Washington Human Rights Commission (WHRC) within the six months following the alleged discriminatory or retaliatory action. Now, employees will have one year to file a complaint of pregnancy discrimination with the WHRC. Remember, there is no requirement that an employee file first with the WHRC before filing a lawsuit under state law, and employees can file a lawsuit on any claim of discrimination or retaliation under the WLAD for up to three years.

"Race" clarified
WLAD has long protected employees from discrimination on the basis of race. In 2020, the legislature has clarified that "race" includes traits historically associated or perceived to be associated with race including, but not limited to, hair texture and protective hairstyles. The nonexclusive list of "protective hairstyles" includes afros, braids, locks, and twists.

PREGNANCY ACCOMMODATION (RCW 43.10.005)

Under the current statute, employers must provide various accommodations to pregnant employees, unless doing so would be an undue hardship. Four specific accommodations are never an undue hardship: 1.) more frequent, longer, or flexible restroom breaks; 2.) modifying no food or drink policies; 3.) providing seating or allowing the employee to sit more frequently; or 4.) waiving a requirement to lift in excess of 17 pounds. For these four accommodations, the employer may not ask for written medical certification of the need for accommodation.

As amended, the statute now also prohibits employers from asking employees for written medical certification of the employee's need for accommodation to express breast milk. The duty to accommodate the need to express breast milk requires employers to provide a private location other than a bathroom to express milk, or if the business location does not have an appropriate space, to work with the employee to identify a convenient location and work schedule to accommodate the need. This duty to accommodate lasts for two years following the child's birth.

WHOLESALE SALES REPRESENTATIVES AND COMMISSIONS (RCW 49.48.150-.190)

Washington has long required a written contract between a wholesale business and its sales representatives that includes details on how the sales representative's commissions will be computed. The statute also requires that following termination, the sales representative must be paid whatever commissions are due under the contract within 30 days from the date that the company receives payment from the client. The statute did not, however, specify what (if any) commissions might be due post-termination. In practice, many wholesale employers wrote contracts specifying that no commissions were due if a sale was not fully completed prior to termination, or established similar limitations on what commissions are due post-termination.

New to the statute is a provision that states, "Where a sales representative's efforts prior to termination … results in a sale, regardless of when the sale occurs, the termination may not affect whether a commission is considered earned." Additionally, "commission" now specifically includes "bonus payments under an incentive compensation plan."

Unfortunately, the new provisions leave some unanswered questions. For example, what if one sales representative's efforts contributed to a sale ultimately closed by a different sales representative after the first representative was terminated? How does an employer determine which sales representative's efforts "resulted" in the sale? There is case law that might provide answers to this question, and employers should consult with an attorney for clarification. It is also unclear if the new provisions apply to contracts that already exist, or only to those that are entered into on or after June 11, 2020. Again, we suggest that an attorney be consulted on this issue.

RELIEF FROM UNEMPLOYMENT BENEFITS CHARGES (RCW 50.29.021 (3)(A)(VIII))

As most employers know, when an employee is terminated and successfully files for unemployment benefits, the employer's experience rating is charged and its premiums may increase as a result. But there have always been some limited circumstances where an employer can be relieved of the charges. Those limited circumstances now include relief from charges when an employee is discharged because they were unable to satisfy a job prerequisite required by law or administrative rule.

Disclaimer: This article is not legal advice. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps business must take under applicable laws.

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