GETTING UP TO CODE AND FOLLOWING THE NEW RULES

2020 Washington Employment Law Update

WAGE AND HOUR ISSUES UNDER THE WASHINGTON MINIMUM WAGE ACT (MWA) (RCW 49.46)

There are several changes for 2021 in the wage and hour arena, including an increased minimum wage and increased salary-exemption levels under the MWA.

State minimum wage increases to $13.69 per hour.

Effective January 1, 2021, the state minimum wage will increase from $13.50 to $13.69 per hour.

Seattle and SeaTac minimum wages also increase in January. See the attached article for more information on those ordinances.

KEY TAKEAWAY: Ensure that employees begin receiving at least the new minimum wage beginning January 1, 2021.

State white-collar exemptions from overtime—it will cost more.

Most employees who are exempt from overtime (and other requirements) fall into one of a handful of exemptions casually referred to as the "white collar" exemptions: the Executive, Administrative, Professional, and Computer Professional exemptions (EAPC exemptions). WAC 296-128-510-530, 535.

For each of these exemptions, the employee must meet a duties test, and there are no changes to the duties in 2021.

Additionally, however, to be EAPC exempt, the employee must usually be paid a minimum weekly salary.[1] In 2020, the minimum salary level under federal law ($684 per week) exceeded the state requirement, and was the default amount to be paid.[2] But that is about to change.

Beginning January 1, 2021, the state minimum salary level for the EAPC exemptions will exceed the federal level, and to be exempt under both laws, an employee must be paid the higher state level. How much higher depends on the number of Washington employees[3] the employer has:

- **51+ employees.** The 2021 required salary level is $958.30 per week ($49,831.60 annually).
- **1-50 employees.** The 2021 required salary level is $821.40 per week ($42,712.80 annually).

The salary levels will increase through 2028, when all employers (regardless of size) will have to pay exempt employees a salary of 2.5 times the then-current state minimum wage for a 40 hour week. WAC 296-128-545. Based on current information, the Washington Department of Labor & Industries projects that the minimum salary level in 2028 will be $1,512 per week ($78,624 annually), though the actual level will likely change depending on inflation, which will increase the state minimum wage. For more information, please see our article attached to these materials.

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KEY TAKEAWAY: Employers should review their exempt employees' current salaries, and if necessary, take action to remain compliant, both in 2021 and looking forward to expected increases through 2028.

For those employees not currently paid at the applicable 2021-salary level, there are various options:

- **Increase the employee's salary to the minimum required.** To maintain the employee's exempt status, the employer must raise the employee's salary to the applicable minimum level.
- **Convert the employee to nonexempt—but there are options there, too.** If the employer does not want to pay the increased salary amount, the employer must convert the employee to nonexempt and eligible for overtime pay. However, there are different ways to pay nonexempt employees, and the different methods can result in significantly different overtime pay being due. Some options:
    - **Basic hourly rate.** Pay the employee a basic hourly rate, and pay 1.5 times the rate for any hours worked over 40 in a workweek. This is the easiest method to compute, and is suitable for employees who seldom work more than 40 hours in a workweek.
    - **Basic salary.** The employer can continue to pay the employee the same salary. When the employee works more than 40 hours in a workweek, the employee's regular hourly rate is determined by dividing the weekly salary by 40, and the employee is entitled to 1.5 times the resulting hourly rate for any hours over 40. Note, under this and other salary methods, the employee must still be paid the full salary even if the employee works fewer than 40 hours in a workweek.
    - **Salary for fixed hours other than 40 hours.** For employees who usually work a set number of hours above 40 (e.g., 45 hours per week), the salary can be set to cover those hours. To determine the employee's regular hourly rate, the salary is divided by the fixed hours (instead of 40). If the employee works between 40 hours and the fixed hours, the employee is paid an additional 50 percent of his or her regular hourly rate for those hours. If the employee works more than the fixed hours, the employee must be paid 1.5 times his or her regular rate.
    - **Salary for fluctuating hours (aka, the fluctuating work week).** This is probably the most complicated option, but can be very useful in keeping overtime costs down when an employee works significantly different hours from week to week, or controls the amount of hours worked. Here, the salary is straight time for all hours the employee worked each week, and the only amount due is the overtime premium for each hour worked over 40. Under this method, the employee's hourly rate changes each week, as does the overtime premium. This method requires that a written plan/explanation be given to the employee.
    - **Piece rate, day rates, commissions, etc.** Employees can also be paid on a production basis, such as piece rate or commission. Whenever the employee works more than 40 hours in a week, the employer must calculate and pay overtime, and additional pay for rest breaks may also be required. Again, be careful to ensure that the calculated regular rate does not fall below the minimum wage.
    - **An important caution:** a nonexempt employee must always receive at least the minimum wage for each hour worked up to 40 hours, and at least 1.5 times the minimum wage for every hour worked over 40 hours. When implementing any pay system other than the basic hourly rate, safeguards must be put in place to ensure that the resulting regular hourly rate does not fall below the minimum wage.[4]
    - **It's not just overtime!** Nonexempt employees are not only entitled to overtime pay, but are also entitled to paid rest breaks and 30-minute meal periods, and must accrue paid sick leave under state law.

      An employer should also check on its benefits plans, as many employers

offer different benefits for exempt and nonexempt employees.

- **Consult with an attorney!** Any compensation method other than just setting a basic hourly rate can be complicated. Any employer wishing to implement such a system, or who is uncertain about what other obligations it may have when converting employees from exempt to nonexempt, should consult with an attorney to ensure that the system is properly implemented.

Agricultural exemption from overtime pay *(Martinez-Cuevas)*

The MWA also has a provision that exempts agricultural workers from the payment of overtime (though not other requirements). RCW 49.46.130(1)(g).

In November 2020, however, the Washington Supreme Court held that, at least as applied to individuals working at dairies, this exemption violated the Washington State Constitution because dairy working is a dangerous employment. As a result, dairy workers must now be paid overtime for any hours above 40 in a week. At this time, it is unclear if the agricultural exemption remains viable for other agricultural employees.

Martinez-Cuevas v. DeRuyter Bros. Dairy, ___ Wn.2d ___, ___ P.3d ___, No. 96267-7, 2020 WL 6495500) (Case No. 96267, Nov. 5, 2020).

KEY TAKEAWAY: Agriculture employers should consider the risks of continuing to use the agricultural exemption.

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.

The statute now states that when a sales representative's efforts result in a sale, termination may not affect whether the commission is considered earned (and therefore payable), regardless of when the sale occurs. Unfortunately, the statute does not provide guidance on determining how or whether a particular sales representative's efforts "resulted" in a particular sale, as opposed to the efforts of another sales representative after the first representative is terminated. Likewise, it is unclear whether the statute applies only to contracts entered into after the effective date (June 11, 2020), or also preexisting contracts.

KEY TAKEAWAY: Employers of wholesale sales representatives need to review their agreements, and if they have any questions about how these changes impact them, should consult with an attorney.

NONCOMPETITION, NONSOLICITATION, AND NONDISCLOSURE AGREEMENTS

Washington's new statute on noncompetition restrictions went into effect January 1, 2020. *See* RCW 49.62. Although the earnings level has increased, the law itself hasn't changed. But we've now seen how employers are reacting to the new law and how our clients are best positioning themselves to adapt, depending on their goals.

New year, new earnings level.

To enforce a noncompetition restriction, the employer must have paid the employee or independent contractor a minimum annual taxable income. Beginning January 1, 2021, that minimum increases from $100,000 to $101,390, and the independent contractor minimum increases from $250,000 to $253,475.

Goodbye noncompetes—hello nonsolicitation and nondisclosure agreements!

RCW 49.62 applies to "noncompetition covenants [agreements]," which excludes some nonsolicitation and nondisclosure/confidentiality agreements. RCW 49.62.010. Many times, the interests that the employer wants to protect through a noncompete agreement—like customer relationships or proprietary information—can also be protected by a nonsolicitation or nondisclosure agreement. If your existing agreement includes nonsolicitation and nondisclosure provisions, consider enforcing those (rather than the

noncompete) against departing employees to avoid the risk of paying damages and attorney fees.

But be careful. A nonsolicitation agreement is narrowly defined as an agreement "that prohibits solicitation by an employee, upon termination of employment * * * of any customer of the employer *to cease or reduce the extent to which it is doing business* with the employer." RCW 49.62.010(5) (emphasis added). A court may interpret a nonsolicitation agreement that imposes broader restrictions to be a de facto noncompete agreement that could violate Washington law.

Out of state, out of mind?

Although RCW 49.62 was "big news" for employers in Washington, it may not have been a focus for employers based in other states. In particular, we've seen employers violate Washington law by suing former employees in out-of-state courts (generally the state where the employer is headquartered). Any noncompete agreement that forces a Washington employee to litigate somewhere other than Washington is void. RCW 49.62.050(1).

In these situations, we've had success countersuing the former employer in Washington on behalf of a former employee and their new employer, asserting damages and attorney fees under RCW 49.62. This has created risk to the former employer and helped us leverage a favorable resolution for our clients.

KEY TAKEAWAY: Employers who wish to have enforceable noncompetition provisions, or who wish to consider alternatives, should consult with an attorney to ensure that they are done correctly.

PAID FAMILY MEDICAL LEAVE (PFML) (RCW 50A)

Washington's PFML has now been fully implemented: the state began collecting premiums in 2019 and began paying benefits in 2020. But changes are still being made to the statute and the regulations as the state and employers gain experience with the program.

Maximum weekly benefit and maximum annual premium wages.

Effective January 1, 2021, the maximum weekly benefit amount increases from $1,000 to $1,206.

Effective 2021, the PFML premium is applied to gross wages (not including tips) up to $142,800 (the Social Security tax cap).

Key definition changes for employers to know (RCW 50A.05.010)

- **"Child."** Employees are entitled to leave to care for a "child" with a serious health condition. "Child" now also includes the spouse of the employee's child.
- **Casual labor is excluded from covered "employment."** Employment for PFML purposes (premiums, benefits) now explicitly excludes casual labor. "Casual Labor" is defined as work that
    - does not promote or advance the employer's customary trade or business; and
    - is performed infrequently and irregularly. "Infrequent" means fewer than 13 times per calendar quarter, and "irregular" means not on a consistent basis.
- **Supplemental benefits.** Employers may allow (but not require) employees to use employer-provided paid-time-off benefits to supplement the PFML benefit the employee receives from the state. "Supplemental benefits" now explicitly include salary continuation, vacation, medical leave, sick leave, personal leave, and comp time. If an employer allows this, it is important that the employer-paid benefits be reported to the state as "supplemental" benefits, and that the employee not report the supplemental benefits as PTO on their weekly claim forms.
- **Additional Changes.** There were additional changes made in 2020, including how employees can bring claims against the employer if they believe their PFML rights have been violated, the damages available for such claims, and other changes.

For more information on the changes discuss above or otherwise, please see the attached article.

KEY TAKEAWAY: Employers should ensure that those who are responsible for compliance with PFML know about the changes in the definitions. Employers also need to consider whether to allow employees to supplement PFML benefits with employer-provided benefits.

DISCRIMINATION (RCW 49.60)

Washington's Law Against Discrimination (WLAD) was amended by the 2020 legislature to include a new category and a clarification of another category.

Citizenship or immigration status

The WLAD now also protects employees from discrimination on the basis of citizenship or immigration status. RCW 49.60.180. The statute recognizes that federal law prohibits employers from employing noncitizens without authorization to work in the United States, and differential treatment authorized by federal or state law, regulation, or government contract is not an unfair labor practice under the statute.

Race

The WLAD now defines "race" as including traits historically associated with race, including hair texture and protective hairstyles. "Protective hairstyles" includes afros, braids, locks, and twists. RCW 49.60.040(21).

KEY TAKEAWAY: Employers should ensure that human resources and managers are aware of these changes and add the new protected categories when updating their policies.

PREGNANCY

Accommodation—expressing breast milk

Washington has required employers to provide specifically identified accommodations to pregnant employees since 2017. In 2019, the list of specific accommodations expanded to include the provision of reasonable breaks and a private location for an employee to express breast milk, for up to two years following a child's birth. RCW 43.10.005(1)(c)(viii). In 2020, the legislature clarified that employers may not require an employee to provide a medical certification for the need to express breast milk. RCW 43.10.005(3).

Filing a charge with the Washington Human Rights Commission (WHRC)

To file a charge of discrimination with the WHRC, an employee must usually file it within six months of the last date of discrimination. Beginning June 11, 2020, employees alleging pregnancy discrimination have a year to file a charge with the WHRC. RCW 49.60.230(2)(b). Note that unlike claims under federal law, there is no requirement that an employee first file with the WHRC or any other agency before filing a lawsuit.

ARBITRATION

Because of the costs and length of time spent in litigating employment disputes, many employers ask employees to agree to arbitrate their claims. To be able to do so, however, employers must set up and timely use such agreements, as two 2020 cases made clear.

Arbitration agreement must be clear and procedurally fair to applicants (*Burnett*)

In 2020, the Washington Supreme Court ruled that Pagliacci Pizza, Inc., could not enforce the arbitration provisions contained in its onboarding documents because the provisions were buried in a 23-page employee handbook, which the applicant was told to read later at home—after the employee had already signed the handbook acknowledgement.

The court also noted that even if the applicant had been given time to review the handbook before signing, the terms of the arbitration provisions were unenforceable because they were very one-sided in favor of the employer.

Burnett v. Pagliacci Pizza, Inc., 196 Wn.2d 38, 470 P.3d 486 (2020).

KEY TAKEAWAY: If an employer wants an enforceable arbitration agreement, it needs to have one that provides procedural fairness to the employee and make sure that the employee sees and agrees to it.

The requirement to arbitrate must be promptly asserted (*Jeoung Lee*)

In 2020, the Washington Supreme Court ruled that Evergreen Hospital had waived the right to assert that the class had to arbitrate their claims of failure to provide rest and meal breaks to its nurses that complied with all the requirements of the state regulation. In this case, the arbitration provisions were contained in a collective bargaining agreement, but Evergreen did not assert that arbitration was required until the case had already been litigated for nine months and until after the class had been certified. Consequently, the court held that Evergreen had waived the right to require arbitration. The same basic rule applies to nonunion arbitration agreements, as well.

Jeoung Lee v. Evergreen Hosp. Med. Ctr., 195 Wn.2d 699, 464 P.3d 209 (2020).

KEY TAKEAWAY: If an employer has a valid arbitration agreement, it must assert it promptly or risk losing the right to require arbitration.

AT-WILL AND EMPLOYMENT CONTRACTS (*GATES FOUNDATION*)

Employers entering into employment contracts with employees often include provisions stating that employment is "at-will" and can be terminated without notice or cause. Courts in Washington have generally held that the "at-will" doctrine also allows employers to unilaterally modify the terms of employment, unless there is a bilateral agreement between the employer and employee. A bilateral agreement is one where the employee accepts the employer's offer by giving binding promises in return, rather than just accepting the offer and beginning employment (known as a unilateral agreement). Modifications to bilateral agreements generally must be mutually agreed to by the parties.

In a unique case, the Washington Court of Appeals recently affirmed a trial court decision for a former highly paid and high-level executive of the Bill and Melinda Gates Foundation (the Foundation) on the claim that the Foundation had breached his employment agreement by not assigning him the duties and responsibilities contemplated during negotiations. Because the agreement was bilateral (which was undisputed), the court held that there was an implied covenant of good faith and fair dealing, and that even though the agreement allowed the Foundation to terminate the executive at will, the Foundation breached the covenant by not assigning the executive the contemplated responsibilities. Because the trial court had applied the wrong standard for determining damages, however, the case was remanded. It is not known at this point whether the decision will be appealed to the Washington Supreme Court.

Bill and Melinda Gates Found. v. Pierce, ___ Wn. App. ___, ___ P.3d ___, No. 79354 3 I, 2020 WL 6707831 (Nov. 16, 2020).

KEY TAKEAWAY: There are several unique aspects of this case that could make its application limited, but employers entering into bilateral employment agreements should be aware that even if the contract protects their right to terminate an employee without notice or cause, there may be limitations on their ability to modify the terms of employment during an ongoing relationship.

FOOTNOTES

[1] There are some exceptions to being paid on a salary basis, but these exceptions are limited and not available to most employers or for most job positions. Also, the Computer Professional exemption allows the employee to be paid on an hourly basis, provided the hourly rate is at least $47.92 for employers with 51 or more employees, and at least $37.65 for employers with 50 or fewer employees. WAC 296-128-535.

[2] Federal law allows some limited credit from incentive compensation to be added to a salary to meet the minimum salary level for exempt employees. Washington does not allow any such credit: employers are free to pay incentive compensation to exempt employees, but none of that incentive compensation counts toward meeting the minimum salary level needed to be exempt under Washington law.

[3] Employer size is based on the number of Washington-based employees (full-time, part-time, temporary, etc.) the employer has on January 1, 2021. An employer classified as having fewer than 50 employees for purposes of the Washington Paid Family Medical Leave (PFML) premium obligations may rely on that determination for purposes of determining the appropriate salary level for exemptions. WAC 296-128-545(10). Any employer who is uncertain which counting method to use or whether to count a particular worker should contact an attorney to discuss the matter.

[4] If the employee works inside the city limits of Seattle, Tacoma, or SeaTac, they may be entitled to a higher minimum wage under those ordinances than is required under state law.

Washington Compensation Requirements—2021 Update

By Susan Stahlfeld and Amy Robinson, SPHR, SHRM-SCP
October 20, 2020

In recent years, Washington has enacted various statutes relating to employee compensation that require annual automatic adjustments by the Department of Labor & Industries (DLI). The new adjustments discussed below will be effective January 1, 2021.

WASHINGTON MINIMUM SALARY LEVEL FOR EXEMPT EMPLOYEES

One of the biggest changes for employers in 2021 is the increase of the minimum salary level that must be paid for an employee to be exempt as an Executive, Administrative, Professional, or salaried Computer Professional employees (EAPC exemptions, also known as the white-collar exemptions). Such employees are exempt from payment of overtime, state paid sick leave requirements, and other mandates that apply only to nonexempt employees.

As of early 2020, the federal minimum salary level for EAPC exempt employees is $684 per week ($35,568 annually). For 2020, the state minimum salary level was less than the federal level and not an issue for most Washington employers.

Effective January 1, 2021, however, under Washington law the minimum salary level for the EAPC exemptions will exceed the federal minimum salary level, with different minimums depending on the size of the employer:

- For employers with 51 or more employees, to be EAPC exempt an employee must be paid at least $958.30 per week. Annualized, this is a salary of $49,831.60.
- For employers with 50 or fewer employees, to be EAPC exempt an employee must be paid at least $821.40 per week. This results in an annual salary of $42,712.80.

Employers need to carefully consider if employees whose current salary does not meet the new 2021 minimum levels should receive salary increases or instead be transitioned to nonexempt status. Additionally, in some limited cases, it may be possible to meet the exemption requirements paying something other than a salary.

As we mentioned in an article published last year, there is also a special minimum hourly rate for those that meet the Computer Professional exemption, which allows for hourly pay, instead of salary only. For 2021, those minimums increase to:

- 2.75 times the minimum wage, which means at least $37.65 per hour, for employers with 50 or fewer Washington-based employees, and
- 3.5 times the minimum wage, which means at least $47.92 per hour, for employers with more than 50 Washington-based employees.

Of course, the decision to pay Computer Professionals on an hourly basis is optional, and employers can still elect to pay the minimum salary listed above instead, if they prefer to do so.

Remember also that the EAPC exemptions require not only that the employee receive the proper compensation, but also has duties that meet one of the EAPC tests.

MINIMUM WAGE INCREASE – WASHINGTON AND SEATTLE

Effective January 1, 2021, the Washington state minimum wage will be $13.69 per hour.

In Seattle, there are two possible minimum wages:

- For employers with 501 or more employees worldwide, and for employers with up to 500 employees worldwide whose employees do not receive at least $1.69 per hour in tips or employer provided medical benefits, the minimum wage staring January 1, 2021, will be $16.69 per hour.
- For employers with 500 or fewer employees worldwide who also provide at least $1.69 per hour in medical benefits or whose employees make at least $1.69 per hour in tips, the Seattle minimum wage beginning January 1, 2021 will be $15 per hour.

SeaTac's minimum wage for transportation and hospitality workers will increase in 2021 to $16.57 per hour.

2021 MINIMUM EARNINGS LEVEL TO ENFORCE NONCOMPETITION RESTRICTIONS

Washington's new noncompetition statute (RCW 49.62) went into effect January 1, 2020. Now, one of the requirements to have an enforceable noncompetition restriction is that an employee must meet a minimum earnings level at the earlier of (a) the time of enforcement or (b) the date of termination. In 2020, that earnings level for employees was $100,000 and for independent contractors it was $250,000, but those levels will increase each year.

To enforce noncompetition restrictions in 2021, an employee must meet the minimum earnings level of $101,390 and an independent contractor must be paid $253,475.

A note of caution: For employees the earnings level is based on taxable income as it appears in Box 1 of the Form W-2. Box 1 earnings do not include items such as 401k contributions.

We hope this brief summary of the upcoming changes is helpful, but recognize that there are many additional factors and details that must be considered in compensation planning and compliance. We at Miller Nash Graham & Dunn would be happy to assist you with considering any and all of these issues.

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.

Susan Stahlfeld is a partner and represents employers in cases involving employment and labor law, such as discrimination, wrongful discharge, wage-and-hour rules, and employment torts litigation. She also regularly counsels employers on the various personnel issues they face day to day, and provides clients with training for supervisors and managers, and for all employees.

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2020 Updates to the Washington Paid Family Medical Leave Act

By Susan Stahlfeld
June 4, 2020

Believe it or not, there are some upcoming legislative changes for Washington employers that have nothing to do with COVID-19.

One set of important changes has to do with the Washington Paid Family Medical Leave Act (PFML). In early March 2020, the state legislature sent SHB 2614 to Governor Inslee, who signed the bill into law on March 25, 2020. These new provisions amend RCW 50A and become effective on June 11, 2020. Below are the substantive changes that should be of interest to employers as they administer PFML for their employees.

Expanded Definition of "Child"
PFML provides leave to an employee to care for a family member with a serious health condition, including children. Now, "child" also includes "a child's spouse."

Casual Labor Is Excluded
"Casual labor" is excluded from the definition of "employment" for PFML purposes. Casual labor is work that 1) is performed infrequently and irregularly, and 2) does not promote or advance the employer's customary trade or business. "Infrequently" is defined as work performed fewer than thirteen times per calendar quarter, and "irregularly" is defined as not performed on a "consistent cadence." (We believe that the legislature meant to state not performed on a consistent "basis.")

Supplemental Benefits Now Defined
Recall that under the rules adopted in 2019, employers may allow, but not require, employees to use accrued paid leave benefits as a supplement (i.e. in addition to) to PFML benefits. This year's amendments clarify that "supplemental benefits" include salary continuation and Paid Time Off (PTO). PTO is any "paid leave offered by an employer under the employer's established policy," including vacation, medical leave, sick leave, personal leave, and compensatory time. Note, when using PTO or salary continuation for supplementation, the employer should designate the payments as "supplemental benefits" to avoid the risk that they will reduce the employee's weekly PFML benefit amount.

Changes to Waiting Period
Prior to these amendments, employees had a seven-day waiting period before they could receive PFML benefits, unless the leave was related to the birth or placement of a child. The waiting period has now been eliminated for PFML related to military exigencies.

Also new, the waiting period will not necessarily be seven actual days. Originally, the waiting period began the day the employee began their leave, whatever day of the week that happened to be. Under these amendments, however, the waiting period commences on the Sunday before the employee begins their leave. Thus, an employee who begins their leave on a Friday will have satisfied the waiting period by the end of the day on Saturday.

However long the employee's leave during the waiting period is, these new amendments make clear that receipt of PTO during the waiting period will not affect the employee's PFML benefits thereafter.

Clarifications to Who Qualifies as Out-of-State Employees

Employers and employees can obtain waivers from PFML coverage for "out-of-state employees." Originally, an out-of-state employee was one "physically based" outside the state. Effective June 11, 2020, an out-of-state employee is now defined as someone who "primarily performs work" outside the state. Additionally, to be considered "out-of-state," the employee must be working in the state on a limited or temporary work schedule, and not work 820 or more hours in Washington in "a period of four consecutive completed calendar quarters."

Interplay with Other Government Benefits

Originally, an employee who was eligible to receive unemployment or workers' compensation benefits was disqualified from receiving PFML benefits. Under the new amendments, the employee is only disqualified from receiving PFML benefits if he or she is actually "receiving, has received, or will receive" compensation under those programs for the same time period. Additionally, in regard to workers' compensation benefits, it is only the receipt of time-loss benefits that is disqualifying. The Employment Security Department (ESD) will determine whether an employee can receive, or is disqualified from receiving, PFML benefits.

Private Lawsuit versus an Agency Complaint

Employees who believe their PFML rights have been violated have two possible courses of action: 1) file a private lawsuit, or 2) file a complaint with the ESD. These new amendments provide some clarity on those processes.

The same three-year statute of limitations to bring a claim applies to both private lawsuits and agency claims. There is no requirement that an employee first file with the ESD before filing a private lawsuit.

If the employee elects to file a claim with the ESD and does not withdraw it within ten (10) business days, the employee is thereafter barred from pursuing a private lawsuit. If the employee withdraws the ESD complaint, the ESD will not investigate and the employee can proceed with a private lawsuit.

Should the employee fail to withdraw the ESD complaint within ten (10) business days, the ESD will investigate and make a determination as to whether the employer violated the PFML. The employer and employee can agree to privately resolve the dispute up until the ESD issues its determination.

If the ESD determines that there is a violation, the ESD is empowered to award damages. If the ESD issues a determination of violation, the employer has 30 days to either pay the damages awarded or appeal the determination. If the employer does neither, the employee can initiate a collection action in any county by filing a warrant with the county clerk.

Finally, the statute now specifically provides that an employee may file a lawsuit on behalf of themselves and other employees similarly situated (i.e., a class action based on violation of PFML).

Potential Damages for Violations

The statute has always provided that the employee may recover 1) lost wages, lost benefits, and any other lost compensation, or 2) if no wages were denied, any actual monetary losses related to the violation (e.g., the cost of paying someone to provide care to the family member that the employee would have provided if leave had been granted) up to a sum equal to the employee's wages for 16 weeks. The statute also provided for interest and an amount equal to the damages as liquidated damages for willful violations by the employer. In a private lawsuit, the employee can also recover their attorney fees.

The new amendments provide that the ESD can determine and assess not only damages, but also the interest and liquidated damages.

Finally, the amendments make clear that all damages, interest, and liquidated damages are paid directly to the employee, including if awarded by the ESD.

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