WASHINGTON LEGAL UPDATES

LEGISLATION, REGULATIONS & NOTABLE CASES

WASHINGTON LEGISLATION

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Washington Employers Restricted from Communicating to Employees on "Political" or "Religious" Matters (RCW 49.44.250)

Under the new statute which went into effect on June 6, 2024, an employer may not threaten or impose any adverse action against an employee who refuses to: (1) attend or participate in an employer-sponsored meeting that has the primary purpose of communicating the employer's opinion on political or religious matters; or (2) listen to a speech or view a communication (including electronic communications) providing such employer opinions.

Furthermore, employers may not use threats of adverse action to encourage employees to attend such meetings or view such communications. Finally, employers may not retaliate against employees asserting their rights under this new statute.

"Political matters" are those relating to "elections for political office, political parties, proposals to change legislation, proposals to change regulations, and the decision to join or support any political party or political, civic, community, fraternal, or labor association or organization."

"Religious matters" are those relating to "religious affiliation and practice, and the decision to join or support any religious organization or association."

Employers should take particular note that "political matters" includes the employer's opinion on labor associations and organizations—entities not commonly considered "political."

The statute creates a private cause of action for employees asserting a violation of the statute. The employee may file a civil lawsuit within 90 days of the alleged violation. Employers are required to post a notice to employees of their rights under the statute.

KEY TAKEAWAYS

In the future, employers' mandatory meetings or communications that are intended to communicate the employer's opinion on political or religious matters (as defined above) must be strictly voluntary, unless related to the employees' job duties or as required by law to be communicated.

Employers are reminded to regularly obtain updated workplace posters and circulate the new notices to employees (photos of the workplace posters sent by email are recommended). Additionally, it is recommended to update employee handbooks if mandatory government notices are included in handbooks.

New Rules for Noncompetition and Nonsolicitation Agreements (RCW 49.62)

In 2019, Washington enacted a new statute limiting which employees can be covered by a post-employment noncompetition covenant, placing specific restrictions on such covenants. That statute explicitly excluded nonsolicitation covenants from coverage under the statute but defined nonsolicitation covenants ambiguously.

In 2024, the legislature made changes to the statute that expanded the statutory requirements to more restrictive covenants, effective as of June 6, 2024. Under RCW 49.62, a primary requirement to enforce a noncompetition covenant is that at the time of enforcement or the employee's termination (whichever occurs first), the employee's annual taxable earnings must meet a set threshold. For 2024, that threshold is $120,559.99. The threshold changes each year for inflation.

As a preliminary matter, the legislature amended the statute to instruct that any exceptions to the statute's coverage must be narrowly construed, and that as a whole the statute should be liberally construed to protect employees and facilitate workforce mobility (from one employer to another). The practical result of this instruction is that any ambiguities as to whether (or to what extent) a restrictive covenant is enforceable will be construed against the employer.

From the beginning, the statutory requirements for an enforceable noncompetition covenant did not apply to agreements entered into as part of the sale or purchase of a business. This provision remains in the statute, but the new bill clarifies that the interest being bought or sold must represent at least one percent of the business for the exclusion from the statutory requirements to apply. Now, a restriction on soliciting customers can only apply to current customers, and not prospective or former customers, to be excluded from the requirements of the statute.

The new bill clarifies that the terms of the noncompetition covenant must be disclosed in writing to the prospective employee before, or at the time of, the "initial oral or written" acceptance of the offer. In situations where there is negotiation of terms of employment back and forth, it may be difficult to determine whether the noncompetition covenant terms were provided by the time of the initial acceptance, particularly if the initial acceptance was oral. If the terms were not disclosed on time, additional consideration is needed to make the agreement enforceable.

Foundationally, the statute now explicitly requires that Washington law apply to any such noncompetition covenant with a Washington-based employee. The original statute provided that any party to an agreement containing a noncompetition covenant could bring an action challenging the restrictions and seek modifications, and/or the greater of actual damages, or $5,000 statutory damages, plus attorney fees and costs. Now, there is no requirement that the person or entity bringing suit be a party to the agreement, provided that they can demonstrate they are "aggrieved" by the noncompetition

covenant. As a practical matter, this means that the employee's new employer may also sue to challenge or modify the noncompete covenant and recover their damages and attorney fees.

KEY TAKEAWAY

Employers should review their restrictive covenants to ensure compliance with the new requirements, and if necessary, revise those restrictions. Employers should also review and possibly revise their confidentiality agreements, as those can provide additional protections. Finally, employers should also review and potentially revise any solicitation agreements that are not limited to current customers or employees.

Employers should either provide a copy of the actual agreement containing restrictive covenants with a job offer or include the text of the restrictive covenants in the job offer itself to ensure that it is communicated before the applicant's initial acceptance of a job offer. In a situation where there may be lengthy negotiations of terms, the noncompetition covenants should be provided earlier rather than later in the process.

Expanded Definition of "Family" under the Paid Sick Leave (PSL) Law (RCW 49.46.210)

Beginning as of January 1, 2025, definitional changes to RCW 49.46.210 will expand who is considered to be the employee's family member or a child for purposes of using paid sick leave, and expanding when paid sick leave can be used for closure of a child's school or place of care:

- The definition of "family" is revised to include: (1) any individual who regularly resides in the employee's home, unless that individual only resides in the same home and there is no expectation of care by the employee; and (2) an individual for whom the relationship creates an expectation that the employee will care for the person, and that individual depends on the employee for care.
- "Child" will now also include the spouse of the employee's child.
- With regard to closure of a child's school or place of care, in addition to closure for a health-related reason, paid sick leave can be used when the closure is due to a declaration of an emergency by a local, state, or federal government, which may be unrelated to health issues.

KEY TAKEAWAY

Employers should update their paid sick leave policies to reflect the changes above prior to January 1, 2025. Alternatively, due to frequent changes to applicable laws, employers may wish to revise their policies and employee handbook to reference a more general "compliance with laws" and provide references and government-mandated notices for applicable leave laws—but consult your employment attorney before making this broad change.

Clarified Definition of "Construction worker" under the Paid Sick Leave Law

Effective March 13, 2024, the legislature adopted a change to RCW 49.46.210 that rejected the overbroad definition of "Construction Workers" that the Department of Labor & Industries (LNI) adopted at the end of 2023 in response to the prior legislative changes requiring payout of accrued sick leave in certain contexts.

Now, rather than covering all employees of non-residential construction employers in Washington, the rule requiring a payout of accrued sick leave (or PTO if used to satisfy the sick leave requirements) for any employee who works less than 90 days for the employer now only applies to those who meet the specific statutory definition:

- (A) "Construction worker" means a worker who performed service, maintenance, or construction work on a jobsite, in the field, or in a fabrication shop using the tools of the worker's trade or craft.

KEY TAKEAWAY

Washington commercial construction employers will want to be sure to update their sick leave policies and practices now to incorporate the new payout requirements if the employee leaves employment before 90 days, and to make sure that the payout is at the correct amount (which the updated guidance states must include piece-rate earnings, commissions, non-discretionary bonuses, and differential rates of pay).

Washington commercial construction employers will also want to ensure their records include documentation of the start and end dates of their employment, as well as the amount paid out.

Expanded Protections Under the Equal Pay and Opportunities Act (EPOA) (RCW 49.58)

Beginning in 2018, Washington specifically prohibited discrimination in pay and career advancement opportunities based on gender under the state EPOA.

Effective **July 1, 2025**, the protections of EPOA, RCW 49.58, will be extended to several more protected categories: age, sex, marital status, sexual orientation, race, creed, color, national origin, citizenship or immigration status, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability.

Among other things, EPOA prohibits disparities in pay and career advancement opportunities between similarly employed individuals of different genders (and in 2025 the other protected categories) that are based solely on the employee's pay history, either with this employer or prior employers.

The statute does recognize that disparities based on *bona fide* job-related factors such as education, seniority systems, regional differences in compensation (including different local minimum wages), and other objective factors would not be unlawful discrimination, but the employer bears the burden of proving that a disparity is based on a *bona fide* job-related factor.

For factors to be considered *bona fide* job-related factors, they must be consistent with business necessity, not based or derived from a gender- (and next year, a protected category) based differential, and account for the entire differential.

EPOA also bars employers from requiring applicants to provide their pay history, prohibiting employees from discussing or disclosing their pay to others or taking any adverse action because an employee disclosed or discussed pay, or inquired about another employee's pay.

The statute provides for a private cause of action with the ability to recover damages, as well as a right to file a complaint with the LNI, and statutory penalties.

KEY TAKEAWAY

Employers may want to analyze their workforce compensation based on the new protected categories to determine if there are any unintended or unknown pay disparities, and whether such disparities are due to *bona fide* job-related factors. If questionable disparities are uncovered and are not supported by objective factors, the employer should take steps to resolve those disparities prior to July 1, 2025.

Employers should also confirm that they do not have any policies prohibiting employees from disclosing or discussing their compensation, and that managers are trained to not take adverse action against employees for discussing compensation.

Cities across Washington have enacted minimum wage laws for a wage higher than that of the state's minimum. In Tukwila, Renton, and Bellingham, the laws provide that any adverse action occurring within 90 days after an employee seeks to exercise rights under the laws will be presumed to be retaliation. King County has enacted similar laws to increase the minimum wage beyond that required by the state. Visit our blog, *Employment Law in Motion*, to read more about recent wage rates in Washington.

WASHINGTON REGULATIONS

Updates to Washington State and the Minimum Wage

Washington State has announced its new minimum wage, exempt salary level, and other compensation levels for 2025. **All of the following will be in effect as of January 1, 2025:**

- Washington State minimum wage: $16.66 per hour.
- To be exempt from overtime and other requirements, an employee must meet a duties test and generally be paid a salary of at least the applicable level:
    - 1-50 Washington employees: $1,322.80/week ($69,305.60/year)
    - 50+ Washington employees: $1,499.40/week ($77,968.80/year)
- For an enforceable noncompetition provision, in 2025, an employee must be paid an annualized total compensation of at least $123,394.17. An independent contractor must receive at least $308,485.43 in annualized compensation from the entity seeking to enforce a noncompetition provision.

Washington State Department of Labor & Industries (LNI), Proposed Rules for Equal Pay and Opportunities Act Related to Pay Transparency

In response to a number of lawsuits against employers for violating pay transparency laws, LNI has proposed new rules and definitions applicable to the law. The proposed rules would define "applicant" under the statute as "an individual, including existing employees, who submits *in good faith* an application for a job posting with the intent of gaining employment." An "employee" is defined as "an employee who is employed in the business of the employee's employee whether by way of manual labor or otherwise. For the purposes of this chapter, the term 'employee' does not include independent contractors or business partners but does include employees who are exempt under the chapter 49.46 RCW."

Additionally, "actual damages" are defined as "compensation—including but not limited to, wages, salary, or other employment benefit—denied or lost to an employee or applicant and may include other monetary losses suffered as a result of a violation."

These proposed rules would limit those challenging employers' actions to individuals seeking employment in good faith.

KEY TAKEAWAY

Employers should keep an eye on lawsuits pertaining to pay transparency and ensure compliance, while also staying attune to LNI's proposed rulemaking.

Washington State Department of Labor & Industries, Final Rule for Paid Sick Leave for Employers with Commercial Construction Workers

Washington's paid sick leave (PSL) law will now require that any covered workers that separate from employment before reaching 90 days must be paid out any accrued but unused paid sick time (or PTO if that is used to satisfy the sick leave requirements).

According to LNI, "construction workers" for purposes of this payout requirement, are defined as "any employee covered under the 2022 North American Industry Classification System (NAICS) industry code 23, except for those employees who perform only work described in NAICS 2361, residential construction." Notably, under the rules, the definition also includes employees who work for an employer that performs commercial construction-related work (as described in NAICS 23) but are not directly engaged in the construction work itself, such as non-exempt administrative staff.

As a reminder, sick leave/PTO must be paid out at the employees' normal hourly compensation, which could be more than their standard hourly rate of pay.

KEY TAKEAWAY

All Washington employers will want to be sure their sick leave policies and practices are in compliance. In addition, employers who employ any personnel that meet the "construction worker" definition outlined above will want to be sure that those policies include the payout requirements if the employee leaves employment before 90 days. Additionally,

employers should make sure that the payout is at the correct amount, and that they are documenting the start and end dates of their employment, as well as the amount paid out.

New Protections for Warehouse Workers

Under a new law that went into effect July 1, 2024, Washington employers with more than 100 workers at a single warehouse or more than 1,000 workers in warehouses within the state must observe particular worker protections if using a warehouse worker quota system.

A quota system is defined as "a work performance standard, whether required or recommended, where: (a) An employee is assigned or required to perform at a specified productivity speed, or perform a quantified number of tasks, or to handle or produce a quantified amount of material, within a defined time period and under which the employee may suffer an adverse employment action if they fail to complete the performance standard; or (b) an employee's actions are categorized between time performing tasks and not performing tasks, if the employee may suffer an adverse employment action if they fail to meet the performance standard."

If using a quota system, an employer must provide a written description, in plain language and in the employee's preferred language, of each quota to which the employee is subject, and potential adverse employment action as a result of failing to meet the quota, and any incentives or bonuses associated with meeting the quota.

The time period considered in a quota, including time designated as productive time or time on a task must include:

- Time for rest breaks and reasonable time to travel to designated locations for rest breaks;
- Reasonable travel time to on-site designated meal break locations. Meal breaks are not considered time on task or productive time unless the employee is required by the employer to remain on duty on the premises or at a prescribed worksite in the interest of the employer;
- Time to perform any activity required by the employer in order to do the work subject to any quota;
- Time to use the bathroom, including reasonable travel time; and
- Time to take any actions necessary for the employee to exercise the employee's right to a safe and healthy workplace.

KEY TAKEAWAY

Employers should ensure employees are provided with written notice of the quota requirements and that the quota system appropriately accounts for breaks. See, https://www.lni.wa.gov/workers-rights/industry-specific-requirements/warehouse-quota-standards/index.

WASHINGTON CASES

Bennett et al. v. Providence Health & Servs., No. 21-2-13058-1 (Wash. Super. Ct. King Cnty., Apr. 18, 2024)

A Seattle jury ruled that workers at Providence Health & Services hospitals and other facilities, some 33,000 nurses and other hourly workers total, were entitled to $98 million in back wages for time clock rounding and meal break calculation errors. Providence had used a 15-minute rounding time-clock program, which has historically been referenced by Washington's LNI as allowable but discontinued the time-clock program in 2023.

Theoretically, Providence's time-clock program would round up and down to the nearest 15-minute increment, but the plaintiffs successfully argued to the jury that in practice the program systematically reduced the affected workers' wages. The jury awarded $9.3 million for these time clock rounding errors. The jury also awarded $89 million in damages based on Providence's alleged failure to provide second meal breaks to workers working shifts longer than 10 hours, as required by state law.

Additionally, the judge in the case had previously ruled that Providence's violations were "willful" and that any damages awarded would be doubled. Providence has stated it plans to appeal the verdict and court rulings.

KEY TAKEAWAY

Employers must ensure that any time clocks in use (whether manual, electronic, or computer-based) either pay workers to the minute or, if rounding is involved, that the rounding is only in favor of the worker (i.e. always rounds up to benefit the worker).

Employers must ensure that workers receive all meal breaks and rest periods required by state and federal law unless union collective bargaining agreements (CBA) are legally permitted to (and do in fact) alter these mandatory meal breaks and rest periods.

Suarez v. Washington, 3 Wash.3d 404, 552 P.3d 786 (2024)

In *Suarez*, an employee identified as a non-denominational Christian, regularly attended church on Tuesdays and Saturdays, and observes a Saturday Sabbath and several holidays throughout the year called the Feasts of God, where observees must abstain from work.

Suarez worked at a certified nursing facility for adults with disabilities, administered by the Washington State Department of Social and Health Services (DSHS). The facility operates 24 hours a day, seven days a week, and staff are required to do mandatory overtime. The facilities employees are unionized and governed by a CBA. The shifts available to employees are tied to their positions, and permanent employees have seniority over probationary employees. Suarez requested Saturdays off to observe her Sabbath and made additional leave requests for religious holidays, but several of her requests were denied due to staffing needs and her probationary status. After refusing to work mandatory overtime shifts and taking an unscheduled leave for a religious event, Suarez was terminated for unreliability. She then brought claims for religious discrimination.

The trial court originally dismissed her case, finding that it would have been an undue hardship for the employer to have accommodated her. However, the Court of Appeals reversed, holding that there were genuine issues of material fact regarding whether Yakima Valley provided sufficient accommodations using a "significant difficulty or expense" test from WAC 82-56-020, rather than the "undue hardship" analysis.

The Washington Supreme Court accepted review and held "[a]n accommodation requiring preferential treatment on the basis of religion to the detriment of other protected classes is unsurprisingly an undue hardship." Further, the court determined that the appropriate test for whether an employer has violated Washington Law Against Discrimination (WLAD) is the "undue hardship" test, as recently clarified by the U.S. Supreme Court in *Groff v. DeJoy*, 600 U.S. 447 (2023). Applying that test, the court found that accommodating Suarez's requests would have required the employer to violate the CBA, and therefore constituted sufficient hardship for the employer to refuse.

KEY TAKEAWAY

Employers need to adjust their policies and practices to ensure that they are evaluating requests for religious accommodation under the current "undue hardship" standard. See also, Employment Law in Motion | Supreme Court Decision "Clarifying" Religious Accommodation Obligation Is Anything but De Minimis | Miller Nash LLP.

Bittner v. Symetra Nat'l Life Ins. Co., No. 85708-8-1, 2024 WL 5488801 (Wash. Ct. App., Oct. 28, 2024)

High-level employees are also protected from retaliation when they take steps to ensure company compliance with employment and anti-discrimination laws.

In *Bittner*, Symetra hired Bittner as a Regional Vice President of Sales. Bittner supervised a team, which four years later was consistently exceeding its sales quota. In 2014, one of Bittner's sales representatives reported that she was being sexually harassed and verbally abused by a vice president at the company. Bittner told the employee she should report the incident to HR, and he did as well. An HR employee told her that she should speak with the vice president harassing and abusing her or "work it out herself." She told Bittner about HR's response, and he recommended she seek legal advice.

Later that year, a similar incident happened again, where another employee reported to Bittner that she was being sexually harassed by her manager. Bittner again advised the employee to submit a report to HR, and he also made a report. Bittner was told by Symetra's Executive Vice President to "take [his] nose out of other managers' business and to mind the matters in [his] own division." After the employee told Bittner that HR did not investigate, he also told her she should seek legal advice.

In early October 2019, Bittner was instructed to put the oldest member on his team on a performance improvement plan. Bittner raised his concerns about age discrimination. Symetra decided to terminate Bittner in mid-October 2019.

Symetra argued that Bittner's conduct was not protected because it interfered with Bittner's duties owed to Symetra as an officer and senior manager. The Washington Court of Appeals rejected this argument because the court determined officials and senior managers' conduct must be protected, otherwise they may be incentivized to "insulate the company from legal liability over their desire to eliminate and prevent discrimination in the workplace."

KEY TAKEAWAY

Employers should be mindful that any "adverse action" following arguably protected activity opens employers up to liability. This arguably protected activity includes supervisory employees advocating for subordinate staff to explore their legal protections.