

Getting Up to Code and Following the New Rules: 2020 Washington Employment Law Update

2020 Employment Law Seminar
Day 2: 2020 Federal & State Law Update



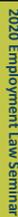
Speaker Introductions



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Wage and Hour Issues

- State minimum wage increases to \$13.69/hr
- Seattle and SeaTac minimum wages also increasing – see attached article
- Effective January 1, 2021

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Wage and Hour Issues

- White collar exemptions from overtime
 - Federal and State laws apply to most employers
 - › Must comply with both
 - Executive/administrative/professional exemptions
 - › Duties test
 - › Minimum salary

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Wage and Hour Issues

- White collar exemptions from overtime
 - Federal exempt salary minimum level
 - › \$684/week [\$35,568 annually]
 - 2021: WA exempt salary minimum level
 - › 51+ employees: \$958.30/week [\$49,831.60 annually]
 - › 0-50 employees: \$821.40/week [\$42,712.80 annually]
 - › No credit for incentive compensation
 - › Effective January 1, 2021

Wage and Hour Issues

- What to do with an employee whose salary is less than the new 2021 minimum?
 - Increase the salary & keep the employee exempt
 - Convert to nonexempt: Pay hourly rate
 - Convert to nonexempt: Pay basic salary
 - Convert to nonexempt: Salary, fixed hours

Wage and Hour Issues

Fixed Hours	0-40 Hours	Worked 45 Hours	Worked 50 Hours
<p>40 hrs/week</p> <p>RR: $\\$700/40 = \\17.50 OTP: $\\$17.50 (50\%) = \\8.75</p> <p>Both RR and OTP need to be paid for all hours over 40</p>	<p>Total Pay: \$700</p>	<p>Salary: \$700</p> <p>40-45 hours: RR: $5 @ \\$17.50 = \\87.50 OT: $5 @ \\$ 8.75 = \\43.75</p> <p>Total Pay: \$831.25</p>	<p>Salary: \$700</p> <p>40-50 hours: RR: $10 @ \\$17.50 = \\175.00 OT: $10 @ \\$ 8.75 = \\$ 87.50$</p> <p>Total Pay: \$962.50</p>
<p>45 hours</p> <p>RR: $\\$700/45 = \\15.56 OTP: $\\$15.56 (50\%) = \\7.78</p> <p>0-45 hours: all RR has been paid, OTP is due</p> <p>>45: Both RR and OTP need to be paid for all hours over 45</p>	<p>Total Pay: \$700</p>	<p>Salary: \$700</p> <p>40-45 hours: RR: $0 @ \\$15.56 = \\$ 0$ OTP: $5 @ \\$7.78 = \\38.90</p> <p>Total Pay: \$738.90</p>	<p>Salary: \$700</p> <p>40-45 hours: RR: $0 @ \\$15.56 = \\$ 0$ OTP: $5 @ \\$7.78 = \\$ 38.90$</p> <p>45-50 hours: RR: $5 @ \\$15.56 = \\$ 77.80$ OTP: $5 @ \\$7.78 = \\$ 38.90$</p> <p>Total Pay: \$855.60</p>
<p>50 hours</p> <p>RR: $\\$700/50 = \\14 OTP: $\\$14 (50\%) = \\$ 7$</p> <p>0-50 hours: all RR has been paid, OTP is due</p> <p>>50: Both RR and OTP need to be paid for all hours over 50</p>	<p>Total Pay: \$700</p>	<p>Salary: \$700</p> <p>40-45 hours: RR: $0 @ \\$14 = \\$ 0$ OTP: $5 @ \\$7 = \\$ 35$</p> <p>Total Pay: \$735.00</p>	<p>Salary: \$700</p> <p>40-50 hours: RR: $0 @ \\$14 = \\$ 0$ OTP: $10 @ \\$7 = \\$ 70$</p> <p>Total Pay: \$770.00</p>

Wage and Hour Issues

- Employer’s options (cont’d)
 - Convert to nonexempt: Salary, fluctuating hours
 - Convert to nonexempt: Piece rate, day rate, commission

Wage and Hour Issues

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- When converting to nonexempt:
 - Pay (including OT on non-discretionary bonuses)
 - Rest and meal breaks
 - Paid sick and safe time
 - Benefit plans?

- Consult with an attorney!

Wage and Hour Issues

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- **Agricultural exemption from overtime pay**
 - Dairy workers in dangerous employment

 - Unconstitutional to exempt from OT pay

 - Could apply broadly to agricultural employees

 - Could apply to other “dangerous” occupations exempt from payment of overtime

Wholesale Sales Representatives

- Revisions to Statute
- Right to commissions on post-termination sales “resulting” from the Sales Rep’s efforts
- May be unclear when a sale “results” from a particular Sales Rep’s efforts
- Unclear whether it applies to existing contracts

Paid Family Medical Leave

- 2021 Maximum weekly benefit: \$1,206
- 2021 Wages subject to premiums: \$142,800
- “Child” includes spouse of the employee’s child
- “Casual Labor” is excluded
 - Does not promote employer’s business
 - Performed infrequently (fewer than 13 times per quarter), and irregularly (not on a consistent basis)

Paid Family Medical Leave

- “Supplemental Benefits”
 - Employer may allow employees to supplement PFML benefits with employer-paid leave
 - Employee’s choice to use or not, if employer allows
 - Important to report as supplemental benefits
- Enforcement changes
- See article attached to materials

Discrimination

- “Citizenship or Immigration Status” is a new protected category
- “Race” includes traits historically associated with race, including hair texture and protective hairstyles

Pregnancy

- Accommodation for expressing breastmilk
 - May not ask for medical documentation supporting accommodation

- WHRC charge
 - Time to file WHRC charge increased from 6 months to a year
 - Does not change time for filing a lawsuit, which is still 3 years

Arbitration Agreements

- Clear and procedurally fair
 - Not buried in a handbook or policies
 - Not one-sided in favor of employer

- Assert right to arbitrate promptly

At-Will and Employment Contracts

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- *Gates Foundation case*
 - Bilateral at-will contract with executive
 - Executive alleged Foundation breached by not giving him the negotiated duties
- Court held:
 - In a bilateral contract, “at-will” refers only to termination
- Key takeaway:
 - Clarify that “at-will” includes employer’s ability to modify terms and conditions of employment, including duties

Restrictive Covenant Update

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- A contractual agreement between an employer and employee that restricts what the employee can do, even after the employment ends
 - **Noncompetition**—agreement not to compete with the former employer
 - **Nonsolicitation**—agreement not to ask third parties (employees or customers) to reduce or end the relationship with the former employer
 - **Nondisclosure**—agreement not to use or divulge the former employer’s confidential information

RCW 49.62—“New” Noncompetition Agreement Law

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- Employee must have annualized earnings of at least \$101,390 (beginning Jan. 1, 2021); contractors must have annualized earnings of at least \$253,475
 - “Earnings” means taxable income, found in Box 1 on an employee’s W2 form
- Noncompetes longer than 18 months are presumed unreasonable

RCW 49.62—“New” Noncompetition Agreement Law

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- Must disclose noncompetes to employees before they accept offer
- “Garden leave” for employees who are laid off
- Must allow employee to challenge noncompete in Washington courts

RCW 49.62—“New” and Potentially Risky Limitations on Enforcement

- No longer may former employers try to enforce overbroad noncompetes without consequence
- If a former employer sues to enforce a noncompete—even if the agreement was signed before January 1, 2020—the former employer risks paying the employee damages and attorney fees unless the court enforces the agreement exactly as written

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RCW 49.62—“New” and Potentially Risky Limitations on Enforcement

- This is a major change and introduces much risk into an employer’s decision whether to enforce a noncompete

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A Year Later, A Year Wiser

- Employers are less litigious
- Out-of-state employers at a disadvantage
- Shift from noncompetes to nonsolicit and nondisclosure agreements

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Nonsolicitation Agreements

- Nonsolicitation agreements are largely not affected by RCW 49.62
- A nonsolicitation agreement restricts the employee from soliciting the employer's customers, and sometimes its employees, to reduce or terminate the relationship with the former employer
- Watch out for agreements that prevent employees from performing work or transacting business with former customers, no matter who makes the initial contact

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Nonsolicitation Agreements

- Like noncompetes, nonsolicitation agreements must be reasonable and supported by consideration
- **Employer Takeaway:** Be careful about simply renaming a noncompete as a nonsolicitation agreement

Nondisclosure Agreements

- Nondisclosure and confidentiality agreements are unaffected by RCW 49.62
- Prohibit employees from disclosing the former employer's confidential and proprietary information
 - Confidential information vs. trade secrets

Nondisclosure Agreements

- Important differences:
 - They *can* last into perpetuity
 - They are contracts that are supplemented by state and federal trade-secrets statutes

Nondisclosure Agreements

- Protect only information actually confidential—not generally known or discoverable
- It is important for an employer to take steps to maintain the confidentiality of its information

Nondisclosure Agreements

- Policies on confidential information should be carefully drafted to apply to the specifics of the employer's business and workplace
- Front-line managers and supervisors should be trained to understand and apply the confidentiality policies

Thank You!



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