2021 WASHINGTON UPDATE

LEGISLATIVE UPDATES

Effective January 1, 2022, the Washington Wage Recovery Act becomes effective and allows employees to assess a property lien for (alleged) unpaid wages. RCW 60.90

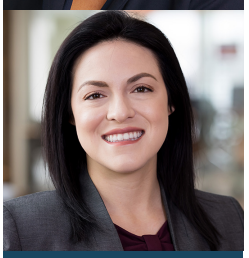
Under the Wage Recovery Act, employees can attach a lien (i.e., a legal hold) on certain property for allegedly unpaid wages owed. The purpose of the wage lien is to secure payment for wage claims. Under the Wage Recovery Act, employees can assess a wage lien against their employer's real and personal property. Critical to Washington businesses, the Wage Recovery Act defines "employer" broadly to include individuals, corporate entities, and persons or groups of persons "acting directly or indirectly in the interest of an employer in relation to an employee." A wage lien is also effective against the community property of the employer and the employer's spouse or domestic partner and against the estate of an employer. For more information on property liens under the Wage Recovery Act, you can access our series here.

Washington employers with existing debt should work with their bank to review whether the existence of a wage lien or the filing of a related foreclosure lawsuit will cause a default under the employer's loan documents.

No more agricultural exemption from overtime laws beginning January 1, 2022. RCW 49.46.130(2)(g).

Following the Washington Supreme Court decision in *Martinez-Cuevas v. DeRuyter Bros. Dairy*, the Washington legislature removed the agricultural exemption from overtime pay. RCW 49.46.130. New overtime rates begin as follows:

- Beginning January 1, 2022, any agricultural employee will be paid overtime (one and one-half times regular rate of pay) for all hours worked over 55 in any one workweek.
- Beginning January 1, 2023, any agricultural employee will be paid overtime (one and one-half times regular rate of pay) for all hours worked over 48 in any one workweek.
- Beginning January 1, 2024, any agricultural employee will be paid overtime (one and one-half times regular rate of pay) for all hours worked over 40 in any one workweek.



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Temp agencies and worksite employers have a joint responsibility to ensure a safe workplace free of recognized hazards. RCW 49.17.490.

Effective July 25, 2021, temp agencies and worksite employers shared new responsibilities for training and assessment of the workplace for health and safety hazards.

At the start of a contract, temp agencies are required to:

- Inquire about safety conditions, workers' tasks, and the worksite employer's safety program before assigning workers.
- Provide safety training for general-awareness safety in the preferred language of the employee, and at no expense to the employee.
- Transmit a general description of the training program, including topics covered, to the worksite employer.
- Provide the Washington State Department of Labor and Industries (DLI) hotline number for the employee to call to report safety hazards and concerns as part of the employment materials provided to the employee.
- Inform the employee who the employee should report safety concerns to at the workplace.

Conversely, at the start of a contract, worksite employers using temp employees must:

- Document and inform temp agencies of anticipated hazards.
- Review training provided by temp agencies to confirm that recognized hazards are covered in training.
- Provide any specialized safety training necessary.
- Maintain records of training.

If a worksite employer changes the job task or worksite location, the worksite employer must notify the temp agency and employee, identify any new hazards, and update PPE and training if necessary.

This new law also provides protection for an employee to refuse a new job task if they have not been given appropriate training to do the new task.

AGENCY UPDATES

New regulations for worker protection against wildfire smoke.

DLI approved an emergency rule (WAC 296-62-085) to protect workers from wildfire smoke, including requiring employers to train employees and supervisors about wildfire smoke and take actions to eliminate or reduce exposures to wildfire smoke where feasible.

The new rule took effect on July 16, 2021, and applies to any workplace "where the employer should reasonably anticipate that employees may be exposed to wildfire smoke."

In general, covered employers must:

- Include wildfire-smoke precautions in their Accident Prevention Program. A template has been provided to guide employers in effectively implementing these precautions.
- Determine employee exposure to PM2.5 before and periodically during each shift when smoke is present.
- Train employees who work near wildfire smoke.
- Inform employees of available protective measures against wildfire smoke.
- Encourage employees to report worsening air quality and any health effects resulting from poor air quality.
- Be prepared to respond appropriately to any employee with symptoms of wildfire-smoke exposure.
- When wildfire-smoke conditions are particularly severe, covered employers must:
- Alert employees of the air quality hazard.
- Implement feasible exposure controls to protect workers from wildfire smoke.
- Provide respirators and encourage their voluntary use.

The emergency rule was effective July 16, 2021, through November 13, 2021, but DLI has filed to start the formal process for this rule to become permanent; Washington employers should expect to see this rule return.

Increased workers' compensation rates in 2022.

DLI adopted an increase in the average price employers and workers pay for workers' compensation insurance beginning January 1, 2022. Individual employers may see their rates go up or down, depending on their recent claims history and changes in the frequency and cost of claims in their industry risk classification. Those changes also can increase or lower premiums paid by workers because workers in Washington pay a portion of the total premium. Visit Rates for Workers' Compensation to see the proposed changes for all risk classes as the 3.1% rate increase is an average—not the exact rate for all classes.

Washington Paid Family and Medical Leave (WAPFML) Maximum weekly benefit and premiums increase.

For employees, the maximum weekly benefits increase from $1,206 to $1,327. For employers, starting January 1, 2022, the premium rate is 0.6 percent of each employee's gross wages, not including tips, up from $142,800 to the 2022 Social Security cap ($147,000). Of this, employers with 50+ employees will pay up to 26.78% and employees will pay 73.22%.

Here is when to submit your reports and payments:

Report & Payment Due: April 30
Q1: January, February, March
Report & Payment Due: July 31
Q2: April, May, June
Report & Payment Due: October 31
Q3: July, August, September
Report & Payment Due: January 31
Q4: October, November, December

Expanded definition of "family" to include others in the home for purposes of PFML Leave eligibility.

Qualifying "family" for WAPFML now includes any individual who regularly resides in the employee's home or where the relationship creates an expectation that the employee care for the individual, and that individual depends on the employee for care.

State minimum wage increases to $14.49 per hour.

Effective January 1, 2022, Washington's minimum wage will increase from $13.69 to $14.49 per hour.

Seattle and SeaTac minimum wages also increase in January 2022.

Salary thresholds increase for exempt employee positions under state law.

Effective January 1, 2022, as a result of the minimum wage increase, Washington State's overtime pay thresholds will be as follows:

- Small businesses (1-50 employees): An exempt employee must earn a salary of at least 1.75 times the state minimum wage ($1,014.30 a week/$52,743.60 a year)
- Large businesses (51 or more employees): An exempt employee must earn a salary of at least 1.75 times the state minimum wage ($1,014.30 a week/$52,743.60 a year) to be exempt.

NOTABLE CASES

***Port of Tacoma v. Sacks*, 495 P.3d 866 (Sept. 21, 2021). For non-exempt employees asked to travel for work, the time spent traveling including time between the home and the destination, including wait time for transportation, is compensable.**

The Washington Court of Appeals took up the issue of compensable travel time this year, extending the potential for compensable time. The Court considered the travel time for employees who traveled to China twice to observe the manufacturing process on new equipment and then later out of state for training. Employees were paid for travel time pursuant to their collective bargaining agreement at a straight-time calculation of eight hours a day.

The Court reaffirmed the statute finding that the employees were entitled to compensation for all "hours worked," and the travel time meets the definition of "hours worked" under WAC 296–126–002(8). Ultimately, the employees should have been compensated for all travel time, including wait time at the airport, shuttle to hotel, etc.

KEY TAKEAWAYS

The Washington Court of Appeals set out a guide for employers to pay for travel time and wait time correctly, with examples:

1. If a person is required to travel to a training seminar in another city, the time from when the employee leaves their home until they arrive at their hotel in the other city is all compensable.
2. Likewise, the time from when the employee leaves the hotel (or training facility) in the remote city, until they arrive back at their home, is also compensable.
3. If, on the other hand, the employee is required to report to work before they travel out of town, then the drive to work and home from work at the end of the travel is considered normal commute time and is not compensable.

***Robertson v. Valley Commc'ns Ctr.*, 18 Wn. App. 2d 122, 490 P3d 230 (June 28, 2021). Time spent doing preparatory tasks that are necessary or integral to the job is compensable.**

Here, again in 2021, the Court of Appeals extended the potential for compensable time, taking up a case on paying employees for preparatory tasks before their shift starts. At issue was King County first responders who had received and dispatched emergency calls and filed for unpaid off-the-clock time. They alleged that their job required preparatory tasks, including gathering resource materials, signing up for breaks, locating ergonomic equipment, plugging in electronics, and logging on to the computer, all before they clocked in at the beginning of their shift. The Court conducted an individual analysis on each task, asking if each was necessary to the job (i.e., responding and dispatching emergency calls). Ultimately, only the task of signing up for breaks was found necessary or integral to the job because the break schedule had to be finalized before the shift started, so the time spent signing up for break shifts was found to be "hours worked" under the Washington Minimum Wage Act (MWA). The Court also found that the "De Minimis Doctrine," which would exclude tasks that have only a minimal impact to the employee's schedule, applies only to the federal Fair Labor Standards Act (FLSA). Washington has not adopted this rule for MWA.

KEY TAKEAWAY

Employers may want to revisit their compensation policies to ensure that any preparatory or conclusory activities that may be deemed "necessary or integral" to the employee's job responsibilities are included as compensable time, without regard for whether it is considered "De Minimis" or not.

***Department of Labor and Indus. v. Tradesmen Int'l, LLC*, 497 P.3d 353 (Oct. 28, 2021). Using a staffing agency for workers does not shield employers from liability for safety violations, and vice versa.**

The Washington Supreme Court combined two separate lawsuits involving different industries in which staffing agencies—Tradesmen International, LLC, and Laborworks Industrial Staffing Specialists, Inc.—placed temporary workers with host employers. In both cases, DLI cited the staffing agencies, along with the host employers, for violations of the Washington Industrial Safety and Health Act (WISHA). The staffing agencies disputed that they could be liable as employers for safety violations under WISHA, as joint employers with the host companies.

The Court drew a roadmap on joint employer analysis, focusing on: (1) whether the staffing agency had sufficient control over the workers, and (2) whether the staffing agency had control over the work environment to abate the relevant safety hazards. Going forward, the Court directed DLI to consider these factors:

- Power to control the workers;
- Control over the manner and instrumentalities of the work being performed, i.e., how the work gets done;
- Power or ability to change the work conditions and status; and
- Level of knowledge of the relevant safety hazard involved in the violation.

KEY TAKEAWAY

Washington staffing agencies and host employers should revisit both their written contracts and practices to consider this liability analysis. Also as a reminder, the determination of employer liability differs by statute, so while the staffing agencies may be liable employers for the purposes of the MWA, that may not translate to liability under WISHA. This analysis and evaluation should therefore be ongoing, even with existing business relationships.