ALL ABOARD THE HR EXPRESS:

WASHINGTON LEGAL UPDATE

Legislative Updates

WRITTEN BY:
Susan Stahlfeld

Job Postings Must Include Compensation & Benefits Information Starting January 1, 2023

Beginning January 1, 2023, any employer with at least 15 employees anywhere in the world whose job postings appear in Washington must include information as to the compensation and benefits available for that position in the job posting.

A posting is any solicitation intended to recruit job applicants for a specific position and also includes the desired qualifications for applicants. A covered posting can be in hard copy or electronic/digital, including on social media and the employer's website.

Each posting must include (a) the wage scale or salary range, (b) a general description of the benefits for that position, and (c) a general description of other compensation to be offered to the hired applicant.

A "wage scale or salary range" should provide the employer's reasonable and genuinely anticipated range, extending from the lowest to the highest pay. If there is no existing range, the employer must create one. Further, the range must have both a bottom and a top limit and cannot be left open on either end (e.g., "$20 per hour and up" would likely be considered noncompliant). If the job is commission-based (in whole or in part), the range of commission rates and general basis for commissions must also be posted.

The required "general description of benefits" means listing general categories of benefits including, but not limited to: health care benefits, retirement benefits, paid time off benefits, and any other benefit that must be reported for federal tax purposes.

If the position is also eligible for "other types of compensation," such as bonuses or stock options, only a general description of the item and not a dollar amount is required to be included in the posting.

Violation of these requirements may result in a Department of Labor & Industries (DLI) complaint and/or a private lawsuit. If a violation is found, the employer would be liable for the greater of actual or statutory damages ($5,000), interest, and attorney fees. Additionally, DLI may impose civil penalties to be paid to DLI, ranging from $500 for the first violation up to the greater of $1,000 or 10% of the employee's damages.

For more information, please see our blog post, Comp & Benefits Info Must Be Included In Washington State Job Postings Starting January 2023.

KEY TAKEAWAY

Employers should be preparing now to comply with this new provision beginning January 1, 2023. Employers should also remove any current noncompliant electronic or digital postings prior to January 1, 2023..

Limitations on Requiring Confidentiality of Allegations—Even in Settlement Agreements

Effective June 9, 2022, Washington employers have significantly more limitations on what they can require of employees or independent contractors as to confidentiality of various work-related allegations, including in settlement agreements.

Under the revised RCW 49.44.211, an employer cannot prohibit current, former, or prospective employees or independent contractors (collectively, "employees") from discussing or disclosing conduct the person reasonably believes to be illegal discrimination, harassment, or retaliation, wage and hour violations, sexual assault, or a violation of a clear mandate of public policy. These limitations apply to alleged conduct occurring at the workplace, at work-related events coordinated by or through the employer, between employees, or between an employer and an employee, whether on or off the work premises.

An employer violates the statute if it:

- Takes an adverse action against an employee for discussing or disclosing such conduct;
- Asks employees to sign agreements (including settlement agreements) that include confidentiality or nondisparagement provisions prohibiting disclosure or discussion of such conduct; and
- Attempts to enforce such confidentiality provisions contained in a prior agreement (except if included in a settlement agreement executed before June 9, 2022).

Notably, the previous provisions of RCW 49.44.211 that included an exception for HR staff, supervisors, and managers were deleted by the legislature. Consequently, employers also cannot prohibit these employees from discussing or disclosing any of the identified unlawful conduct.

Provisions protecting trade secrets, proprietary information, or other confidential information are not affected by this new law and may continue to be included in employee agreements and enforced.

Also, settlement agreements can include provisions requiring the employee to keep confidential the amounts paid in settlement. At the same time, however, the employer cannot require the employee to keep confidential the fact that there was a settlement of claims involving the listed topics.

Employees have a private right of action for violations of RCW 49.44.211, with actual or statutory damages of $10,000 (whichever is greater), and an award of attorney fees.

For more information, please see our blog post, Washington Update: Employee Confidentiality Limitations Further Narrowed.

KEY TAKEAWAY

Given the breadth of topics protected under the new law, it is hard to think of any confidentiality-of-allegations or nondisparagement provision that would not potentially be in violation of the statute. Employers should consider removing such provisions from their policies and agreements, and also consider adding an explicit disclaimer that nothing in the policy or agreement prohibits the employee from discussing unlawful workplace conduct.

Agency Updates

Washington Paid Family Medical Leave Update

2023 Premium Increase: Beginning January 1, 2023, the Employment Security Department (ESD) is increasing the total premiums being collected for the Washington Paid Family Medical Leave (PFML) program, from 0.6% to 0.8%. This premium is assessed on each employee's gross income, up to the 2023 Social Security income cap of $160,200. Of the total premium, employees will pay 72.76% of the premium, and employers with 50 or more Washington employees will pay 27.24% of the premium. Employers with fewer than 50 Washington employees are exempt from the premium. For more information on this premium increase, please see our blog post: Washington Update: Paid Family Medical Leave (PFML) Premiums Increasing in 2023.

In 2022, the Washington legislature enacted some changes to the PFML program, including now providing up to seven (7) days of PFML paid benefits for bereavement purposes when a newborn or newly adopted/fostered child dies. Additionally, any employee who is a union member that is currently not covered by PFML because of the effective date of their collective bargaining agreement (CBA) will become covered no later than January 1, 2024. For more information, please see our blog post: WA PFML Update: Bereavement Leave for Death of a Newborn, Expiration of PFML CBA Exemption, and More.

KEY TAKEAWAY

Employers need to be ready to make changes in PFML premium should any changes be announced. Employers with employees covered by a CBA currently exempt from PFML need to be looking forward to implementation of PFML for those employees in the next year.

The Washington Cares Act—What Next?

Because of concerns about the structure and fiscal viability of the planned Washington Cares Act, which is intended to provide long-term care coverage to Washington employees, in 2022 the Washington legislature delayed the premium deductions from payrolls from January 1, 2022, to July 1, 2023. For more information on this delay, please see our blog post: The Washington Cares Act – Premiums Postponed, Extra Exemptions, and Anticipated Amendments.

At this time, the future of this program is uncertain. There may or may not be additional changes made by the 2023 legislature. In the meantime, employers should be ready to deduct these premiums beginning July 1, 2023.

State Minimum Wage Increases to $15.74 Per Hour

Effective January 1, 2023, Washington's minimum wage will increase from $14.49 to $15.74 per hour.

Seattle and SeaTac minimum wages also increase in January 2023. Seattle's minimum wage will be $18.69 (employers with fewer than 500 employees worldwide can meet this number with a combination of $16.50 in pay and $1.42 in paid benefits or allowed tips). SeaTac's minimum wage for Transportation and Hospitality employees will be $19.06 in 2023.

Salary Thresholds Increase for Exempt Employee Positions Under State Law

Effective January 1, 2023, Washington State's overtime pay thresholds for the white-collar exemptions will be as follows:

- Small businesses (1-50 employees): An exempt employee must earn a salary of at least $1,101.80 a week ($57,293.60 a year)
- Large businesses (51 or more employees): An exempt employee must earn a salary of at least $1,259.20 a week ($65,478.40 a year) to be exempt.

Note, in addition to the pay thresholds, the employee must also meet the duties tests for one of the exemptions.

Computer Professionals can be paid either the salary listed above, or $55.09 per hour to be exempt from overtime requirements.

State Minimum Compensation Level to Enforce Noncompetition Provisions.

Among other requirements, to enforce noncompetition provisions against a former employee, the employee's annualized taxable income [Box 1 W-2 income] at termination must meet a minimum level. For 2023, that level is $116,593.18. To enforce a noncompetition provision with an independent contractor, the 2023 compensation level is $281,482.95.

Notable Cases

Washington Court of Appeals Voids Class Action Waivers in Some Wage and Hour Claims

***Oakley v. Domino's Pizza, LLC,* ___ Wn. App. _____, ___ P.2d ___ (2022) (2022 WL 3351502; Ordered Published on 9/12/2022).**

In a recently published decision, the Washington Court of Appeals declared class action waivers in certain employment agreements unenforceable.

In *Oakley v. Domino's Pizza, LLC*, the plaintiff-employee brought a class action lawsuit asserting claims on his own behalf and behalf of other Domino's freight drivers for violation of Washington wage statutes. When Oakley began employment with Domino's, he signed an arbitration agreement that had two provisions relevant to this case: (1) he agreed to arbitrate his claims under the Federal Arbitration Act (FAA), and (2) he waived his right to participate in a class action. The agreement also provided that if the class action waiver was not enforceable, then the entire arbitration agreement failed.

The first key issue the Court considered was whether Oakley was a "transportation" employee engaged in interstate commerce. If he was, then the FAA did not apply to him

because it explicitly excludes such employees from coverage. Oakley was not a pizza delivery driver. Rather, he drove trucks delivering raw materials to Domino's franchise locations, including some routes that crossed state lines. Even on those routes that did not cross state lines, the product he was transporting generally had crossed state lines at some point. Based on these facts, the Court determined that Oakley was a transportation employee engaged in interstate commerce and the FAA did not apply to him.

Because the FAA did not apply to Oakley, that meant state law applied to the interpretation of the arbitration agreement he signed. The second key issue then became whether Washington law allows class action waivers. The Court of Appeals held that such provisions were unconscionable under Washington law, against public policy, and unenforceable. In reaching this conclusion, the Court analogized class action lawsuits to collective bargaining of union contracts, and the public policy of allowing workers to protect their rights collectively. Because the class action waiver was determined to be invalid under Washington law and the agreement provided that in such case the entire arbitration agreement was unenforceable, Oakley is allowed to maintain and pursue the class action lawsuit.

For more information on the *Oakley* case, please see our blog post: Washington Court of Appeals Voids Class Action Waivers in Some Wage and Hour Claims.

KEY TAKEAWAY

When the FAA applies to an arbitration agreement, then class action waivers are enforceable. Employers who wish to have an arbitration agreement that includes a class action waiver should consider having the governing law on the agreement be the FAA (provided that the employees involved are not excluded transportation employees). As a reminder, though, even if the FAA otherwise applies, due to recent changes in that statute, an employee cannot be required to arbitrate or waive class action claims of sexual harassment or sexual assault.

Guidance on Accommodation of Religion for Public Employers—and Maybe Private Employers, Too

***Suarez v. Washington*, ___ Wn. App. ___, ___ P.2d ___ (2022) (2022 WL 4351109, September 20, 2022).**

The Washington Court of Appeals recently revived a state employee's religious accommodation claim, finding that there were issues of fact as to whether the employer had taken steps to affirmatively accommodate the employee, or if any reasonable accommodation would create an undue hardship on the facility.

Suarez was a Certified Nursing Assistant (CNA) working at a residential nursing facility for vulnerable, disabled adults. She sought changes to her work schedule to accommodate her attendance at weekly Sabbath services and unpaid time off to attend occasional religious festivals. Because her employment was covered by a collective bargaining agreement (CBA) with rules for scheduling that did not permit the employer to change Suarez' schedule, those requests were denied. Additionally, while the employer provided some additional unpaid days off to Suarez, they declined to grant her request on her final shift. When she missed the shift and the employer had to call in someone to cover at overtime rates, her employment was terminated.

Although the trial court had dismissed her claims, the Court of Appeals found that there were issues of fact as to whether the employer had taken affirmative steps to reasonably accommodate Suarez' religious beliefs. The Court held that a reasonable accommodation is one that "resolves the conflict between an employee's religious beliefs and their work duty without adverse impact on their job benefits or status."

Even a reasonable accommodation does not have to be provided, however, if it imposes an undue hardship on the employer. At least for the purposes of a public sector employer, the *Suarez* Court adopted the ten factor test created by the state Office of Financial Management (found at WAC 82-56-020), which includes looking at the size of the employer, the employee's duties, and whether the burden is *de minimis*. The *Suarez* Court again found an issue of fact existed as to whether if any reasonable accommodation was available, it would be an undue burden under this test.

While the Court confirmed that it would be an undue hardship for the employer to make schedule changes contrary to the CBA, the Court also noted that the employer made no effort to assist Suarez in obtaining shift exchanges with coworkers, which were allowed under the CBA. Likewise, the Court noted that providing unpaid leave in addition to that provided for in a CBA could be a reasonable accommodation.

The Court also pointed to a position that became open that had a schedule that would accommodate Suarez' accommodation request. The position was awarded to a less senior employee than Suarez after the opening was generally communicated to all employees. While noting that Suarez did not apply for the alternative position (she alleged that she did not know she had to apply for a different position to get a schedule change), the Court held that the employer should have affirmatively suggested to Suarez that she apply for the position, and could not rely on a passive generalized communication as an attempt to accommodate.

Finally, the Court commented that having to pay overtime rates for someone to substitute on a shift for an employee could be an undue hardship, but that would depend on the size and resources of the employer, as well as the frequency with which the employer did that for employee absences due to reasons other than a religious accommodation.

For more information on the Suarez case, please see our October 10, 2022 blog post: Washington Court Revives Public Employee's Religious Accommodation Claim.

KEY TAKEAWAY

This holding could be limited to public sector employers, who should consider it carefully when faced with an employee's request for religious accommodations. But all employers should take note of the Court's concern with the lack of evidence of affirmative steps taken by the employer to attempt to accommodate the employee's religious beliefs in this particular situation.