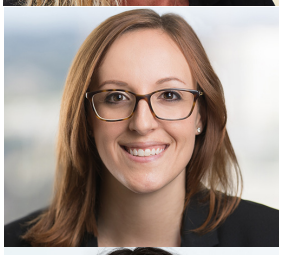
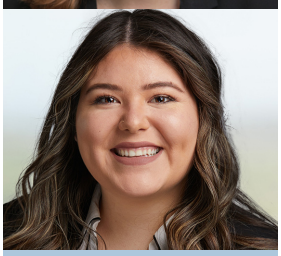
WAGE & HOUR

UPDATES

Employee vs Independent Contractor—Ever-Changing Rules



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Shifting political winds over the past few years have also shifted the U.S. Department of Labor's rules for determining whether a person is an employee or an independent contractor. This issue is crucial to employers because if a person is mischaracterized as an independent contractor and later determined by a state or federal agency to be an employee, then minimum wage, overtime, meal and break periods, benefits, and other legal requirements for employees are owed to that person. There could also be liability to taxing authorities for unemployment/workers compensation taxes, payroll taxes, and income taxes that were not withheld. The costs and penalties for mischaracterization can be substantial, especially if more than one person is involved.

A rule adopted in March 2021 (Trump administration) sought to modify the economic-realities test for determining independent contractor categorization to focus on two key aspects. The rule's implementation was delayed after the presidential election, then a court determined the rule went into effect in March 2021. The Biden administration has proposed adoption of a new rule returning back to the 6-part economic-realities, which is expected to be completed and released in October 2023.

The "totality of the circumstances" test, which the U.S. Department of Labor is expected to return to, focuses on six factors:

1. the worker's "opportunity for profit or loss depending on managerial skill" of the work;
2. "investments by the worker and the employer" in the work;
3. the "degree of permanence of the work relationship";
4. the "nature and degree of control" of the work by the employer, such as supervision of work, employer's right to supervise or discipline the worker, or demands on worker time that do not allow working for others or when they choose;
5. the "extent to which the work performed is an integral part of the employer's business"; and
6. whether a worker uses specialized skills brought to the job or depends on "training from the employer to perform the work."

KEY TAKEAWAY

Employers should review the employment situation for each person currently identified as an independent contractor but who either (a) comes to the employer's office regularly; or (b) works primarily or exclusively for the employer, or (c) does not have other clients.

Additionally, states and even state agencies may have a different test used. For other examples, see the following links: see e.g. these links:

- Oregon: https://www.oregon.gov/ic/independent/Pages/EE-IC.aspx
- Washington: https://esd.wa.gov/employer-taxes/independent-contractors; https://lni.wa.gov/workers-rights/_docs/esa14.pdf (Section 9)
- California: https://www.dir.ca.gov/dlse/faq_independentcontractor.htm
- Alaska: https://labor.alaska.gov/estax/forms/contract.pdf
- Idaho: https://iic.idaho.gov/employee-or-independent-contractor/
- Montana: https://erd.dli.mt.gov/work-comp-regulations/montana-contractor/independent-contractor

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Meals and Rest Periods

OREGON

Oregon, at a minimum, requires employers to provide employees with: (a) two ten-minute paid rest breaks; and (b) one thirty-minute unpaid meal break during a typical eight-hour workday. The number of required rest and meal breaks is dependent on the number of hours worked. For example, no meal period is required if the workday/shift is less than 6 hours, and additional meal periods are required for workdays/shifts more than 14 hours. Generally, paid rest breaks are required every four hours, and are in addition to the meal breaks. Rest breaks should be taken as near as possible to the middle of the work segment. Meals and rest breaks should not be added to the beginning or end of the day.

Law: ORS 653.261; OAR 839-020-0050.

BOLI: https://www.oregon.gov/boli/workers/pages/meals-and-breaks.aspx

WASHINGTON

Employees working more than five consecutive hours must be allowed to take at least a thirty-minute meal period between two and five hours after the employee starts their workday/shift. Employees may also be entitled to an additional meal period if they work a shift longer than eight (8) hours; no employee may be required to work more than five hours without a meal period. Meal periods are unpaid when employees are completely relieved of their job duties and receive 30 minutes of uninterrupted time. Employees may voluntarily waive any or all of the meal period requirements but should do so beforehand in writing.

Employees are also allowed to receive rest periods of at least ten minutes every four hours. Rest periods should be scheduled as near as possible to the middle of the four-hour period, but no later than the end of the third working hour. If an employee's duties

permit taking intermittent breaks such that a total of ten minutes is taken in every four-hour work period, that complies with the rest break requirements. Employees cannot waive their right to a rest period.

*There are special rules for employees under 18 years old and agricultural workers.

Law: RCW 49.12; WAC 296-126-092

DLI (non-agriculture workers): https://www.lni.wa.gov/workers-rights/_docs/esc6.1.pdf

CALIFORNIA

Generally, unless there is an exception under the statute (for example, by collective bargaining agreement), employers must provide employees who work at least five hours with at least a thirty-minute meal period, which can be unpaid. If an employee works more than ten hours, they should be provided with a second meal period of at least thirty minutes (which can be waived if the total hours worked is no more than 12 hours, and the first meal period was not waived). For the meal period to be unpaid, employees must be relieved of all duties during this time.

Rest breaks must be at least ten minutes and provided for each four-hour work period. For example:

- Ten minutes of rest time for work shifts from 3.5 to 6 hours.
- Twenty minutes of rest time for work shifts of more than 6 hours up to 10 hours.
- Thirty minutes of rest time for work shifts of more than 10 hours up to 14 hours.

Rest periods are not required when work periods are less than 3.5 hours total. Rest periods are paid.

Law: Cal. Lab. Code § 512; Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004 (2012).

ALASKA

Alaska provides different rules for meal periods and rest breaks for employees under the age of 18 and employees over the age of 18. Employees under the age of 18 are entitled to a minimum thirty-minute unpaid break if they are scheduled to work at least six hours (after the first hour of work and before the last). Even if not initially scheduled to work at least six hours, employees under 18 who work five hours should be provided a thirty-minute unpaid break.

For employees over 18, Alaska does not require employers to provide breaks to employees. If an employer does provide breaks, however, these breaks have to be paid if the break is less than 20 minutes.

IDAHO

Idaho generally does not require meal periods and rest breaks for employees.

Read More: https://www.labor.idaho.gov/businesses/idaho-labor-laws/labor-laws-faq/#:~:text=Idaho%20law%20does%20not%20require,employer's%20policy%20to%20provide%20them.

MONTANA

Montana generally does not require meal periods and rest breaks for employees, but employees must be paid for rest break times and, unless fully relieved of all duties, must pay for meal periods given. Read More: https://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/hours-worked

KEY TAKEAWAY

Each state has specific minimum requirements for rest periods and meal breaks. These requirements apply generally to only nonexempt employees because these requirements are related to the Fair Labor Standards Act and state minimum wage laws. Regardless of the state, employers need to ensure that nonexempt employees are allowed to take these rest periods and meal breaks as required by law and notify supervisors immediately if they are not able to be fully relived of their duties during these breaks.

Exempt and Nonexempt Employees

To be "exempt" means that the employee is exempt from the federal and most state minimum wage laws and is therefore not entitled to minimum wage, overtime pay, paid rest breaks, meal breaks, accrued sick leave (Washington State[1]), and more. Exemptions are the exception to the rule, and it is the employer's burden to prove that an exemption applies.

Under current federal law, an employee can be exempt as an executive, administrative, or professional employee if they are paid a salary of at least $684 per week and meet a duties test. Some states, however, have different exemption requirements . There are several significant proposed changes to these rules pending, including increasing the minimum weekly pay to approximately $1,059 per week (using a census-based formula), and increasing the highly-compensated employee exemption to approximately $143,988 annual salary (using another formula).

The standard exemptions (known as the "white-collar" exemptions) have two basic requirements: the employee must be paid on a salary basis and must meet one of the duties tests. For these exemptions, it is not enough that the employee be paid on a salary basis (even if it is a salary above the required threshold). The main hurdle can be assessing whether the employee exercises discretion and independent judgment, thus meeting the duties test.

Other types of professionals have additional available exemptions at the federal and/or state level, including computer professionals, teaching professionals, and outside salespersons.

[1] Note, Seattle and Tacoma have paid sick leave laws that do apply to exempt employees.

OREGON

In Oregon, employees may be exempt if they earn a salary threshold, which requires a weekly salary equivalent to a monthly salary calculated by multiplying the applicable regional minimum wage by 2,080 hours and dividing that amount by 12 months (ORS 653.010(9); OAR 839-020-0004(29)).

Law: ORS 653.020; ORS 653.010; OAR 839-020-0004; 29 U.S.C. § 213(a)(1)

Read More: https://www.oregon.gov/boli/employers/Pages/salaried-exempt-employees.aspx

CALIFORNIA

In California, a salary threshold also exists, and an employee is exempt if the employee earns at least double the state minimum wage for full-time employment and is primarily engaged in duties outlined in administrative, executive, or professional exemptions. Primarily engaged differs from the federal test for the "white collar" exemptions, because it typically means that more than half of the employee's work time has to be spent engaged in the exempt duties.

Law: Cal. Lab. Code § 226(j); IWC Wage Order No. 4, § 1(A)(1)(e), (2)(f), and (3)(b)

WASHINGTON

Like federal law, Washington requires that an employee be paid at least a minimum salary amount and meet a duties test. However, unlike federal law, Washington does not have the highly compensated employee exemption; to be exempt an employee must meet one of the duties tests.

While Washington requires that teaching professionals be paid on a salary or fee basis (unlike federal law which allows teaching professionals to be paid on an hourly basis), the Washington minimum salary amount is not applicable to teaching professionals .

Law: Washington Minimum Wage Act (RCW 49.46.005 to 49.46.920).

ALASKA

The "white collar" exemptions (executive, professional, and administrative exemptions) are determined by applying the federal standards under the Fair Labor Standards Act and the U.S. Department of Labor regulations. This includes meeting the salary threshold and duties test. Alaska's overtime and minimum wage requirements do not apply to certain employees as provided under the Alaska Wage and Hour Act (AWHA).

Law: Alaska Stat. Ann. § 23.10.055; 23.10.060

IDAHO

Idaho's Minimum Wage Law does not apply to any employee employed in a bona fide executive, administrative or professional capacity, or to any individual employed as an outside salesman.

Read More: https://dhr.idaho.gov/wp-content/uploads/EOO/Element2/Guide-to-Idaho-Labor-Laws-English.pdf

MONTANA

Montana law exempts a range of positions and situations from minimum wage laws, including individuals employed in bona fide executive, administrative, or professional capacities, as well as computer systems analysts, computer programmers, software engineers, network administrators, or other similarly skilled computer employees who earn not less than $27.63 an hour, or individuals employed in an outside sales capacity.

Read More: https://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/minimum-wage

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Compensable Activities Before and After Work Shifts

Employers must pay nonexempt workers for all time worked¬, but certain preparatory and concluding activities may not be compensable. For example, such activities may be setting up a workstation or preparing machinery. Two recent Ninth Circuit cases explain that under the Fair Labor Standards Act (FLSA), an employer is required to pay for time for an employee's activities that are either (1) an "integral and indispensable" part of the employees' principal activities for the employer, or (2) that are compensable as a matter of contract, custom, or practice.

On October 24, 2022, the Ninth Circuit found in *Cadena v. Customer Connexx LLC* (51 F4th 831 (9th Cir 2022)), that employees' time spent booting up their computers at a call center before clocking into the timekeeping program was compensable because it was integral and indispensable to their work. The court explained that pre- or post-shift activities are "integral and indispensable" when they are intrinsic to their principal work and the employee must perform such activities to perform their principal work. In that specific case, the employees spent several minutes logging on and off of their computers, which was required to log into various computer programs needed for employees to engage in their principal work.

On the other hand, on March 10, 2023, the Ninth Circuit explained in *Buero v. Amazon.com Services, Inc.* (61 F4th 1031 (9th Cir 2023)), that under both the FLSA and Oregon law, employees' time spent waiting for and undergoing mandatory security screenings before work shifts and returning from meal breaks was not compensable because it was not integral and indispensable to their principal activities.

KEY TAKEAWAY

Employers should review their timekeeping practices to avoid wage and hour claims for "wage theft" on pre- and post-shift mandatory activities. Specifically concerning compensable work, employers should evaluate employees' pre- and post-shift work for activities that are indispensable to their jobs and ensure employees are being paid for such time.

Timeclock Rounding Practices

Many, though not all, jurisdictions officially permit some form of timeclock rounding. Below, we discuss the specifics of federal, Oregon, Washington, and Alaska law on time clock rounding.

Employers should be aware, however, that even though officially allowed, many courts have been determining that time clock rounding is not available for employers who use computerized or other systems that can readily keep time to the minute. Timeclock rounding was initially allowed when timecards and payroll were done by hand and it was administratively difficult to capture small amounts of time, but with modern systems, that key justification for timeclock rounding is difficult to support. For more discussion on the dangers of using timeclock rounding with modern timekeeping and payroll systems, see our blogpost: https://www.millernash.com/industry-news/as-time-goes-bypay-practices-which-may-be-a-surprising-risk-for-employerspart2.

FEDERAL

The U.S. Department of Labor (DOL) permits employers to "round" the times that employees clock in and out under the FLSA, but they cannot always round down. Employers may round down employee time from one to seven minutes, but must round up employee time from eight to fourteen minutes. Employers may round employee time to the nearest quarter hour.

OREGON

Oregon law does not permit rounding. On November 29, 2022, a federal district court held in *Eisele v. Home Depot U.S.A., Inc.* (643 F Supp. 3d 1166 (D Or Nov. 29, 2022)), that Oregon law requires payment for all hours worked on an individual basis and rejected a rounding practice despite that it rounded both up and down including to the employee's benefit.

WASHINGTON

Washington law follows the federal rules on timeclock rounding, permitting rounding practices similarly to the FLSA to the nearest five, ten, or fifteen minutes (up to the quarter-hour based on the seven-minute rule described above), with rounding practices working both ways so that time averages out and employees are paid for all of the time they actually work. For more information and examples of rounding under Washinton law, see Section 11 of https://lni.wa.gov/workers-rights/_docs/esd1.pdf.

CALIFORNIA

Timeclock rounding is technically still permitted, however, California case law is making it clear that rounding practices are likely to be found illegal soon. In *Woodworth v. Loma Linda University Medical Center*, the court of appeals rejected an overall-neutral timeclock rounding practice. The case is now back down at the trial court, however, other appeal cases are pending and are anticipated to outlaw timeclock rounding in most (if not all) circumstances.

ALASKA

Alaska state law generally requires employees to be paid for time worked. Alaska Stat. 23.10.065.

IDAHO

Idaho law generally requires employees to be paid for time worked.

Read More: https://dhr.idaho.gov/wp-content/uploads/EOO/Element2/Guide-to-Idaho-Labor-Laws-English.pdf

MONTANA

In Montana, state law generally addresses payment of wages for time worked. However, the Montana Secretary of State has interpreted this law to allow rounding to the nearest five-minute increment, provided such a rounding practice allows employees to be compensated for all time actually worked.

Read More: https://rules.mt.gov/gateway/RuleNo.asp?RN=24%2E16%2E1012

KEY TAKEAWAY

Employers should review their timekeeping practices to avoid wage and hour claims for "wage theft" on timeclock practices as well. Concerning recorded time, employers should review their state's employment manuals concerning rounding practices. Although some rounding is officially permitted under the FLSA and some states, other states do not permit rounding. Even in states that do allow rounding, such practices are now heavily scrutinized for whether the time averages out such that employees are paid for all of the time they actually work. The trend is towards not allowing rounding at all.

Pay Equity Laws and Pay Equity Analyses Require Attention and Updating to Hiring and Negotiation Practices and Policies

All employers in the country are subject to the federal Equal Pay Act of 1963, requiring equal pay for equal work. New provisions strengthening equal pay laws began in the 2000s, with California enacting the Fair Pay Act in 2015. California's Fair Pay Act added to its prior Equal Pay Act and requires equal pay for employees who perform "substantially similar work," when viewed as a composite of skill, effort, and responsibility. In 2017, California expanded the law to include not only gender but also race and ethnicity. In 2018, California again expanded the law to prohibit employers from asking for applicant salary history, and to require employers to provide wage/salary scales for job applicants upon request. Employers must also keep employee pay records throughout employment and for at least three years after termination. For more information, visit https://www.dir.ca.gov/dlse/california_equal_pay_act.htm#:~:text=The%20amended%20Equal%20Pay%20Act,and%20responsibility%2C%20and%20performed%20under.

Washington and Oregon are among several states to enact their own enhanced pay equity laws that prohibit discriminatory pay practices, including asking about an applicant's salary history. As part of these efforts to address historical pay inequity, a growing number of states are now also considering additional language to provide employees with protections related to wage and pay transparency, as addressed further below.

Oregon and Washington's pay equity laws have several similarities but also important differences:

	WASHINGTON	OREGON
What is the purpose of the law?	The Washington Equal Pay and Opportunities Act (EPOA) prohibits gender pay discrimination and promotes fairness among workers by addressing business practices that contribute to income disparities between genders, including pay transparency requirements (discussed in next section). Washington's law is narrower than Oregon's EPA, which includes other protected classes.	The Oregon Equal Pay Act (OEPA) prohibits discriminatory wage rates based on statutorily protected characteristics, which includes race, color, religion, sex, sexual orientation, gender identity, national origin, marital status, veteran status, disability, or age.
To whom does it apply?	Applies to all Washington employers—private and public (except for pay transparency provisions which apply to 15+ employees). Applies to all employees working in Washington or job applicants seeking employment with Washington employer. No exemption for workers covered by Collective Bargaining Agreement (CBA).	All employers with one or more employees performing work in the state of Oregon must follow this law. This law covers all employees who perform work in the state of Oregon. No exemption for workers covered by Collective Bargaining Agreement (CBA).
What does it prohibit?	It is unlawful to base an employee's pay or career advancement opportunities on their gender. Disparate pay histories do not justify current pay disparities. Employees also have the protected right to discuss their wages and have the right to access certain wage and salary information.	It is unlawful to discriminate between employees on the basis of a protected class in the payment of wages or other compensation for "work of comparable character." According to the law, differences in pay for work of a comparable character must be based on certain bona fide factors.

	WASHINGTON	OREGON
What is pay for purposes of equal pay consideration?	Compensation means the wages and benefits provided by an employer to an employee. Wages include, but are not limited to salaries, hourly rates, commissions, and non-discretionary bonuses. Benefits include compensation given to employees not based on performance such as gifts, medical insurance plans, retirement plans, paid time off, and discretionary bonuses.	Look at an employee's total compensation, including all wages and benefits provided by (and offered by) an employer to an employee, such as: • Salaries • Hourly rates • Commissions • Equity-based compensation plans (i.e., stocks) • Nondiscretionary bonuses • Fringe benefits
When should employees' pay be compared?	"Similarly Employed" means: • Same employer • Job requires similar skill, effort, responsibility, and similar working conditions • Job title is not controlling • Requires an analysis of job requirements, job description, job duties, management, and supervisory duties	Under the law, work of "comparable character" is work that requires substantially similar knowledge, skill, effort, responsibility, and working conditions regardless of job title.

	WASHINGTON	OREGON
Pay differentials: Bona Fide Job-Related Factors	Unequal compensation between employees of different genders may be acceptable if the difference is not based on gender. Permissible factors for differences in pay may include: • Differences in education, training, or experience • Seniority • Merit/work performance • Compensation based on quantity or quality of production • Regional differences in compensation (Eastern v. Western Washington) • Job-related factors consistent with business need • Differences in local minimum wages	Employees performing work of comparable character may be compensated at different levels so long as the differences are based entirely on one or more "bona fide factors" that are specifically provided in the law. The "bona fide factors" that permit pay differentials include: • a seniority system • a merit system • a system that measures earnings by productivity • workplace location, travel, education, training, and/or experience Any system used to justify a compensation differential must be a consistent and verifiable method that was in use at the time of the alleged violation. NOTE: Oregon does not have the same catch-all category that Washington law provides
Remedies available?	• L&I Citation and Notice of Assessment • Damages (pay differential) • 1% interest • $500 for first violation up to $1,000 or 10% of damages for repeat violations	An employee can file a complaint with BOLI, and the employee may be awarded back pay for up to two years. If an employee files a civil lawsuit, a court may award injunctive relief and any other equitable relief that may be appropriate, including back pay, as well as compensatory damages (ORS 659A.885(5)).

Alaska, Idaho, and Montana have not yet enacted enhanced Pay Equity laws. However, all three states have equal pay laws requiring equal pay for equal work, at least on the basis of gender if not additional bases.

Alaska: https://humanrights.alaska.gov/wp-content/uploads/2021/02/Quick-Facts-for-Employers.pdf

Idaho: https://legislature.idaho.gov/statutesrules/idstat/title44/t44ch17/sect44-1702/#:~:text=(1)%20No%20employer%20shall%20discriminate,jobs%20which%20have%20comparable%20requirements

Montana: https://leg.mt.gov/bills/mca/title_0390/chapter_0030/part_0010/section_0040/0390-0030-0010-0040.html

KEY TAKEAWAY

Employers should review existing policies and practices for compliance with applicable equal pay obligations, including updating compensation policies and hiring processes, reviewing job descriptions, revising interview scripts and negotiation guidelines, and training departments and employees who are interacting with job applicants, whether they are an interviewer or a hiring decision-maker. Employers may be liable for the conduct of third-parties like recruiters, so make sure that agreements with those third-parties reflect these obligations and their compliance with them.

Employers should also conduct regular compensation and salary reviews periodically to identify and address pay disparities before they become claims (and to provide some defenses to an employer if they do become claims), and they should do so with the guidance of legal counsel to protect privilege, when appropriate.

Mandatory Disclosure of Wage/Salary Scales in Job Postings—Trend to Transparency and Competitive Advantages

In addition to existing rights under the NLRB to discuss workplace conditions and pay, states are passing their own laws to promote pay transparency and to provide employees with the right to challenge, question, or file complaints related to compensation and fair pay, including retaliation protections.

WASHINGTON

As part of the same law addressed above (the Washington EPOA) starting January 1, 2023, employers with 15+ employees (anywhere), with at least one employee engaging in any business, industry, profession, or activity in Washington, must comply with Washington pay transparency obligations. These requirements apply to paper, electronic, and digital postings. "Job posting" includes any solicitation meant to attract applicants, whether by the employer or a third party (e.g., recruiter), and that also includes qualifications for a specific position. Each posting must include: a wage scale or salary range (top and bottom), general description of benefits, and a general description of other compensation. An employer cannot avoid disclosing wage and salary information requirements by indicating within a posting that the employer will not accept Washington applicants.

Just this month (October 2023), several class action lawsuits were filed against employers in Washington for alleged failure to comply with pay transparency obligations. For additional information, please see our blogpost: https://www.millernash.com/industry-news/dli-issues-updated-guidance-2023-washington-state-job-posting-requirements.

OREGON

Oregon law prohibits discrimination or retaliation against employees who discuss wages with their coworkers (ORS 659A. 355). Additionally, a bill was introduced in the 2023 Legislature that, if adopted, would be very similar to Washington's new posting requirements. This legislation is expected to reappear in 2024.

OTHER STATES

As noted above, California already has a law requiring employers of 15 or more employees, (including public employers) to provide wage/salary scales for job postings and requires all employers to provide wage/salary scales for a position upon applicant's request. Read more here: https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB&sectionNum=432.3.

Montana, Idaho, and Alaska do not yet have pay transparency laws at the state level. All three states have seen legislation introduced on pay transparency, and it may be a matter of time before all three states adopt such legislation.

CITIES AND COUNTIES

Even if a state has not adopted pay transparency laws, cities and counties are increasingly considering and adopting pay transparency requirements. Employers should consult not only state but also local laws where they do business.

KEY TAKEAWAY

Employer policies and practices generally cannot prohibit employee pay discussions or sharing, or raising issues or concerns about pay unfairness, promotional opportunities, etc. In our new remote world, employers should confirm whether laws of neighboring state or states in which they employ workers apply to them and that they are in compliance (e.g., Washington, Colorado). It is also important to review job postings and job descriptions (including removing old postings) for compliance with your obligations based on the various laws that may apply. Failure to comply with the technical obligations of pay transparency laws can lead to costly class action lawsuits.

Even if not required, voluntarily disclosing detailed compensation systems and benefits can make it easier for employers to defend their pay practices. More importantly, the talent market may demand this information for employers to remain competitive.

Employee Noncompetition Agreements Under Fire

California has had employee noncompetition agreements in their crosshairs for several years in an attempt to protect high-tech and other workers who want to change jobs frequently. (See California Business and Professions Code Section 16600, making

employee noncompetition agreements null and void). More recently, other states have joined in, adding restrictions on non-competition agreements each legislative session.

In Oregon, ORS 653.295 limits employee noncompetition agreements to salaried exempt employees earning above a certain pay threshold, and then only for 12 months and with two weeks' pre-employment notice or upon bona fide advancement and post-employment notice within 30 days.

In Washington, RCW 49.62 also limits employee noncompetition agreements to employees earning above a certain pay threshold, and then only for less than 18 months and with pre-employment notice. These statutes contain other restrictions as well, and geographic restrictions must be narrowly tailored, too.

While Montana, Idaho, and Alaska do not have statutes broadly restricting employee noncompetition agreements, state courts still construe such agreements narrowly. Additionally, Montana recently enacted a ban on noncompetition agreements for mental health workers, which may signal a trend for more restrictions on noncompetition agreements in coming years.

As if the state scrutiny were not enough, the federal government is joining the scrum. The U.S. National Labor Relations Board's general counsel issued a memorandum on May 30, 2023 claiming that employee noncompetition agreements violate the National Labor Relations Act. Additionally, on January 19, 2023, the Federal Trade Commission proposed a new rule to end enforcement of employee noncompete agreements nationwide, including not only future but also current agreements (a questionable legal term). Adoption of these federal agency rules are pending, and likely to be the subject of protracted litigation if adopted.

Each state's laws relating to noncompetition agreements is changing frequently, so constant reference to, and review of, the state laws is necessary:

- Oregon: https://www.oregon.gov/boli/employers/pages/noncompetition-agreements.aspx
- Washington: https://app.leg.wa.gov/RCW/default.aspx?cite=49.62
- California: https://oag.ca.gov/news/press-releases/attorney-general-bonta-reminds-employers-and-workers-noncompete-agreements-are
- Alaska: https://labor.alaska.gov/lss/forms/pam100.pdf
- Idaho: https://isb.idaho.gov/blog/navigating-restrictive-covenants-in-a-mobile-workforce/
- Montana: https://psychnews.psychiatryonline.org/doi/10.1176/appi.pn.2023.09.9.7

KEY TAKEAWAY

Employers should review their existing noncompetition agreements against various state laws that may be applicable to each employee with a signed agreement. Additionally, employers should consider whether a noncompetition agreement is even needed, or if a more narrow nonsolicitation and confidentiality of trade secrets agreement will serve the employer's needs, and allow for greater uniformity and enforceability across state lines.

Paystubs and Final Paychecks—The Devil Is in the Details

Although previously a quiet area of employment law, paystubs are now getting increased scrutiny, including from plaintiff lawyers. Each state has its own requirements for mandatory paystub details—some of the mandatory details may surprise employers!

Among other details, Oregon requires the employer's address, phone number, and business registry number. Washington requires employee's occupation and mandatory paid sick leave law leave balances (unless such notice is provided otherwise). California requires the last four digits of the employee's social security number, vacation, and sick leave balances. More importantly, California law allows up to $4,000 per employee in damages if paystubs do not contain the correct information.

For state-specific information, see the following links:

- Oregon: https://oregon.public.law/rules/oar_839-020-0012
- Washington: https://lni.wa.gov/workers-rights/workplace-policies/payroll-and-personnel-records
- California: https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB&sectionNum=226
- Alaska: https://labor.alaska.gov/lss/whfaq.htm#:~:text=The%20stub%20must%20include%20the,dates%20of%20the%20pay%20period
- Idaho: https://www.labor.idaho.gov/businesses/idaho-labor-laws/labor-laws-faq/
- Montana: https://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/wage-payment-act

FINAL PAYCHECKS

All six states have requirements and restrictions on final paychecks, including when final paychecks are due, depending on whether an employee quit with or without notice or was terminated, and whether the event falls on a weekend or weekday. Additionally, all six states have restrictions on what deductions may be taken from an employee's final pay. For example, some states allow repayment of wage advances or employee loans from the final paycheck, while others only allow it provided the employee is still paid minimum wage, while others prohibit such deductions.

California generally prohibits any deductions from the final paycheck, except mandatory deductions such as taxes and benefits. Oregon is similarly restrictive but does allow deduction of an employee loan from a final paycheck under certain conditions (read more: https://www.oregon.gov/boli/workers/pages/paycheck-deductions.aspx). Washington allows some more deductions from final paychecks, such as employee purchases of goods or services from the business (read more:https://www.lni.wa.gov/workers-rights/wages/getting-paid/paycheck-deductions).

KEY TAKEAWAY

Regarding paystubs, employers need to confirm their paystubs contain the state-mandated details. Even payroll service providers like ADP do not always have compliant paystubs—and it is the employer's responsibility and liability regardless of whether a third party prepares the paystubs. For employers operating in multiple states, the paystubs for each employee in each state must comply with that state's paystub requirements. Often

for multi-state employers it is easiest to simply include the same detail for all employees, choosing to amalgamate the requirements of each state into one standard paystub for all employees in all states, although this becomes more difficult when some states have paid leave and other laws that other states do not have.

Similarly for final paychecks, employers must confirm an employee's final paycheck contains only those deductions permitted by state law. Additionally, well in advance of issuing a final paycheck, employers should ensure that employee consent is obtained for final paycheck deductions such as repayment of employee loans or wage advances and payment for receipt of employer's goods or services.

Disclaimer: This summary is not legal advice and is based upon current statutes, regulations, and related guidance that is subject to change. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps employers must take under applicable laws. For legal advice on these or related issues, please consult qualified legal counsel directly.