WASHINGTON UPDATES

NOTABLE CASES & REGULATIONS

Washington's 2024 Minimum Wage, Exempt Salary Requirements, and Noncompetition Earnings Threshold

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Per state statute, Washington's minimum wage increases each year as a function of increases in the Consumer Price Index (CPI-W). **Effective January 1, 2024, Washington's minimum wage will increase to $16.28 per hour**—up from 2023's rate of $15.74.

Likewise, the minimum salary required for an employee to be exempt under the Executive, Administrative, and Professional exemptions (commonly referred to as the "white collar" exemptions) will increase this year as a result of inflation and the phase-in adjustment for smaller employers.

In 2024, all Washington employers (regardless of size) will have to pay a weekly salary of $1,302.40 (annually, $67,724.80) to treat an employee as exempt from overtime and other requirements.

Computer Professionals can be exempt either under the minimum salary requirement, or alternatively, if they are paid at least $56.98 per hour for all hours worked.

As a reminder, these "white collar" exemptions also require that an employee meet a duties test, in addition to being paid at least the applicable required minimum salary.

To enforce a noncompetition provision against a former employee, the employee's annualized taxable income [Box 1 W-2 income] at termination must meet the minimum level of $120,559.99 in 2024. To enforce a noncompetition provision with an independent contractor, the 2024 earnings level is $301,399.98.

Note, the cities of Seattle, Sea-Tac, and Tukwila each have higher minimum wages than the state.

- **SeaTac**'s 2024 minimum wage (which applies to Hospitality and Transportation workers) rises to $19.71 per hour.
- For one more year **Seattle** will have two different minimum wage rates depending on the size of the employer and whether the employee receives sufficient tips or medical benefits:
    - Large Employers (501+ employees worldwide): $19.97.
    - Small Employers (up to 500 employees worldwide): $17.25/hour if the employee receives $2.72 per hour in tips or the employer pays $2.72 per hour toward the employee's medical benefits. Otherwise, the small employer must pay $19.97 per hour.

- **Tukwila** is also phasing in new minimum wage rates and currently has separate minimum wages depending on the size of the employer:
    - Large employers (more than 500 employees worldwide): For 2024, the minimum wage will be $20.29 per hour.
    - Mid-size employers (either 15-500 employees world worldwide or over $2 million annual gross revenue in Tukwila): January–June 2024, the minimum wage will be $18.29. July—December 2024, the minimum wage will be $19.29.
    - Small employers (fewer than 15 employees and less than $2 million annual gross revenues): no Tukwila minimum wage.

KEY TAKEAWAY

Employers must have their payroll systems ready to begin using the correct new minimum wage rates for work performed on January 1, 2024, and thereafter. Likewise, employers need to determine whether to raise salary levels in order to keep treating an employee as exempt, or instead transfer that employee to non-exempt status with hourly pay. Remember, if an employee is transitioned from exempt to non-exempt, the employee then becomes subject to the Washington Paid Sick Leave requirements, and rest and meal break requirements. It may also impact the employee's benefits, depending on whether the employer provides different benefits to exempt and non-exempt employees. If an employer decides to transition an employee from exempt to non-exempt, the employee needs to be notified of that change in status and, if needed, trained in the employer's timekeeping rules before January 1, 2024, and preferably at least two weeks in advance.

Effective January 1, 2024, PFML Premiums are Changing

Washington's Paid Family Medical Leave (PFML) program is funded by payroll taxes paid by all employees and larger employers. Effective January 1, 2024, the premium rate is declining to 0.74%. Of that total premium, employers will pay 28.57% and the employees will pay 71.43%. The premium is applied to wages up to the Social Security cap, which for 2024 will be $168,600.

KEY TAKEAWAY

As with the new minimum wage rates, employers need to make sure their payroll systems are ready to begin deducting the correct PFML premium amount from employee paychecks for work on or after January 1, 2024.

Effective January 2024, Washington Employers Will Be Significantly Limited in Their Right to Decline to Hire People for Past Cannabis Use

Although Washington decriminalized recreational use of cannabis in 2012, employers in Washington have been free to deny employment on the basis of any evidence of cannabis use, including pre-hire drug testing, and even including if cannabis use was for medicinal purposes.

Beginning January 1, 2024, that will no longer be the case in most situations, as it will generally be unlawful for an employer to refuse to hire an applicant because of (1)

the applicant's prior off-the-job/away from work use of cannabis (regardless of how an employer may have found out about it), or (2) a pre-hire drug screening test that identifies nonpsychoactive cannabis metabolites.

Exceptions

There are some important limitations/exceptions on the new law. For example, it only applies to hiring decisions, and does not prohibit or limit post-accident tests, reasonable suspicion tests, or other tests during employment.

Additionally, these new provisions do not apply to:

- pre-hire drug test that does not screen for nonpsychoactive cannabis metabolites;
- positions or workplaces where an employer is obligated under federal law to maintain a drug-free workplace or meet other federal requirements, or the position requires a federal government background investigation or security clearance;
- safety sensitive positions for which impairment while working presents a substantial risk of death (provided that the position was identified as a safety sensitive position before the applicant applied);
- law enforcement, fire department, first responder, or corrections officer positions; or
- positions in the airline or aerospace industries.

Importantly, the new statute also does not apply when a state or federal law requires an applicant to be tested for controlled substances. This includes laws requiring that applicants be tested, and how they are tested, as (a) a condition of employment, (b) a condition of receiving federal funding or licensing-related benefits, or (c) required by a federal contract.

KEY TAKEAWAY

Employers who require new hires to submit to drug testing as a condition of employment will want to update their practices to comply with the new rules in Washington as of January 1, 2024. Moving forward, employers should either not test for cannabis or ensure that their testing center does not transmit results to them if the test screens for nonpsychoactive metabolites.

Likewise, employers should make sure that those responsible for hiring and onboarding are aware of these new limitations. If they somehow learn about an applicant's prior off-the-job cannabis use even without a pre-hire drug test, it cannot be used as a factor in any hiring decision regarding that applicant.

Finally, employers need to make sure that they have identified and designated all safety sensitive positions that have a substantial risk of death if an employee is impaired while working, or positions for which there are federal or other legal requirements for the testing, if the employer wants to use pre-hire testing of cannabis in the hiring decision for those positions.

With Few Exceptions, Washington Employers May Not Search Employees' Personal Vehicles

Beginning July 23, 2023, the ability of employers to search employees' privately owned vehicles (even when located on the employer's property) was severely limited.

Under the new law, an employer is generally prohibited from searching the privately owned vehicles of its employees even when located in the employer's parking lots or garages, or on any access roads leading to the employer's parking lots or garages.

This new statute also explicitly provides that employees are permitted to have any private property they own in their vehicle unless possession of that property is otherwise unlawful.

Employers may not require an employee or applicant to waive their right to be free from a search by the employer or to have lawfully possessed private property in their personal vehicle as a condition of employment.

There are some specific exceptions to the new prohibitions. The provisions discussed above do not apply:

- To any vehicle owned or leased by the employer.
- When the employer requires or authorizes an employee to use their personal vehicle for work-related activities and the employer needs to inspect the vehicle to ensure that it is suited to conducting the work-related activities. While the statute does not specify any limits on this right to search, we anticipate that it will be limited to those areas of the vehicle directly related to it being suited to conducting the work-related activity.
- To lawful searches by law enforcement.
- When a reasonable person would believe that accessing an employee's private vehicle is necessary to prevent an immediate threat to human health, life, or safety.
- When an employee consents to the search by the employer, the employer's agent, or a private security guard, based on probable cause that the employee unlawfully possesses:
    - Employer property, or
    - A controlled substance in violation of both federal law and the employer's written policies prohibiting drug use.
    - The employee's consent must be given immediately prior to the search, and the employer may not require that the employee waive consent as a condition of employment.
    - The employee has the right to select a witness to be present during the search.
- To security inspections on vehicles on state and federal military installations and facilities.
- To vehicles located on state correctional institution premises.
- To specific employer areas subject to searches under state or federal law.

Employers are prohibited from taking any adverse action against an employee for exercising any right under this new statute, including not any of the following adverse actions:

- Withholding wages or any other amounts owed to the employee.
- Reducing the employee's rate of pay.
- Terminating, suspending, demoting, or denying a promotion.
- Reducing the number of work hours for which the employee is scheduled or altering the employee's preexisting work schedule.
- Threatening to take, or taking any action, based upon the immigration status of an employee or the employee's family member.

KEY TAKEAWAY

Employers who currently have policies that reserve the right to search the private vehicles of their employees should revise those policies and corresponding practices to be consistent with these new employee rights. Additionally, all necessary personnel should be educated on these limitations. Employers who do not currently have any policy regarding searching employee vehicles might want to consider whether to adopt such a policy that is consistent with these new requirements.

Beginning January 2024, Washington Employers Will Get a Little More Information about an Employee's PFML

The lack of information about an employee's Paid Family Medical Leave (PFML) can lead to challenges when administering a Washington employee's leave. Fortunately, a little help is on the way: beginning January 1, 2024, employers can ask the Employment Security Department (ESD) to provide the following information about an employee's approved PFML leave:

1. the type of leave being taken (Medical or Family);
2. the requested duration of the leave, including approved dates of the leave; and
3. whether the employee was approved for benefits and was paid benefits in any given week.

The received information may only be used for administering internal employer leave or benefit practices under established employer policies. The ESD can investigate any use of the information to ensure compliance with the new law.

The ESD is creating a process by which the employer can request the information.

KEY TAKEAWAY

The provided information will help employers plan for an employee's absence and provide some certainty as to when the employer can expect the employee to return to work. If the employer allows employees to supplement PFML benefits with other paid leave, the employer will now know how much the employee received in any week without relying on the employee to self-report.

If an employer elects to ask for PFML information, it will need to take steps to safeguard the information similarly to any other medical or private information of the employee. Only those employer agents with a need to know should be provided with the information, and all documents should be protected.

New Liability for Washington Employers If a Paycheck Bounces

If cash flow is tight, making payroll can sometimes be a problem. For Washington employers, finding themselves in that situation and considering various options, there is now even more incentive to make sure that employee payroll is fully funded.

Effective January 1, 2024, if paychecks are returned due to insufficient funds and if the employee presents the dishonored paycheck to the employer within 30 days, the employer is obligated to reimburse the employee for any bank charge for the dishonored check. The only exception is if the employer's financial institution confirms in writing that the instrument was returned due to an error by the financial institution. These charges would be on top of any liability the employer might have for failing to timely pay employees their wages.

As an important reminder, pursuant to a separate statute (RCW 49.52) any officer, vice principal, or agent of an employer who knowingly deprives an employee of wages that are owed can be held personally liable for the employee's wages, a second amount as penalty, interest at 12% and the employee's attorney fees incurred in seeking relief. This provision would likely apply to a situation in which the officer, vice principal, or agent knew that the employer's bank account did not have sufficient funds to meet payroll.

Washington Expands Grounds for "Good Cause" Resignations Allowing Employees to Collect Unemployment Benefits

Generally speaking, employees who resign are not eligible for unemployment benefits. Washington, however, has several exceptions to this general rule in which an employee who had "good cause" to resign is eligible for unemployment benefits.

Related to Family Care

Effective September 3, 2023, if an employee quits due to the death, illness, or disability of any family member (not just immediate family members), they are not disqualified from unemployment benefits.

Additionally, for any separation from July 7, 2024, through July 8, 2029, necessary because the employee was unable to access care for a child or vulnerable adult in their care, the employee is not disqualified from unemployment benefits. Benefits paid under this "good cause" are not charged directly to the employer but are instead paid out of the general Unemployment Insurance fund.

In both cases, the employee must have (a) made reasonable efforts to stay employed by requesting accommodating changes in working conditions or work schedules, or leaves of absence (notifying the employer this is the reason for the leave) and

promptly requesting reinstatement when able to do so, and (b) the employee must have terminated the employment and not be entitled to reinstatement to the same, or comparable, position.

Relocation of Minor Child

Beginning July 7, 2024, an employee will not be disqualified from unemployment benefits if they resign to follow a minor child who has relocated outside the employee's labor market, provided that the employee had parental rights over the minor child at the time of the job separation, and the employee remained employed as long as reasonable prior to relocating. Benefits allowed for this reason are not charged directly to the employer but are instead paid out of the general Unemployment Insurance fund.

Involuntary Shift Changes

Beginning July 7, 2024, an employee will not be disqualified from unemployment benefits for resigning because their regularly scheduled start or end times are changed by the employer by at least six hours on a non-temporary basis. For this "good cause" exception to apply, the employee must have had a regularly scheduled shift/split shift for the prior 90 days, and the change in shift must not be based on a seniority system or due to a request by the employee.

KEY TAKEAWAY

If an employee requests changes to a work schedule or other working conditions, or a leave of absence due to the death, illness, or disability of a family member, or the need to care for a dependent child or vulnerable adult because they cannot access other care, the employer should consider reasonable accommodations or leaves of absences for the employee. Likewise, before involuntarily changing the shift start and end times for an employee, an employer should consider whether the change is worth the risk of a charge to the employer's unemployment account.

Pregnancy Accommodations: The Accommodations Listed in the Statute are Required

Since 2017, Washington's Healthy Starts Act has identified various accommodations for pregnant employees. Many employers believed that some of the listed items were unreasonable accommodations in their particular workplace or for particular positions, and wondered if they could meet their obligations under the Act by offering different accommodations.

In *Arroyo v. Pacific Maritime Association* (529 P.3D 1 (2023)), the Washington Court of Appeals addressed that uncertainty, issuing two key holdings that employers should pay attention to:

- The Court held that the accommodations listed in the statute are always *per se* reasonable for all employers, and employers cannot argue that in their particular situation the accommodation is not reasonable (though for some of the listed accommodations, the employer can argue that it would be an undue hardship); and

- The listed reasonable accommodations must be provided if that is the accommodation(s) the pregnant employee wants (absent an undue hardship), even if other reasonable accommodations are possible or are offered by the employer.

Under the Act, these are the accommodations that are automatically considered reasonable accommodations for pregnant employees, and for which the employer may *not* assert that they create an undue hardship:

1. Providing more frequent, longer, or flexible restroom breaks;
2. Modifying a no food or drink policy;
3. Providing seating or allowing an employee to sit more frequently if the job requires standing; and
4. Refraining from lifting more than 17 pounds (the specific 17 pounds limitation is contained in the implementing regulations rather than the statute).

Pursuant to *Arroyo*, an employer must always provide any or all of these four accommodations to a pregnant employee.

Under the Act, the following accommodations are *per se* reasonable under the statute, but for these accommodations an employer can argue that it would create an undue hardship under the circumstances:

1. Job restructuring, part-time or modified work schedules, reassignment to a vacant position, or acquiring or modifying equipment, devices, or an employee's workstation;
2. Providing a temporary transfer to a less strenuous or hazardous position;
3. Providing assistance with manual labor or lifting 17 pounds or less; and
4. Scheduling flexibility for prenatal visits.

Arroyo affirmed that for these reasonable accommodations an employer could argue that the accommodation would create an undue hardship under the circumstances. The Act defines "undue hardship" as "an action requiring significant difficulty or expense."

If none of the above-listed accommodations are available, the employer must then consider and offer other possible reasonable accommodations, just as the employer would when accommodating an employee with a non-pregnancy related disability. If so, a leave of absence can be a reasonable accommodation, but employers may not require that if any of the above or any other reasonable accommodation is available (and does not create an undue hardship).

KEY TAKEAWAY

While an employer can always offer a pregnant employee a reasonable accommodation that is not listed in the statute, if the employee prefers one of the listed accommodations, the employer will be required to provide it, unless it is one of the final four and the employer can demonstrate it creates an undue hardship.

Employers May Be Able to Have Policies Prohibiting All Employees from Working for a Competitor During Employment

Effective since January 2020, Washington has had a statute that required certain conditions for employers to enforce a noncompetition agreement, including that the employee must make a significant level of earnings from the employer.

A lesser-known provision of that statute prohibits employers from having anti-moonlighting policies for employees who make less than twice the minimum wage that prohibits such employees from taking other jobs (RCW 49.62.070). The anti-moonlighting provision has some limitations on it, however, including that it does not alter an employee's duty of loyalty to the employer or prohibit policies that forbid conflicts of interest.

In a very recent opinion, the Washington Court of Appeals held that an employer's requirement that all employees (including those making less than twice the minimum wage) agree that during employment they would not "directly or indirectly engage in any business that competes with the employer," and specifically to refrain from working for any competing business, was not prohibited by the statute. *David, et. al. v. Freedom Vans LLC*, 2023 WL 6809654, (unpublished).

The court analyzed the agreement under the "duty of loyalty" exception and concluded that the employer was permitted to have such an agreement for all employees. (The court did not consider whether it would also be permissible under the "conflict of interest" exception).

Note, the opinion is unpublished, meaning that it does not have precedential value, and it could be risky for an employer to adopt a similar provision.

KEY TAKEAWAY

If an employer wants policies or agreements that prohibit current employees from working for a competitor at the same time they are working for the employer, they may be able to do so even for lower paid employees. It is advisable to consult with an attorney regarding such a policy, however, as the *David* decision was unpublished.

Narrow "No Hire" Provisions in Settlement Agreements Are Lawful under Washington Law

In many cases when an employment relationship ends, the settlement agreement includes a "no re-hire" provision in which the employee agrees to not seek or accept reemployment with the former employer.

In a case against Washington State University Spokane (WSU-Spokane), a former employee who had settled his discrimination claims against the university turned around and filed another suit against the university claiming that the settlement agreement contained a narrow no-hire clause which was against public policy and was unlawful

retaliation under the Washington Law Against Discrimination (RCW 49.60), as well as in violation of the state's statute on noncompetition agreements (RCW 49.62). This lawsuit sought class certification for all former state employees whose discrimination claim settlement had included a no-rehire provision (*Elgiadi v. Washington State University Spokane*, 24 Wn. App. 261, 519 P.3d 939 (2022)).

The no-rehire provision of the agreement settling his first claim against WSU-Spokane was a narrow provision, prohibiting Elgiadi from seeking reemployment at WSU-Spokane and explicitly not applying to any entity other than WSU-Spokane.

The trial court had granted summary judgment to Washington State University, and on appeal a divided Division III of the Washington Court of Appeals affirmed that summary judgment dismissal. The majority opinion noted the narrow nature of the no-rehire provision multiple times, indicating that was important in its decision in affirming summary judgment for WSU-Spokane.

KEY TAKEAWAY

The no-rehire provision upheld in *Elgiadi* was a narrow one, applying only to the specific entity which employed Elgiadi in his prior lawsuit. Employers who include no-rehire provisions in separation agreements should consider whether a narrow provision naming only the employing entity will meet their needs, and that such a provision that broadly applies to all affiliated entities could be considered *too* broad to be enforceable and might constitute retaliation.