Workplace Law Update For Washington Employers, Summer 2018 Edition

Insights
6.27.18

Washington's lawmakers and regulators have not taken a summer holiday this year, remaining active by passing new regulations based on legislation from the last legislative cycle or reacting to new case law by creating new legal obligations. Their actions continue to challenge Washington employers to keep up with evolving workplace laws. The good news? We've put together summaries of some of the more significant recent developments for you here.

Washington Paid Family Leave
As we've shared previously, Washington employers must start collecting premiums for Paid Family and Medical Leave benefits on January 1, 2019. The benefits become available January 1, 2020.

Codified as Title 50A RCW, this new program will allow all employees who have worked at least 820 hours in the previous year to take up to 12 weeks of paid leave (1) to care for a family member with a serious health condition; (2) to care for a new child after birth, adoption, or foster placement; and (3) for a qualifying military exigency.

The Employment Security Department (ESD), who will administer this new leave, is currently in the process of developing rules to implement, clarify, and enforce the new program. The rulemaking will be done in four phases.

- **Phase One**, recently concluded, established rules on (1) voluntary plans; (2) collective bargaining agreements; and (3) premium assessments. These final rules clarify that the new leave requirements do not apply to parties covered by collective bargaining agreements in effect before October 19, 2017, unless and until the agreements expire, are reopened, or are renegotiated. These new rules also provide greater detail regarding the requirements to adopt a "voluntary plan," an option for employers who chose offer their own paid family and medical leave program, such as employee eligibility criteria, when voluntary plans may take effect, and how to submit voluntary plans applications for approval. Other final rules adopted further define the requirements for premium assessment and collection, election of coverage, and eligibility for conditional premium waivers.
- **Phase Two**, currently underway, will establish rules on (1) employer responsibilities; (2) penalties; and (3) small business assistance grants. ESD has posted a draft of Phase Two proposed rules on its website and interested individuals and organizations can provide written

comments and attend upcoming public hearings. Final Phase Two rules are expected to be filed in November 2018.

- **Phase Three**, which will establish rules on benefits, is slated to begin in August 2018.
- **Phase Four,** concerning appeals of violations, is slated to begin in mid-2019.

For more information about the ESD's rulemaking process and to view the final and proposed rules, visit its website here.

Arbitration Limits For Government Contractors

Washington Governor Jay Inslee recently issued Executive Order 18-03—a clear rebuke to the U.S. Supreme Court's recent decision in *Epic Systems Corp. v. Lewis* and a warning to employers doing business with the State of Washington. *Epic Systems* essentially resolved a split among the federal circuit courts of appeal by upholding the validity of mandatory class action waivers in employment arbitration agreements, and rejecting arguments that Section 7 of the National Labor Relations Act (NLRA) prohibited such waivers through its "concerted activities" protections.

Governor Inslee's June 12 executive order registers his disagreement with the Supreme Court's ruling, going so far as to state that *Epic Systems* "will inevitably result in an increased difficulty holding employers accountable for widespread practices that harm workers." Thus, effective immediately, the order directs all Washington executive and small cabinet agencies, when making purchasing and procurement decisions, to show a preference for employers that "can demonstrate or will certify" that their employees are not required to sign arbitration agreements containing class action waivers as a condition of employment.

This order has potentially large implications for employers who contract with the state of Washington. Such government contractors should consider revisiting any employee arbitration agreements to determine how those may impact any bids for work.

Seattle Paid Sick Leave

You may recall that Seattle amended its Paid Sick and Safe Time (PSST) ordinance in late 2017 in reaction to some more generous provisions of Washington's new Paid Sick Leave law. The Seattle Office of Labor Standards (OLS) has finally issued its updates to the administrative rules, effective July 1, 2018. Highlights of some of the key changes are:

- **The definition of "normal hourly compensation."** PSST must now be paid at the employee's "normal hourly compensation." Like Washington's Paid Sick Leave law, normal hourly compensation *includes* differential rates (a different rate paid for the same work performed under differing conditions), commissions, and *excludes* holiday pay, premium rates, tips, gratuities, and service charges. However, normal hourly compensation does not include commissions for overtime exempt employees (who are generally not covered under Washington's law, but are covered in Seattle). For employees who are entitled to overtime, normal hourly compensation does not include overtime pay.

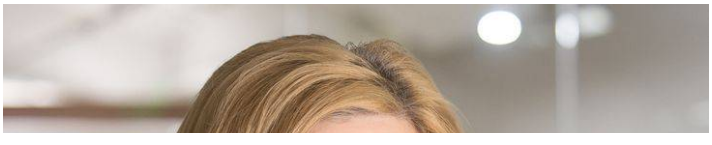
- **PSST Policy Must Include Notice of Normal Hourly Compensation.** Unlike Washington's Paid Sick Leave law, PSST policies must explicitly state that employees have a right to receive their normal hourly compensation for PSST, even though the policy need not state the specific PSST rate of pay.
- **No Variances.** Unlike Washington's Paid Sick Leave law, Seattle's OLS will *not* grant a variance from the increments of use requirement found in SMC 14.16.030(C), which requires that PSST may be used in the smallest increment in which compensation is tracked, not to exceed one hour. Seattle also will *not* recognize a variance issued by the Washington State Department of Labor and Industries for any work performed in Seattle.
- **Employers May Not Seek Reimbursement for Frontloaded PSST.** Under Washington's Paid Sick Leave law, employers can obtain reimbursement for any used "frontloaded" paid sick leave used that is greater than what an employee would have otherwise accrued through a final paycheck deduction, provided there is a specific written agreement. Seattle's law explicitly prohibits such reimbursement for Seattle-based employees.
- **OLS PSST Poster.** Employers must display the OLS poster in the specific dimensions established by OLS (i.e. 11" x 17").
- **Changes that Did Not Happen.** Seattle did not change its provisions that are more favorable than the Washington law. This includes, among other provisions, its higher accrual and carryover requirements for Tier 2 and Tier 3 employers. So, for example, the minimum accrual and carry over for an employer with over 250 or more FTEs worldwide still remains 1 hour for every 30 hours worked, with a minimum annual carryover of 72 hours for unused hours. (The Washington law only requires 1 hour for every 40 with a carry-over of 40 hours.)

Reconciling the differences between Seattle's and Washington's laws to come up with a compliant sick and safe leave or universal PTO policy remains challenging. Employers who believe their current paid policy meets both Seattle and Washington's laws should consider a fresh look to ensure compliance.

Conclusion
If you have questions about any of the above legal developments, please contact any member of our Seattle office at 206.682.2308 or your Fisher Phillips attorney.

This Legal Alert provides an overview of specific state law changes. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People



Catharine Morisset
Partner
206.693.5076
Email

Service Focus

Class and Collective Actions

Employee Leaves and Accommodations

Labor Relations

Litigation and Trials

Related Offices

Seattle