Latest Legal Developments For Washington Employers, 2019 Edition

Insights
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As predicted, Washington's legislature has been busy over the past few months passing new laws that directly impact how employers conduct business. There have also been several key court decisions impacting workplace law of which all employers should be aware. What happened? We've put together summaries of the more significant recent developments for you below.

Non-Compete Restrictions
As of January 1, 2020, the use of noncompetition agreements in Washington will be heavily restricted, including requirements on minimum compensation for both employees and independent contractors for the agreement to be enforceable. The new law applies to when the agreement is enforced; it is not dependent on when the agreement was signed. For more, please read our May 2019 alert.

Salary Inquiry Prohibition
Earlier this year, Washington's legislature determined that "despite existing equal pay laws, there continues to be a gap in wages and advancement opportunities among workers in Washington, especially women." Consequently, lawmakers amended the Equal Pay Act in an effort to promote fairness among workers by ensuring all employees are "compensated equitably." The following amendments were effective as of July 28, 2019:

- Employers are prohibited from seeking the wage or salary history of an applicant for employment, although an employer may confirm this information if is "voluntarily disclosed," or after the employer has made an offer of employment that includes compensation.
- Employers must provide the wage scale or of minimum salary for to applicants after making an initial offer of employment.
- Employers must also provide the wage scale or salary range to an employee who is offered an internal transfer to a new position or promotion if the employee requests such information.

If no wage scale of salary range exists, the employer must provide the minimum wage or salary expectation set by the employer prior to transferring to, promoting to, or posting the position.

Employers who violate these new provisions will be assessed penalties by the Department of Labor and Industries, or subject to a civil action in which it could be liable for damages and interest, and

attorneys' fees and costs. Recruiters, managers, supervisors who conduct employee interviews should be cautioned to not ask about salary or wage history during the interview process. All questions about salary or wage history should be moved from job applications.

Exercise Care When Offering Arbitration

How employers communicate and offer arbitration agreements is crucial, as underscored by the Washington's Court of Appeals opinion in *Burnett v. Pagliacci Pizza, Inc.* issued on June 17, 2019. Following his termination, former delivery driver Steven Burnett sought to bring class-based wage and hour claims. Pagliacci Pizza sought to compel arbitration of those claims relying upon a mandatory arbitration agreement in its employee guide called the "Little Book of Answers." Burnett had received this Book, along with various other policies, during his orientation – including an "Employee Relationship Agreement," which incorporated the Book. The employer instructed him to read the Book at home before signing it separately.

Burnett argued that the mandatory arbitration agreement was procedurally and substantively unconscionable and sought to have it struck. The Court of Appeals held that the agreement was unconscionable and therefore unenforceable. The court found that it was procedurally unconscionable because it was an adhesion contract; the arbitration provision was simply a clause buried in the 23-page Book, and Burnett was given no choice but to accept the Employee Relationship Agreement (which incorporated the Book) before he could begin work.

The Court also held the mandatory arbitration agreement was substantively unconscionable because it sought to shorten the statute of limitations for any claim, and required anyone – including former employees – to report their concerns to a supervisor before bringing a claim. This essentially bared former employees from initiating arbitration. It also found that this and other procedural hoops were unconscionable as applied to current employees.

You should review your arbitration agreements and the procedure for obtaining valid legal consent from employees with legal counsel. Agreements buried in a handbook are likely a red flag, as are agreements that are offered on a "take or leave it" basis.

Panic Buttons And Prevention of Sexual Assault

Last May, Washington adopted a new law requiring every hotel, motel, retail, or security guard entity, or property services contractor who employs at least one employee in Washington must:

- Adopt a sexual harassment policy;
- Provide mandatory sexual harassment training to all employees (including managers and supervisors);
- Provide employees with a list of resources, which must at least minimum include contact information for the Equal Employment Opportunity Commission, the Washington State Human Rights Commission, and local advocacy groups focused on preventing sexual harassment and sexual assault; and

- Provide a panic button to each employee (with the exception of some security guard companies).

Property service contractors (any person or entity that employs workers to perform commercial janitorial services for another person or on behalf of an employer) must provide the Department of Labor and Industries with the following information:

- The date the sexual harassment policy was adopted;
- The number of employees (including managers and supervisors) trained; and
- The locations where janitorial services are provided and the total number of employees or contractors and hours worked at each location.

Hotels and motels with 60 or more rooms must meet these new requirements by January 1, 2020. All other hotels, motels, retail entities, security guard entities, or property services contractors must meet these new requirements by January 1, 2021.

Employers who are covered by this new law should take immediate steps to implement or update their written sexual harassment policy, and budget and prepare to train their employees on the policy. You should also plan and budget to provide panic buttons with a related policy regarding their appropriate use.

What's Going On With Paid Family Medical Leave?
As previously reported, Washington has joined several other states in offering paid family and medical leave benefits to workers. Washington's Paid Family Medical Leave Act created a state-managed insurance program funded by both employee and employers. Employees and most employers pay premiums to the Employment Security Department (ESD), who in turn will administer the Paid Family Medical Leave to employees.

Since our last Legal Alert, the ESD changed the premium reporting and remitting deadlines for Quarters 1 and 2 to August 31, 2019, and decided it would not penalize employers who failed to withhold premiums in Quarter 1 and 2 for 2019 only. Nevertheless, employers who failed to withhold the employee premiums after the first of the year cannot retroactively withhold the premiums from the employees and must make full payment of any missed employee premiums. The employer may withhold future premiums, so long as the employer gives the employee at least one pay period's advance notice that it will be deducting the employee premium amount from the employee's paycheck.

The ESD also developed its online reporting tools and protocol. Employers can now report and remit their Paid Family Medical Leave premiums online by going to www.secureacess.wa.gov and setting up an account. Employers then have the option to manually enter the reporting criteria (name, social security number or independent tax identification number, hours worked, and wages paid) separately for each employee (maximum 50 employees), or an employer can submit one csv file (e.g., an excel spreadsheet) that contains reporting criteria for all of its employees. Third party

administrators can report using an ICESA file, but should consult ESD's website (www.paidleave.wa.gov/bulk-filing) for specific instructions before doing so.

The regulations relating to employee fraud have been recently finalized. If ESD determines that an employee committed willful nondisclosure or misrepresentation, the employee will not only have to repay any benefits paid by ESD as result of fraud, but will also be temporarily disqualified from receiving Paid Family and Medical Leave benefits and will be assessed a penalty.

An employee commits willful nondisclosure if (1) they omitted or failed to disclose information; (2) they knew or should have known that the information should have been provided; (3) the information concerned a fact that was material to the employee's rights and responsibilities under the Paid Family and Medical Leave Act; and (4) the employee omitted or did not disclose the information with the intent that the department would take action on the other information the employee did provide.

An employee commits misrepresentation if (1) they made a statement or provided information; (2) the statement was false; (3) they either knew or should have known the statement or information was false when making or submitting it; (4) the statement or submission concerned a fact that was material to the employee's rights and responsibilities under the Paid Family and Medical Leave Act; and (5) they made the statement or submitted the information with the intent that ESD would rely on the statement or information when taking action.

The ESD also clarified that employers may not require employees to take paid vacation leave, paid sick leave, or other forms of paid time off before, in place of, or concurrently with Paid Family and Medical Leave. Employers can, however, allow employees to choose which type of paid leave to take.

ESD continues to work on finalizing the regulations and will hopefully have all of the regulations finalized by December 20, 2019 – which does not leave employers much time to adjust their policies and procedures before employees can begin using Paid Family Medical Leave in January 1, 2020. It is our recommendation that employers habitually check the Employer Toolkit for up-to-date changes to the law, and to set a reminder to review their sick leave policies at the end of 2019 to ensure they are ready for their employees to start using Paid Family Medical Leave on the first of the year.

Obesity Joins Ever-Growing List Of Protected Classes

Finally, the Washington State Supreme Court recently held for the first time that obesity alone is a protected class under the Washington Law Against Discrimination (WLAD) in *Taylor v. Burlington Northern Railroad Holdings, Inc.*. In the unprecedented decision, our highest court stated that "obesity is always an impairment under the plain language of WLAD because the medical evidence shows that it is a 'physiological disorder, or condition' that affects many of the listed body systems." For more information on this, please read our full alert on the case.

We will continue to monitor the state legislature and court system and provide necessary updates regarding these and other new laws, so you should ensure you are subscribed to Fisher Phillips'

regarding these and other new laws, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our Seattle office.

This Legal Alert provides an overview of specific court decisions and legislative/regulatory developments. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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