



Employment Law Note

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Bills, Bills Everywhere



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2019 was an eventful year for the Washington legislature with respect to employment law matters. The Legislature enacted (and the Governor signed) important new laws on a range of subjects: pre-offer inquiries into wage or salary history, non-competition agreements, accommodating employees' need to express breast milk, "panic buttons" for certain workers, and important amendments to the nascent Paid Family and Medical Leave law.

A number of bills have already been introduced in Olympia for 2020 that, if passed, could have tremendous impact upon employers. Spoiler alert: be glad it's a short legislative session and remember most bills do not make it into law.

Potential New Wage-and-Hour Laws

32-Hour Workweek: SB 6516 would reduce the weekly overtime threshold in Washington to just 32 hours. It is before the Senate's Labor and Commerce committee.

Independent Contractors: Numerous bills are pending that would greatly restrict the ability to retain freelancers and other independent contractors. SB 5690, the "Employee Fair Classification Act," would deem any "individual" who "performs labor or services for another individual or entity" to be an employee, rather than an independent contractor, and would make it unlawful to "require or request" such a person to sign any document that "does not accurately reflect" their "relationship with the employer." The Bill would create a private right of action for either triple damages, or potentially up to \$25,000 per misclassified employee, whichever is more. A separate bill (SB 5987) would make most independent contractors subject to the entire Minimum Wage Act—including its overtime, meal break, and rest break requirements—by defining "employee" to include "any person working for an employer under an independent contract the essence of which is his or her personal labor."

Yet another bill (SB 6276) would render freelancers—defined as "any natural person or any organization composed of no more than one natural person"—subject to many requirements of the Minimum Wage Act, including the requirement to pay the state minimum wage. All of this is pending before the Senate's Labor and Commerce committee.

Bonus Payments to Sales Employees: HB 2474 would make incentive-based "bonus payments" to sales representatives subject to all of the requirements of Washington's sales commission law—including that they be paid within 30 days after the principal has received payment for the goods in question. This bill has passed the House's Labor and Workplace Standards committee.

Discrimination and Harassment

Citizenship or Immigration Status: SB 5165 would add "citizenship or immigration status" to the list of protected classes in RCW 49.60. It has passed the Senate and is before the House's Civil Rights and Judiciary committee. It remains to be seen whether this bill conflicts with the federal Immigration Reform and Control Act, which generally prohibits employers from employing persons who are not authorized to work in the United States.

Lawful Off-Duty Conduct: SB 5526 and SB 5807 would amend the Law Against Discrimination to prohibit discrimination against employees engaging in most lawful off-duty conduct (including constitutionally protected speech and assembly) so long as it occurs off the employer's premises and during non-working hours. The most common use of this type of law in other jurisdictions has been to limit employers' abilities to discharge employees for things like smoking. These bills are pending before the Senate's Committee on Law and Justice.

Harassment Trainer Registry: Substitute SB 6169 would create a "voluntary registration to qualify professional trainers and peer trainers" on sexual harassment and discrimination prevention. Professional trainers would be

required to have “significant experience” in “explaining” various aspects of harassment and discrimination law and prevention. “Peer” trainers would be required to meet additional qualifications, including at least eight hours of sexual violence advocate training. This bill is presently before the Senate’s Ways and Means committee.

Other Proposed Legislation of Note

Positive Marijuana Tests: HB 2740 would make it unlawful to refuse to hire someone because they tested positive for the presence of marijuana. There would be exemptions for firefighters, EMTs, and for positions where federal law requires submission to screening tests or where an employer would “lose a monetary or licensing-related benefit under federal law.” This bill is currently before House’s Committee on Labor and Workplace Standards.

Using AI to Analyze Video of Job Applicants: HB 2401 would regulate employers who use artificial intelligence (AI) to analyze video of job applicants. Employers would be required to notify applicants that AI would be used, provide the applicant with information about how the AI works and what characteristics it uses to evaluate applicants, and obtain the applicant’s consent. Employers would be prohibited from using AI to evaluate applicants who have not consented, from sharing videos (subject to limited exceptions), and from rejecting applicants “solely for refusing to consent.” Employers would also be required to delete the videos and all copies within 30 days of any request by an applicant. This bill is presently before the House’s Committee on Labor and Workplace Standards.

Personnel and Payroll Records: SB 6233 would make several changes to the law giving employees a right to review their personnel records. It would require employers to provide complete and unredacted copies of the entire file within 14 days to both employees and former employees as well as to their “agent or fiduciary” (*i.e.*, their lawyer or their union representative). It would also greatly expand the scope of documents to be furnished to include all “job application records,” “medical, leave, and

reasonable accommodation records,” and “payroll records.” SB 6233, which is pending before the Senate’s Labor and Commerce committee, would create a private right of action for violations, including a right to equitable relief, a statutory \$1,000 penalty for each violation, and attorneys’ fees and costs. (A 2018 Washington Supreme Court decision, *Martin v. Gonzaga University*, holds that no private right of action exists under the current law.)

Written Reasons for Discharge: SB 6233 would also codify into law the requirement that employers furnish a “written statement” of “the reasons for and effective date” of any discharge of the employee, and do so within 10 days of receiving a written request from the employee or his or her “agent.” This is presently enforced as a regulation. The new law would be subject to the same private right of action noted previously concerning personnel file access.

Searching Employee-Owned Vehicles: Substitute HB 2239 and SB 6177 would make it unlawful to search privately owned employee vehicles (even on company property) and would also forbid employers from requiring employees to waive this protection. The law would contain an exception for searches “necessary to prevent an immediate threat to human health, life or safety.” The House bill has passed the Labor and Workplace Standards committee and has been referred to Appropriations. The Senate version is before the Senate’s Labor and Commerce committee.

Cash in Lieu of Parking Subsidy: HB 2748 would require employers who provide a parking subsidy and have 50 or more employees in Washington to allow employees to receive this subsidy as a cash payment. This bill has passed the House’s Labor and Workplace Standards committee.

Head Tax Ban: SB 5589 would prohibit cities and towns from enacting taxes “measured by employee wages, employee hours, or the number of employment positions”—*i.e.*, taxes such as the employee head tax attempted by the City of Seattle in 2018. This bill died in committee last year but has been reintroduced and is pending before the Senate’s Local Government committee.

For more information about this month’s Employment Law Note
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