September 25, 2018

Slides and supporting materials are available at www.ryanswansonlaw.com.

Agenda

NOON – 1 P.M.  REGISTRATION & LUNCH
12:30 P.M.  WELCOME & INTRODUCTION – BRITENAE PIERCE
12:35 P.M.  KEYNOTE PRESENTATION: “ACHIEVING PAY EQUITY”
            – SARA BOWEN, STARBUCKS, GLOBAL LEADER, INCLUSION, DIVERSITY, EQUITY & ACCESSIBILITY
1:20 P.M.  PROGRAM
            •  WASHINGTON’S PAID FAMILY AND MEDICAL LEAVE
              SILVIA I. LUGO AND MATT LAFAR from THE WASHINGTON EMPLOYMENT SECURITY DEPARTMENT
            •  WORKPLACE INVESTIGATIONS (CASE STUDY)
              KRISTIN NEALY MEIER
2:30 P.M.  BREAK
2:45 P.M.  PROGRAM
            •  HOW TO BE SUCCESSFUL IN THE CURRENT IMMIGRATION CLIMATE
              JOEL PAGST
            •  RECENT DEVELOPMENTS IN FEDERAL & STATE LAW
              MANA KERN
            •  WHAT WE’RE HEARING FROM OUR CLIENTS: ANSWERS TO FREQUENTLY ASKED QUESTIONS FROM HR PERSONNEL
              SHANNON LAWLESS
            •  BEST PRACTICES IN HIRING AND FIRING
              BRITENAE PIERCE
4:00 P.M.  COCKTAIL RECEPTION AT THE HALO BAR (UPSTAIRS)
Why Paid Family and Medical Leave

- Position WA as a leader in a globally competitive economy.
- Ensure all Washingtonians have access to critically important paid leave during major life events.
- Share the costs associated with leave among employers and workers.
- Ensure a healthy economy by improving employee retention and other economic benefits.
Rollout Timeline

2019
Premium Collection
Reporting Hours & Wages

2020
Benefits Available

Who Does This Apply To?

Workers & their employers in Washington
Benefits

Leave to care for your family or yourself.
Weekly wage replacement: Proportion of weekly wages from $100 to $1,000
Typical leave of up to 12 weeks, 18 weeks in exceptional circumstances.

Covered Events: Examples

- Taking time to receive cancer treatment
- Caring for a sibling getting treatment for opioid addiction
- Recovering from a back injury following a car accident
- Extended hospital stay with a premature baby
- Spending time with a parent before a military deployment
Eligibility

820 Hours
worked during the qualifying period.
Portable across employers.

20 Hours/week -> 41 Weeks
40 Hours/week -> 20.5 Weeks

Qualifying period is the first four of the last five completed calendar quarters from the leave date.

What about paid sick leave?

<table>
<thead>
<tr>
<th>Paid Sick Leave</th>
<th>Paid Family and Medical Leave</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit is 100% of wage.</td>
<td>Benefit is proportion of wage.</td>
</tr>
<tr>
<td>Leave accrued in proportion to hours worked.</td>
<td>Leave in proportion to medical need.</td>
</tr>
<tr>
<td>100% employer funded</td>
<td>Split funding by employer (37%) and employee (63%)</td>
</tr>
</tbody>
</table>

Paid Sick Leave and Paid Medical and Family Leave cannot be used at the same time.
What about FMLA?

“Unless otherwise expressly permitted by the employer, leave taken under this chapter must be taken concurrently with any leave taken under (FMLA).” RCW 50A.04.250

Premiums

$50,000/year wage ⇒ Employee: $126.67 • Employer: $73.33

Small businesses with fewer than 50 employees don’t pay employer premium.

Still required to remit employee portion of premium and all reporting requirements
Premium Calculation

1. Calculate Premium
   ► Total Premium = Gross Wages * .004

2. Calculate Employer & Employee Portion
   ► Employer Portion\(^1\) = Total Premium * .3667
   ► Employee Portion = Total Premium * .6333

\(^1\)Fewer than 50 employees: Employer not required to pay employer portion.

Calculations for state plan only. Voluntary Plan employers will use different method.
Business Size

Less than 50 Employees
- Not required to pay employer portion of premium
- Required to do all other parts of state plan
- Can choose to pay employer premium for access to assistance

50 - 150 Employees
- Required to pay employer premium
- Eligible for up to $3000 in small business assistance

Calculating Business Size

<table>
<thead>
<tr>
<th>Quarter 1</th>
<th>Quarter 2</th>
<th>Quarter 3</th>
<th>Quarter 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>20 employees</td>
<td>40 employees</td>
<td>40 employees</td>
<td>140 employees</td>
</tr>
</tbody>
</table>

Average: 60 employees

Calculated September 30 each year.
- Headcount, not FTE or other counting method
- Based on required quarterly reporting
- Once counted, set for year
Small business assistance

$3,000
Grants if you hire a temporary employee to replace an employee on leave for more than seven days.

Up to $1,000
Grants for significant additional wage-connected costs.

Who is eligible?
- Employers with between 50-150 employees
- Employers with between 1-49 employees who elect to pay the employer share of premiums

Reporting

- Reporting schedule is in rulemaking
  - See phase 2 of rulemaking

- Benefit is portable between employers
  - All Washington workers with 820 hours are eligible.

- Penalties for missing or misreporting
  - Reporting starts in 2019
Reporting in 2019

► As proposed in rulemaking: Wages, hours worked, and more
  ► In phase 2 rulemaking, which is open now

► Reporting portal development ongoing
  ► Will be separate from UI reporting
  ► Will use SecureAccess.wa.gov for login information

Self Employed

► Can elect to participate
  ● Sole proprietor, independent contractor, partner, or joint venture

► Opt-in for 3 years initially, 1 year after initial period
  ● Must work for 820 hours to qualify for benefits

► Must pay employee portion of premium
  ● Must report wages and hours worked if you opt-in
Implementing in Phases

The timeline is an approximate timeframe for the implementation of the Paid Family and Medical Leave.

MILESTONE 1: Voluntary Plans
- Late summer 2018
  - Voluntary plans become available
  - May be submitted

MILESTONE 2: Premiums
- Jan. 1, 2019
  - Premiums begin to be assessed
  - Opt-in available

MILESTONE 3: Benefits
- Jan. 1, 2020
  - Benefits claims may begin to be filed

This timeline is an approximate timeframe for the implementation of the Paid Family and Medical Leave.

Rulemaking - Overview

Phase 1
- Collective Bargaining Agreements
- Premium Liability
- Voluntary Plans

Phase 2
- Employer Responsibilities
- Penalties
- Small Business Assistance

Phase 3
- Benefit Applications
- Benefit Eligibility
- Continuation of Benefits
- Fraud

Phase 4
- Job Protection
- Benefit Overpayments
- Miscellaneous
- Appeals

Phase 5

Phase 6

Mid-2018 Early-2019 Mid-2019 Late-2019

The timeline is an approximate timeframe for the implementation of the Paid Family and Medical Leave.
Review
Paid leave to care for yourself or your family.

Voluntary Plans

► Employer operated paid family and medical leave program
  • Like your existing plan? Turn it into a Voluntary Plan.

► Must apply to all employees
  • You can choose Family, Medical, or both for voluntary plan.

► Benefits must be equal or better than state plan
  • Duration of leave, premium amount, weekly benefit, and more.
Voluntary Plans

► Must meet or exceed state plan benefits:
  ● Employee Eligibility
  ● Employee Premium Amount
  ● Leave Duration
  ● Weekly Benefit
  ● Job Protection
  ● Health Benefits While on Leave

Voluntary Plans

► Applications available now
► $250 application fee
► Reapproved for first 3 years, then only if changed
► FMLA rules about maintaining health care still apply
► More information at paidleave.wa.gov
More To Come

- Reporting, application, and benefit tools being built now.
- Rulemaking is ongoing. Benefits phase starting this month.
- Customer Care Team taking calls now about Voluntary Plans. Later open to public.

Learn More

- Employer Webinar Series
  Paidleave.wa.gov/Employer-webinar
- Informational Forums
  Paidleave.wa.gov/events
Getting ready for 2019
1. Prepare to withhold premiums.
2. Prepare to report wages and hours worked.
3. Look for mandatory flier later this year.
4. Choose State Plan or Voluntary Plan.

Continue the Conversation

Give us Feedback: LINK TO SURVEY
Email us: paidleave@esd.wa.gov
Call us: 833-717-2273

Our Website: paidleave.wa.gov
Follow us: @PaidLeaveWA
Sign up for Newsletter: bit.ly/PaidLeaveList
Public Comment Forum: bit.ly/CommentForum
Employers’ Duty to Eliminate Discrimination and Harassment

- Enact a policy which prohibits discrimination, harassment and retaliation and provides a procedure to report.
- Investigate all reports/complaints promptly and reasonably thoroughly.
- Draw a reasonable conclusion.
- Take appropriate and effective corrective action promptly.
Confidentiality

- Cannot promise complete confidentiality or no action.
- Can promise to be as discreet as possible, but must may need to investigate and take action.
- Should assure employee there will be no retaliation and remind them to report any retaliatory conduct.
- Encourage employee to provide all information so that you can address any problems.

Investigation

- Interview all witnesses.
- Use two interviewers – better recollection of facts, protect against false allegations.
- Keep detailed notes
- Review all pertinent documents, communications and data.
- Draw a reasonable conclusion.
- Write a report summarizing findings and reasons for conclusion.
What’s a Reasonable Conclusion?

- Clark sexually harassed Francine?
- All conduct was consensual?
- Francine lied?
- Clark lied?
- There is insufficient evidence to corroborate the disputed allegations?

Possible Corrective Actions

- Additional Training
- Separate or reassign employees
- Suspension
- Demotion
- Cut in pay
- Discharge
Francine’s Ongoing Performance Issues

- Well documented?
- Clear expectations?
- Opportunity and assistance with improvement?

Thank you

Questions/concerns?

Contact me at kmeier@ryanlaw.com, or Rick Lentini at lentini@ryanlaw.com.
How to be Successful in the Current Immigration Climate

Joel Paget
paget@ryanlaw.com

Goals

- Availability of Human Resources
- Timeliness
- Dependability and Consistency
- Reasonable Cost
Availability of Resources

- 3.6% Unemployment Rate
- 66,000 Seasonal Workers (H-2B) – Gone in Minutes
- 85,000 Specialty Workers (H-1BS) – Gone In Days
- Employment Based One – Extraordinary Aliens and Multi-International Manager/Executives – Not Current – 1st Time
- Refugees Visas Cut in Half – Now 30,000
- Nationals From Six Countries Still Banned From Entry

Timeliness

- Petitions for Non-Immigrant Visas – 60 Days Now Six Months
- Applications for Adjustment of Status – 4 Months Now 12
- Applications for Naturalization – 4 Months Now 12
Dependability and Consistency

- Tougher Standards for Specialty Workers and Intracompany Transfers
- No More Deference Given To Prior Decisions
- Outright Denials Can Be Issued Without Notice or Request for Additional Information
- Notices To Appear in Immigration Court to be Issued if Petition or Application is Denied
- Employment Authorization Documents Not Issued Within 90 Days

Costs

- Original Submission – More Preparation Needed
- Request For Further Evidence – 30-40%
- Extreme Vetting of Visa Applicants at U.S. Consulates
- Increase in Enforcement Visits at Employer Sites on Forms 1-9, H-1B AND L-1 Compliance
Take-Aways

- Move to Canada
- Hire Americans
- Prior Approvals Provide No Certainty
- Plan Well In Advance
- Plan on the Processing Time to Take Twice As Long
- Have Employees Keep Current Their Non-Immigrant Status While Pursuing Adjustment to Permanent Residency
- Plan on a Site Visit

Thank you

Questions/concerns?

Contact me at paget@ryanlaw.com.
Federal Cases: Supreme Court

EPIC SYSTEMS CORP. v. LEWIS
138 S.Ct. 1612 (May 21, 2018)

- Employment arbitration agreements are enforceable, and class action waivers in employment arbitration agreements are permissible.
Federal Cases: Supreme Court

EPIC SYSTEMS CORP. v. LEWIS
138 S.Ct. 1612 (May 21, 2018)

Takeaways:

□ An employer may require a class action waiver as a condition of employment when an employee is starting, but (in Washington) must offer additional/new consideration for an existing employee.

□ While arbitration agreements are enforceable, they aren’t always desirable.

Federal Cases: Supreme Court

ENCINO MOTORCARS v. NAVARRO
138 S.Ct. 1134 (April 2, 2018)

□ Auto-service advisors are exempt from the federal Fair Labor Standards Act (FLSA) overtime requirements.
Federal Cases: Supreme Court

ENCINO MOTORCARS v. NAVARRO
138 S.Ct. 1134 (April 2, 2018)

Takeaway:

- Previously the general principle has been that exemptions to the FSLA should be narrowly construed, but the majority opinion in Encino seems to reject that principle in favor of a more pro-employer stance.

Federal Cases: Circuit Courts

RODRIGUEZ V. TACO BELL
896 F.3d 952 (July 18, 2018)

- Taco Bell doesn’t have to give break pay to its workers who buy discounted meals. Taco Bell workers claimed that they should be paid during breaks because Taco Bell required them to stay on the premises if they bought the subsidized workers’ meals. The court ruled in favor of Taco Bell.
Federal Cases: Circuit Courts

RODRIGUEZ V. TACO BELL
896 F.3d 952 (July 18, 2018)

Takeaway:

- The court looks at control. An employer has to pay an employee not only when the employee is expected to be working, but when the employer is controlling what their employees do or making them stay on the premises.

Federal Cases: Circuit Courts

RIZO V. YOVINO
877 F3d 453 (April 2018)

- Female employee’s prior salary could not be used to justify a lower wage than that earned by her male counterpart.
Federal Cases: Circuit Courts

RIZO V. YOVINO
877 F3d 453 (April 2018)

Takeaway:
- Prior salary cannot be used as a reason for paying lower wage to female employee.
  (See also Washington's Equal Pay Opportunity Act)

Federal Cases: Circuit Courts

WETZEL v. GLEN ST. ANDREWS LIVING COMMUNITY, LLC
2018 WL 4057365 (August 27, 2018)

- The Seventh Circuit Court of Appeals ruled that a landlord may be held liable under the Fair Housing Act for failing to protect a tenant from known, discriminatory harassment at the hands of other tenants.
Federal Cases: Circuit Courts

WETZEL v. GLEN ST. ANDREWS LIVING COMMUNITY, LLC
2018 WL 4057365 (August 27, 2018)

Takeaway:
- The Court left the door open for analysis of sexual orientation claims against proprietors of traditional nursing homes and hospitals under anti-discrimination statutes.

Washington State Cases

CHAVEZ V. OUR LADY OF LOURDES HOSPITAL AT PASCO
190 Wash.2d 507 (April 19, 2018)

- The Washington State Supreme Court unanimously ruled that the nurses could sue their employers collectively, rejecting the hospital’s argument that differences between various units of the hospital made a class action lawsuit impossible.
Washington State Cases

CHAVEZ V. OUR LADY OF LOURDES HOSPITAL AT PASCO
190 Wash.2d 507 (April 19, 2018)

Takeaway:

- Our supreme court reiterated that our state is friendly to class action certification. Class action waivers are important for employers to consider.

Washington State Cases

ZHU v. N. CENT. EDUC SERV DISTRICT
189 Wash.2d 607 (November 9, 2017)

- The Washington Law Against Discrimination prohibits retaliatory discrimination against job applicants by prospective employers.
Washington State Cases

ZHU v. N. CENT. EDUC SERV DISTRICT
189 Wash.2d 607 (November 9, 2017)

Takeaway:
- Retaliation in hiring is a valid cause of action. The case highlights the importance of an impartial and compliant hiring process.

MIKKELSEN V. PUB. UTIL. DIST. NO. 1 OF KITTITAS COUNTY
189 Wash.2d 516 (October 19, 2017)

- A fired employee alleged that her dismissal violated the progressive corrective action policy the district distributed to its employees. The employer maintained that she was an at-will employee. The court held that the employer’s corrective action policy was ambiguous and could plausibly be read as establishing a for-cause standard for dismissal.
Washington State Cases

MIKKELSEN V. PUB. UTIL. DIST. NO. 1 OF KITTITAS COUNTY
189 Wash.2d 516 (October 19, 2017)

Takeaway:
- Be clear in your policies. At-will is the default standard, but a for-cause standard can be established by a progressive discipline policy if it is not clearly and carefully worded.

Statutory Update

- Equal Pay Opportunity Act
- Fair Chance Act – Ban the Box Law
- Paid Sick and Safe Leave
- Paid Family and Medical Leave
Thank you

Questions/concerns?

Contact me at kern@ryanlaw.com
What do I need to know about Washington’s new Equal Pay Act?

- An employer may not discriminate in providing compensation based on gender between “similarly employed” employees
  - A differential in pay is not discriminatory if it is based on a “bona fide job-related factor,” such as education, training, experience, a seniority system, a system that measures earnings by quality or quantity of production, or a bona fide regional difference—but NOT salary history
- An employer may not have a pattern or practice of limiting opportunities for career advancement on the basis of gender
What do I need to know about Washington’s new Equal Pay Act? (con’t.)

- An employer may not prevent employees from disclosing or discussing their wages
- An employer may not retaliate against an employee for discussing wages, asking the employer for an explanation, or otherwise exercising rights under the Equal Pay Act

How do I reduce the risk of Equal Pay Act claims?

- Don’t ask about salary history
- Develop written, objective factors for setting compensation
- Protect pay audits from discovery using attorney-client privilege
How do I deal with employees abusing paid sick leave?

- Written policy can require at least 10 days’ advance notice for foreseeable absences
- Employer can request verification if employee is absent for more than 3 consecutive days
- Employer can withhold pay if absence is for an unauthorized purpose

Does it violate the WA Paid Sick Leave law to give a bonus for good attendance?

- Employers cannot retaliate for taking paid sick leave
- Labor & Industries position: if an employee’s ability to receive a bonus is negatively impacted by taking paid sick leave, it’s retaliation
Should I participate in the State’s PFMLA plan or adopt a voluntary plan?

- State plan is the best option for most employers at this time
- State plan is free for small employers and relatively inexpensive for larger ones
- Voluntary plans have stricter requirements and risks
  - Job protection required if employee has worked for 9 months & 965 hours
  - Administrative burden
  - Possible lawsuits for claim denials

What do I do when an employee’s health affects their work?

- Engage in “interactive process” to identify reasonable accommodations that will allow employee to perform essential job functions
  - Document all communications
  - Job Accommodation Network (https://askjan.org/) can help identify options
- Make a reasonable accommodation unless undue hardship to business
  - Employer can choose which accommodation
I made a reasonable accommodation and it didn’t work. Now what?

- Take adverse action only if employee cannot perform essential job functions after reasonable accommodation has been implemented
- After termination, affirmatively offer help with reemployment

How should I handle employees’ use of mobile devices?

- Consider providing company phones to key customer-facing employees
- Employee handbook or policy should address:
  - No expectation of privacy in company-provided email or devices
  - Don’t use personal email or phone number for business purposes
  - Required security for devices with company information
How can I limit what employees say about work on social media?

- Employers cannot prohibit employees from talking about terms and conditions of employment
- Employers can:
  - Require confidentiality about trade secrets and customer information
  - Require employees not to speak on behalf of the company
  - Offer severance agreements that include non-disparagement and confidentiality provisions

Thank you

Questions/concerns?

Contact me at lawless@ryanlaw.com.
Best Practices in Hiring and Firing

Britenae Pierce
pierce@ryanlaw.com

Hiring
What do I need to know about hiring?

- It’s tough!
- Review resumes - over 1/3 contain some untruth
- Check references
- Don’t ghost
- Aim for a good fit, but no implicit bias

What can or should I be asking about?

- Review list of appropriate/ inappropriate inquiries
- WAC 162-12-140 Pre-employment inquiries
  - Applies to applications, interviews, etc.
  - Ex. Age, family, national origin,
- In the interview, ask open-ended questions dealing with job-related issues
- Consider pre-planned questions
- Do not discriminate!
Can I consider criminal history when hiring?

- Can consider criminal history *after* application and initial screening are complete
- For background checks, use legally compliant authorization forms
- City of Seattle:
  - Don’t act based on arrest (but can act based on underlying conduct)
  - Take adverse action only if there is a “legitimate business reason”
  - Give applicant a reasonable opportunity to respond
  - Hold job open for 2 days after notice of adverse action

How do I properly classify my new hire?

- Properly classify at the outset
- Independent contractor or employee – workers are presumptively considered employees
- Exempt or non-exempt – employees are presumptively entitled to overtime
- Improper classification can lead to liability for uncollected tax, issues with employee benefit plans, reporting and employer issues, liability for unpaid overtime, etc.
- Independent contractor status strongly disfavored
- Multiple agencies/courts with multiple different tests
Can I have employees sign a non-competition/non-solicitation agreement?

- **Timing/Consideration**
  - Reasonable in time limit, geographic scope, scope of overall restriction
  - Employee must be able to have some sort of job after termination
  - Consider whether necessary for the position – not necessary for all employees but uniformity for certain positions is preferable

Firing
Where do I start when considering termination?

- Employment at-will, but no discrimination
- Think it through first
- Consider alternatives
- Document
- Treating this employee similar to other employees in similar circumstances?
- Special considerations if employee made a recent complaint
- What would a third party (judge/jury) think?

Any company specific requirements at time of termination?

- Check employment agreement, handbook, stock agreements, etc.
- Any notice required?
- Any severance due?
- Pay unused vacation days?
- Stock vesting or re-purchasing?
- Comply with all required terms
Should I use a settlement and release agreement?

- Use when making any offer beyond what employee is already entitled to receive
- Consider using when risk of employee bringing a claim against the company (discrimination/retaliation)
- “Payment” to employee can be $$, goods (keep the laptop), stock, etc.
- Special release considerations for age

How do I handle the termination meeting?

- Schedule in advance, when possible
- Consider a witness at termination meeting
- Be professional
- Be truthful (don’t call a termination a layoff)
- Explain decision briefly, listen to employee’s response
- Remind employee of noncompete, etc. obligations
- Make sure employee returns all company property
- Cut off access to company network/email
- Paycheck due on next regularly scheduled payday
Do I need to give the employee all the reasons for the termination?

 You don’t need to give extensive examples/detail

 If an employee requests the reason for the termination, then you must provide it in writing

Thank you

Questions/concerns?

Contact me at pierce@ryanlaw.com.