Welcome!

Ryan Swanson's 32nd Annual Employment Law Webinar Series

September 28 - October 2, 2020

Top Three New Employment Laws You Missed During the Pandemic

Shannon Lawless
October 1, 2020
EAP Exemptions

Executive, administrative, and professional (EAP) employees may be exempt from overtime and minimum wage requirements if they meet:

- Duties Test AND Salary Basis Test
## Example: Executive Employee 2019

<table>
<thead>
<tr>
<th>Duties Test</th>
<th>Salary Basis Test</th>
</tr>
</thead>
<tbody>
<tr>
<td>▪ Employee’s primary duty is managing the enterprise or a department</td>
<td>▪ Paid a salary of at least $455/week ($23,660/year)</td>
</tr>
<tr>
<td>▪ Manages at least 2 FTEs</td>
<td></td>
</tr>
<tr>
<td>▪ Authority or significant influence over hiring and firing</td>
<td></td>
</tr>
</tbody>
</table>

Federal Changes as of Jan. 1, 2020

- Salary basis increased to $684/week ($35,568/year)
- No changes to duties tests
Example: Executive Employee 2020

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>▪ Employee’s primary duty is managing the enterprise or a department</td>
<td>▪ Paid a salary of at least</td>
</tr>
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<td>▪ Manages at least 2 FTEs</td>
<td>$455/week ($23,660/year)</td>
</tr>
<tr>
<td>▪ Authority or significant influence over hiring and firing</td>
<td>$684/week ($35,568/year)</td>
</tr>
</tbody>
</table>

WA Changes as of July 1, 2020

- Salary basis increasing to 2.5x minimum wage over 8 years
- Increase is slower for employers with 50 or fewer Washington-based employees
  - Headcount, not FTE
- Duties tests revised to align with federal law
<table>
<thead>
<tr>
<th>Date</th>
<th>1-50 Employees</th>
<th>51+ Employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 1, 2020</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>x Minimum Wage</td>
<td>x Minimum Wage</td>
</tr>
<tr>
<td></td>
<td>Salary</td>
<td>Salary</td>
</tr>
<tr>
<td>July 1, 2020</td>
<td>1.25 x min. wage</td>
<td>1.25 x min. wage</td>
</tr>
<tr>
<td></td>
<td>$675/week</td>
<td>$675/week</td>
</tr>
<tr>
<td></td>
<td>$35,100.00/year</td>
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</tr>
<tr>
<td></td>
<td>$684/week</td>
<td>$35,568.00/year</td>
</tr>
<tr>
<td></td>
<td>$35,568.00/year</td>
<td></td>
</tr>
<tr>
<td>Jan. 1, 2021</td>
<td>1.5 x min. wage</td>
<td>1.75 x min. wage</td>
</tr>
<tr>
<td></td>
<td>&gt;$810/week</td>
<td>&gt;$945/week</td>
</tr>
<tr>
<td></td>
<td>&gt;$42,120.00/year</td>
<td>&gt;$49,140.00/year</td>
</tr>
<tr>
<td>Jan. 1, 2022</td>
<td>1.75 x min. wage</td>
<td>1.75 x min. wage</td>
</tr>
<tr>
<td></td>
<td>&gt;$945/week</td>
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</tr>
<tr>
<td></td>
<td>&gt;$49,140.00/year</td>
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</tr>
<tr>
<td>Jan. 1, 2023</td>
<td>1.75 x min. wage</td>
<td>2 x min. wage</td>
</tr>
<tr>
<td></td>
<td>&gt;$945/week</td>
<td>&gt;$1,080/week</td>
</tr>
<tr>
<td></td>
<td>&gt;$49,140.00/year</td>
<td>&gt;$56,160.00/year</td>
</tr>
<tr>
<td>Jan. 1, 2024</td>
<td>2 x min. wage</td>
<td>2 x min. wage</td>
</tr>
<tr>
<td></td>
<td>&gt;$10,080/week</td>
<td>&gt;$1,080/week</td>
</tr>
<tr>
<td></td>
<td>&gt;$56,160.00/year</td>
<td>&gt;$56,160.00/year</td>
</tr>
<tr>
<td>Jan. 1, 2025</td>
<td>2 x min. wage</td>
<td>2.25 x min. wage</td>
</tr>
<tr>
<td></td>
<td>&gt;$10,080/week</td>
<td>&gt;$1,215/week</td>
</tr>
<tr>
<td></td>
<td>&gt;$56,160.00/year</td>
<td>&gt;$63,180.00/year</td>
</tr>
<tr>
<td>Jan. 1, 2026</td>
<td>2.25 x min. wage</td>
<td>2.25 x min. wage</td>
</tr>
<tr>
<td></td>
<td>&gt;$1,215/week</td>
<td>&gt;$1,215/week</td>
</tr>
<tr>
<td></td>
<td>&gt;$63,180.00/year</td>
<td>&gt;$63,180.00/year</td>
</tr>
<tr>
<td>Jan. 1, 2027</td>
<td>2.25 x min. wage</td>
<td>2.5 x min. wage</td>
</tr>
<tr>
<td></td>
<td>&gt;$1,215/week</td>
<td>&gt;$1,350/week</td>
</tr>
<tr>
<td></td>
<td>&gt;$63,180.00/year</td>
<td>&gt;$70,200.00/year</td>
</tr>
<tr>
<td>Jan. 1, 2028</td>
<td>2.5 x min. wage</td>
<td>2.5 x min. wage</td>
</tr>
<tr>
<td></td>
<td>&gt;$1,350/week</td>
<td>&gt;$1,350/week</td>
</tr>
<tr>
<td></td>
<td>&gt;$70,200.00/year</td>
<td>&gt;$70,200.00/year</td>
</tr>
</tbody>
</table>

Computer Professional 2020

### Duties Test

Computer system analyst, computer programmer, software engineer, or similar

Primary duty is:
- Using systems analysis to determine hardware, software, or system functional specifications, and/or
- Design, documentation, testing, creation, or modification of computer systems, programs

### Salary Basis Test

Paid a salary of at least $455/week ($23,660/year) and $684/week ($35,568/year) or hourly rate of $27.63.

In WA, hourly rate will increase to 3.5x minimum wage for all employers by 2022.
**Employer Action Items**

- Confirm that all exempt employees meet new salary basis test
- Plan for upcoming Washington salary basis increases, while also monitoring for legal action that could prevent them from taking effect

**New Non-Compete Statute**

- RCW 49.62, effective Jan. 1, 2020
- Non-competes enforceable only if
  - Employee makes over $100k annually
  - Non-compete is presented to employee *before* offer is accepted or employer provides extra consideration
  - Term does not exceed 18 months (in most cases)
  - If employee laid off, base salary continues during non-compete term
What is a Non-Compete?

- An agreement that prohibits or restrains an employee or independent contractor from engaging in a lawful profession, trade, or business
- A non-compete is NOT:
  - A non-solicitation that prohibits solicitation of customers or employees
  - A confidentiality agreement
  - A prohibition on using or disclosing trade secrets

Minimum Salary

- Box 1 of employee’s W-2, annualized, for the previous year
- Adjusted annually for inflation
- $250k for independent contractors, adjusted annually
Enforcement

- Attorney general or private civil lawsuit
- If a non-compete violates the law or a judge must rewrite it, the employer must pay $5k penalty plus employee’s attorney fees

Employer Action Items

- Review old non-competes and analyze whether changes are needed
- Make sure new non-competes comply with statutory requirements
- Consider alternatives to non-competes that can protect your business, such as non-solicitation, confidentiality, and trade secret agreements
PFML Overview

- Statewide paid insurance benefits during family or medical leave
- Administered by Employment Security Department (ESD)
- Partial wage replacement of up to $1,000/week for 12-18 weeks
- Funded by premiums paid by employee and employer
- Employers can participate in state plan or self-insure through a state-approved “voluntary plan”

Premiums

- .4% of gross wages after Jan. 1, 2019, up to social security cap
- Premium split between employee (.253% of wages) and employer (.147% of wages)
- Employers pay and report to ESD quarterly
- Employers with fewer than 50 employees are not required to pay employer’s portion
Types of Leave

Family Leave
- Bonding after adoption, birth, or foster placement of a child
- Caring for a family member during serious health condition
- Certain military leave

Medical Leave
- Employee’s own serious health condition

Covered Family Members

FMLA
- Spouse
- Parent
- Dependent Child

PFML
- Grandchild
- Grandparent
- Sibling
- Registered Domestic Partner
- Child (regardless of age or capacity)
- Parent-in-Law
- Grandparent-in-Law
Maximum Weekly Benefit

- Percentage of employee’s average weekly wage from all jobs over approximately the last year
- Maximum $1,000/week, minimum $100/week
- Paid for 12-18 weeks after waiting period of 7 days or less

Applying for Benefits

- Employees apply online with ESD
- Initial application, including proof of identity and healthcare provider’s certification, establishes eligibility
- Weekly application triggers benefit payment
- Substantial application backlog from early 2020 has decreased
Notice to Employees

Employers must:
- Display mandatory poster
- Provide notice of rights to employees absent 7+ days for family or medical reasons
- Poster and notice online at: https://paidleave.wa.gov/employers/

Job Protection

- Different standard for benefits eligibility than for job protection
- Employers must restore an employee to the same or an equivalent job after PFML if:
  - Employer has 50+ WA employees
  - Employee has worked for current employer for at least 12 months
  - Employee has worked at least 1,250 hours during 12 months preceding leave

- Caution: other laws may require job protection even if PFML doesn't
FMLA/PFML

- PFML job protection runs concurrently with FMLA if eligibility aligns
- Frequent exceptions:
  - FMLA used in 2019, PFML used in 2020 (e.g. babies born in 2019)
  - PFML used for family member not covered by FMLA
  - Intermittent leave
  - Employee delays PFML application (?)

Example: 2019 Birth

- 9/24/19: Lucy Lucky gives birth and starts FMLA leave.
- 12/17/19: Lucy’s FMLA leave expires.
- 1/1/20: Lucy applies for and begins receiving PFML family leave benefits.
- 3/25/20: Lucy stops receiving PFML benefits and is entitled to job restoration.

Result: Lucy is entitled to 24 weeks of job-protected leave related to this pregnancy.
Example: 2020 Birth

- 1/1/20: Nina Normal gives birth and applies for PFML benefits. Job protection starts running under FMLA and PFML.
- 3/25/20: Nina’s FMLA leave expires; she is still receiving PFML benefits.
- 4/22/20: Nina stops receiving PFML benefits and is entitled to job restoration.

Result: Nina is entitled to 16 weeks of job-protected leave related to this pregnancy.

Supplemental Benefits

- General rule: Employee may not receive PFML for an absence that is also paid from another source (unemployment, workers’ comp, employer-paid sick leave, etc.)
- Exception: An employer may allow—but not require—employees to top off PFML with other employer-paid leave
- Employer-paid leave used to top off PFML benefits is a “supplemental benefit”
Voluntary Plan

- Employers can self-insure for family leave, medical leave, or both
- Voluntary Plan must be approved by ESD
- Benefits must be at least equivalent to what is offered under state plan
- Lower threshold for employer coverage and job protection
- 248 approved voluntary plan applications as of fall 2019

Employer Action Items

- Pay PFML premiums and file reports quarterly with ESD
- Display poster
- Provide mandatory notice of rights to employees absent for family or medical reasons
- Update employee handbook
- Manager training
Thank you.

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Upcoming Webinar:

Friday, October 2, 12pm:
Panel Presentation - Employment Law Updates & FAQs
ryanswansonlaw.com/registration