

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

Agenda

- Overtime exemption changes
- Washington's new non-compete statute
- Paid Family & Medical Leave (PFML)

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

Duties Test	Salary Basis Test
<ul style="list-style-type: none">Employee's primary duty is managing the enterprise or a departmentManages at least 2 FTEsAuthority or significant influence over hiring and firing	<ul style="list-style-type: none">Paid a salary of at least \$455/week (\$23,660/year)

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

Duties Test	Salary Basis Test
<ul style="list-style-type: none">Employee's primary duty is managing the enterprise or a departmentManages at least 2 FTEsAuthority or significant influence over hiring and firing	<ul style="list-style-type: none">Paid a salary of at least \$455/week (\$23,660/year) \$684/week (\$35,568/year)

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

Date	1-50 Employees		51+ Employees	
	x Minimum Wage	Salary	x Minimum Wage	Salary
July 1, 2020	1.25 x min. wage	\$675-\$684/week \$35,100.00 \$35,568.00/year	1.25 x min. wage	\$675-\$684/week \$35,100.00-\$35,568.00/year
Jan. 1, 2021	1.5 x min. wage	>\$810/week >\$42,120.00/year	1.75 x min. wage	>\$945/week >\$49,140.00/year
Jan. 1, 2022	1.75 x min. wage	>\$945/week >\$49,140.00/year	1.75 x min. wage	>\$945/week >\$49,140.00/year
Jan. 1, 2023	1.75 x min. wage	>\$945/week >\$49,140.00/year	2 x min. wage	>\$1,080/week >\$56,160.00/year
Jan. 1, 2024	2 x min. wage	>\$10,080/week >\$56,160.00/year	2 x min. wage	>\$1,080/week >\$56,160.00/year
Jan. 1, 2025	2 x min. wage	>\$10,080/week >\$56,160.00/year	2.25 x min. wage	>\$1,215/week >\$63,180.00/year
Jan. 1, 2026	2.25 x min. wage	>\$1,215/week >\$63,180.00/year	2.25 x min. wage	>\$1,215/week >\$63,180.00/year
Jan. 1, 2027	2.25 x min. wage	>\$1,215/week >\$63,180.00/year	2.5 x min. wage	>\$1,350/week >\$70,200.00/year
Jan. 1, 2028	2.5 x min. wage	>\$1,350/week >\$70,200.00/year	2.5 x min. wage	>\$1,350/week >\$70,200.00/year



Computer Professional 2020

Duties Test	Salary Basis Test
<p>Computer system analyst, computer programmer, software engineer, or similar</p> <p>Primary duty is:</p> <ul style="list-style-type: none"> Using systems analysis to determine hardware, software, or system functional specifications, and/or Design, documentation, testing, creation, or modification of computer systems, programs 	<p>Paid a salary of at least \$455/week (\$23,660/year) \$684/week (\$35,568/year) or hourly rate of \$27.63</p> <p><i>In WA, hourly rate will increase to 3.5x minimum wage for all employers by 2022</i></p>



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

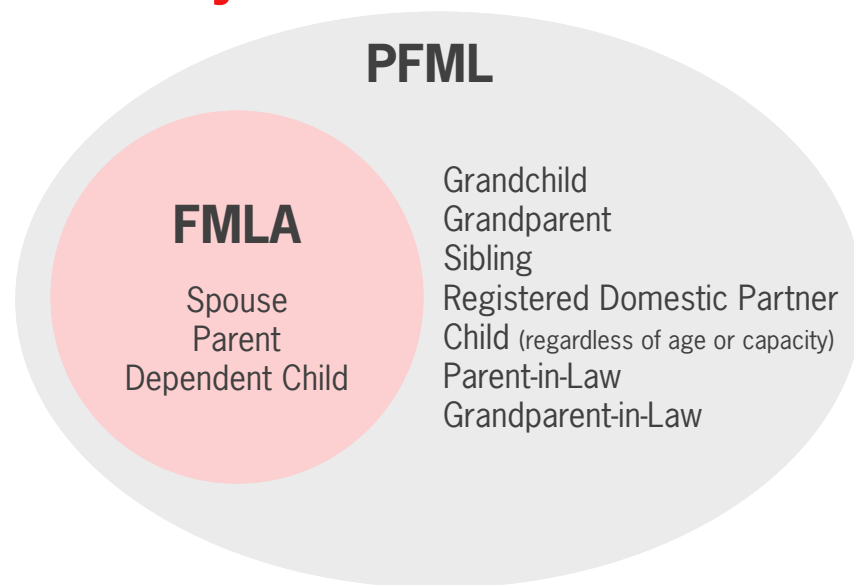
Family Leave

- 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



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 PFMLA 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