

Ryan Swanson's 34th Annual Employment Law Webinar



# Recent Developments in State and Federal Law

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September 27, 2022



# Washington Silence No More Act

## What is it?

- A law which prohibits nondisclosure and nondisparagement provisions that prevent an employee or contractor from disclosing or discussing conduct the individual reasonably believes to be illegal acts of discrimination, harassment, retaliation, wage and hour violations, sexual assault, or other conduct recognized as being against a clear mandate of public policy.

# Washington Silence No More Act (con't.)

## When did it go into effect?

- June 9, 2022

## Applicable to:

- All employers with employees in Washington state
- Agreements between:
  - Employers and current, former or prospective employees
  - Hiring entities and their current, former or prospective independent contractors

## Washington Silence No More Act (con't.)

- Employers are prohibited from requesting or requiring an employee to enter into, and are prohibited from enforcing a provision of any agreement that prohibits discussion or disclosure of:
  - Conduct that the individual reasonably believes to be illegal discrimination, illegal harassment, illegal retaliation, a wage and hour violation, or sexual assault.
  - Conduct that is recognized as being against a clear mandate of public policy.
  - The existence of a settlement involving any of the above conduct.
- Retaliation is prohibited
- Pre-existing agreements which contain prohibited terms are unenforceable

# Washington Silence No More Act, cont.

- Employers may
  - Prohibit disclosure of the amount of a settlement
  - Protect Trade Secrets, proprietary information or confidential information that does not involve illegal acts
- Consequences
  - Entering into a new agreement that contains prohibited terms or attempting to enforce a pre-existing agreement that contains prohibited terms may result in penalties.
  - The act provides for civil causes of action and for a minimum damages award of \$10,000, plus attorneys' fees and costs.

# Washington Silence No More Act (con't.)

## What does it mean to Washington employers?

- Many standard offer letters, confidentiality agreements, etc., may contain nondisclosure and nondisparagement provisions which violate the new law.
- Employers with employees in Washington state should:
  - review their employment agreements, confidentiality agreements and non-compete agreements, and
  - carefully consider language contained in any settlement agreements with employees.
- The restrictions are applicable to independent contractors.

# Washington Equal Pay Act Changes (Pay Transparency)

## Summary

- Requires many Washington employers to disclose the salary range and benefits in their job postings.

## To which employers does it apply?

- Those with 15+ employees.

## When does it go into effect?

- January 1, 2023

# Washington Equal Pay Act Changes (Pay Transparency) (con't.)

## What must employers do to comply?

- Disclose the wage scale or salary range in all job postings.
- Include a general description of all benefits and other compensation in every job posting.

## What penalties apply to violations?

- Government enforcement/civil penalties
- Private cause of action



# Washington Equal Pay Act Changes (Pay Transparency) (con't.)

## Unanswered questions:

- Which benefits must be included?
- What is a 'job posting'?
- Does the law apply to jobs which could be performed remotely from other states?
- How are the 15 employees calculated?

# Seattle's Independent Contractor Protection Ordinance

## What is it?

- An ordinance providing additional protections to ICs working in Seattle.

## What must employers do?

- Provide certain notices to their independent contractors
- Timely pay their independent contractors

# Seattle's Independent Contractor Protection Ordinance (con't.)

## When must employers provide notice?

- For new ICs: Before the contractor begins work
- For existing ICs: By September 30, 2022, or by the date of compensation, whichever is sooner.

# Seattle's Independent Contractor Protection Ordinance (con't.)

## To which ICs do the new regulations apply?

- Self-employed independent contractors with no employees who perform any part of their work in Seattle for a commercial hiring entity and will or reasonably expect to receive at least \$600 in compensation from the hiring entity in the calendar year
- Exceptions: lawyers, those whose relationship is due solely to a property rental agreement, and any others which can be excluded by rule if the director finds they have adequate bargaining power.

## What information must be provided?

- A notice of rights.
- A pre-work written notice that outlines the proposed terms and conditions of work and payment. The Ordinance does not require any specific terms or conditions for this pre-work notice; it only requires that such a notice be provided.

# Seattle's Independent Contractor Protection Ordinance (con't.)

## Resources:

- Forms containing the notice requirements which hiring entities may use are available on the Seattle Office of Labor Standards website at <https://www.seattle.gov/laborstandards/ordinances/independent-contractor-protections->

# Washington Wage Recovery Act

**Permits employees with a wage claim to put a lien on employer assets**

- Lien is pre-judgment
- Lien can be placed on real property, accounts, goods, intangibles
- Employee must file suit within eight months

# Federal Caselaw and Developments

## *Dobbs v. Jackson Women's Health Organization*

- Health Equity Policies

## *Freyd v. University of Oregon*

- What constitutes 'comparable work' for Equal Pay analysis?
- Disparate impact of bonus structures (retention bonus)

## National Labor Relations Act (NLRA) Trends

# Thank you.

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# Appealing a WISHA Citation: Focus on the Reassumption Hearing

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September 27, 2022



# Authority

- Occupational Safety and Health Administration (OSHA) – Enacted to develop and enforce safety health rules
- Washington Industrial Safety and Health Act (WISHA) – State Plan
- Division of Occupational Safety and Health (DOSH) – Enforcement, Cooperative Programs, Appeals

# Inspection

- Programmed v. Unprogrammed
- Opening Conference
- Walk-around
- Interviews
- Closing Conference

# Citation



Washington State Department of  
Labor & Industries  
*Division of Occupational Safety and Health*

## Invoice

Inspection:

UBI:  
Legal Name:  
DBA Name:  
Inspection  
Site:

Issued:  
Opening Conference:  
Closing Conference:  
Inspector ID: J2313

### Summary of Assessed Penalties Due

The Citation and Notice of Assessment includes a full description of each violation.

Violation Item	Violation Type	WAC	Correction Due Date	Penalty Amount
1-1	Serious	296-800-17005	4/21/2015	\$4,200.00
1-2	Serious	296-800-17030	4/21/2015	\$4,200.00
1-3	Serious	296-809-20002	4/21/2015	\$7,000.00
1-4	Serious	296-809-20004(1)	4/21/2015	\$7,000.00
1-5	Serious	296-809-30002	4/21/2015	\$7,000.00
1-6	Serious	296-809-30004	4/21/2015	\$7,000.00
1-7a	Serious	296-809-40002	4/21/2015	\$7,000.00
1-7b	Serious	296-809-40004	4/21/2015	\$0.00
1-8	Serious	296-809-50002	4/21/2015	\$7,000.00
1-9	Serious	296-809-50004	4/21/2015	\$7,000.00
1-10	Serious	296-809-50006	4/21/2015	\$7,000.00
1-11	Serious	296-809-50008	4/21/2015	\$7,000.00
1-12	Serious	296-809-50010	4/21/2015	\$7,000.00
1-13	Serious	296-809-50012	4/21/2015	\$7,000.00
1-14	Serious	296-809-50016	4/21/2015	\$7,000.00
1-15	Serious	296-809-50018	4/21/2015	\$7,000.00
1-16	Serious	296-809-50020	4/21/2015	\$7,000.00
1-17	Serious	296-809-50022	4/21/2015	\$7,000.00
1-18	Serious	296-809-50024	4/21/2015	\$7,000.00
2-1	General	296-800-16005	4/21/2015	\$0.00
2-2	General	296-800-16015(1)	4/21/2015	\$0.00
2-3	General	296-800-16020	4/21/2015	\$0.00
2-4	General	296-800-16025	4/21/2015	\$0.00
Total Penalty Due				\$120,400.00



# Appeal Considerations

- Classification
- Ability to bid for work
- Experience Modification Rate (EMR)
- 15-day Deadline

# Appeal Options

- Board of Industrial Insurance Appeals
  - Catastrophic loss
  - Civil litigation
  - Repeat serious / willful
- Reassumption Hearing
  - Department level
  - Informal
  - Recorded

# Reassumption Hearing Tips

- Purpose
  - Seek resolution in lieu of litigation
  - Penalty reduction, classification, WAC, grouping, vacate, etc.
- Considerations
  - Department inspection file
  - Hazard, Exposure, Code, Knowledge (HECK)
  - Affirmative defenses
  - Inconsistent/incorrect statements, incomplete information/documentation
  - Employer efforts
- Corrective Notice of Redetermination
  - 15-day deadline for appeal to the Board

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# Workers' Compensation: Tips for Navigating the Tough Claims

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September 27, 2022





# Topics

- Allowance protest
- Continued treatment
- Terminating time loss

# Allowance Protest

- Report of Accident (ROA) – employer response
  - Request claim denial
  - Interlocutory order
- 60 days to protest allowance order
  - Preserve / confirm information
  - Note and obtain facts you do need
- Injury – tangible happening, discrete time, medical diagnosis
- Occupational – condition arose naturally & proximately

# Allowance Investigation

- Claimant statement
  - Mechanism of injury, condition & history, correlate with schedule
- Medical
- Pictures
  - Assist the trier of fact, experts & vocational witnesses
  - Jobsite, machine, object (weight & measurement)
- Employer statements
  - Personal observations, outside activities, medical concerns
  - Preserve contact information

# Continued Treatment

- Medical fixity & employability = closure
- Conservative care & imaging
- Department Treatment Guidelines – OMD
  - Has the physician documented objective & subjective findings
  - Health Technology Clinical Committee (HTCC) - considerable weight
- Reconcile area of expertise
- Claim investment – medical and/or surveillance

# Terminating Time Loss

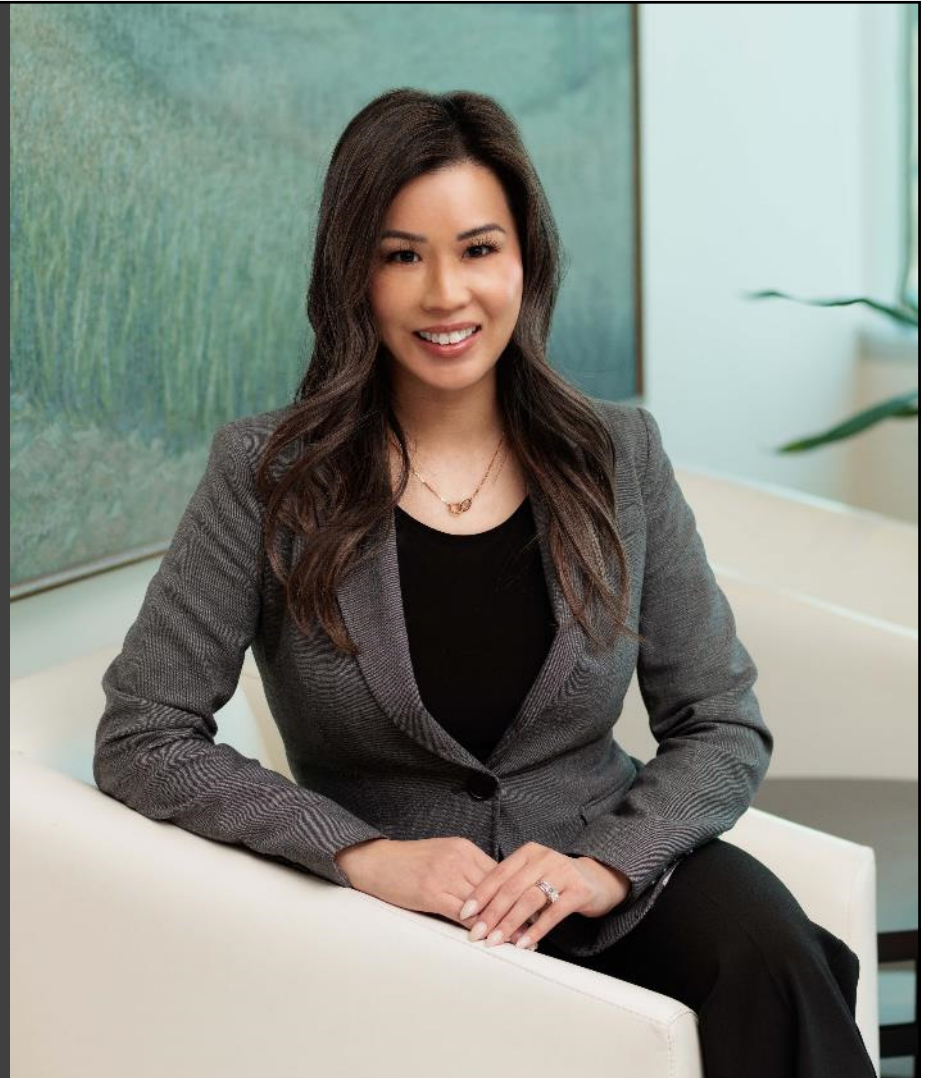
- Continues if injury/disease prevents gainful employment, *unless*
  - Released for full-duty by attending
  - Found employable after vocational retraining / transferable skills
  - Worker returns to work – job of injury (JOI) or another employer
- Light Duty
  - Avoid secondary gain
  - Written, approved, provided to worker with acceptance
  - Creative, meaningful
- Prepare for dispute
  - Communication
  - Job history, training, certifications
  - Vocational assessment

# Thank you.

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# How Foreign-owned Companies Can Bring Workers to the U.S. Using E-Visas

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# How Foreign-owned Companies Can Bring Workers to the U.S. Using E-Visas

- E-1: To engage in substantial trade, including trade in goods or services principally between the United States and the treaty country.
- E-2: To develop and direct the operations of an enterprise in which the applicant has invested a substantial amount of capital.
- To work in the enterprise as an Executive, Supervisor, or Essentially skilled employee.



# Treaty Countries

- Over 80 countries including Canada, United Kingdom, South Korea, Germany, and Japan.
- Having a treaty does not mean they qualify for both E-1 and E-2.
  - E.g., Jamaica only qualifies for E-2
- Two large omissions — India and China (though Taiwan listed).
- A person entering the U.S. on an E visa must be a national of a treaty country.

# Proving Qualifying Nationality

- Look at the nationality of the ultimate individual owners.
  - Trace ownership through the holding companies to individuals
- Nationals of the treaty country must own at least 50 percent.
- Shares owned by U.S. permanent residents cannot be considered in determining the nationality of the business.
- Country of incorporation typically does not matter.
- Publicly traded company – If it is sold exclusively on a stock exchange in the country of incorporation, creates presumption that company has nationality of that exchange/incorporation.

## E-2 Substantial Investment in a Real and Operating Business that has the Ability To

- No set figure as to what constitutes “substantial”
- Proportionality Test
- investment sufficient to ensure the investor’s financial commitment to the enterprise
- investment that supports the likelihood that the business is viable
- Funds Must Be “At Risk” — subject to partial or total loss - must be irrevocably committed
  - Equipment
  - Inventory
  - Professional services
  - Prepaid Rents
  - Intellectual property
- Real and operating
- Employ U.S. workers or make economic impact

## E-1 Substantial Trade

- Trade must be an exchange, international in scope, and involving qualifying activities
  - Includes export or import
  - Goods are “tangible commodities or merchandise having extrinsic value.”
  - Services are “legitimate economic activities which provide other than tangible goods.” Service is interpreted “in an expansive fashion.”
- However, proceeds must support business activity in the treaty country
- Placing proceeds in a bank account abroad does not indicate a meaningful exchange
- Trade must be principally between U.S. and treaty country
  - 50% of total volume of international trade must be between U.S. and treaty country.

# Employees and Nationality

- At least 50% of the corporation must be owned by persons having the nationality of the treaty country to employ persons from the treaty country.
- When a company is equally owned and controlled by nationals of two different treaty countries, employees of either nationality may obtain E visas to work.
- The employee must be an executive, supervisor, or an “essential employee” to obtain an E visa.

# Executives & Supervisors

- Position must be principally and primarily executive, or supervisory, as opposed to incidentally or collaterally.
- Duties must show ultimate control and responsibility for the enterprise's overall operation or a major component.

## Executives & Supervisors (con't.)

Agency shall consider:

1. whether executive has authority to determine policy and direction;
2. whether supervisor provides supervision for a significant portion of the operation and does not generally involve supervision over low-level employees;
3. whether the applicant possesses executive/supervisory skills and experience;
4. whether salary and title are commensurate with executive/supervisory position;
5. the position within the organizational structure;
6. whether the applicant has responsibility for making discretionary decisions, setting policies, directing and managing business operations, and/or supervising other professional and supervisory personnel; and
7. whether the position requires performance of routine staff work.

# Essential Employees

- The service is essential to the efficient operation of the enterprise;
- The skills are necessary for the enterprise; and
- The applicant possesses those skills.



## Essential Employees (con't.)

Factors to consider regarding specialized skills are:

1. Short- or long-term need for employee
2. Experience and training necessary to achieve the skills
3. Uniqueness of such skills
4. Availability of U.S. workers with the skills
5. Salary such special expertise can command
6. Degree of proven expertise of the person in the area of specialization
7. Function of the job to which the essential employee is destined

## Essential Employees (con't.)

- Ordinary skilled workers can qualify for essential employees which if workers are needed for start-up or training purposes.
- Preferably a “short period of time after which the enterprise will be able to train American employees.
- Knowledge of a foreign language, culture, or country conditions, or previous employment do not by themselves meet the special qualifications requirement.
- Employee’s skills do not have to be “unique” or “one of a kind,” but rather, “indispensable to the success of the enterprise.”
- Whether essential skills are needed or available will vary during the life of an enterprise. Skills that may be needed to start an enterprise may not be necessary after the business is running smoothly.

# Process

- Can be filed from within the U.S. to change the persons status to E-1/E-2 or at the U.S. consulates around the world for a visa
- Each consulate has their own specific requirements
- State Department's reciprocity schedules determines the validity of the visa
- Maximum is 5 years at a time
- E-visas are continuously renewable so long as the qualifying entity/trade exists
- Typically granted admission up to 2 years at a time, even if enter day before the visa expires
- E-Visa Company Registration Programs — subsequent applications focus on the employee

# Employment by Subsidiary

- May perform work for parent or subsidiary of employer enterprise if:
  - At the time the E status was determined, the applicant provided information about the parent-subsidary relationship and demonstrated that the subsidiary company independently qualified as an E-2 company.
  - The work performed at the subsidiary must be consistent with job duties at the parent company.

# Families of E Visa Holders

- Spouse and children (under 21) can enter the U.S.
- Nationality of the dependent not important
- Children can attend school without changing status, but are not employment authorized
- Spouse is employment authorized incident to status —
  - Meaning they can work for any employer in the U.S. without the need to apply for formal work authorization

# Thank you.

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# Where you Work Matters: Legal Risks with your Hybrid and Remote Workforce

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# Business vs. Legal Challenges for Remote Work

- Full remote v. hybrid v. full in-office
- Applying remote work fairly
- Discrimination potential
  - In office gets more opportunities
  - Certain classes (i.e., women) more likely to work remotely
  - Identify impact of uneven remote work

# Legal Risks

- Seattle Labor Laws
- Different laws apply to workers living in different states
- Security/Confidentiality
- Discipline/Termination with remote workers

# Seattle Labor Laws

- If you are not a Seattle Company, but employees work remotely in Seattle
- New Independent Contractor law
- Paid Sick and Safe Time
- Wage Theft
- Commuter Benefits
- Minimum Wage

## Other States' Laws

- State law where employee resides usually applies to relationship (i.e., noncompete, leave laws, notice of termination)
- Sometimes must register to do business in each state where employee lives and have a registered agent
- Tax liabilities (corporate and business activity taxes, sales and employment taxes) in each state may be triggered, must register with the state's tax authority
- There are often state and local licenses and business permits as well

# Security and Confidentiality

- Cybersecurity
- Confidentiality if multiple people living and working in the home
- Printing, saving to desktop, what are your protocols?

# Discipline/Termination

- Tracking productivity
- Communication of not meeting expectations
- How do you meet to discuss discipline?
- Are workers recording the conversation when meeting remotely?
- Termination and return of equipment, security cards while out of the office

# Thank you.

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# Frequently Asked Questions from HR Personnel on Washington and Federal Leave Laws

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# What types of leave are available to employees?



- Medical leave
- Family leave
- Domestic violence leave
- Workers' compensation
- Short- or long-term disability
- Military leave
- Personal leave
- Other (bereavement, jury duty, etc.)

# Universe of Leave Laws

- Federal leave laws
- State leave laws
- City/County leave laws
- Employer provided leave
  - policies, handbook, agreement



# What laws address employee leave?

- Americans with Disabilities Act (ADA)
- Family and Medical Leave Act (FMLA)
- Washington Paid Family and Medical Leave Act (WA PFML)
- Healthy Starts Act
- Paid Sick and Safe Leave
- WA Family Care Act
- Domestic Violence Leave
- Uniformed Services Employment and Reemployment Rights Act (USERRA)
- WA Military Family Leave Act
- Volunteer Emergency Services Personnel
- Washington Law Against Discrimination (WLAD)
- Workers' Compensation

# Which law applies?

- Check federal and state and local laws
- State laws where employee works
- Law most beneficial to the employee
- Can be more than one law
- Can be concurrent or consecutive



## **Does a company need to allow additional leave if employee has exhausted or is not eligible for WA PFML/FMLA leave?**

- Maybe... may need to offer leave under other laws, such as the ADA or company policies
- Leave can be long, but not required to be indefinite or forever
- For ADA, leave is not a “reasonable accommodation” if an “undue hardship” → high threshold

# Is employee entitled to reinstatement after WA PFML leave?

- Yes if the employer/employee meet FMLA requirements
  - company has 50+ employees
  - employee has worked for company for at least a year
  - Employee worked at least 1250 hours in prior year
- No if the above is not met
- No if employee is salaried and among highest 10% paid employees in 75 miles
- No if job would not exist upon return



## During WA PFML leave, what happens with employee benefits?

- Must keep an employee's benefits if one day of overlap with FMLA leave
- May keep benefits if company elects to do so even if no overlap with FMLA leave
- May continue to require employee to pay their share of premiums while on leave

# Are employees entitled to bereavement leave?

- Yes under WA PFML amendment (effective 6/9/22): can use PFML during the 7 calendar days after death of child (if child was someone employee would have qualified for medical leave for birth or family leave to bond following birth/placement)
- Yes if in employee handbook/policy – may be more generous



# How does leave work for pregnant employees?



- SO MANY LAWS!
  - FMLA, WA PFML, Healthy Starts Act, WLAD, WFCA, WA Paid Sick Leave
- Under WA PFML, may be up to 18 weeks leave
  - up to 12 weeks medical and 12 weeks bonding, combined total of 16 weeks but up to 18 weeks if serious, incapacitating health issue related to pregnancy
  - Post-natal leave for parent giving birth is now presumptively medical leave for 6 weeks after birth, no documentation required

## How does leave work for pregnant employees? (con't.)



- Job protection for entire length of disability due to pregnancy
- Adoptive/parental leave = up to 12 weeks
- Also check employer leave policies

<https://lni.wa.gov/workers-rights/leave/pregnancy-parental-leave>

# Can the employer require documentation from a medical provider?

- Generally yes, employer can require employee to provide medical certification of a medical issue, need for leave/accommodation, etc.
- For WA sick/safe leave, can only require documentation if absent more than 3 consecutive days
- Can request employee provide medical release for provider to release records directly, but cannot require it
- Employer can also request fitness-for-duty certification upon return to work

# No leave law applies, so can leave be denied?

- Check employee handbook/policies
- Companies often allow “leave of absence” in certain circumstances
- Also, employee may use PTO/personal leave
- Treat employees in similar circumstances the same



# Thank you.

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