

Washington Legislative Update

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Breaking Developments In Labor and Employment Law 03/27/08

The Washington State Legislature ended its regular session on March 13, 2008. The big news for employers this year is in the arena of expanded leave of absence rights for employees. Employers should pay careful attention to two new state laws that guarantee leaves of absence to employees under specific circumstances. Both of these new state leave laws apply to all employers, regardless of the size of the employer's workforce.

SHB2602: Employment Leave for Victims of Domestic Violence, Sexual Assault or Stalking.

In March 2008, the Legislature passed a bill allowing employees who are victims of domestic violence, sexual assault or stalking (or whose family member is a victim), to take "reasonable leave from work, intermittent leave, or leave on a reduced leave schedule" in order to:

- Seek legal or law enforcement assistance or remedies to ensure the health and safety of the employee or the employee's family members;
- Seek treatment by a health care provider for physical or mental injuries, or to attend to health care treatment for a victim who is a member of the employee's family;
- Obtain, or assist a family member in obtaining, services from social services programs;
- Obtain, or assist a family member in obtaining, mental health counseling; or
- Take actions to increase the safety of the employee or the employee's family members, specifically including relocation (temporary or permanent) and participation in safety planning.

"Family members" include the employee's child, spouse, parent, parent-in-law, grandparent or person with whom the employee has a dating relationship. The bill does not explain what may constitute "reasonable leave from work." The Department of Labor and Industries ("L&I") is granted the authority to adopt rules to implement this chapter, and it is possible that L&I will provide further guidance on this issue in the future. In addition, the new law includes a posting requirement, based on posters that will be developed by L&I.

This new entitlement to leave from work covers all employers and all employees. **Where feasible, the employee needs to request the leave in advance, consistent with the employer's policies. If advance notice is not feasible, the employee needs to request leave by the end of the first day of leave.** Employers may require verification from the employee. Verification may be provided in a variety of forms, including by a written statement from the employee that the leave was taken for one of the above-listed reasons and related to domestic violence, sexual assault or stalking. Employees may elect to use accrued sick leave and other paid time off, compensatory time (if applicable) or unpaid leave time.

The employer must maintain the employee's health insurance coverage during his or her leave to the extent allowed by law. In addition, the leave cannot result in the loss of any pay or benefits accrued by the employee prior to the leave. The employer is obligated to return the employee to his or her same or equivalent position, unless the employee is with a staffing company and on a temporary assignment, or was hired for a discrete project that has been completed and the employer would not have continued to employ the employee. The new law also includes strict confidentiality requirements that prohibit employers from disclosing the nature of the leave or any information regarding the employee's status as a victim (or family member of a victim) of domestic violence, sexual assault or stalking.

Finally, the new law prohibits employers from taking an adverse action or otherwise discriminating against employees who exercise rights or assert an intention to exercise rights under this chapter, or who participate in another employee's attempt to exercise rights. Employees alleging a violation of the chapter may bring a civil lawsuit against the employer and seek an injunction, actual damages and attorneys' fees.

The bill has been forwarded to Governor Christine Gregoire for signature. The Governor has not, as of the date of this printing, indicated when she intends to sign this bill. **The bill provides that it is effective as soon as it becomes law.**

SB6447: The Military Family Leave Act.

This bill provides an eligible employee with unpaid leave when the employee's spouse is a member of the armed forces and has been notified of a deployment during a period of military conflict. Eligible employees are entitled to fifteen (15) days of protected leave per deployment. The leave is to be taken "before deployment or when the military spouse is on leave from deployment." Employees taking leave must provide the employer with notice within five (5) business days of receiving official notice of the call to active duty or the leave from deployment. While the leave is unpaid, the employee may elect to substitute any accrued paid leave to which he or she is entitled.

Similar to the bill addressing domestic violence leave, this law also applies to employers of any size. However, it does not apply to all employees. To be eligible for "military family leave," an

employee must have worked an average of 20 or more hours per week. The leave entitlement does not apply to independent contractors.

Employers must restore an employee taking leave under this law to the employee's same or equivalent position upon return from leave. The leave may not result in the loss of any benefits accrued by the employee prior to the leave. The employee must be allowed to continue medical or dental benefits during the leave. If the employee is not eligible for any employer contribution for such benefits during any period of the leave, the employee must be allowed to continue coverage at the employee's expense as permitted by law.

Employers may not interfere with an employee's exercise of his or her leave rights under this law, and may not discharge or otherwise discriminate against an employee for exercising such rights. Likewise, employers may not retaliate against employees for taking action to protect their or others' rights under this law. Remedies for violation are identical to those applicable to the Family Leave Act, RCW 49.78.

The law also amends RCW 38.40.060 to provide public employees who are members of the armed forces with paid military leaves of absences of up to 21 days, increased from the prior limit of up to fifteen (15) days.

The Governor signed this bill into law on March 19, 2008, and it becomes effective on June 12, 2008.

ESHB3122: "Independent Contractors" in the Construction and Electrical Industries.

This bill revises and harmonizes the test for who is considered an "independent contractor" for purposes of unemployment and workers' compensation laws. Only licensed electrical or other registered construction contractors under RCW 19.28 and RCW 18.27, respectively, meet the exceptions from these laws under the new definitions. This bill generally follows the test for independent contractors previously set forth in the workers' compensation statute (with a few changes), and applies this test to the unemployment compensation statute as well. This should simplify matters for employers and provide for greater consistency between the statutes.

The Governor signed this bill into law on March 20, 2008 and it becomes effective on June 12, 2008.

HB2699: Employers Must Disclose Automatic Service Charges.

This bill recodifies RCW 19.48.130 as part of the Minimum Wage Act. This statute requires an employer who imposes an automatic service charge (including automatic tip or gratuity charges) related to food, beverage, entertainment or portage, to disclose to the customer the percentage of the automatic service charge that is paid to the employees serving the customer. Service charges are in addition to hourly wages paid to the employee. As previously codified, the statute lacked any administrative or civil enforcement. By moving the statute from Chapter 19.48 RCW

(pertaining to hotels, lodging and restaurants) and into the Minimum Wage Act, the statute's provisions will now be subject to enforcement under Title 49 governing Labor Relations and, in particular, the civil liability and damages provisions of RCW 49.52.050 and RCW 49.52.070. Employers who fail to comply with the statute's disclosure requirements may be at risk of claims that some portion or the entire amount of the service charge, gratuity or tip is the employee's wage and that the employer has failed to accurately disclose or pay the wages, which could subject the employer to civil liability for double the amount, plus attorneys' fees and costs.

The Governor is scheduled to sign this bill into law today, March 27, 2008. Once signed, the bill will become effective immediately.

Bills that Were Proposed But Not Passed.

A number of employment-related bills were proposed, but not passed, this legislative session. A selection of these bills include:

- *Implementing Provisions for Family Leave Insurance.* Last year, the Legislature passed a bill establishing a program to provide five weeks of paid leave to care for a newborn or newly adopted child. Two bills proposing to have the Employment Security Department (“ESD”) administer this insurance program failed to pass. ESD was provided with some limited funding, however, to begin some early development of the program. Long-term funding of the program remains an issue.
- *Workplace Bullying.* Similar to ideas proposed last year, this bill would have created a cause of action for “abusive conduct,” which is often referred to as workplace bullying. “Abusive conduct” would have been defined as “conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive and unrelated to an employer’s legitimate business interests.”
- *Mixed Motive Defenses to Discrimination Claims.* This bill proposed that an employee who alleges discrimination under RCW 49.60 need only show that the impermissible, discriminatory motive was a “substantial factor” in the adverse action. The proposed standard would have been a departure from existing state law, which allows employers to defend against a claim of discrimination by showing that the employer would have taken the same action, even in the absence of some impermissible motive. In other words, the bill aimed to eliminate the requirement that plaintiffs prove that the adverse action would not have occurred “but for” an impermissible discriminatory motive.

What These Developments Means for Employers.

The new state leave laws represent both an expansion of the types of leave available to employees and the scope of those to whom the leave is available (i.e., employees of small employers). This is a significant change for small employers who are not currently subject to other leave entitlement laws such as the Washington Family Leave Act and the federal Family and Medical Leave Act (“FMLA”).

Employers should also note that the requirements of the new state law addressing military leave may be in addition to, or run in conjunction with, leave under the recently amended federal FMLA, which provides eligible employees with up to 26 weeks of leave to care for seriously ill or injured family members who are members of the armed forces. Another recent FMLA amendment will also provide up to 12 weeks of leave for any “qualifying exigency” resulting from a family member who is on active duty in the armed forces, or called to active duty; however, this alternative type of leave will not be available until the Secretary of Labor issues final regulations defining what may constitute a “qualifying exigency.” Employers should watch for future updates on the FMLA’s new provisions for military-related leaves.

For more information, please contact the Labor and Employment Law Practice Group at Lane Powell:

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