



NAVIGATING EMPLOYMENT LAW

PRESENTED BY
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EMERGING EMPLOYMENT LAW/HR ISSUES

- Key Developments re: Worker Classification and Exemption Issues
- Wage & Hour Implications
- Respectful Workplace Expectations
- Discrimination/Harassment/Retaliation Trends and Common Pitfalls
 - Investigation Refresher
 - Interviewing
 - Disability Discrimination and Failure to Accommodate Claims
 - Discipline
- Leave Laws



WORKER CLASSIFICATION & WAGE/HOUR ISSUES

Key Developments in Worker Classification

- Independent Contractor vs. Employee
 - Various tests apply – Issuing a 1099 is not sufficient
 - Personal Labor Test
 - Brings their own employees to perform work and you exercise no control
 - Brings heavy or costly specialized heavy equipment and their expertise and you exercise no control
 - 6-7 Part Test
 - Key: No control, service outside usual course of business, works with other customers, UBI #
- Remote Employee
 - Not automatically exempt from WA's workers' compensation or unemployment requirements – must still pass the independent contractor test

Key Developments in Overtime Exemptions

- Federal and Washington Law have recently addressed new salary thresholds for Overtime Exempt Employees – WA has a higher standard.
 - Minimum Salary Basis Threshold = 2 times state minimum wage.
 - 2024: \$67,742.80 annually (both small and large employers)
 - 2028: \$92,560.00 annually (both small and large employers)
 - See www.lni.gov/forms-publications/F700-207-000.pdf
- Must continue to meet job duties test as well
 - Executive, Administrative, Professional
 - Computer Professional or Outside Sales

Don't Meet Tests? Options for Those Employees Going Forward

- Reclassify former exempt employees who no longer meet the salary basis test as non-exempt
- Hybrid option: classify a former exempt employee as a “non-exempt, salaried employee”
- Limiting hours worked by employees to 40 per workweek
- KEY: All employees who do not meet both the salary basis test and the job duties tests, are entitled to overtime for all hours worked over 40 per workweek at their regular rate

Proper Classification and Payment of Employees Is Important (aka limiting legal liability)

- Legal tests to classify workers has changed over the last ten (10) years.
- What the “employee” wants does not matter.
- Employer has control over the records and is expected to follow the law.
- Ensure clear communication with all employees regarding timekeeping and overtime expectations.
 - How to record time and when
 - Who is authorized to record time and who is authorized to work overtime

Wage & Hour Class Actions - Observations

Still source of lucrative claims for plaintiff's counsel

- Meal Breaks – failure to track 30 minute uninterrupted meal period
- Rest Breaks – failure to track two – ten (10) minute paid rest breaks
- Meal Break Waivers – get documentation
- Rounding – rounding up or down
- Overtime – failure to pay OT at 1.5 times “regular rate.” (Issue with any fluctuating rates, i.e. shift differentials)
- Penalties and attorneys fees

EMPLOYMENT AT WILL



What is Employment “At Will”?

Employment that either the employee or the employer may terminate at any time, without notice, and (for the employer) without a prohibited cause.

- I quit!
- You’re fired!

Employers cannot terminate employees because a prohibited cause:

- Complaining about discrimination, workplace harassment or retaliation
- For taking protected leave
- For talking about the terms and conditions of employment etc.

Why It Matters (from Legal Perspective)

- In a discrimination lawsuit, all an employee has to do to get over their first legal hurdle is show that they have a protected characteristic and that they suffered an adverse employment action (pretty easy). At that point, discrimination is presumed.
- Then the employer has to prove that it had a legitimate non-discriminatory reason for the adverse employment action.
- Therefore, employers always need to justify their decisions that result in adverse employment actions.

A long, heavy chain of rusty metal links is laid out on a dark asphalt surface, receding into the distance. In the background, two workers wearing high-visibility vests are standing near some industrial equipment. The scene is brightly lit, with a strong light source creating a lens flare effect.

RESPECTFUL WORKPLACE

*Respect, and not the law, will
end workplace harassment
and discrimination.*

Respectful Workplace

A respectful workplace is one where:

- All are treated fairly
- Differences of all types are acknowledged and valued,
- Communication is open, respectful and civil,
- Conflict is addressed early, and
- There is a culture of empowerment and cooperation

Respectful workplaces = fewer incidents of poor behavior that create illegal harassment, discrimination and retaliation

Creating and Maintaining a Respectful Workplace Culture is Important

- Reduces voluntary turnover
- Supports your Port as an employer of choice
- People know that their skills and hard work will be valued
- Keeps people responsible for their actions and behaviors
- Fosters diversity and inclusivity
- Improves problem-solving and conflict resolution
- Increases productivity and engagement
- Reduces workplace stress
- Supports of workplace culture of fairness and equity that reduces the likelihood of a lawsuit

How Do We Create a Respectful Workplace

- Recognize and value diversity
- Value the contributions of ALL
- Encourage positive communication and team work
- Promote equal and fair treatment to ALL
- Listen fully to others
- Genuinely and willingly apologize to direct reports or colleagues when something you may have said or done offended them
- Ensure positive communication, feedback and workload planning
- Set a good example

Negative Social Behaviors Can Lead to Harassment or Discrimination Claims

- Put down humor or sarcasm
- Arguing, fighting, quick tempers
- Quick to blame
- Inappropriate joking, teasing or hazing
- Insensitive, inappropriate language, e.g. retarded, handicapped, generational, gender-related, stereotyping
- Yelling, shouting or using profanity
- Intruding on a person's privacy
- Constantly interrupting
- Spreading rumors or gossiping
- Rolling of eyes
- Ignoring someone, excluding
- Unwelcome remarks, innuendos, or taunting
- Humiliation of staff in front of co-workers

AVOID DISCRIMINATION



What is Discrimination?

- Discrimination: making decisions based on differences or perceived differences.
- Not all discrimination is illegal: making decisions based on an individual's job skills or performance is not illegal.
- Illegal discrimination: adverse employment conduct that is based on a difference protected by law.
 - Harassment on the basis of a protected characteristic is a form of discrimination
 - Retaliation on the basis of engage in protected activity is a form of discrimination

What Are Protected Characteristics

- Race, color, national origin, or genetic characteristics
- Religion (including religious dress)
- Sex, pregnancy, sexual orientation, gender expression and identity
- Disability or perceived disability
- Over 40 years old
- Marital status or veteran or military status
- Arrest or conviction records
- Political affiliation (Seattle)
- Natural hair (CROWN Act) (8 states)
- Obesity (WA)
- Employee's caste (Seattle)

What Common Mistakes Lead to Discrimination Claims?

- Facially neutral policies that may have a disparate impact – e.g. background checks for only certain types of employees.
- Treating someone differently (favorably or less favorably) because of their protected characteristic.
- Making assumptions:
 - Assuming a woman of color is applying for a lower level position
 - Assuming a woman will stay home after having her baby
 - Assuming an older worker will retire soon
 - Assuming a disabled worker would have trouble with business travel or lifting

More Common Mistakes

- Making “stray remarks,” jokes, or comments about someone’s protected characteristic, even if not in the context of an employment decision.
- Engaging in harassing conduct.
- Retaliating against someone for complaining about pay transparency or other workplace fairness rights.
- Retaliating against someone for reporting discrimination or harassment.
- Passing someone over because they are not “a cultural fit.”

HARASSMENT



Harassment Refresher

- Harassment can be verbal or physical conduct that denigrates or show hostility towards an individual because of a protected characteristic.
- Harassment is not just limited to sexual harassment, but can be harassment based on age, race, sexual orientation, disability, religion, or other protected characteristics.
- Harassment can also be conduct so severe or pervasive that it creates a hostile work environment which a reasonable person would find intimidating, hostile or abusive.

Examples of Harassment

- Racial slurs or epithets
- Age-related jokes or comments:
 - “Old guy” “Gramps”
- Comments about a disability:
 - “He must be bipolar” “She’s off her medication”
- Derogatory slang or name calling, even if the people involved do not find it offensive:
 - “Gals”
- Sending sexually explicit emails to a co-worker
- Constantly telling jokes about various religions
- Giving someone the cold shoulder or excluding someone from other activities:
 - (Do only the guys go golfing every Friday afternoon?)

Sexual Harassment

- Quid Pro Quo sexual harassment is the appearance, perception, or understanding that a person's employment or success depends on their willingness to submit to sexual advances.
 - #metoo
- “Hostile Workplace” or environment is a workplace that involves repeated unwelcome conduct or comments of a sexual nature.
 - Avoid the “close talker” or being the “toucher.”
 - Asking for dates
 - Excluding or questioning someone because of their sexual identity
- Sexual Orientation and Gender Identity (SOGI) discrimination and harassment

Investigation of Harassment (or Discrimination) Complaints

Best Practices:

- If on-going and life-threatening, assess safety and call 911 if necessary.
- Report to HR.
- Let HR take lead on any investigation.
 - HR (or an outside investigator) will interview witnesses and individuals involved
 - HR will evaluate actions in terms of a policy or legal violation (many employers have workplace policies that are more strict than what the law requires).
 - HR will make recommendations for next steps
- Cooperate with HR
- Do not retaliate against anyone for reporting or participating in an HR investigation

Business Case to Stop Harassment and Discrimination

- People want to be judged in their workplace based on their skills and performance, not on characteristics that do not affect their work like the color of their skin, their national origin, or gender to name a few.
- People do not want their managers or co-workers making decisions or assumptions about them based on their characteristics.
- Creating a respectful workplace where people feel valued for their skills and professional contributions will help with employee **retention** as well as strong candidate **recruitment**.
- Avoids disruptions and expenses from investigations and litigation

Special Considerations for Interviewing

First impressions count for potential employees too. Be thoughtful about your hiring and interviewing process to avoid any potential discriminatory impact, for example:

- Centralize as much as possible with trained diverse interviewers who have also received unconscious bias training.
- Focus on questions related to the applicant's skills and qualifications and the job requirements.
- Consider standard questions and avoid deviations.
- Take notes on information related to the applicant's ability to perform the job
 - "3 years specific experience with public works project management"

Disability Discrimination

- Disability discrimination claims on the rise:
 - The Port failed to accommodate me!
 - The Port fired me because of my disability!
- Difficult for managers to deal with
 - Federal and state law is very specific regarding what employers must do for qualified employees with a disability
- KEY: Get HR involved immediately

Examples of Potential Disabilities – Not Exhaustive

- Deafness
- Blindness
- Cancer
- Diabetes
- Epilepsy
- Intellectual disabilities
- Obesity
- PTSD
- Mental disorders – e.g., anxiety
- Major depressive disorder
- Recovery of alcohol or substance abuse
- Having a “record of”
- Being “regarded as”

Interactive Process and Reasonable Accommodations

Interactive Process is a legally mandated discussion between the Port (HR) and the employee to determine what, if any, accommodation would be reasonable so that the employee can perform the essential function of the job.

- Back and forth process. Should be managed by HR, not a manager.

Reasonable Accommodation is a workplace modification so that a qualified individual with a disability can perform the essential functions of their job.

- Result of interactive process. Should be determined by HR, not a manager.

Special Issues with Disabilities and Discipline

- Disabled employee must meet same quality standards as non-disabled employee
- Same job evaluation criteria
- Poor performance review or work performance counseling – when employee raises disability for first time
- When an employee does not give notice of the need for accommodation until after performance problem arises, reasonable accommodation does not require the employer to
 - (1) tolerate or excuse poor performance;
 - (2) withhold disciplinary action warranted by that performance;
 - (3) raise a performance rating; or
 - (4) give an evaluation that does not reflect the actual performance

LEAVE LAWS



Potential Statutory Leave Rights

- Federal Family Medical Leave Act (FMLA)
- Washington's Paid Family and Medical Leave (PFML)
- Washington's Paid Sick Leave (non-exempt employees)
- Pregnancy & Parental Leave
- Washington's Family Care Act (only for family members)
- Domestic Violence, Sexual Assault or Stalking (employee and family)
- Military Family Leave Act (spouse to active duty)
- Certain Emergency Service Personnel (volunteer firefighters, reserve)

How to Trigger Leave Laws?

- No magic words required; simply state a need for leave exists:
 - My mom is dying. I need to go help take care of her.
 - I was in a car accident this morning and the ER won't release me yet.
 - I'm injured and will be in late.
 - I think I'm having a panic attack.
- Employer may require written notice
- If leave request is foreseeable, then employer may require employee to provide up to 30 days' notice
- Reasons for leave: birth of a child and care of newborn, adoption of child and care during first year, care of a child, parent, or spouse who suffers from "serious health condition," employee's "serious health condition," or a "qualifying exigency"

Get HR Involved (If Possible)

- Determine eligibility
 - Federal law
 - State law
 - Local ordinance
- Track leave taken
- Handle all medical certification: Coordinate with employee and physician, if necessary, to get appropriate documentation – HIPAA issues
- Ensure proper notices are given
- Manage disputes regarding the type and length of leave
- Maintain records pursuant to local, state and federal law

REMOTE WORKER & SEPARATION CONSIDERATIONS



Remote and Hybrid Worker Considerations

- Have a facially neutral policy – implement and enforce
- Culture and collaboration – more challenging and requires more creativity
- Not all workers want to work remotely – be flexible about more in person
- For workers who want to only work remotely, analyze the question under your policy and the legitimate business needs of the company
- If leave or disability accommodation at issue, seek legal advice

Employment Separations: Mitigating Risk

- Clear Business Justification
 - Sale of a division
 - Termination of certain services
 - Closing operations
- Business Justification with Subjective Component
 - Reduction in force – across entire organization
 - Termination for performance
- Separation/Severance Agreements

The background features a blue-toned grid pattern, resembling a wire mesh or a digital screen. Three question marks are visible: one in the center-left is brightly lit with a warm orange and yellow glow, while two others to its right are dimmer and appear in shades of blue and white. The word "QUESTIONS" is written in white, uppercase letters across the middle of the image.

QUESTIONS



Stephanie Berntsen

Shareholder

Stephanie Berntsen provides proactive, common-sense legal advice on employment issues for companies operating in the Pacific Northwest.

As service group leader of Schwabe's Employment and Labor practice group, she works with a wide array of companies, but has particular experience in emerging technology, ports, and construction industries. While Stephanie's goal is always to help prevent or resolve disputes before litigation, she has extensive experience defending companies against claims of discrimination, retaliation and wage issues (including class actions) in administrative and court proceedings. In addition, Stephanie regularly represents companies in non-competition, non-solicitation and trade secret misappropriation disputes.

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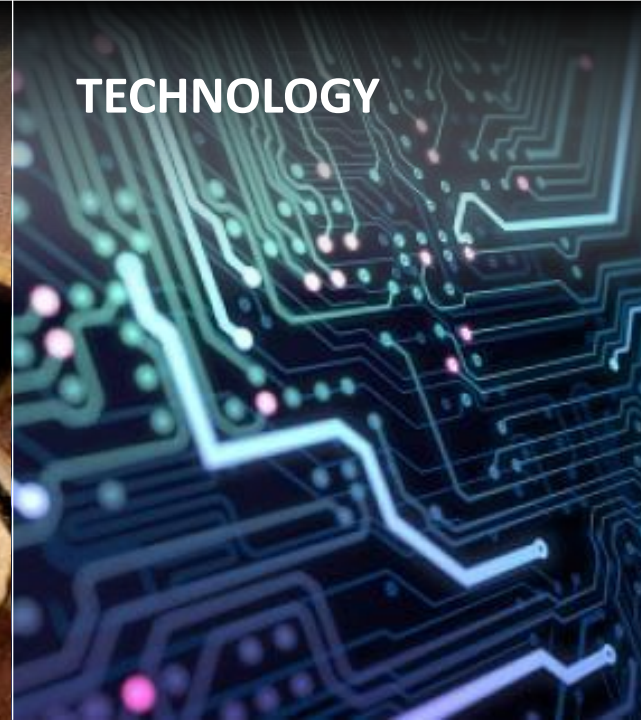
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