Labor Law Update for Port Finance

PRESENTED BY
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Why Are We Here?

It has been a busy legislative session in Olympia.

Several important changes have been made to labor and employment laws that Port professionals needs to stay abreast of, which may impact the financial bottom line. Meanwhile, class action lawyers continue to make life difficult for employers statewide.

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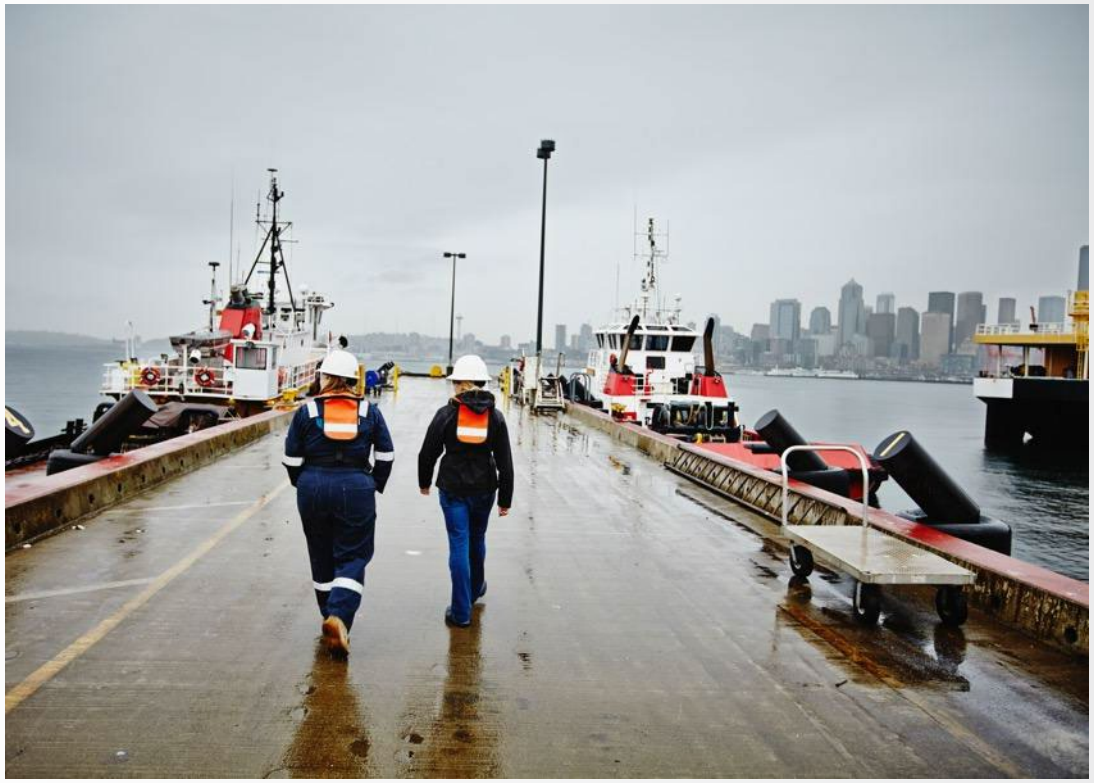
What We Will Cover

- Striker unemployment compensation benefits
- Amendments to Washington's Fair Chance Act
- Changes to Washington's Equal Pay and Opportunities Act
- Developments in Washington case law regarding missed and late rest and meal breaks leading to a barrage of class action lawsuits
- How can employers protect themselves from paying out huge settlements and judgments

Striker Employment Benefits

- On May 19, 2025, Governor Ferguson signed bill permitting economic strikers to receive state unemployment compensation
- Makes Washington only third state in U.S. to permit such benefits after New York and New Jersey
- Oregon has gone down the same path
- Represents a fundamental change in the balance of power between management and labor during labor disputes

Striker Employment Benefits



- Last-minute compromises made bill less generous to strikers
- Strikers are initially disqualified for benefits until the second Sunday following the start of the strike provided that the strike is not prohibited by federal or state law in a final judgment
- Expect unions to commence strikes on Fridays or Saturdays!

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Striker Employment Benefits

- The normal waiting week follows
- After the waiting week, strikers can receive up to six weeks of unemployment. Could have been much worse!
- If the strike is found to be prohibited by federal or state law, strikers will need to repay benefits
- Recovery is likely a dubious proposition!

Striker Employment Benefits

- Public employees are prohibited from striking in Washington
- RCW 53.18.020 contains a specific prohibition for Port employees
- Despite these clear prohibitions, public employees in Washington strike anyway
- Law encourages public employees to strike

What's A Public Employer To Do?

- Public employers are stuck between a rock and a hard place
- Either bear costs of benefits for illegally striking workers or bear the litigation costs to obtain a final judgment holding strike illegal
- Incentivizes public employers to seek injunctions
- Law encourages both strikes and litigation- a double whammy!

What's A Public Employer To Do?

- Problem is disqualification is dependent on a final judgment
- TROs and preliminary injunctions are not final
- Unions can drag out litigation and bill encourages that
- By the time the judgment becomes final, the strike will be settled
- Illusory remedy for a public employer

Amendments To Fair Chance Act

- Washington Legislature made substantial changes to Fair Chance Act, colloquially known as “Ban the Box” law
- Makes it much more difficult for employers to screen applicants or take adverse actions against employees for criminal convictions or charges

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Amendments To Fair Chance Act

- Commencing July 1, 2026, employers with more than 15 employees must make significant changes to their screening and hiring practices. Applies to applicants and existing employees. Can’t take adverse employment actions based on arrest or conviction except in very limited circumstances. Increases penalties for violations.

Amendments To Fair Chance Act

- Exceptions include jobs that involve unsupervised access to minors, certain financial institutions, law enforcement, federal contractors if the contract prohibits those with criminal records from working on contract.
- Most employers in the State are covered.

Amendments To Fair Chance Act

- Major provisions of the law:
- (1) Wait until after making a conditional offer before any inquiry or consideration of an applicant's criminal history
- (2) Cannot reject an applicant or take adverse action against an employee because of conviction record unless employer can demonstrate a "legitimate business reason"

Amendments To Fair Chance Act

- (3) Cannot implement any policy or practice that automatically or categorically excludes individuals with a criminal record from any position
- (4) Cannot reject an applicant or take adverse action because of an arrest record, including a “pending charge for criminal conduct, or juvenile record conviction”

Amendments To Fair Chance Act

- Not many escape valves for employers
- Employers may consider adult arrest records if person is out on bail or released on their own recognizance pending trial
- “Legitimate business” is narrowly defined and a heavy burden is placed on the employer to demonstrate it

Amendments To Fair Chance Act

“Legitimate business reason” means the employer believes in good faith that the nature of the criminal conduct will:

(a) have a negative impact on the individual’s fitness or ability to perform the position sought or held; or

(b) harm or cause injury to people, property, business reputation, or business assets

Amendments To Fair Chance Act

- The second prong will be where the action is!
- Will be very difficult for employers to demonstrate as there are both substantive and procedural hoops to jump through
- Similar to the Fair Credit Reporting Act

Amendments To Fair Chance Act

- Employer must first consider and document six separate factors:

(a) the seriousness of the conduct underlying the adult conviction record;

(b) the number and types of convictions;

(c) the time that has elapsed since the conviction, including periods of incarceration;

Amendments To Fair Chance Act

(d) any verifiable information related to the individual's rehabilitation, good conduct, work experience, and training as provided by the individual;

(e) the specific duties and responsibilities of the position sought or held; and

(f) the place and manner in which the position will be performed

Amendments To Fair Chance Act

- In addition to these substantive findings, onerous notification procedure is also imposed both before and at the time of adverse action:
- Prior to taking adverse employment action, the employer must notify the employee of the potentially disqualifying condition and hold position open for at least two days
- Failure to give notice violates the law

Amendments To Fair Chance Act

- Employer must then provide the applicant or employee a reasonable opportunity to correct or explain the record or provide information about their rehabilitation, good conduct, work experience, education, and training
- Employer must consider and respond to this information of mitigation

Amendments To Fair Chance Act

- But wait, more process is due!
- If the employer elects to moves forward after receiving and considering the applicant or employer's evidence of mitigation, the employer must provide a detailed written decision including "specific documentation as to its reasoning and assessment" of numerous factors:

Amendments To Fair Chance Act

Factors include:

a) the impact of the conviction on the position or business operations

b) consideration of the applicant's or employee's rehabilitation, good conduct, work experience, education, and training

Amendments To Fair Chance Act

Even more notice is required:

Any employer who advises job applicants that the position will be subject to a post-offer criminal history background check must at the time make a written disclosure of aspects of the law and include a copy of the Attorney General's Fair Chance Act Guide

Amendments To Fair Chance Act

If an applicant discloses without inquiry a criminal record during interview, the employer must give the applicant the same notice of his rights under the statute and serve a copy of the AG's Fair Chance Act guide

Amendments To Fair Chance Act

- Stiffer penalties: AG can impose $1,500 for first violation, $3,000 for second, and $15,000 for each subsequent violation per job applicant
- Penalty goes to the applicant or if unidentifiable to the State
- AG can also pursue unpaid wages, compensatory damages, and attorney fees
- Consider a privileged legal review of background screening procedures to avoid liability

Changes to Equal Pay and Opportunities Act

- Since 2023, Washington employers have faced a barrage of class action lawsuits regarding this law
- Law requires employers with 15 or more employees to disclose in each posting the salary range or wage scale offered in addition to a description all benefits and compensation offered for the position

Changes to Equal Pay and Opportunities Act

- Class action cases sought $5,000 for each alleged job applicant for posting for technical violations
- Hundreds of class action cases filed since 2023
- Million dollar settlements
- Should be called Class Action Plaintiff Lawyer Opportunity Act!

Changes to Equal Pay and Opportunities Act

- Rare showing of common sense!
- The amended EPO provides employers a cure period of five business days after receiving written notice of a defective posting to amend posting before a job applicant may seek remedies
- This provision hopefully will cut off class action lawsuits
- Employers will need to act swiftly upon receipt of notice to change posting and contact third parties

Changes to Equal Pay and Opportunities Act

- If employer receives notice from any person that constitutes notice from any job applicant seeking a remedy
- Employer who cures and contacts any applicable third-party posting entity (Linked-In, Indeed, etc.) to correct posting is immune from penalties, damages or other relief

Changes to Equal Pay and Opportunities Act

- Law allows employers to advertise a fixed pay amount in job postings instead of a range under certain circumstances
- Two separate and exclusive remedy paths for violations: administrative or private right of action
- Administrative: L&I may award statutory damages of no less than $100 nor more than $5,000 per violation, and also may order costs of investigation, civil penalty of up to $500 for first violation and $1,000 for repeat violations, actual damages, injunctive relief and other appropriate remedies

Changes to Equal Pay and Opportunities Act

- Employee may elect to sue instead within 3 years of violation and seek statutory damages of no less than $100 nor more than $5,000 per violation, plus reasonable attorney fees and costs
- The court may also order actual damages, injunctive relief and any other appropriate remedies

Changes to Equal Pay and Opportunities Act

- In assessing statutory damages, either L&I or the court is required to consider the following: (a) was violation willful; (b) is it a repeat violation; (c) the size of the employer; (d) the amount necessary to deter future noncompliance; and (e) the purposes of the law
- Hopeful that this law will tamp down "gotcha" class actions for innocent mistakes, but plaintiff class action lawyers are tenacious and resourceful and won't give up!
- Employers must be on guard!

Missed or Untimely Meal and Rest Periods

- Slew of class action lawsuits in Washington regarding missed or untimely meal and rest periods
- Another source of multi-million settlements against employers for technical violations of the law

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Missed or Untimely Meal and Rest Periods

- Employees allowed a meal period of at least 30 minutes beginning no less than two hours nor more than five hours from beginning of shift
- Rest periods, free from duty, of at least 10 minutes for four hours worked

Missed or Untimely Meal and Rest Periods

- Private right of action for missed meal period, ten minutes' pay plus liquidated damages and attorney fees
- Theory is that employer got extra work for the same wage/unjust enrichment
- *Wingert* case/CBA cannot abrogate these rights

Missed or Untimely Meal and Rest Periods

- For missed meal periods, employee has a Minimum Wage Act cause of action if not paid for time worked
- Employers who auto-punch for lunches are vulnerable if employees miss lunch
- Better to clock in and out for lunch but if you auto-punch, notify employees of procedure to reverse punch

Missed or Untimely Meal and Rest Periods

- But what if you pay the employee for the missed lunch?
- *Androkitis* decision from late 2024 also gives employee an implied cause of action for a missed “respite” break
- Failure to take lunch results in 30 minutes of pay in addition to time worked
- Liquidated damages and attorney fees

Missed or Untimely Meal and Rest Periods

- Numerous class action lawsuits after *Androkitis* case- California firms filing cases in Washington, one firm alone filed over 20 in early 2025!
- What if the employer gives the rest break but gives it more than five hours after shift begins?

Missed or Untimely Meal and Rest Periods

- Law is not clear but law firms are claiming late breaks also require 30 minutes of pay
- Filing class actions over this issue
- Washington appellate courts may very well hold that this interpretation is correct
- Good arguments that it isn’t

Missed or Untimely Meal and Rest Periods

- Good news is that employees can waive meal periods either in writing, verbally or by clear and unequivocal conduct
- Get it in writing and let employee know of right to revoke waiver at any time
- Don’t coerce waiver

Missed or Untimely Meal and Rest Periods

- Regulations don’t clearly permit waiver with regards to timing of lunches
- If employer wants to start lunch after five hours, you can seek a variance from L&I to avoid liability
- Pay careful attention to these issues to avoid crippling class action cases

Missed or Untimely Meal and Rest Periods

Best timekeeping practices:

(1) Train managers and supervisors about Washington law and employer policies and hold them accountable for compliance;

(2) Require employees to punch in and out for meal periods and avoid auto-punches;

(3) Educate employees about what to do if they miss all or part of a meal period;

Missed or Untimely Meal and Rest Periods

(4) Always timely pay for missed or shortened breaks

(5) Consider ways to prevent or track meal period punches such as (a) preventing clock-in before 30 minutes are up; or (b) implementing a system where there is an automatic flag or real-time notification to supervisors when breaches occur;

Missed or Untimely Meal and Rest Periods

(6) Don’t forget second required meal period for long shifts;

(7) Discipline employees and supervisors for repeated breaches;

(8) Create a non-coercive waiver system or seek variances


Thank You!
Questions?

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Shareholder

For more than 40 years, I've been engaged in high-level administrative, trial, and appellate litigation in multiple state and federal courts with a special emphasis on traditional labor and employment law.

With extensive experience in commercial and labor arbitration, I have successfully taken two cases to the United States Supreme Court, resulting in decisions on cutting-edge issues under the Federal Arbitration Act. I was the lead attorney in complex administrative, court, and appeal proceedings leading to a multimillion-dollar verdict against a powerful maritime labor union. I also defended numerous wage and hour class action cases involving national retailers.

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