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STATE

Littler on

Washington Employment Law

COVERAGE

Scope of Discussion. This publication is designed to help employers operating in a state to identify and apply various state employment law requirements. It follows the chronology of employment—tracking requirements from pre-hire, time of hire, during employment, and the end of employment. Because employers are subject to both federal and state employment laws, each section provides a brief overview of federal law and then summarizes applicable state law.

Although the major developments in Alabama employment law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. In addition:

- This publication focuses on requirements for private-sector employers; requirements applicable solely to public employers are not covered. Similarly, while some provisions applicable to government contractors may be covered, this publication is not designed to address requirements applicable only to government contractors.
- Local ordinances are generally excluded from this publication. Notwithstanding, local rules may be included to the extent they deal with ban-the-box or criminal history restrictions, local minimum wage, paid sick leave, or antidiscrimination provisions. A detailed discussion of these requirements, however, is outside the scope of this publication. Further, the focus of local ordinances is primarily on jurisdictions with populations of 100,000 or more residents, but laws in locations with populations below that threshold may also be included.
- State law may create special rules or provide exceptions to existing rules for certain industries—for example, the health care industry. This publication does not offer an exhaustive look at these industry-specific exceptions and should not be interpreted to cover all industry-specific requirements.
- Civil and criminal penalties for failure to follow any particular state employment law requirement may be covered to the extent the penalty is specifically included and discussed in the statute. Any penalty discussion that is included, however, is nonexhaustive and may only highlight some of the possible penalties under the statute. In many instances, an individual statute will not include its own penalty provision; rather, a general or catchall penalty provision will apply, and these are not covered here.

To adhere to publication deadlines, developments, and decisions subsequent to **October 11, 2024** are not covered.

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This publication is not intended to, and does not, provide legal advice or a legal opinion. It does not establish an attorney-client relationship between Littler Mendelson, P.C. and the user. It also is not a do-it-yourself guide to resolving employment issues or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation may find the information useful in understanding the issues raised and their legal context. This publication is not a substitute for experienced legal counsel and does not provide legal advice regarding any particular situation or employer, or attempt to address the numerous factual issues that arise in any employment-related dispute.

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TABLE OF CONTENTS

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1. PRE-HIRE

1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

A person providing services to another for payment generally can be classified either as an employee or an independent contractor. An independent contractor is considered self-employed, whereas an employee, as the term suggests, works for an employer. The choice between classifying a worker as an independent contractor or an employee is more than a question of terminology and can have many and far-reaching consequences for a company. A company's legal obligation to its workers under various employment and labor laws depends primarily on whether workers are employees. For example, a company using an independent contractor is not required to:

- withhold income taxes from payments for service;
- pay minimum wages mandated by state or federal law;
- provide workers' compensation coverage or unemployment insurance;
- provide protections for various leaves of absences required by law; or
- provide a wide range of employee benefits, such as paid time off or a 401(k) retirement plan, that are offered voluntarily to the employer's employees as part of the terms or conditions of their employment.

As independent contractor use increased, government officials began to scrutinize asserted independent contractor relationships with increasing skepticism. Courts have also proven willing to overturn alleged independent contractor relationships that fail to satisfy the increasingly rigorous standards applied by federal and state agencies for classifying workers as independent contractors.

For companies, misclassification of a worker as an independent contractor can carry significant tax, wage, and benefit liabilities, as well as unanticipated and perhaps under-insured tort liability to third parties for injuries caused by the worker.

There are four principal tests used to determine whether a worker is an employee or an independent contractor:

1. the common-law rules or common-law control test;[1]
2. the economic realities test (with several variations);[2]

[1] The common-law rules or common-law control test, informed in part by the Internal Revenue Service's 20 factors, focus on whether the engaging entity has the right to control the means by which the worker performs their services as well as the end results. *See generally* Treas. Reg. § 31.3121(d)-(1)(c); I.R.S., Internal Revenue Manual, *Technical Guidelines for Employment Tax Issues*, 4.23.5.4, *et seq*. (Nov. 22, 2017), *available at* https://www.irs.gov/irm/part4/irm_04-023-005r.html#d0e183.

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for themselves." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

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3. the hybrid test, combining the common law and economic realities test;[3] and
4. the ABC test (or variations of this test).[4]

For a detailed evaluation of the tests and how they apply to the various federal laws, see LITTLER ON CLASSIFYING WORKERS.

1.1(b) *State Guidelines on Classifying Workers*

In Washington, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law (see Table 1).

To reduce instances of misclassification of employees as independent contractors, Washington has entered into a partnership with the U.S. Department of Labor, Wage and Hour Division to work cooperatively through information sharing, joint enforcement efforts, and coordinated outreach and education efforts.[5] The State of Washington Department of Labor and Industries has an agreement with the Wage and Hour Division.[6]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	Washington Human Rights Commission	Statutory balancing test. While no single factor is determinative, the key factor is the extent of control exerted by the purchaser of work as to the manner and means of work performed. The test includes the following factors: • control of work, meaning "not only as to the result to be achieved, but also as to the details by which the result is achieved;" • which party supplies the tools and place of work;

[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347(5th Cir. 2008).

[4] Under a typical formulation of the ABC test, a worker is an independent contractor if: (A) there is an ABSENCE of control; (B) the BUSINESS is performed outside the usual course of business or performed away from the place of business; and (C) the work is CUSTOMARILY performed by independent contractors.

[5] More information about the related U.S. Department of Labor Misclassification Initiative is available at https://www.dol.gov/whd/workers/misclassification/#stateDetails.

[6] U.S. Dep't of Labor, Wage & Hour Div. & State of Wash., Dep't of Labor & Indus., *Partnership Agreement*, *available at* https://www.dol.gov/whd/workers/MOU/wa_1.pdf.

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Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		• skill level involved for the particular occupation; • type of work involved, including whether the work is typically supervised; • duration of work, given that "[i]ndependent contractors typically are hired for a job of relatively short duration;" • method of payment, *i.e.*, whether the worker is paid by time or by the job; • how the work relationship can be terminated, *i.e.*, whether by one party, with or without notice; • whether leave benefits are afforded; • whether the work performed "is an integral part of the business of the purchaser;" • whether the worker accrues retirement benefits; • which party pays employer taxes, such as Social Security, unemployment, and workers' compensation, or for withholding federal income tax; • whether the worker treats his or her income as salary or as business income; • whether "the purchaser of work keeps and transmits records and reports required of employers, such as those required under the workers' compensation act;" and • the intention of the parties.[7] The party claiming the individual is an independent contractor bears the burden of proof.[8]
Income Taxes	Not applicable	Washington does not impose a personal income tax.
Unemployment Insurance	Employment Security Division	Two statutory tests. An individual must meet the requirements of *one* test to be considered an independent contractor.

[7] WASH. ADMIN. CODE § 162-16-230(3).

[8] WASH. ADMIN. CODE § 162-16-230(4).

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Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		Test One. The individual must meet all three requirements of the ABC test: A. the "individual has been and will continue to be free from control or direction over the performance of such service," both under their contract and in fact; B. the work is either "outside the usual course of business" for the purchaser of services, or the "service is performed outside of all the places of business of the enterprises for which such service is performed;" and C. the worker is "customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service."[9] *Test Two.* Under the second test, the individual qualifies as an independent contractor if the individual meets all six statutory requirements. The six requirements include the three elements for the ABC test mentioned above in Test One, *plus the following*: • as of effective date of the contract, "the individual is responsible for filing . . . a schedule of expenses with the internal revenue service for the type of business" they are conducting; • as of effective date of the contract, "the individual has established an account with the department of revenue, and other state agencies as required by the particular case, . . . for the payment of all state taxes normally paid by employers" and has "received a unified business identifier number from the state;" and • as of effective date of the contract, the individual maintains "a separate set of

[9] WASH. REV. CODE § 50.04.145(1)-(3).

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Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		books or records that reflect all items of income and expenses of the business."[10] Depending on the type of work performed, the individual may also require a valid contractor registration.[11]
Wage & Hour Laws	Department of Labor & Industries	Fair Labor Standards Act (FLSA) economic realities test.[12]
Workers' Compensation	Department of Labor & Industries	Statutory test. This test is identical to the six-part test described above as *Test Two* for unemployment insurance purposes.[13]
Workplace Safety: Washington Industrial Safety & Health Act	Department of Labor & Industries	Common-law test, focusing on the right to control.[14]

1.1(c) *Local Guidelines on Classifying Workers*

Seattle's Independent Contractor Protections Ordinance requires certain disclosures to be made to independent contractors prior to their beginning work for a hiring entity. It also sets forth requirements

[10] WASH. REV. CODE § 50.04.145; *see also* Washington State, Employment Sec. Dep't, *Independent Contractors*, *available at* https://esd.wa.gov/employer-taxes/independent-contractors.

[11] WASH. REV. CODE § 50.04.145(7).

[12] In 2012, Washington's Supreme Court held that the definition of employee in the Washington Minimum Wage Act incorporates the "economic dependence" test developed by the federal courts in interpreting the federal FLSA. *Anfinson v. FedEx Ground Package Sys., Inc.*, 281 P.3d 289, 297-99 (Wash. 2012). "The relevant inquiry is whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself." 281 P.3d at 299 (internal quotations omitted). The court did not set forth a specific test but referred to the various factor tests used by the federal appellate courts. The court explained, however, that factor tests will be examined liberally in favor of employee classification. 285 P.3d at 302.

[13] WASH. REV. CODE § 51.08.195; *see also* WASH. REV. CODE § 51.08.070 (defining employer and noting exceptions to the definition found in section 51.08.195, and for work that requires registration or licensing, under section 51.08.181); WASH. REV. CODE § 51.08.180 (defining *worker* and noting same exceptions as in the definition of *employer*); *Malang v. Dep't of Labor & Indus.*, 162 P.3d 450, 456 (Wash. Ct. App. 2007) (explaining that the legislature's broad definitions of employer and worker in the workers' compensation statute shows their intention to provide coverage to certain individuals not meeting the common-law definition of employee). The Department of Labor and Industries has published an independent contractor guide for Washington employers, which also addresses workers' compensation insurance coverage. Washington State, Dep't of Labor & Indus., *Independent Contractor Guide: A Step-by-Step Guide to Hiring Independent Contractors in Washington State*, F101-063-000 (Nov. 2017), *available at* https://lni.wa.gov/forms-publications/F101-063-000.pdf.

[14] *See, e.g.*, *Kamla v. Space Needle Corp.*, 52 P.3d 472, 474-75 (Wash. 2002) (quoting the RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958)); *Cano-Garcia v. King Cnty.*, 277 P.3d 34, 40 (Wash. Ct. App. 2012).

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regarding the timing of payments, as well as disclosures that must be provided to independent contractors each time a payment is made. Additional notice and recordkeeping provisions apply.[15]

1.2 Employment Eligibility & Verification Requirements

1.2(a) *Federal Guidelines on Employment Eligibility & Verification Requirements*

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly employing workers who are not authorized to work in the United States. Under IRCA, an employer must verify each new hire's identity and employment eligibility. Employers and employees must complete the U.S. Citizenship and Immigration Service's Employment Eligibility Verification form (Form I-9) to fulfill this requirement. The employer must ensure that: (1) the I-9 is complete; (2) the employee provides required documentation; and (3) the documentation appears on its face to be genuine and to relate to the employee. If an employee cannot present the required documents within three business days of hire, the employee cannot continue employment.

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[16]

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly, state and local immigration laws have faced legal challenges.[17] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[18]

For more information on these topics, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.

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[15] SEATTLE, WASH., MUN. CODE §§ 14.34.010 *et seq*. More information is available at https://www.seattle.gov/laborstandards/ordinances/independent-contractor-protections-.

[16] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

[17] *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007), *aff'd*, 724 F.3d 297 (3d Cir. 2013) (striking down a municipal ordinance requiring proof of immigration status for lease and employment relationship purposes).

[18] *See Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

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1.2(b) *State Guidelines on Employment Eligibility & Verification Requirements*

Washington does not have a generally applicable employment eligibility or verification statute. Therefore, private-sector employers in Washington should follow federal law requirements regarding employment eligibility and verification.

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

1.3(a) *Restrictions on Employer Inquiries About & Use of Criminal History*

1.3(a)(i) *Federal Guidelines on Employer Inquiries About & Use of Criminal History*

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[19] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

1. **Arrest Records.** An exclusion from employment based on an arrest itself is not job related and consistent with business necessity as required under Title VII. While, from the EEOC's perspective, an employer cannot rely on arrest records alone to deny employment, an employer can consider the underlying conduct related to the arrest if that conduct makes the person unfit for the particular position.
2. **Conviction Records.** An employer with a policy that excludes persons from employment based on criminal convictions must show that the policy effectively links specific criminal conduct with risks related to the particular job's duties. The EEOC typically will consider three factors when analyzing an employer's policy: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.

Employers should also familiarize themselves with the federal Fair Credit Reporting Act (FCRA), discussed in **1.3(b)(i)**. The FCRA does not restrict conviction-reporting *per se*, but impacts the reporting and consideration of criminal history information in other important ways.

For additional information on these topics, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

1.3(a)(ii) *State Guidelines on Employer's Use of Arrest Records*

Washington Fair Chance Act. Until an employer initially determines that an applicant is otherwise qualified for the position, the employer cannot:

- include any question about an applicant's criminal record on any application for employment;
- inquire about an applicant's criminal record either orally or in writing;

[19] EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq.* (Apr. 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

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- receive information through a criminal history background check; or
- otherwise obtain information about an applicant's criminal record.[20]

Criminal record includes any record about a citation or arrest for criminal conduct, including records relating to probable cause to arrest, and includes any record about a criminal or juvenile case filed with any court, whether or not the case resulted in a finding of guilt.[21]

Once the employer has initially determined that the applicant is otherwise qualified, the employer may inquire into or obtain information about an applicant's criminal record. *Otherwise qualified* means that the applicant meets the basic criteria for the position as set out in the advertisement or job description without consideration of a criminal record.[22]

The Act further prohibits an employer from implementing any policy or practice that automatically or categorically excludes individuals with a criminal record from consideration prior to an initial determination that the applicant is otherwise qualified for the position. Prohibited policies and practices include rejecting an applicant for failure to disclose a criminal record prior to initially determining that the applicant is otherwise qualified for the position. However, an employer is not required to provide accommodations or job modifications in order to facilitate the employment or continued employment of an applicant or employee with a criminal record or who is facing pending criminal charges.[23]

In addition, the Act restricts what an employer may include in a job advertisement. An employer may not advertise employment openings in a way that excludes people with criminal records from applying. Ads that state "no felons," "no criminal background," or otherwise convey similar messages are prohibited.[24]

Certain categories of employment are excluded. The Fair Chance Act does not apply to:

- any employer hiring a person who will or may have unsupervised access to children under the age of 18, a vulnerable adult, or a vulnerable person as defined under state law;
- any employer, including a financial institution, who is expressly permitted or required under any federal or state law to inquire into, consider, or rely on information about an applicant's or employee's criminal record for employment purposes;
- employment by a general or limited authority Washington law enforcement agency or by a criminal justice agency;
- an employer seeking a nonemployee volunteer; or
- any entity required to comply with the rules or regulations of a self-regulatory organization, as defined in the federal Securities and Exchange Act of 1934.[25]

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[20] WASH. REV. CODE § 49.94.010.

[21] WASH. REV. CODE § 49.94.005.

[22] WASH. REV. CODE § 49.94.005.

[23] WASH. REV. CODE § 49.94.020.

[24] WASH. REV. CODE § 49.94.010.

[25] WASH. REV. CODE § 49.94.020.

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The Act does not provide a private right of action to enforce its terms. Rather, the state attorney general's office is charged with enforcement, and employers found to be in violation will be subject to monetary penalties.[26]

Washington Human Rights Commission Preemployment Inquiry Regulations. The Washington Human Rights Commission has codified a Preemployment Inquiry Guide in its regulations. The regulations provide that at the preemployment stage only, an employer may inquire about arrests that occurred within the last 10 years.[27] Covered employers are those that employ eight or more persons.[28]

If the employer chooses to do so, the employer may also inquire:

- whether the charges are still pending or have been dismissed; and
- whether the arrest led to conviction of a crime involving behavior that would adversely affect job performance.[29]

These rules do not apply after an individual is employed, although records of the protected status of employees may not be used for discriminatory purposes.[30] Moreover, Washington recognizes an exception to unfair preemployment inquiries when the inquiries are based on *bona fide* occupational qualification, in which case the inquiry must be accompanied by a written explanation of the purpose.[31]

Exempt from these limitations are certain organizations that have direct responsibility for the supervision, care, or treatment of children, mentally ill persons, developmentally disabled persons, or other vulnerable adults. Such employers may be required by federal or state law to obtain an applicant's criminal history, including arrest records.[32]

1.3(a)(iii) *Local Guidelines on Employer's Use of Arrest Records*

Seattle's Fair Chance Employment Ordinance (Ban the Box)

The Seattle Fair Chance Employment Ordinance prohibits employers from advertising, publicizing, or implementing a policy or practice that automatically or categorically excludes all individuals with any arrest record or conviction record from any employment position that will be performed in whole or in substantial part (at least 50% of the time) in Seattle.[33]

Employers may perform a criminal background check on a job applicant or require a job applicant to provide criminal history information, but only after the employer has completed an initial screening of applications to eliminate unqualified applicants.[34]

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[26] WASH. REV. CODE § 49.94.030.

[27] WASH. ADMIN. CODE § 162-12-140.

[28] WASH. REV. CODE § 49.60.040.

[29] WASH. ADMIN. CODE § 162-12-140(3).

[30] WASH. ADMIN. CODE §§ 162-12-140(1), 162-12-180. The Washington Human Rights Commission does not include persons with a criminal history record as a protected class. WASH. ADMIN. CODE §§ 162-12-140(1), 162-12-180.

[31] WASH. ADMIN. CODE §§ 162-12-135, 162-12-140.

[32] WASH. ADMIN. CODE § 162-12-140.

[33] SEATTLE, WASH., MUN. CODE § 14.17.020(A).

[34] SEATTLE, WASH., MUN. CODE § 14.17.020(B).

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Adverse Action. An arrest is not proof that an individual has engaged in unlawful conduct. Employers shall not carry out a tangible adverse employment action based solely on an employee's or applicant's arrest record.[35] *Adverse action* means denying a job or promotion, demoting, terminating, failing to rehire after a seasonal interruption of work, threatening, penalizing, retaliating, engaging in unfair immigration-related practices, filing a false report with a government agency, changing an employee's status to a nonemployee, or otherwise discriminating against any person for any reason prohibited by the ordinance. Adverse action for an employee may involve any aspect of employment, including pay, work hours, responsibilities, or other material change in the terms and condition of employment.[36]

Employers may inquire about the criminal conduct related to an arrest record, however, employers are prohibited from carrying out a tangible adverse employment action based solely on the conduct relating to an arrest unless the employer has a "legitimate business reason" for taking such action.[37] A *legitimate business reason* exists where, based on information known to the employer at the time the employment decision is made, the employer believes in good faith that the nature of the criminal conduct underlying the conviction or pending criminal charge either:

- will have a negative impact on the employee's or applicant's fitness or ability to perform the position sought or held; or
- will harm or cause injury to people, property, or business assets, and the employer has considered the following factors:
  - the seriousness of the underlying criminal conviction or pending criminal charge;
  - the number and types of convictions or pending criminal charges;
  - the time that has elapsed since the conviction or pending criminal charge, excluding periods of incarceration;
  - any verifiable information related to the individual's rehabilitation or good conduct provided by the individual;
  - the specific duties and responsibilities of the position sought or held; and
  - the place and manner in which the position will be performed.[38]

Before taking a tangible adverse employment action based solely on an applicant's or employee's criminal conviction record, the conduct relating to an arrest record or pending criminal charge, the employer must identify to the applicant or employee the record(s) or information on which they are relying and give the applicant or employee a reasonable opportunity to explain or correct that information.[39]

Employers must hold open a position for a minimum of two business days after notifying an applicant or employee that they will be making an adverse employment decision solely based on their criminal conviction record, the conduct relating to an arrest record, or pending charge in order to provide an applicant or employee a reasonable opportunity to respond, correct, or explain that information. After

[35] SEATTLE, WASH., MUN. CODE § 14.17.020(C).

[36] SEATTLE, WASH., MUN. CODE § 14.17.010.

[37] SEATTLE, WASH., MUN. CODE § 14.17.020(D).

[38] SEATTLE, WASH., MUN. CODE § 14.17.010.

[39] SEATTLE, WASH., MUN. CODE § 14.17.020(E).

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two business days, employers may, but are not required, to hold open a position until a pending charge is resolved or adjudicated or questions about an applicant's conviction history or conduct relating to an arrest are resolved.[40]

Antiretaliation Provisions. The Seattle Fair Chance Employment Ordinance expressly prohibits retaliation. Employers are prohibited from taking adverse action against any person because the person has exercised in good faith the rights protected under the ordinance. Unlawful retaliation includes an express or implied assertion that the employer will make a report to government authorities regarding the suspected citizenship or immigration status of an employee or their family member.[41]

Ordinance Enforcement, Remedies & Penalties. An applicant or employee alleging a violation of the Seattle Fair Chance Employment Ordinance may file a complaint with the Seattle Office of Civil Rights, but the ordinance does not create a private right of action for applicants or employees.[42] Available remedies include payment of unpaid wages, liquidated damages, civil penalties, penalties payable to the aggrieved party, fines, and interest.[43]

Spokane's Fair Chance Hiring Ordinance (Ban the Box)

The Spokane Fair Chance Hiring Ordinance prohibits employers from:

- advertising applicable employment openings in a way that excludes people with arrest or conviction records from applying, such as using advertisements which state "no felons," "no criminal background," or which otherwise convey similar messages;
- including any question in an application for applicable employment, inquiring orally or in writing, receiving information through a criminal history background check, or otherwise obtaining information about an employee's arrest or conviction record until after the employee has participated in an in-person or video interview or received a conditional offer of employment;
- using, distributing, or disseminating an employee's arrest or conviction record except as required by law;
- disqualifying an employee from applicable employment solely because of a prior arrest or conviction unless the conviction is related to significant duties of the job or disqualification is otherwise allowed under the ordinance; or
- rejecting or disqualifying an applicant for failure to disclose a criminal record prior to an initial determination that the applicant is otherwise qualified for the position.[44]

Notwithstanding the above prohibitions, the ordinance does not prohibit an employer from declining to hire an applicant with a criminal record or from terminating the employment of an employee with a criminal record. An employer may inquire into or obtain information about a job applicant's criminal

[40] SEATTLE, WASH., MUN. CODE § 14.17.020(G).

[41] SEATTLE, WASH., MUN. CODE § 14.17.030.

[42] SEATTLE, WASH., MUN. CODE § 14.17.090.

[43] SEATTLE, WASH., MUN. CODE § 14.17.055.

[44] SPOKANE, WASH., MUN. CODE § 09.02.050.

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conviction or arrest record or background, and consider the information received regarding such record after the conclusion of a job interview, and use such information in a hiring decision.[45]

Further, the ordinance must not be construed to protect criminal conduct or interpreted or applied as imposing an obligation on the part of an employer to provide accommodations or job modifications in order to facilitate the employment or continued employment of an applicant with an arrest or conviction record or who is facing pending criminal charges.[46]

Employer means any individual, partnership, association, corporation, business trust, contractor, temporary staffing agency, training and apprenticeship program, job placement, referral and employment agency, or any person or group of persons acting directly or indirectly and within the city limits of Spokane. *Applicable employment* means any occupation, vocation, job, or work for pay, including temporary or seasonal work, contracted work, contingent work, and work through the services of a temporary or other employment agency; or any form of vocational or educational training, whether offered with or without pay. *Otherwise qualified* means that the applicant meets the basic criteria for the position as set out in the advertisement or job description without taking into account the existence or absence of a criminal conviction or arrest record.[47]

In addition, the ordinance has built in several exceptions, and does *not* apply to:

- any employer hiring an employee who will have unsupervised access to children under the age of 18, a vulnerable adult as defined in Washington Revised Code section 74.34.020(21), or a vulnerable person as defined in Washington Revised Code section 9.96A.060;
- employers that are expressly permitted or required under any federal or Washington state law to inquire into, consider, or rely on information about an applicant's arrest or conviction record for employment purposes;
- any General Authority Washington law enforcement agency; or
- criminal background checks that are specifically permitted or required under state or federal law.[48]

Ordinance Enforcement, Remedies & Penalties. An applicant or employee alleging a violation of the ordinance may file a civil action. Jurisdiction over all causes of action for violations of the ordinance lies with the City of Spokane municipal court, though nothing in the ordinance may be deemed to deny any person the right to institute any action or to pursue any civil or criminal remedy for the violation of such person's civil rights.[49] With respect to penalties, a violation of the ordinance is a Class 1 civil infraction.[50]

1.3(a)(iv) *State Guidelines on Employer's Use of Conviction Records*

Preemployment Inquiries. Covered employers (those who employ eight or more persons) may inquire about an applicant's convictions or imprisonments that are reasonably related to the applicant's fitness

[45] SPOKANE, WASH., MUN. CODE §§ 09.02.040, 09.02.050.

[46] SPOKANE, WASH., MUN. CODE § 09.02.040.

[47] SPOKANE, WASH., MUN. CODE § 09.02.030.

[48] SPOKANE, WASH., MUN. CODE § 09.02.040.

[49] SPOKANE, WASH., MUN. CODE § 09.02.020.

[50] SPOKANE, WASH., MUN. CODE § 09.02.070.

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to properly perform the job for which the applicant is applying.[51] As with arrests, the inquiry should be limited to convictions (or releases from prison) that occurred during the last 10 years.[52]

Exempt from these limitations are certain organizations that have direct responsibility for the supervision, care, or treatment of children, mentally ill persons, developmentally disabled persons, or other vulnerable adults. Such employers may be required by federal or state law to obtain an applicant's criminal history, including arrest records.[53]

Employer Access to Conviction Records. Employers are authorized to obtain criminal conviction information from the Washington State Patrol for the following purposes:

- to secure a bond required for employment;
- to conduct preemployment and postemployment evaluations of employees and applicants "who, in the course of employment, may have access to information affecting national security, trade secrets, confidential or proprietary business information, money, or items of value;" or
- to assist an investigation of suspected employee misconduct that might also constitute a penal offense under federal or state law.[54]

An employer's use of information obtained from the State Patrol, however, remains subject to the limitations imposed by the Washington Human Rights Commission regulations regarding preemployment inquiries.[55]

When an employer has requested and received a conviction record from the Washington State Patrol, the employer must notify the employee at issue within 30 days of receipt of the records (within 10 days in the case of an applicant who will have unsupervised access to children or disabled vulnerable adults), or immediately upon completion of any pending investigation if the record was sought to assist in investigation of alleged misconduct.[56] The employer must provide the employee or prospective employee notice of the opportunity to inspect the record.[57]

This information must be kept confidential and made available only to persons involved in the hiring, background investigation, or job assignment of the person whose record is sought, and must be used only as necessary for the above purposes.[58]

1.3(a)(v) *State Guidelines on Employer's Use of Sealed or Expunged Criminal Records*

For all purposes, including completing employment applications, a person whose conviction record has been vacated may state that they have never been convicted of that crime.[59]

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[51] WASH. REV. CODE § 49.60.040; WASH. ADMIN. CODE § 162-12-140.

[52] WASH. ADMIN. CODE § 162-12-140(b).

[53] WASH. ADMIN. CODE § 162-12-140(b).

[54] WASH. REV. CODE § 43.43.815(1).

[55] WASH. REV. CODE § 43.43.815(8).

[56] WASH. REV. CODE § 43.43.815(2).

[57] WASH. REV. CODE § 43.43.815(2).

[58] WASH. REV. CODE § 43.43.815(4).

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Applicants for jobs that require state licensure may hold a *certificate of restoration of opportunity*, which is a court-issued certificate that restricts the ability of state licensing boards and agencies to consider a license applicant's criminal history in determining whether to issue the license. However, an employer may, in its sole discretion, determine whether to consider a certificate of restoration of opportunity in making employment decisions. An employer is immune from a suit for damages based upon its exercise of that discretion or the refusal to exercise such discretion. The Certificate of Restoration of Opportunities Act does not create a protected class, private right of action, any right, privilege, or duty, nor does it change any existing right, privilege, or duty concerning employment.[60]

Juvenile Records. A person whose juvenile records have been sealed may reply to inquiries by stating that those proceedings never occurred.[61]

1.3(a)(vi) *State Enforcement, Remedies & Penalties*

Under state law, employees harmed by a violation of the procedures by which employers must obtain criminal conviction information may sue the employer to enjoin the wrongful conduct. They may also recover damages and attorneys' fees.[62]

1.3(b) *Restrictions on Credit Checks*

1.3(b)(i) *Federal Guidelines on Employer's Use of Credit Information & History*

The Fair Credit Reporting Act (FCRA). The FCRA[63] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[64] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

The FCRA establishes procedures that an employer must strictly follow when using a consumer report for employment purposes. For example, before requesting a consumer report from a consumer reporting agency, the employer must notify the applicant or employee in writing that a consumer report will be requested and obtain the applicant's or employee's written authorization before obtaining the report. An employer that intends to take an adverse employment action, such as refusing to hire the applicant, based wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

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[59] WASH. REV. CODE § 9.94A.640(4).

[60] WASH. REV. CODE § 9.97.020.

[61] WASH. REV. CODE § 13.50.260(6). However, any subsequent adjudication for a juvenile offense or crime or charging of an adult felony nullifies the sealing order. WASH. REV. CODE § 13.50.260(8)(b).

[62] WASH. REV. CODE § 43.43.815(5).

[63] 15 U.S.C. §§ 1681 *et seq*.

[64] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 15 U.S.C. § 1681a(f). A *consumer report* is any communication by a consumer reporting agency bearing on an individual's "creditworthiness, credit standing, character, general reputation, personal characteristics or mode of living" that is used for employment purposes. 15 U.S.C. § 1681a(d).

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Many states have enacted their own version of the FCRA, referred to as "mini-FCRAs." While these laws often mirror the FCRA's requirements, there may be important distinctions between federal and state requirements.

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[65]

1.3(b)(ii) *State Guidelines on Employer's Use of Credit Information & History*

Washington has enacted a mini-FCRA law, entitled the Washington Fair Credit Reporting Act (WFCRA).

Consumer Reports. Employers may not obtain a *consumer report* concerning an applicant for employment purposes unless:

1. prior to obtaining the report, "a clear and conspicuous disclosure has been made in writing" notifying the individual that a consumer report may be obtained for purposes of considering the individual for employment (the disclosure may be included in the application materials); or
2. the individual authorizes the procurement of the report.[66]

A *consumer report* refers to any communication of information (written, oral, or otherwise) by a consumer reporting agency bearing on an individual's "creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used or collected in whole or in part" for employment purposes.[67]

With respect to current employees, employers may obtain a consumer report if they notify employees in writing that consumer reports may be used for employment decisions.[68] Such written notice may be included in employee guidelines or manuals available to employees.[69]

Investigative Consumer Reports. Employers may obtain an *investigative consumer report* only if:

1. they clearly and accurately disclose to the individual "that an investigative consumer report including information as to character, general reputation, personal characteristics and mode of living, whichever are applicable, may be made," and that disclosure:
    a. is written, mailed, or otherwise delivered to the individual "not later than three days after the date on which the report was first requested;" and

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[65] EEOC, *Pre-Employment Inquiries and Financial Information*, *available at* https://www.eeoc.gov/laws/practices/financial_information.cfm (emphasis in original).

[66] WASH. REV. CODE § 19.182.020(1)-(2)(a).

[67] WASH. REV. CODE § 19.182.010(4)(a).

[68] WASH. REV. CODE § 19.182.020(2)(b).

[69] WASH. REV. CODE § 19.182.020.

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b. informs the individual of their right to request additional disclosures as well as a written summary of the individual's rights; *or*

2. "the report is to be used for employment purposes for which the consumer has not specifically applied."[70]

An *investigative consumer report* is a consumer report (or part thereof) that contains "information on an individual's character, general reputation, personal characteristics or mode of living," which was "obtained through personal interviews with neighbors, friends, or associates" of the subject individual or with others with whom the individual "is acquainted or who may have knowledge concerning any items of information."[71]

Upon an individual's written request—made within a reasonable period of time after the receipt of the notice of the report—an employer must make a "complete and accurate disclosure of the nature and scope of the investigation requested."[72] This disclosure must be written, mailed, or otherwise delivered within five days of either the date on which the individual's request was received, or on which the report was first requested, whichever date is later.[73]

Adverse Action. Before taking any adverse action based in whole or part on an individual's consumer report or investigative consumer report, an employer must provide the following to the individual, regardless of whether the individual is an applicant or a current employee:

1. the name, address, and telephone number of the consumer reporting agency providing the report;
2. a description of the individual's rights pertaining to consumer reports obtained for employment purposes; and
3. a reasonable opportunity to respond to any information in the report that is disputed by the individual.[74]

If adverse action is taken based on a report or on information contained in a consumer report, the employer must:

1. provide written notice of the adverse action;75 and
2. provide the individual with the name, address, and telephone number of the consumer reporting agency that furnished the report.[76]

Credit History. The WFCRA also contains a provision specific to checks on creditworthiness. Specifically, an employer cannot procure a consumer report for employment purposes where any information

[70] WASH. REV. CODE § 19.182.050.

[71] WASH. REV. CODE § 19.182.010(10).

[72] WASH. REV. CODE § 19.182.050(2).

[73] WASH. REV. CODE § 19.182.050(2).

[74] WASH. REV. CODE § 19.182.020(2)(d).

[75] Verbal notice may be given in an adverse action involving a business regulated by the Washington Utilities and Transportation Commission, if verbal notice does not impair an individual's ability to obtain a credit report without charge under section 19.182.100(2). WASH. REV. CODE § 19.182.110; *see* WASH. REV. CODE § 19.182.100(2).

[76] WASH. REV. CODE § 19.182.110.

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contained in the report bears on the individual's creditworthiness, credit standing, or credit capacity, unless the information is either substantially job-related and the employer's reasons for the use of such information are disclosed to the individual in writing, or the information is required by law.[77] The law does not define "substantially related."

1.3(b)(iii) *State Enforcement, Remedies & Penalties*

A violation of the WFCRA is considered an unfair or deceptive act that violates the Washington Consumer Protection Act. Remedies include actual damages, costs, and attorneys' fees. Employers that willfully fail to comply with any requirement of the WFCRA are additionally liable for penalties.[78]

1.3(c) *Restrictions on Access to Applicants' Social Media Accounts*

1.3(c)(i) *Federal Guidelines on Access to Applicant's Social Media Accounts*

There is no federal law governing an employer's ability to request access to applicants' or employees' social media accounts. However, various federal laws, or federal agencies' interpretations and enforcement of these laws, may impact employer actions. For example:

- Preemployment action taken against an applicant, or post-employment action taken against an employee, based on information discovered via social media may run afoul of federal civil rights law (*e.g.*, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).
- The National Labor Relations Board, which is charged with enforcing federal labor laws, has taken an active interest in employers' social media policies and practices, and has concluded in many instances that, regardless of whether the workplace is unionized, the existence of such a policy or an adverse employment action taken against an employee based on the employee's violation of the policy can violate the National Labor Relations Act.
- Accessing an individual's social media account without permission may potentially violate the federal Computer Fraud and Abuse Act or the Stored Communications Act.

For additional information on federal law related to background screening, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

1.3(c)(ii) *State Guidelines on Access to Applicants' Social Media Accounts*

Washington restricts an employer's access to applicants' and employees' social media information. An employer cannot:

- "request, require, or otherwise coerce an employee or applicant to disclose login information" for their personal social networking account;
- "request, require, or otherwise coerce an employee or applicant to access his or her personal social networking account in the employer's presence" so as to enable the employer to observe the account's contents;
- "compel or coerce an employee or applicant to add a person, including the employer," to the individual's contact lists within any personal social networking account; or

[77] WASH. REV. CODE § 19.182.020(2)(c).

[78] WASH. REV. CODE §§ 19.182.150, 19.86.010 *et seq*.

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- "request, require, or cause an employee or applicant to alter the settings on his or her personal social networking account that affect a third party's ability to view" account contents.[79]

In addition, an employer cannot take adverse action again an employee or applicant because they refused to do any of the actions above.[80]

Exceptions. The law contains a significant exception for workplace investigations applicable to current employees. Employers can require that employees share content from their personal social media accounts in connection with an investigation if:

- the content is requested or required to make a factual determination in the course of the investigation;
- the investigation is undertaken in response to information received about the employee's personal social media content;
- the goal of the investigation is to ensure compliance with laws, requirements, or prohibitions against work-related employee misconduct" or to "investigate an allegation of unauthorized transfer of an employer's proprietary, confidential, or financial information to the personal social media account;" and
- the employer does not request or need the individual's login information.[81]

Employers are not prevented from complying with federal or state law, common law, or self-regulatory organization regulations.[82]

The law's prohibitions also do not apply to employer-provided accounts or devices.[83] An employer can require or request an employee to disclose login information for access to an account or service the employer provides or an electronic communications device or online account the employer supplies.[84] If, through using an employer-provided electronic communications device or electronic device or program that monitors an employee's network, an employer inadvertently receives an employee's login information, it is not liable for possessing the information. However, the employer cannot use the information to access the employee's personal social networking account.[85] Moreover, an employer can enforce existing personnel policies that do not conflict with the law.[86]

1.3(c)(iii) *State Enforcement, Remedies & Penalties*

An aggrieved individual can file a civil action and, if successful, be awarded injunctive or equitable relief, actual damages, a $500 penalty, and reasonable attorneys' fees and costs. An employer can recover

[79] WASH. REV. CODE § 49.44.200(1).

[80] WASH. REV. CODE § 49.44.200(1).

[81] WASH. REV. CODE § 49.44.200(2).

[82] WASH. REV. CODE § 49.44.200(3).

[83] WASH. REV. CODE § 49.44.200(3).

[84] WASH. REV. CODE § 49.44.200(3).

[85] WASH. REV. CODE § 49.44.200(3).

[86] WASH. REV. CODE § 49.44.200(3).

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reasonable attorneys' fees and expenses, however, if final judgment is entered in its favor because the judge found the action was frivolous and pursued without reasonable cause.[87]

1.3(d) *Polygraph / Lie Detector Testing Restrictions*

1.3(d)(i) *Federal Guidelines on Polygraph Examinations*

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[88] The law bars most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

The EPPA further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant:

- for refusing to take a lie detector test;
- based on the results of such a test; and
- for taking any actions to preserve employee rights under the law.

There are some limited exceptions to the general ban. The exception applicable to most private employers allows a covered employer to test current employees reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business. There is also a narrow exemption for prospective employees of security guard firms and companies that manufacture, distribute, or dispense controlled substances.

Notably, the EPPA prohibits only mechanical or electrical devices, not paper-and-pencil tests, chemical tests, or other nonmechanical or nonelectrical means that purport to measure an individual's honesty. For more information on federal restrictions on polygraph tests, including specific procedural and notice requirements and disclosure prohibitions, see LITTLER ON EMPLOYMENT TESTING.

Most states have laws that mirror the federal law. Some of these state laws place greater restrictions on testing by prohibiting lie detector "or similar" tests, such as pencil-and-paper honesty tests.

1.3(d)(ii) *State Guidelines on Polygraph Examinations*

In Washington, employers may not require employees or prospective employees to take or be subjected to any lie detector or similar test[89] as a condition of employment or continued employment.[90]

However, the statute does not apply to applications for employment with law enforcement agencies; persons who manufacture, distribute, or dispense controlled substances; or persons in sensitive positions directly involving national security.[91]

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[87] WASH. REV. CODE § 49.44.205.

[88] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dep't of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

[89] These provisions do not apply to the use of psychological tests. WASH. REV. CODE § 49.44.120(2).

[90] WASH. REV. CODE § 49.44.120(1).

[91] WASH. REV. CODE § 49.44.120(1).

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1.3(d)(iii) *State Enforcement, Remedies & Penalties*

Violating the prohibition on lie detector tests is a misdemeanor. Moreover, an aggrieved individual can file a civil action or seek injunctive relief, and if successful, recover actual damages, a $500 penalty, and reasonable attorneys' fees and costs. An employer can recover reasonable attorneys' fees and expenses, however, if final judgment is entered in its favor because the judge found the action was frivolous and pursued without reasonable cause.[92]

1.3(e) *Drug & Alcohol Testing of Applicants*

1.3(e)(i) *Federal Guidelines on Drug & Alcohol Testing of Applicants*

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation industries.[93] The Drug-Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[94] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

For the most part, workplace drug and alcohol testing is governed by state law, and state laws differ dramatically in this area and continue to evolve.

1.3(e)(ii) *State Guidelines on Drug & Alcohol Testing of Applicants*

Beginning January 1, 2024, an employer cannot discriminate against an applicant for employment if the discrimination is based on (1) the person's use of cannabis off the job and away from the workplace; or (2) an employer-required drug screening test that has detected nonpsychoactive cannabis metabolites in the person's hair, blood, urine, or other bodily fluids.[95]

However, an employer is not prohibited from basing initial hiring decisions on scientifically valid drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites. Further, the law does not affect an employer's rights or obligations to maintain a drug- and alcohol-free workplace, or any other rights or obligations required by federal law or regulation.[96]

The law does not apply to testing for controlled substances other than preemployment testing, such as post-accident testing or testing because of a suspicion of impairment or being under the influence of alcohol, controlled substances, medications, or other substances. In addition, the law does not apply to an applicant seeking:

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[92] WASH. REV. CODE §§ 49.44.120(1), 49.44.135.

[93] These industries are covered by the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration (FMSCA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); and the Pipeline and Hazardous Materials Safety Administration (PHMSA). In addition, the U.S. Department of Defense, the Coast Guard, and the Nuclear Regulatory Commission, as well as other government agencies, have adopted regulations requiring mariners, employers, and contractors to maintain a drug-free workplace.

[94] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[95] WASH. REV. CODE § 49.44.240.

[96] WASH. REV. CODE § 49.44.240.

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- a position requiring a federal government background investigation or security clearance;
- a position with a general authority Washington law enforcement agency;
- a position with a fire department, fire protection district, or regional fire protection service authority;
- a position as a first responder not already listed above, including a dispatcher position with a public or private 911 emergency communications system or a position responsible for the provision of emergency medical services;
- a position as a corrections officer with a jail, detention facility, or the Department of Corrections, including any position directly responsible for the custody, safety, and security of people confined in those facilities;
- a position in the airline or aerospace industries; or
- a safety sensitive position for which impairment while working presents a substantial risk of death, and the employer has identified these positions prior to the applicant's application for employment.[97]

Finally, the law does not preempt state or federal laws requiring an applicant to be tested for controlled substances. This includes state or federal laws requiring applicants to be tested or specifying the way they are tested, as a condition of employment, receiving federal funding or federal licensing-related benefits, or as required by a federal contract. An employer may require an applicant to be tested for a spectrum of controlled substances, which may include cannabis, as long as the cannabis results are not provided to the employer.[98]

For additional information on drug or alcohol testing of current employees, see **3.2(b)(ii)**.

1.3(f) *Additional State Guidelines on Preemployment Conduct*

1.3(f)(i) *Restrictions on Salary History Inquiries*

An employer may not seek a job applicant's wage or salary history from the applicant or from a current or former employer, or require that an applicant's prior wage or salary history meet certain criteria, except as provided under the statute.[99] However, an employer may confirm an applicant's wage or salary history:

- if the applicant has voluntarily disclosed the applicant's wage or salary history; or
- after the employer has negotiated and made an offer of employment with compensation to the applicant.[100]

Through December 31, 2022, upon an applicant's request after the employer has initially offered the applicant the position, an employer of 15 or more employees must provide the minimum wage or salary for the position for which the applicant is applying. Likewise, upon request of an employee who has been offered a promotion or an internal transfer to a new position, such employers must provide the

[97] WASH. REV. CODE § 49.44.240.

[98] WASH. REV. CODE § 49.44.240.

[99] WASH. REV. CODE § 49.58.100.

[100] WASH. REV. CODE § 49.58.100.

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wage scale or salary range for the employee's new position. If no wage scale or salary range exists, the employer must provide the minimum wage or salary expectation set by the employer prior to posting the position, making a position transfer, or making the promotion.[101]

Beginning in 2023, amendments to the statute require an employer to disclose the pay range for a position, rather than requiring an employer to provide the pay range upon an applicant's request. An employer of 15 or more employees must disclose in each posting for each job opening the wage scale or salary range and a general description of all the benefits and other compensation to be offered to the hired applicant. *Posting* means any solicitation intended to recruit job applicants for a specific available position, including recruitment the employer does directly as well as indirectly through a third party, and includes any postings done electronically, or with a printed hard copy, that includes qualifications for desired applicants. If no wage scale or salary range exists, the employer must provide the minimum wage or salary expectation set by the employer prior to posting the position, making a position transfer, or making the promotion. Further, upon request of an employee who has been offered a promotion or an internal transfer to a new position, an employer must provide the wage scale or salary range for the employee's new position.[102]

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

Table 2 lists the documents that must be provided at the time of hire under federal law.

Table 2. Federal Documents to Provide at Hire

Category	Notes
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[103] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[104] if the employee purchases a qualified health plan through the exchange; and • that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any)

[101] WASH. REV. CODE § 49.58.100.

[102] WASH. REV. CODE § 49.58.110.

[103] 26 U.S.C. § 36B.

[104] 42 U.S.C. § 18071.

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Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.105 The U.S. Department of Labor's Employee Benefits Security Administration provides a model notice for employers that offer a health plan to some or all employees and a separate notice for employers that do not offer a health plan.[106]
Benefits & Leave Documents: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Employers or group health plan administrators must provide written notice to employees and their spouses outlining their COBRA rights no later than 90 days after employees and spouses become covered under group health plans. Employers or plan administrators can develop their own COBRA rights notice or use the COBRA Model General Notice.[107] Employers or plan administrators can send COBRA rights notices through first-class mail, electronic distribution, or other means that ensure receipt. If employees and their spouses live at the same address, employers or plan administrators can mail one COBRA rights notice addressed to both individuals; alternatively, if employees and their spouses do not live at the same address, employers or plan administrators must send separate COBRA rights notices to each address.[108]
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[109] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[110]

[105] 29 U.S.C. § 218b.

[106] Model notices are available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice.

[107] The model notice is available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[108] 29 C.F.R. § 2590.606-1.

[109] 29 C.F.R. § 825.300(a).

[110] The U.S. Department of Labor's Wage & Hour Division's model FMLA poster, which satisfies the notice requirement, is available at https://www.dol.gov/WHD/fmla/index.htm.

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Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.[111]
Immigration Documents: Form I-9	Employers must ensure that individuals properly complete Form I-9 section 1 ("Employee Information and Verification") at the time of hire and sign the attestation with a handwritten or electronic signature. Also, individuals must present employers documentation establishing their identity and employment authorization. Within three business days of the first day of employment, employers must physically examine the documentation presented in the employee's presence, ensure that it appears to be genuine and relates to the individual, and complete Form I-9, section 2 ("Employer Review and Verification"). Employers must also, within three business days of hiring, sign the attestation with a handwritten or electronic signature. Employers that hire individuals for a period of less than three business days must comply with these requirements at the time of hire.[112] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.
Tax Documents	On or before the date employment begins, employees must furnish employers with a signed withholding exemption certificate (Form W-4) relating to their marital status and the number of withholding exemptions they claim.[113]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[114]
Wage & Hour Documents	To qualify for the federal tip credit, employers must notify tipped employees: (1) of the minimum cash wage that will be paid; (2) of the tip credit amount, which cannot exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped employee must be retained by the employee except for a valid tip

[111] 29 C.F.R. § 825.300(a).

[112] *See generally* 8 C.F.R. § 274a.2. The form is available at https://www.uscis.gov/i-9.

[113] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[114] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

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Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements.[115]

2.1(b) *State Guidelines on Hire Documentation*

Table 3 lists the documents that must be provided at the time of hire under state law.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents: Paid Sick Leave	Employers must notify each employee of: • their entitlement to paid sick leave; • the rate at which the employee will accrue paid sick leave; • the authorized purposes under which paid sick leave may be used; • the employer's intention to use a PTO program to meet the law's requirements (if applicable); and • that retaliation by the employer for the employee's lawful use of paid sick leave and other rights provided under section 49.46 of the Washington Revised Code, and all applicable rules, is prohibited. Employers must provide such notification in written or electronic form, and must make this information readily available to all employees. Employers must notify each employee of such rights no later than the commencement of their employment.[116] Additionally, not less than monthly, employers must provide each employee with written or electronic notification detailing the amount of paid sick leave accrued and the paid sick leave reductions since the last notification, and any unused paid sick leave available for use by the employee. Employers may satisfy the notification requirements by providing this information in regular payroll statements. Employers are not required to provide monthly notification to an employee if the employee has no hours worked since the last notification. If an employer chooses to frontload paid sick leave to an employee in advance of accrual: (1) The employer must make written or electronic notification to an employee no later than the end of the period for which the frontloaded paid sick leave was intended to cover, establishing that the amount of paid

[115] 29 C.F.R. § 531.59.

[116] WASH. ADMIN. CODE §§ 296-128-600(2), 296-128-755. The Washington State Department of Labor & Industries provides a sample employee paid sick leave notification form online, at https://lni.wa.gov/forms-publications/F700-191-000.docx, and in Spanish at https://lni.wa.gov/forms-publications/F700-191-999.docx.

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Table 3. State Documents to Provide at Hire	
Category	**Notes**
	sick leave frontloaded to the employee was at least equal to the accrual rate under Wash. Rev. Code § 49.46.210 (1)(a); and, (2) The employer is not relieved of their obligation to provide notification, not less than monthly, of the paid sick leave available for use by the employee.[117]
Fair Employment Practices Documents	No notice requirement located.
Seattle Secure Scheduling Ordinance	The Seattle Secure Scheduling Ordinance requires covered employers (certain retail and food services establishments) to provide new hires with "a written good faith estimate of the employee's work schedule." That written estimate must include: • "median number of hours the employee can expect to work each work week;" and • "whether the employee can expect to work on-call shifts."[118] This good faith estimate notice must be provided at the time of hire in English and the employee's primary language. Written updates to the estimate for each employee must be provided annually, or anytime there is a significant change to the individual's schedule due to either the employee's availability or the employer's business needs.
Seattle Wage Theft Ordinance	The Seattle Wage Theft Ordinance requires employers to provide written notice at hire to each new employee that includes: • employer's name and any trade names used by the employer (*i.e.*, "doing business as"); • physical address of the employer's main office or principal place of business and, if different, a mailing address; • employer's telephone number, and email address if applicable; • employee's pay rate(s), and eligibility to earn overtime, if applicable; • employer's tip policy, including explanations of any tip sharing, pooling, or allocation policies, if applicable; • employee's pay basis (*e.g.*, hour, shift, day, week, commission); and • employee's established payday for earned wage and tip compensation.[119] Employers must provide information to employees in English and any other language commonly spoken by employees at the particular workplace.[120] Employers can choose a reasonable method for providing

[117] WASH. ADMIN. CODE § 296-128-755.

[118] SEATTLE, WASH., MUN. CODE § 14.22.025.

[119] SEATTLE, WASH., MUN. CODE §§ 14.20.025.

[120] SEATTLE, WASH., MUN. CODE § 14.20.040(D).

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Table 3. State Documents to Provide at Hire	
Category	**Notes**
	this information, including, but not limited to a letter or an employee-accessible online system. The Seattle Office of Civil Rights makes a model notice available on its website.[121]
Tax Documents	No notice requirement located. Washington does not have a personal income tax.
Trade Secrets & Invention Documents	Under certain circumstances, employers must provide notice at hire that pertains to trade secrets and employee inventions. Specifically, if an employment agreement requires "the employee to assign any of the employee's rights in any invention to the employer, the employer must also, at the time the agreement is made, provide a written notification to the employee." This notice must explain: > that the agreement does not apply to an invention for which no equipment, supplies, facility, or trade secret information of the employer was used and which was developed entirely on the employee's own time, unless (a) the invention relates (i) directly to the business of the employer, or (ii) to the employer's actual or demonstrably anticipated research or development; or (b) the invention results from any work performed by the employee for the employer.[122]
Noncompetition Agreements	Employers must disclose the terms of the noncompetition covenant in writing to prospective employees no later than the time the employee accepts an offer of employment. For more information on Washington's restrictive covenant statute, see 2.3(b). The law applies to "all proceedings commenced" on or after January 1, 2020. **Effective June 6, 2024**, amended statutory language indicates that the statute is intended to apply to noncompetition agreements entered into prior to January 1, 2020, if the covenants are being enforced or "explicitly leveraged" after January 1, 2020.[123]
Wage & Hour Documents	No notice requirement located.
Warehouse Worker Quota	**Effective July 1, 2024**, employers—that employ or control the wages of 100 or more employees at a single warehouse distribution center in the state, or 1,000 or more employees at one or more centers in the state-must provide each employee a written description of any quotas

[121] SEATTLE, WASH., MUN. CODE § 14.20.025. The model wage theft notice is available in English, Amharic, Arabic, Chinese, Korean, Oromo, Somali, Spanish, Tagalog, Tigrigna, and Vietnamese at http://www.seattle.gov/laborstandards/ordinances/wage-theft.

[122] WASH. REV. CODE § 49.44.140.

[123] WASH. REV. CODE § 49.62

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Table 3. State Documents to Provide at Hire	
Category	**Notes**
	applicable to them, including quantified numbers of tasks to be performed, or materials to be produced or handled, any potential adverse action resulting from failing to meet these quotas, and any incentives associated with meeting the quotas. These must be provided either upon hire or within 30 days of July 1, 2024. Employers must also provide notice whenever there is a change to the quota before the employee will be subject to the new standard. This notice may be verbal or in writing and must be provided as soon as possible. The employer must also provide an updated written description of the quota to the employee within two business days of the change. The written notice of the quota must be in plain language and in the employee's preferred language.[124]

2.2 New Hire Reporting Requirements

2.2(a) *Federal Guidelines on New Hire Reporting*

The federal New Hire Reporting Program requires all states to establish new hire reporting laws that comply with federal requirements.[125] State new hire reporting laws must include these minimum requirements:

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[126]

[124] WASH. REV. CODE § 49.84.020.

[125] The New Hire Reporting Program is part of the Personal Responsibility and Work Opportunity Act of 1996. 42 U.S.C. §§ 651 to 669.

[126] 42 U.S.C. § 653a.

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These are only the minimum requirements that state new hire reporting laws must satisfy. States may enact new hire reporting laws that, for example, require additional information to be submitted or require a shorter reporting timeframe. Many states have also developed their own reporting form; however, its use is optional.

Multistate Employers. The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;
- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

If the company is reporting new hires on behalf of subsidiaries operating under different names and FEINs, it must list the names and FEINs, and the states where those subsidiaries have employees working.

Multistate employers can notify the HHS by mail, fax, or online as follows:

Table 4. Multistate Employer New Hire Information

Contact By Mail or Fax	Contact Online
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[127] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

2.2(b) *State Guidelines on New Hire Reporting*

The following is a summary of the key elements of Washington's new hire reporting law.[128]

[127] HHS offers the form online at https://www.acf.hhs.gov/programs/css/resource/multistate-employer-registration-form-instructions.

[128] WASH. REV. CODE § 26.23.040.

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Who Must Be Reported. Employers must report employees newly hired, rehired, or returned to work after being laid off, furloughed, separated, granted an unpaid leave, or terminated. *Rehired* means that at least 60 consecutive days elapsed between the employee's separation from employment and subsequent rehire.

Report Timeframe. Washington employers must submit new hire information for employees within 20 days of the hiring date. If submitted magnetically or electronically, employers may submit new hire information twice per month, if necessary, and not less than 12 nor more than 16 days apart.

Information Required. The information required to be reported includes the employee's name, address, social security number, date of birth, and the date the employee first performed services, or, for rehired employees, the date the employee returned to work following a layoff, furlough, separation or leave without pay. The employer's name, address, and federal tax identification number must also be reported.

Form & Submission of Report. The information should be submitted via federal Form W-4, or, at the option of the employer, an equivalent form. Reports may be submitted via mail, fax, telephone, online, or by magnetic media.

Location to Send Information.

ISSD Data Control
New Hire Directory
P.O. Box 9023
Olympia, WA 98507-9023
(800) 562-0479
(800) 782-0624 (fax)
http://www.dshs.wa.gov

Multistate Employers. Employers doing business in two or more states may register with the National New Hire Reporting Program and report all new hires to one state.

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

2.3(a) *Federal Guidelines on Restrictive Covenants & Trade Secrets*

Restrictive covenants are limitations placed on an employee's conduct that remain in force after their employment has ended. Post-employment restrictions are designed to protect the employer and typically prevent an individual from disclosing the employer's confidential information or soliciting the employer's employees or customers. These restrictions may also prohibit individuals from engaging in competitive employment, including competitive self-employment, for a specific time period after the employment relationship ends. There is no federal law governing these types of restrictive covenants. Therefore, a restrictive covenant's ability to protect an employer's interests is dependent upon applicable state law and the type of relationship or covenant involved.

As a general rule, a covenant restraining competition (referred to as a "noncompete") is more likely to be viewed critically because restraints of trade are generally disfavored. The typical exception to this general rule is a reasonable restraint that has a legitimate business purpose, such as the protection of trade secrets, confidential information, customer relationships, business goodwill, training, or the sale of a business. Notwithstanding, state laws vary widely regarding which of these interests can be protected

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through a restrictive covenant. Even where states agree on the interest that can be protected, they may vary on what is seen as a reasonable and enforceable provision for such protection.

Protections against trade secret misappropriation are also available to employers. Until recently, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[129] As such, the DTSA provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

For more information on these topics, see **LITTLER ON PROTECTION OF BUSINESS INFORMATION & RESTRICTIVE COVENANTS**.

2.3(b) *State Guidelines on Restrictive Covenants & Trade Secrets*

2.3(b)(i) *State Restrictive Covenant Law*

Noncompete agreements are void and unenforceable against employees earning less than $120,559.99 (effective January 1, 2024) annually from the party seeking to enforce the agreement, and independent contractors earning less than $301,399.98 (**effective January 1, 2024**) from the party seeking enforcement. The Washington State Department of Labor and Industries will adjust these compensation thresholds yearly.

The statute creates a presumption that noncompetition agreements with a restrictive period extending beyond 18 months after the termination of employment are unreasonable and unenforceable. Employers can overcome this presumption only by proving through clear and convincing evidence that a longer restrictive period is necessary to protect the employer's business or goodwill.[130]

Effective June 6, 2024, amendments to Wash. Rev. Code §§ 49.62.005:

- expand the definition of "noncompetition covenant" to include agreements prohibiting a former employee or independent contractor from accepting or transacting business with a customer (as distinguished from a non-solicitation agreement);
- limit the noncompete "sale of a business" exceptions to transactions where the signatory purchases, sells, acquires, or disposes of at least 1% of the business;
- limit covered customers for "non-solicitation" to "current" customers;
- void noncompete covenants that allow the application of choice of law of any jurisdiction other than Washington state;
- imposes a notice requirement that employers disclose the terms of the non-competition agreement in writing to prospective employees no later than the time the employee accepts an offer of employment, clarifying that the disclosure must occur at or before the employee's "initial verbal or written acceptance" of an offer of employment;

[129] 18 U.S.C. §§ 1832 *et seq.*

[130] WASH. REV. CODE §§ 49.62.005 *et seq*.

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- expand retroactive application of the law by permitting declaratory actions based on pre-January 1, 2020 covenants, if the covenants are being enforced or "explicitly leveraged" after January 1, 2020; and
- expand the private right of action, providing that any "person aggrieved by a noncompetition covenant" may bring a cause action.

Prior to the law's implementation, Washington did not have a statute governing the enforceability of covenants not to compete. Generally speaking, covenants not to compete have been subjected to careful judicial scrutiny because they are contracts in restraint of trade. Washington courts, however, have enforced such agreements to the extent they are reasonable.

Courts consider three factors when evaluating whether a covenant is reasonable:

- whether the restraint is necessary to protect the employer's business or goodwill;
- whether it imposes on the employee a restraint greater "than is reasonably necessary to secure the employer's business or goodwill;" and
- whether the extent of injury to the public, in terms of the "loss of service and skill of the employee" warrants setting aside and declining to enforce the covenant.[131]

Washington's general rule requires courts to first apply this three-factor test and then enforce a noncompetition agreement insofar as it is reasonable.[132] If the court determines that a restrictive covenant passes the reasonableness test, the covenant will not be deemed an illegal restraint on trade.[133] While the precise burden of proving the reasonableness of a noncompete has not yet been decided in Washington, it likely rests with the former employer.[134] Where the facts are undisputed, the reasonableness of a covenant not to compete is determined by the court as a matter of law.[135]

Given this legal framework, noncompetition agreements should be narrowly drawn and limited with regard to scope, time, and geographical area. The agreement should be no greater in scope than is necessary to protect the business or goodwill of the employer.[136] This requirement is generally satisfied if the restraint corresponds to the employer's protectable interest and to the activities that the former employee engaged in while employed. A covenant not to compete is not enforceable merely to protect an employer's interest in training it provided to an employee, or to protect the expertise or skills the employee acquired through general experience during employment.[137]

In determining whether a temporal or geographic restriction is reasonable, Washington courts will evaluate whether the restriction is reasonably necessary and calculated to protect the legitimate

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[131] *Perry v. Moran*, 748 P.2d 224, 228 (Wash. 1987), *judgment modified on other grounds*, 766 P.2d 1096 (Wash. 1989); *see also Emerick v. Cardiac Study Ctr., Inc.*, 357 P.3d 696 (Wash. Ct. App. 2015).

[132] *Alexander & Alexander, Inc. v. Wohlman*, 578 P.2d 530, 539 (Wash. Ct. App. 1978).

[133] *Knight, Vale & Gregory v. McDaniel*, 680 P.2d 448, 453 (Wash. Ct. App. 1984).

[134] *See, e.g.*, *Sheppard v. Blackstock Lumber Co. Inc.*, 540 P.2d 1373 (Wash. 1975) (holding that the burden of establishing the reasonableness of a clause that affected the forfeiture of retirement benefits was on the employer).

[135] *Knight, Vale & Gregory*, 680 P.2d at 451.

[136] 680 P.2d at 452.

[137] *Copier Specialists, Inc. v. Gillen*, 887 P.2d 919, 920 (Wash. Ct. App. 1995).

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interests of the employer without imposing undue hardship on the employee.[138] Courts have held that noncompetition agreements within a geographical area place greater restrictions on an employee than do restrictions on servicing the former employer's clients.[139] Accordingly, courts are likely to allow a restriction on servicing former clients to substitute for a geographic restriction. Washington courts have upheld restrictions of two or three years.[140]

Enforceability Following Employee Discharge. In Washington, noncompetes likely will be enforced even if the employee is terminated from employment.[141] Beginning January 1, 2020, if an employer wishes to enforce a noncompetition covenant against an employee terminated as a result of a layoff, the employer must provide compensation equivalent to the employee's base salary at the time of termination, minus compensation earned through subsequent employment, for the entire period of enforcement.

2.3(b)(ii) *Consideration for a Noncompete*

Restrictive covenants require an employee to promise not to do something the employee would otherwise have been able to do. For example, by signing a noncompete agreement, an employee is giving up the right to open a competing business or work for an employer in a competing business. Therefore, employers need to provide an employee with "consideration" in return for the agreement to be binding. Providing consideration means giving something of value—*i.e.*, a promise to do something that the employer was not otherwise obligated to do—such as extending an offer of employment to a new employee or providing a bonus for an existing employee.

In Washington, noncompetition and confidentiality agreements, as with other contracts, must be supported by valid consideration. A noncompete signed at the inception of employment is considered sufficient.[142] Notably, merely offering an existing employee continued at-will employment is not sufficient consideration for an agreement not to compete.[143] In contrast, continued employment coupled with other changes in terms of employment may be sufficient consideration.[144]

As of January 1, 2020, employers must disclose the terms of the noncompetition covenant in writing to prospective employees no later than the time the employee accepts an offer of employment. If the agreement becomes enforceable only at a later date due to changes in the employee's compensation, the employer must specifically disclose that the agreement may be enforceable against the employee in

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[138] *Perry v. Moran*, 748 P.2d 224, 228 (Wash. 1987), *judgment modified on other grounds*, 766 P.2d 1096 (Wash. 1989).

[139] 748 P.2d at 230; *Alexander & Alexander, Inc. v. Wohlman*, 578 P.2d 530, 540 (Wash. Ct. App. 1978) (disregarding a geographical limit but upholding a covenant restricting solicitation of customers).

[140] *See, e.g.*, *Knight, Vale & Gregory v. McDaniel*, 680 P.2d 448, 452 (Wash. Ct. App. 1984) (three-year restriction); *Alexander & Alexander, Inc.*, 578 P.2d at 540 (two-year restriction).

[141] *Steveson v. United Subcontractors, Inc.*, 2008 WL 5114270, at *3 (W.D. Wash. Dec. 2, 2008) (dismissing request for injunctive relief because agreement stated noncompete would apply following a termination with or without cause).

[142] *Labriola v. Pollard Grp., Inc.*, 100 P.3d 791, 794 (Wash. 2004); *Knight, Vale & Gregory*, 680 P.2d at 453.

[143] *Labriola*, 100 P.3d at 795 (continued employment did not serve as consideration where employer did not incur additional duties or obligations); *Allyis, Inc. v. Schroder*, 2017 WL 751329, at *6 (Wash. Ct. App. Feb. 27, 2017) (same).

[144] *Labriola*, 100 P.3d at 794 (independent consideration may include increased wages, a promotion, bonus, a fixed term of employment, or perhaps access to protected information).

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the future. In addition, noncompetition covenants entered into after the start of employment must be supported by independent consideration; continued at-will employment is insufficient consideration under the law.

2.3(b)(iii) *Ability to Modify or Blue Pencil a Noncompete*

When a restrictive covenant is found to be unreasonable in scope, some states refuse to enforce its terms entirely (sometimes referred to as the "all-or-nothing" rule), while others may permit the court to "blue pencil" or modify an agreement that is unenforceable as written. *Blue penciling* refers to the practice whereby a court strikes portions of a restrictive covenant it deems unenforceable. *Reformation*, on the other hand, refers to a court modifying a restrictive covenant to make it enforceable, which may include introducing new terms into the agreement (sometimes referred to as the "reasonableness" rule). By rewriting an overly broad restrictive covenant rather than simply deeming it unenforceable, courts attempt to effectuate the parties' intentions as demonstrated by their agreement to enter into a restrictive covenant in the first place.

Washington courts may partially enforce an otherwise-defective provision where such enforcement is possible without injury to the public and without injustice to the parties.[145] The court may therefore partially enforce, or reword, an otherwise overbroad or unreasonable covenant. For example, in one instance, the court found the geographic area and time restrictions of the agreement to be unreasonable and therefore reduced the time by half and limited the geographic restriction significantly.[146]

Beginning January 1, 2020, if a court or arbitrator determines that a noncompetition covenant violates the new law, or "reforms, rewrites, modifies, or only partially enforces" a noncompetition covenant, the employer is required to pay the employee actual damages or a statutory penalty of $5,000, whichever is greater, plus reasonable attorneys' fees, expenses, and costs incurred.

2.3(b)(iv) *State Trade Secret Law*

The Washington Supreme Court has stated that trade secret law is important in maintaining and promoting standards of commercial ethics and fair dealing.[147] Following this line of thought, the court has taken a liberal stance in protecting trade secrets. The court has interpreted the term *trade secret* expansively.[148] The court has also recognized that the law provides a broad mechanism for preserving the confidentiality of trade secrets.[149]

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[145] *Wood v. May*, 438 P.2d 587, 591 (Wash. 1968) (court exercising its equity powers may enforce a noncompete to the extent such restraint would be reasonable and lawful, and where partial enforcement is possible without injury to the public and without injustice to the parties); *see also Sheppard v. Blackstock Lumber Co.*, 540 P.2d 1373, 1377 (Wash. 1975) (modification allowed in forfeiture-for-competitive activity provision in a profit-sharing retirement plan).

[146] *Armstrong v. Taco Time Int'l, Inc.*, 635 P.2d 1114, 1117-18 (Wash. Ct. App. 1981).

[147] *Boeing Co. v. Sierracin Corp.*, 738 P.2d 665, 679 (Wash. 1987).

[148] *Progressive Animal Welfare Soc. v. University of Wash.*, 884 P.2d 592, 603 (Wash. 1994).

[149] 884 P.2d at 603.

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Like many states, Washington has adopted a version of the UTSA, known as the Washington Trade Secrets Act (WTSA).[150] To establish a claim for misappropriation of a trade secret under the WTSA, the plaintiff must first prove that a legally protectable trade secret exists.[151]

Definition of a Trade Secret. A *trade secret* is defined as:

> information, including a formula, pattern, compilation, program, device, method, technique, or process that:
>
> (A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[152]

Washington law also requires that a plaintiff show there is economic value specifically because competitors do not know the secret.[153]

Misappropriation of a Trade Secret. Once the plaintiff satisfies the burden of proving that a legally protectable trade secret exists, it must establish misappropriation.[154] *Misappropriation* under the WTSA can occur in two ways: (1) "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;" or (2) unauthorized use or disclosure of a trade secret.[155] As for the latter scenario, the WTSA defines misappropriation to include disclosure or use of another's trade secret, without express or implied permission, by a person who:

1. used improper means to acquire the knowledge;[156]
2. knew or had reason to know that the knowledge passed on to them was obtained improperly, under various circumstances;[157] or
3. "before a material change of the his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake."[158]

Generally, agreements between employers and employees that identify confidential and/or proprietary information provide a basis for establishing that the employee was aware of a duty to maintain the

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[150] WASH. REV. CODE §§ 19.108.010 *et seq*.

[151] *Boeing Co.*, 738 P.2d at 674.

[152] WASH. REV. CODE § 19.108.010.

[153] *Precision Moulding & Frame, Inc. v. Simpson Door Co.*, 888 P.2d 1239, 1242-43 (Wash. Ct. App. 1995); *see also Buffets, Inc. v. Klinke*, 73 F.3d 965, 968-69 (9th Cir. 1996) (interpreting Washington law and holding that a restaurant chain's recipes lacked the requisite novelty and economic value to be accorded trade secret status).

[154] *Precision Moulding & Frame, Inc.*, 888 P.2d at 1242.

[155] WASH. REV. CODE § 19.108.010(2).

[156] WASH. REV. CODE § 19.108.010(2)(b)(i).

[157] WASH. REV. CODE § 19.108.010(2)(b)(ii) (describing three ways in which trade secrets could be passed on improperly so as to constitute misappropriation).

[158] WASH. REV. CODE § 19.108.010(2)(b)(iii).

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confidentiality of the information. An employee's failure to abide by the agreement or to maintain the secrecy of the information may then be actionable under the WTSA, or under general contract law. The WTSA preempts tort claims that are dependent on the existence of trade secrets, such as claims for misuse of confidential information and intentional interference.[159]

2.3(b)(v) *State Guidelines on Employee Inventions & Ideas*

Washington law allows an employer to require its employees to assign invention rights "directly related to the business of the employer" or "to the employer's actual or demonstrably anticipated research or development," even if such inventions are developed on an employee's own time or without the employer's resources.[160] An assignment of an employee's inventions must provide the employee with the following written notification:

> [This] agreement does not apply to an invention for which no equipment, supplies, facilities, or trade secret information of the employer was used and which was developed entirely on the employee's own time, unless (a) the invention relates (i) directly to the business of the employer, or (ii) to the employer's actual or demonstrably anticipated research or development, or (b) the invention results from any work performed by the employee for the employer.[161]

This notification may be included as part of the inventions assignment agreement signed by an employee; it need not be made on a separate written notification.[162] If an invention assignment does not contain the required notification, the assignment agreement will be limited as necessary to comply with the statute.[163]

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

3.1(a)(i) *Federal Guidelines on Posting & Notification Requirements*

Several federal employment laws require that specific information be posted in the workplace. Posting requirements vary depending upon the law at issue. For example, employers with fewer than 50 employees are not covered by the Family and Medical Leave Act and, therefore, would not be subject to the law's posting requirements. Table 5 details the federal workplace posting and notice requirements.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**

[159] WASH. REV. CODE § 19.108.900.

[160] WASH. REV. CODE § 49.44.140.

[161] WASH. REV. CODE § 49.44.140(3).

[162] *Waterjet Tech., Inc. v. Flow Int'l Corp.*, 996 P.2d 598 (Wash. 2000).

[163] 996 P.2d at 602.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[164]
Equal Employment Opportunity (EEO) Act ("EEO is the Law" Poster)	Employers must post and keep posted in conspicuous places upon their premises, in an accessible format, a notice that describes the federal laws prohibiting discrimination in employment.[165]
Fair Labor Standards Act (FLSA)	Employers must post and keep posted a notice, summarizing employee rights under the FLSA, in conspicuous places in every establishment where employees subject to the FLSA are employed.[166]
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[167]
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	Farm labor contractors, agricultural employers, and agricultural associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language common to migrant or seasonal agricultural workers who are not fluent or literate in English.[168]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates must at all times display and make available to employees a poster explaining the conditions under which the special wage rate applies. Where an employer finds it inappropriate to post notice, directly providing the poster to its employees is sufficient.[169]
Occupational Safety and	Employers must post a notice or notices informing employees of the Fed-

[164] 29 C.F.R. § 801.6. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/eppa.htm.

[165] 29 C.F.R. §§ 1601.30 (Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act), 1627.10 (Age Discrimination in Employment Act). This poster is available in English, Spanish, Arabic, and Chinese at https://www1.eeoc.gov/employers/poster.cfm.

[166] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

[167] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

[168] 29 C.F.R. §§ 500.75, 500.76. This poster is available in English, Spanish, Haitian Creole, Vietnamese, and Hmong at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.htm.

[169] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Health Act ("the Fed-OSH Act")	OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[170]
Uniformed Service Employment and Reemployment Rights Act (USERRA)	Employers must provide notice about USERRA's rights, benefits, and obligations to all individuals entitled to such rights and benefits. Employers may provide notice by posting or by other means, such as by distributing or mailing the notice.[171]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[172] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy Statement (in addition to the required "EEO is the Law" Poster), which indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[173]
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[174]
Employee Rights Under the Service Contract or Walsh-Healey Public Contracts Acts Poster	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice, where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by attaching a notice to the contract, or may post the notice at the worksite.[175]

[170] 29 C.F.R § 1903.2. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

[171] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[172] 41 C.F.R. § 60-1.42; *see also* 41 C.F.R. § 60-741.5(a) (requiring all agencies and contractors to include an equal opportunity clause in contracts, in which the contractor agrees to post this notice). This poster is available at https://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

[173] 41 C.F.R. §§ 60-300.44, 60-741.44.

[174] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[175] 29 C.F.R. § 4.6(e); 29 C.F.R. § 4.184. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/sca.htm.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is visible to prospective employees and all employees who are verified through the system.[176]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[177]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[178]
Office of the Inspector General's Fraud Hotline Poster	Certain government contractors must prominently post notice, where accessible to employees, addressing fraud and how to report such misconduct.[179]
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[180] **Pay Period or Monthly Notice.** A contractor must inform an employee in

[176] U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., *E-Verify Memorandum of Understanding for Employers*, *available at* https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf. The poster is available at https://preview.e-verify.gov/sites/default/files/everify/posters/IER_RightToWorkPoster%20Eng_Es.pdf. According to the U.S. Citizenship and Immigration Services, this poster must be displayed in English and Spanish.

[177] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[178] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[179] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

[180] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[181]
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[182]
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where accessible to employees, summarizing the applicable minimum wage rate and other required information.[183]

3.1(a)(ii) *State Guidelines on Posting & Notification Requirements*

Table 6 details the state workplace posting and notice requirements. While local ordinances are generally excluded from this publication, some local ordinances may have posting requirements, especially in the minimum wage or paid leave areas. Local posting requirements may be discussed in the table below or in later sections, but the local ordinance coverage is not comprehensive.

[181] 29 C.F.R. § 13.5.

[182] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[183] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

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Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Benefits & Leave: Domestic Violence Leave	Employers must post conspicuous notice of leave available to victims of domestic violence, sexual assault, or stalking. The required material is included in the poster provided by the state, entitled "Your Rights as a Worker in Washington State."[184]
Benefits & Leave: Family Care Act & Leave Policies	Employers must post conspicuous notice that employers that offer paid leave must allow employees to choose what type of leave to take to care for certain ill family members. The required material is included in the poster provided by the state, entitled "Your Rights as a Worker in Washington State." Employers must also post a copy of their leave policies, if any, in a conspicuous place.[185]
Benefits & Leave: Paid Family and Medical Leave	Employers must post notice in conspicuous places on the premises where notices to employees and applicants are customarily posted, a notice prepared or approved by the commissioner that sets forth excerpts or summaries of the law and information pertaining to filing a complaint.[186]
Child Labor Law	Employers of minors must post a copy of the child labor law in the workplace. The required material is included in the poster provided by the state, entitled "Your Rights as a Worker in Washington State."[187]
Domestic Violence Resources	All employers must post a poster provided by the Employment Security Department regarding domestic violence. The poster includes a space where the employer must provide the names of community resources regarding domestic violence. It must be posted where other required employment posters are located.[188]
SeaTac Minimum Wage Ordinance Bulletin	Covered SeaTac employers—generally speaking, those in the hospitality and transportation industries—must provide written notice, updated annually, informing employees of the current minimum wage. The City Manager prepares a yearly bulletin for employer use.[189]

[184] WASH. REV. CODE § 49.76.130. This poster (F700-074-909) is available in English and Spanish at https://www.lni.wa.gov/forms-publications/required-workplace-posters.

[185] WASH. REV. CODE § 49.12.275; WASH. ADMIN. CODE § 296-130-050. This poster (F700-074-909) is available in English and Spanish at https://www.lni.wa.gov/forms-publications/required-workplace-posters.

[186] Wash. Rev. Code § 50A.20.020; WASH. REV. CODE § 49.76.130. Poster is available at https://paidleave.wa.gov/employer-roles-responsibilities/ in English and Spanish.

[187] WASH. ADMIN. CODE §§ 296-126-080, 296-128-400(13). This poster (F700-074-909) is available in English and Spanish at https://www.lni.wa.gov/forms-publications/required-workplace-posters.

[188] WASH. REV. CODE § 50.12.330. This poster is available at https://media.esd.wa.gov/esdwa/Default/ESDWAGOV/about-employees/DomesticViolence-Poster_190812.pdf.

[189] SEATAC, WASH., MUN. CODE § 7.45.050. The current bulletin is available at http://www.ci.seatac.wa.us/Modules/ShowDocument.aspx?documentid=13475. Additional information about the ordinance is available at http://www.ci.seatac.wa.us/index.aspx?page=681. The City of SeaTac also has a paid sick leave ordinance, but it does not include any notice or posting requirements.

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Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Seattle Fair Chance Employment Ordinance	Employers must display a poster describing the rights afforded under the ordinance in a conspicuous and accessible location where any of their employees work. If display of the poster is not feasible, including situations where employees work remotely or do not have a regular workplace, employers may provide the poster on an individual basis in an employee's primary language in physical or electronic format that is reasonably conspicuous and accessible.[190]
Seattle Paid Sick & Safe Time Ordinance Notice & Poster	The Seattle Paid Sick and Safe Time ordinance imposes notice and posting requirements on covered employers. These requirements cover all employees who work in Seattle, even if they are not eligible for leave. First, an employer must provide written notice to all employees detailing its policy and procedure for satisfying the ordinance's requirements. This notice must include information about: • the employee's right to paid sick and safe time under the law; • the employer's designation of a "benefit year" (*i.e.*, calendar year, tax year, etc.) for purposes of calculating wages and benefits; • the employer's tier size; • the rate of accrual; and • use and carry-over of hours; • the manner of updating employees on leave accrual on paydays; • notification requirements for absences and requesting leave; and • prohibitions against retaliation for use of paid sick and safe time. The enforcement agency also requires that employers define family member for sick time and family member/household member for safe time purposes, establish a method and point of contact for requesting the time, and describe the expected timeline for notice of foreseeable and unforeseeable absences. The enforcement agency recommends certain additional information be included in employee notices. The City of Seattle has prepared a model notice for employer use.[191] Second, each time wages are paid, employers must provide a written statement of the updated amount of paid leave time available to each employee for use as either sick or safe time. Employers can include this

[190] SEATTLE, WASH., MUN. CODE § 14.17.025. The poster must be displayed in English and in the primary language of the employee(s) at the particular workplace.

[191] SEATTLE, WASH., MUN. CODE § 14.16.045. Details about the Seattle ordinance, including a policy checklist and sample policy, are available at http://www.seattle.gov/laborstandards/ordinances/paid-sick-and-safe-time.

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Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	information on paystubs or memos, or can establish an online system for employee access.[192] Third, employers must conspicuously display a poster in accessible locations, which informs employees about: • the right to paid sick and safe time guaranteed by the law; • the amount of paid sick and safe time, and the terms of its use; • the right to be protected from retaliation for exercising in good faith the rights protected by the law; and • the right to file a complaint with the Seattle Office of Labor Standards or bring a civil action for violation. Employers must use the poster prepared by the City of Seattle and must display the poster English and in the primary language(s) of the employee(s) at the particular workplace.[193]
Seattle Secure Scheduling Ordinance Poster	The Seattle Secure Scheduling Ordinance requires covered employers (certain retail and food services establishments) to post a notice informing employees of their rights under the law. The Seattle Office for Civil Rights will prepare a poster to be displayed.[194] This ordinance also requires employers to post the employees' written work schedule at least 14 calendar days before the first day of that schedule. That schedule notice must be posted, on an ongoing basis, in a conspicuous and accessible location, in English and any other primary languages spoken by employees at that workplace. The notice must include all regular and on-call shifts.[195] Additional notice is required before employers hire new employees from an external pool or agency, to fill available hours.[196] Before hiring, employers must post a conspicuous notice describing additional hours of

[192] SEATTLE, WASH., MUN. CODE § 14.16.030; *see also* City of Seattle, *Paid Sick and Safe Time Ordinance Questions and Answers* (rev. July 26, 2016), *available at* https://www.seattle.gov/Documents/Departments/LaborStandards/OLS-QA-PSST.pdf.

[193] SEATTLE, WASH., MUN. CODE § 14.16.045. The Seattle Labor Standards poster is available in English, Amharic, Chinese, French, Khmer, Korean, Oromo, Somali, Spanish, Tagalog, Thai, Tigrigna, and Vietnamese at https://www.seattle.gov/laborstandards/resources-and-language-access/resources/posters.

[194] SEATTLE, WASH., MUN. CODE § 14.22.060. The poster is available at https://www.seattle.gov/laborstandards/ordinances/secure-scheduling.

[195] SEATTLE, WASH., MUN. CODE § 14.22.040.

[196] While SeaTac, Washington has a similar law obligating employers to offer available hours to existing staff, that law does not include any particular notice or record-keeping requirements. *See* SEATAC, WASH., MUN. CODE §§ 7.45.010, 7.45.030.

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Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	work to existing employees, for at least 3 consecutive calendar days. This notice must include: • description and title of the position; • required qualifications; • total hours of work offered; • schedule of available shifts; • whether the available shifts will occur the same time each week; and • length of time the employer anticipates the need for coverage for these additional hours. This notice offering access to hours for current employees must be posted in English and any other primary languages spoken by employees at that workplace. The Office for Civil Rights will prepare a template.[197]
Seattle Workplace Poster	Seattle requires employers to display a poster in a conspicuous location at the workplace, informing employees of their rights under the various city ordinances, including the minimum wage, wage theft, fair chance, and paid sick time laws. The Seattle Office of Labor Standards provides a poster in English, Spanish, and numerous other languages.[198]
Tacoma Minimum Wage Ordinance Notice	Tacoma employers must give notice to employees about the minimum wage ordinance, and notice must explain: • their entitlement to minimum wage and the current rate; • their rights under the ordinance; • the prohibition against retaliation; and • their rights to file charges for unpaid wages or retaliation. The city provides a model notice for employer use. Employers can comply by posting the notice in a conspicuous and accessible place. Alternatively, notice may be given to employees in employee handbooks or other written guidance, or can be distributed to new employees upon hiring. Electronic distribution for either such option is permissible.[199]

[197] SEATTLE, WASH., MUN. CODE § 14.22.055.

[198] *See, e.g.*, SEATTLE, WASH., MUN. CODE §§ 14.16.045, 14.17.025, 14.19.045, and 14.20.025. This poster is available at City of Seattle Customer Service Centers or online at https://www.seattle.gov/laborstandards/resources-and-language-access/resources/posters. The English version is available at https://www.seattle.gov/documents/Departments/LaborStandards/2024_OLS_MW_WorkplacePoster_web.pdf, and the Spanish version is available at https://www.seattle.gov/Documents/Departments/LaborStandards/Spanish.pdf. The poster is also available in Amharic, Arabic, Chinese, Khmer, Oromo, Somali, Tagalog, Tigrigna, and Vietnamese.

[199] TACOMA, WASH., MUN. CODE § 18.20.100. The current notice is available at http://cms.cityoftacoma.org/finance/minimum-wage/minimum-wage-notice.pdf. Additional information about the ordinance is available at http://www.cityoftacoma.org/cms/One.aspx?portalId=169&pageId=89891.

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Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Tacoma Paid Sick & Safe Time Ordinance Notice	Tacoma employers must give notices to employees about the paid sick and safe time ordinance, the time accrued by employees, and any related policies they adopt. First, notice about the ordinance must explain for employees: • their entitlement to leave; • the amount of leave and terms of use guaranteed under law; • the prohibition against retaliation; and • their rights to file charges if earning, use, or payment of leave is denied, or if an employer retaliates. Notice must be provided in English and in an employee's primary language, if the city has prepared such a notice. The city provides a model notice for employer use in English and several other languages. Employers can comply by posting the notice in a conspicuous and accessible place. Alternatively, notice may be given to employees in employee handbooks or other written guidance, or can be distributed to new employees upon hiring. Electronic distribution for either such option is permissible.[200] Second, employers that institute certain practices must maintain a written policy that is made readily available to employees. Notice is required if employers adopt policies concerning: • required written documentation or other verification for leave use; • minimum paid leave usage; • donation of paid leave; • a premium pay program; • payout or retention of accrued paid leave when employment ends; • additional or substitute hours/shifts & shift swapping; or • payout of accrued paid leave in lieu of carry-over.[201] Third, employers must adopt a system for notifying employees about leave hours. They can list remaining available leave time on each pay stub or establish an online system for employee access.[202]
Unemployment	Employers must post and maintain conspicuous notice informing

[200] TACOMA, WASH., MUN. CODE § 18.10.050. The current notice is available in English, Spanish, Korean, Russian, Cambodian, and Vietnamese at http://www.cityoftacoma.org/cms/One.aspx?portalId=169&pageId=87935.

[201] TACOMA, WASH., PAID LEAVE R. 6.22.2, 3.2, 4.1, 5.8, 9.2, 11.1, 12.6, *available at* http://cms.cityoftacoma.org/finance/paid-leave/tacoma-paid-leave-rules-and-regulations.pdf; *see also* City of Tacoma, *Does Your Paid Time Off Policy Check Out?* (Apr. 2016), *available at* http://cms.cityoftacoma.org/Finance/paid-leave/PTO-Policy-Checklist.pdf.

[202] TACOMA, WASH., MUN. CODE § 18.10.030.

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Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Compensation	employees of benefits, including how to file a claim. The required material is included in the poster provided by the state.[203]
Warehouse Worker Quota	**Effective July 1, 2024**, employers—that employ or control the wages of 100 or more employees at a single warehouse distribution center in the state, or 1,000 or more employees at one or more centers in the state-must provide each employee a written description of any quotas applicable to them, including quantified numbers of tasks to be performed, or materials to be produced or handled, any potential adverse action resulting from failing to meet these quotas, and any incentives associated with meeting the quotas. These must be provided within 30 days of July 1, 2024. Employers must also provide notice whenever there is a change to the quota before the employee will be subject to the new standard. This notice may be verbal or in writing, and must be provided as soon as possible. The employer must also provide an updated written description of the quota to the employee within two business days of the change. The written notice of the quota must be in plain language and in the employee's preferred language.[204]
Workers' Compensation: Certificate of Coverage	Each employer (unless self-insured) must obtain a certificate of coverage from the Department of Labor and Industries, for each place of business, and must post it conspicuously at respective location.[205]
Workers' Compensation: Notice to Employees—If a Job Injury Occurs (State Fund Employer)	Employers must post and maintain conspicuous notice informing employees of benefits, including how to file a claim. The required material is included in the poster provided by the state, entitled "Notice to Employees—If a Job Injury Occurs." This poster should be used by employers that participate in the state's workers' compensation program.[206]

[203] WASH. REV. CODE §§ 50.20.140, 50.44.045; WASH. ADMIN. CODE § 192-310-100. This poster (EMS 9874) is available at https://media.esd.wa.gov/esdwa/Default/ESDWAGOV/about-employees/ESD-unemployment-benefits-poster.pdf (English) and https://media.esd.wa.gov/esdwa/Default/ESDWAGOV/Espanol/ESD-unemployment-benefits-poster-sp.pdf (Spanish).

[204] H.B. 1762.

[205] WASH. REV. CODE § 51.04.120.

[206] WASH. ADMIN. CODE § 296-800-20005. This poster (F242-191-909) is available in English and Spanish at https://www.lni.wa.gov/forms-publications/f242-191-909.pdf.

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Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Workers' Compensation: Notice to Employees—If a Job Injury Occurs (Self-Insured Businesses)	Employers must post and maintain conspicuous notice informing employees of benefits, including how to file a claim. The required material is included in the poster provided by the state, entitled "Notice to Employees—If a Job Injury Occurs." This poster should be used by employers that obtain their own insurance coverage.[207]
Workplace Safety: Job Safety & Health Law Poster	Employers must post and maintain conspicuous notice informing employees of their rights to a safe workplace, to file complaints, etc. The required material is included in the poster provided by the state, entitled "Job Safety and Health Law."[208]
Workplace Safety: No Smoking Signs	Smoking is generally prohibited in places of employment. "No Smoking" signs must be posted at each entrance to the workplace, and in the case of retail stores and retail service establishments, signs must be posted conspicuously at each entrance and in prominent locations throughout the facility.[209]
"Your Rights As a Worker in Washington State" Poster	As indicated earlier in this table, this poster is mandatory and covers several topics. In addition to those topics already mentioned, the poster informs employees about wage and hour issues, meal and rest breaks, family and medical leave, military spousal leave, etc. These posters must be displayed conspicuously.[210]
Employee Free Choice Act	**Effective June 6, 2024**, employers are required to post a notice of employee rights in a place normally reserved for employment-related notices and in a place commonly frequented by employees.[211]

3.1(b) *Record-Keeping Requirements*

3.1(b)(i) *Federal Guidelines on Record Keeping*

Table 7 summarizes the federal record-keeping requirements.

Table 7. Federal Record-Keeping Requirements

[207] WASH. REV. CODE § 51.14.100. This poster (F207-037-909) is available in English and Spanish at https://www.lni.wa.gov/forms-publications/required-workplace-posters.

[208] WASH. REV. CODE § 49.17.060; WASH. ADMIN. CODE § 296-800-20005; *see also* WASH. ADMIN. CODE § 296-155-100. This poster (F416-081-909) is available in English and Spanish at https://www.lni.wa.gov/forms-publications/required-workplace-posters.

[209] WASH. REV. CODE § 70.160.050.

[210] *See, e.g.*, WASH. REV. CODE §§ 50A.20.020, 49.76.130), and 49.12.275. This poster (F700-074-909) is available in English and Spanish at https://www.lni.wa.gov/forms-publications/required-workplace-posters.

[211] SB 5778.

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Records	Notes	Retention Requirement
Age Discrimination in Employment Act (ADEA): Payroll Records	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth; • occupation; • rate of pay; and • compensation earned each week.[212]	At least 3 years from the date of entry.
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[213]	At least 1 year from the date of the personnel action to which any records relate.
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[214]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the Americans with Disabilities Act (ADA): Personnel Records	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants; • other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and	At least 1 year from the date the records were made, or from the date of the personnel action involved,

[212] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

[213] 29 C.F.R. § 1627.3(b).

[214] 29 C.F.R. § 1627.3(b).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• selection for training or apprenticeship.[215]	whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[216]	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[217]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct	At least 3 years following the date on which the polygraph examination was conducted.

[215] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[216] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[217] 29 C.F.R. § 1602.7.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.[218]	
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This includes vouchers, worksheets, receipts, and applicable resolutions.[219]	At least 6 years after documents are filed or would have been filed but for an exemption.
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[220]	3 years.
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[221]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins;	3 years from the last day of entry.

[218] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[219] 29 U.S.C. § 1027.

[220] 29 C.F.R. § 1620.32(a).

[221] 29 C.F.R. § 1620.32(b).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[222] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips; • weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); • amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable federal minimum wage);	

[222] 29 C.F.R. §§ 516.2, 516.5.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• hours worked each workday in which an employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[223]	
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees, and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.[224]	3 years from the last day of entry.
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j); • certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and • sales and purchase records.[225]	At least 3 years from the last effective date.

[223] 29 C.F.R. § 516.28.

[224] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

[225] 29 C.F.R. § 516.5.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Labor Standards Act (FLSA): Other Records	*In addition to other FLSA requirements, employers must preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[226]	At least 2 years from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement. *Covered employers with no eligible employees must only maintain the following records:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation;	At least 3 years.

[226] 29 C.F.R. § 516.6.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records required by the second series with respect to any secondary employees.* *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[227]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to	At least 4 years after the date the tax is due or paid, whichever

[227] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	employees for employment services. The records must show with respect to each employee receiving such remuneration: ▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[228]	is later.
Immigration	Employers must retain all completed Form I-9s.[229]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including	Required to be maintained for "so long as the contents [of the

[228] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[229] 8 C.F.R. § 274a.2.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.[230]	records] may become material in the administration of any internal revenue law;" this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[231]	4 years after the return is due or the tax is paid, whichever is later.
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[232]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation;	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.

[230] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[231] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[232] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[233]	
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and	At least 30 years.

[233] 26 C.F.R. § 31.6001-4.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[234]	
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests; • medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:* • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[235]	Duration of employment plus 30 years.
Workplace Safety: Analyses Using Medical and Exposure Records	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual employee exposure or medical records, or information collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[236]	At least 30 years.
Workplace	*Employers must preserve and retain records of employee*	5 years following

[234] 29 C.F.R. § 1910.1020(d).

[235] 29 C.F.R. § 1910.1020(d).

[236] 29 C.F.R. § 1910.1020(d).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Safety: Injuries and Illnesses	*injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[237]	the end of the calendar year that the record covers.
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and • AAP for the immediately preceding AAP year and documentation of good faith effort.[238]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; ▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not have a contract of at least $150,000, the minimum retention period is one year from the date of making the record or the

[237] 29 C.F.R. §§ 1904.33, 1904.44.

[238] 41 C.F.R. § 60-1.12(b).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; ▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[239]	personnel action, whichever occurs later.
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[240]	Until final disposition of the complaint, compliance review or action.
Minimum Wage Under Executive Orders Nos. 13658 (contracts entered into on or after January 1, 2015), 14026	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s); • rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and	3 years.

[239] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[240] 41 C.F.R. §§ 60-1.12, 60-741.80.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
(contracts entered into on or after January 30, 2022)	• total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[241]	
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee to provide, including copies of any certification or documentation provided by an employee; • any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract; • the regular pay and benefits provided to an employee for each use of paid sick leave; and	During the course of the covered contract as well as after the end of the contract.

[241] 29 C.F.R. § 23.260.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[242]	
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and • worker or employee employed in conjunction with the project.[243]	At least 3 years after the work.
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage; • fringe benefits; • total daily and weekly compensation; • the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and • a copy of the contract.[244]	At least 3 years from the completion of the work records containing the information.

[242] 29 C.F.R. § 13.25.

[243] 29 C.F.R. § 5.5.

[244] 29 C.F.R. § 4.6.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[245]	At least 3 years from the last date of entry.

3.1(b)(ii) *State Guidelines on Record Keeping*

Table 8 summarizes the state record-keeping requirements.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Benefits & Leave: Family and Medical Leave	Employers must keep and maintain at their places of business, employment records demonstrating compliance with the state family and medical leave law. All reports, records, and information concerning employee participation in an approved voluntary plan also must be retained and provided to the commissioner upon request.[246]	6 years.
Public Works Contracts	*Each contractor engaged in a public works project must retain accurate payroll records for each employee, including:* • name, address, and Social Security number; • trade or occupation; • straight time rate; • hourly rate of usual benefits; • overtime hours worked each day and week; • any executed employee authorizations; and • actual rate of wages paid for each worker.[247]	3 years from date of acceptance of the project by contract awarding agency.
References	Employers that decide to disclose information in response to a	At least 2 years.

[245] 41 C.F.R. § 50-201.501.

[246] WASH. REV. CODE §§ 50A.26, 50A.33..

[247] WASH. ADMIN. CODE §§ 296-127-320, 296-127-022.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	reference request to prospective employers and/or employment agencies must keep a written record of the identity of the person or entity to whom the information was disclosed.[248]	
SeaTac Minimum Wage Ordinance, *and* Paid Sick & Safe Time Ordinance	*Covered SeaTac employers—generally speaking, those in the hospitality and transportation industries—must retain records showing, for each employee:* • hours worked; • wages and benefits provided; and • any paid sick and safe time taken. Employers need not modify their record-keeping practices if existing records reasonably indicate this information.[249]	2 years.
Seattle Paid Sick & Safe Time Ordinance	Covered Seattle employers must keep records showing hours worked by employees, as well as paid sick and safe time used by covered employees. Employers need not alter existing record-keeping practices but may comply with this requirement using any records that reasonably indicate all hours worked in Seattle, accrued leave time, and used leave time. Special rules apply concerning the tracking of hours worked and leave used, particularly for exempt employees and for employers with universal leave policies.[250]	3 years from the date the hours are worked, or from the date such leave time was used.
Seattle Secure Scheduling Ordinance	*Covered Seattle employers must keep records showing compliance with the scheduling ordinance, including:* • the necessary written good faith estimates of work schedules; • written records of *bona fide* reasons for denying employee requests to alter hour in light of a major life event; • work scheduled; • payroll records, indicating any additional compensation paid under the ordinance; • written records of employee-requested changes; • written employer mass communications concerning the available of extra hours; • any disciplinary records supporting a reduction in hours;	3 years.

[248] WASH. REV. CODE § 4.24.730.

[249] SEATAC, WASH., MUN. CODE § 7.45.070.

[250] SEATTLE, WASH., MUN. CODE § 14.16.050. Additional information can be found in the rules concerning the ordinance, which are available at https://www.seattle.gov/laborstandards/ordinances/paid-sick-and-safe-time (rules concerning record-keeping requirements are found at SHRR 70-430 to 70-450).

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• written notices of additional hours of work; • records for employees who opted out of receiving notice of extra hours of work; and • written confirmation from employees (including employees on the "access to hours" list) that they are not interested in extra hours of work if the employer reduces the notice requirements.[251]	
Tacoma Minimum Wage Ordinance	*Tacoma employers must keep records for each Tacoma employee, documenting:* • hours worked, on a daily and weekly basis; and • wages paid, including the total earned, any deductions, and net pay for each pay period.[252]	3 years.
Tacoma Paid Sick & Safe Time Ordinance	*Tacoma employers must keep records for each Tacoma employee, documenting:* • name and hire date; • hours worked; • date employee was eligible to use paid leave; • accrued amount paid leave; and • paid leave used, including the dates and time used.[253]	3 years.
Washington State Paid Sick Leave	Employers must keep and preserve payroll or other records containing the following paid sick leave related information and data for each covered employee: • paid sick leave accruals each month, and any unused paid sick leave available for use by employee; • paid sick leave reductions each month including but not limited to: paid sick leave used by an employee, paid sick leave donated to a co-worker though a shared leave program, or paid sick leave not carried over to the following year; • the date employment commenced; • (effective January 1, 2024) paid sick leave paid to CBA covered construction workers before usage and leave remaining after payment; • (effective January 1, 2024) paid sick leave paid out to CBA covered construction workers when employment ended;	At least 3 years.

[251] SEATTLE, WASH., MUN. CODE § 14.22.060.

[252] TACOMA, WASH., MUN. CODE § 18.20.110.

[253] TACOMA, WASH., MUN. CODE § 18.10.060; TACOMA, WASH., PAID LEAVE R. 6.2, *available at* http://cms.cityoftacoma.org/finance/paid-leave/tacoma-paid-leave-rules-and-regulations.pdf.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	and • (effective January 1, 2024) dates of separation.[254]	
Unemployment Compensation	*Washington law requires every employer to maintain true and accurate records for administration of the unemployment compensation program, including:* • name and Social Security number; • beginning date of employment and separation date, if applicable; • basis upon which wages are paid; • location where services are performed; • summary of time record showing the calendar day or days of the week work was performed; • actual number of hours worked each day; • total gross pay period earnings; • amount and purpose of amounts withheld from earnings; and • the cause for any discharge or quit (if known).[255]	4 calendar years following the calendar year employment occurred.
Wages, Hours & Payroll: Industrial Welfare Act	*The Industrial Welfare Act requires all employers to keep the following basic employee information:* • names of all employees; • address and occupation of each employee; • dates of employment; • rate of pay and amount paid each pay period; and • hours worked each day and each week. Employers must also make these records available to their employees, upon request, at any reasonable time.[256]	At least 3 years.
Wages, Hours & Payroll: Minimum Wage Act	*Employers must maintain the following records concerning all employees:* • name (and employee's identifying symbol or number, if such is used in place of name on any time, work, or payroll record – must be the same name used for Social Security record purposes); • home address; • occupation; • date of birth, if under 18;	At least 3 years.

[254] WASH. ADMIN. CODE § 296-128-010 (12-14).

[255] WASH. ADMIN. CODE § 192-310-050.

[256] WASH. REV. CODE § 49.12.050; WASH. ADMIN. CODE § 296-126-050.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• time of day and day of week on which employee's workweek begins; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages (total earnings or wages due for hours worked during the workday or workweek, including all earnings or wages due during any overtime worked, but exclusive of overtime premium); • total overtime premiums for the workweek (the excess compensation for overtime worked which amount is over and above all straight-time earnings or wages also earned during overtime worked); • total additions to or deductions from wages each pay period (plus a record of the dates, amounts, and nature of additions and deductions); • total wages paid each pay period; and • dates of payment and the pay period covered by payment; • paid sick leave accruals each month, and any unused paid sick leave available for use by the employee; • paid sick leave reductions each month, including but not limited to: paid sick leave used by an employee, paid sick leave donated to a co-worker through a shared leave program, or paid sick leave not carried over to the following year; • (effective January 1, 2024) paid sick leave paid to CBA covered construction workers before usage, and leave remaining after payment; • date of commencement of employee's employment • (effective January 1, 2024) paid sick leave paid out to CBA covered construction worker when employment ended; and • (effective January 1, 2024) date(s) of separation. An employer may use symbols where names or figures are called for so long as symbols are uniform and defined.[257]	
Wages, Hours & Payroll: Minimum Wage Act—Truck or	*Special record-keeping requirements exist for employers that employ individuals as truck or bus drivers subject to the provisions of the federal Motor Carrier Act. These employers must also keep:*	4 years.

[257] WASH. REV. CODE § 49.46.070; WASH. ADMIN. CODE §§ 296-128-010, 296-128-020.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Bus Drivers	• payroll and accounting records, including payroll ledgers; • all check registers and canceled checks covering both payroll and general disbursements; • general and subsidiary ledgers; • disbursement and petty cash records; and • profit and loss statements or financial statements.[258]	
Workers' Compensation: Employment Records	*Washington law requires every employer to maintain records for each covered worker necessary to facilitate determination of workers' compensation premiums due by law. For each employee, employers must record:* • name and Social Security number; • beginning date of employment; • date of separation, if applicable; • basis on which wages are paid to the worker; • number of units earned or produced for each piecework employee; • risk classification applicable to each worker whenever the hours of an employee is being divided between categories; • number of hours actually worked unless another basis of computing hours is prescribed; • a summary time record showing days worked and the number of hours worked each day; • total gross pay period earnings; • specific sums withheld from earnings and the purpose for the withholding; and • net pay earned.[259]	3 full calendar years following the calendar year in which employment occurred.
Workers' Compensation: Business & Financial Records	*In addition to the above employment-related documents, employers must maintain these business and financial records to comply with the workers' compensation law:* • all original employment time records; • for employers that pay by check, all check registers and bank statements; and • for employers that pay by cash, detailed records of the cash transactions.[260]	3 full calendar years following the calendar year in which employment occurred.
Workplace Safety: Analyses	Employers must keep "each analysis using medical or exposure records."[261]	At least 30 years.

[258] WASH. ADMIN. CODE § 192-310-050.

[259] WASH. ADMIN. CODE § 296-17-35201.

[260] WASH. ADMIN. CODE § 296-17-35201.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Using Medical & Exposure Records		
Workplace Safety: Exposure Records	*Employers must keep employee exposure records, which include:* • sampling results; • collection methodology (sampling plan); • description of the analytical and mathematical methods used; • background data to environmental monitoring or measuring, such as laboratory reports and work sheets. (Actual background data need not be retained for more than one year if a summary of the data is retained for 30 years.); and • identity of any toxic substance used in the workplace, including where and when the substance was used. (Employers do not need to keep employee exposure records when the toxic substances at issue are purchased as a consumer product and are used in the same manner and frequency with which a consumer would use them.).[262]	At least 30 years from the date the record was made.
Workplace Safety: Injuries & Illnesses	*Covered employers must keep records of fatalities, injuries, and illnesses for each facility that are: (1) work related; (2) a new case; and (3) meet one or more of the general recording criteria.* *The necessary records include all of the following:* • OSHA Log 300, on which the below details must be noted: ▪ work-related needlestick injuries and cuts from sharp objects contaminated with another's blood or other potentially infectious material; ▪ events when an employee is medically removed; ▪ hearing loss cases, if an employee's hearing test reveals that a recordable threshold shift in one or both ears has occurred; and ▪ instances in which an individual has been occupationally exposed to anyone with a known case of tuberculosis and the employee subsequently	5 years after the year the records cover.

[261] WASH. ADMIN. CODE § 296-802-20015.

[262] WASH. REV. CODE § 49.17.220; WASH. ADMIN. CODE § 296-802-20010.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	develops a tuberculosis infection, as evidenced by a positive skin test or diagnosis by a physician or other licensed health care professional (check the "respiratory condition" column); • privacy list (if one exists); • annual summary; and • OSHA 301 Incident Reports.[263]	
Workplace Safety: Medical Records	*Medical records for each employee must be retained, with the following exceptions. The following types of records need not be held for any specific period of time:* • health insurance claims records maintained separately from the employer's medical program; • first-aid records (not including medical histories) of one-time treatment and subsequent observation of minor scratches, cuts, etc.; and • medical records of employees who work for the employer for less than a year, if the records are provided to the employee upon termination.[264]	Duration of employment plus 30 years.
Warehouse Worker Protections	*Employers covered under this law must establish and maintain records of the following:* • each employee's work speed data; • aggregated work speed data for similar employees at the same warehouse distribution center; • written descriptions of each quota each employee was provided under this law; and • subsequent to an employee's separation from the employer, records relating to the 6-month period prior to the date of the employee's separation from employer.[265]	Employee's tenure plus 3 years after separation. If an employer takes an adverse action against an employee for failing to meet a quota, the employer must maintain records of the basis of the decision for 3 years following the date of the adverse action.

[263] WASH. ADMIN. CODE §§ 296-27-00103, 296-27-00105, 296-27-01101, 296-27-01109, 296-27-01111, 296-27-01113, 296-27-01115, 296-27-2105, and 296-27-02107.

[264] WASH. ADMIN. CODE § 296-802-20005.

[265] WASH. REV. CODE § 49.84.035.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
		Subsequent to an employee's separation from the employer, the employer must keep records relating to the 6-month period prior to the date of the employee's separation from the employer for at least 3 years from the date of separation. Records on how quota time periods and reasonable travel time were considered in determining any quota must be preserved for 3 years.

3.1(c) *Personnel Files*

3.1(c)(i) *Federal Guidelines on Personnel Files*

Federal law does not address access to personnel files for private-sector employees.

3.1(c)(ii) *State Guidelines on Personnel Files*

Requests for Access to Personnel Files. An employer must allow an employee to inspect their personnel file at least annually.[266] The Department of Labor and Industries interprets this requirement to extend to former employees, who retain the right to inspect their personnel files after termination.[267] An employer is not required, however, to provide access to records relating to the investigation of a

[266] WASH. REV. CODE § 49.12.240.

[267] Washington State Dep't of Labor & Indus., *Employee Access to Personnel File*, Admin. Policy No. ES.C.7 (Jan. 2, 2002), *available at* https://lni.wa.gov/workers-rights/_docs/esc7.pdf.

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possible criminal offense or records compiled in preparation for an impending lawsuit that would not be available to another party under pretrial discovery rules.[268]

Upon request, employers must make personnel files available locally to the requesting employee within a reasonable period of time.[269] A *reasonable period* means within 10 business days of the employee's request unless good cause is shown that more time is needed. *Locally* means at the location where the requesting employee works or at a mutually convenient location agreed upon between the employer and employee.[270]

The Washington statute addressing employees' access to their employment records does not provide a definition for "personnel file." However, the Washington State Department of Labor and Industries defines *personnel file* as records that are regularly maintained by the employer as part of its business records or those that are subject to reference for information given to persons outside the company. In addition, personnel file generally includes:

- records of employment and such other information required for business or legal purposes;
- documents containing employees' qualifications;
- verification of training completed;
- signed job descriptions;
- supervisors' files;
- all performance evaluations, letters of commendation, and letters of reprimand;
- salary, sick, and vacation leave hours; and
- summaries of benefits and other similar information.[271]

Disputes Over Personnel Files. On an annual basis, an employee may request that their employer review the employee's personnel file for irrelevant or erroneous information and remove such information. If the employee does not agree with the employer's determination of the material that should be retained in the file, the employee may place a statement in the file setting forth their rebuttal or correction. Former employees also retain the right to rebut or correct the employer's determination of erroneous or disputed information for up to two years from the termination of the employment relationship.[272]

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[268] WASH. REV. CODE § 49.12.260.

[269] WASH. REV. CODE § 49.12.240; WASH. ADMIN. CODE § 296-126-050.

[270] Washington State Dep't of Labor & Indus., *Employee Access to Personnel File*, Admin. Policy No. ES.C.7 (Jan. 2, 2002), *available at* https://lni.wa.gov/workers-rights/_docs/esc7.pdf.

[271] Washington State Dep't of Labor & Indus., *Employee Access to Personnel File*, Admin. Policy No. ES.C.7 (Jan. 2, 2002), *available at* https://lni.wa.gov/workers-rights/_docs/esc7.pdf.

[272] WASH. REV. CODE § 49.12.250.

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3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

3.2(a)(i) *Federal Guidelines on Background Screening of Current Employees*

For information on federal law related to background screening of current employees, see **1.3**.

3.2(a)(ii) *State Guidelines on Background Screening of Current Employees*

As discussed in **1.3(b)**, Washington prohibits an employer from procuring, or causing to be procured, a consumer report for employment purposes without first making certain legally required disclosures to the applicant or employee whose report is to be procured.[273] The general prohibition against procuring a consumer report without making the required disclosure does not apply, however, concerning a consumer report of a current employee whom the employer has reasonable cause to believe has engaged in specific activity that constitutes a violation of law.[274]

State guidelines on employer inquiries about criminal records for employees and restrictions on access to employees' social medial information are also discussed in **1.3(a)** and **1.3(c)**, respectively.

3.2(b) *Drug & Alcohol Testing of Current Employees*

3.2(b)(i) *Federal Guidelines on Drug & Alcohol Testing of Current Employees*

For information on federal laws requiring drug testing of current employees, see **1.3(e)(i)**.

3.2(b)(ii) *State Guidelines on Drug & Alcohol Testing of Current Employees*

No Washington statute requires drug or alcohol screening in the workplace. Private-sector employers in Washington are generally free to compel their employees to consent to drug or alcohol testing as a condition of continued employment.

In *Roe v. Quality Transportation Services*, for example, an employee fired for refusing to consent to drug testing claimed the discharge was in violation of public policy.[275] The Washington Court of Appeals held that the state's constitutional privacy provision is not a constraint on private employers, and therefore, could not provide the required basis for a public policy claim. The court also held that statutes protecting privacy and public records, and unauthorized recordings, were also insufficient, as they did not suggest a legislative intent to announce public policy in the area of drug testing.[276] Drug test results, moreover, are not protected from disclosure by the Washington Health Care Disclosure Act.[277]

3.2(c) *Marijuana Laws*

3.2(c)(i) *Federal Guidelines on Marijuana*

Under federal law, it is illegal to possess or use marijuana.[278]

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[273] WASH. REV. CODE § 19.182.020.

[274] WASH. REV. CODE § 19.182.020.

[275] 838 P.2d 128, 130-31 (Wash. Ct. App. 1992).

[276] 838 P.2d at 131-32.

[277] *Hines v. Todd Pac. Shipyard Corp.*, 112 P.3d 522, 527-28 (Wash. Ct. App. 2005).

[278] 21 U.S.C. §§ 811-12, 841 *et seq*.

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3.2(c)(ii) *State Guidelines on Marijuana*

In 2012, the Washington legislature legalized the recreational use (production, possession, delivery, and distribution) of marijuana to people aged 21 and over. Notwithstanding the concerns raised due to the conflict between federal and state law on this issue, employers are still able to justify banning drug use or impairment on the job due to workplace safety or other job-related concerns. Employers are advised, however, to update their policies to make it clear that marijuana use can violate company rules even if it does not violate local, state, or federal law.

Washington also permits the use of medical marijuana by qualified patients.[279] However, an employer may establish a drug-free workplace policy and is not required to accommodate an employee by allowing use of medical marijuana in the workplace.[280] The Washington State Supreme Court has held that the Medical Use of Marijuana Act "does not prohibit an employer from discharging an employee for medical marijuana use, nor does it provide a civil remedy against the employer. MUMA also does not proclaim a sufficient public policy to give rise to a tort action for wrongful termination for authorized use of medical marijuana."[281] Similarly, at least one federal district court judge observed in a footnote that the recreational marijuana statute did not establish a clear public policy to support a wrongful discharge in violation of public policy claim.[282]

3.2(d) *Data Security Breach*

3.2(d)(i) *Federal Data Security Breach Guidelines*

Federal law does not contain a data security breach notification statute. However, of interest to employers that provide identity theft protection services to individuals affected by a data security breach, whether voluntarily or as required by state law:

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.
- An individual whose personal information may have been compromised in a data breach is not required to include in their gross income the value of the identity protection services.

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[279] WASH. REV. CODE § 69.51A.060(26).

[280] WASH. REV. CODE § 69.51A.060.

[281] *Roe v. TeleTech Customer Care Mgmt. (Colo.) L.L.C.*, 257 P.3d 586 (Wash. 2011); *see also Swaw v. Safeway, Inc.*, 2015 WL 7431106 (W.D. Wash. Nov. 20, 2015) (Granting employer judgment on the pleadings, court held: (1) Employee could not "state a claim for employment discrimination [under the Washington Law Against Discrimination (WLAD)] on the basis of disability for his termination for violating Safeway's drug-free workplace policy by testing positive for medical marijuana;" and (2) Employee failed to state a claim for retaliation because "[i]nforming one's employer that one uses marijuana for medicinal purposes does not constitute opposing an activity reasonably considered to be discrimination on the basis of disability under the WLAD.").

[282] *Brown v. Home Depot*, 2015 WL 9839773 (W.D. Wash. Feb. 5, 2015) (Granting defendant's motion for judgment on the pleadings concerning wrongful discharge in violation of public policy claim).

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- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[283]

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;
- identity protection services provided for reasons other than as a result of a data breach, such as identity protection services received in connection with an employee's compensation benefit package; or
- proceeds received under an identity theft insurance policy.[284]

3.2(d)(ii) *State Data Security Breach Guidelines*

Under Washington law, when a covered entity (including an employer) doing business in the state discovers or is notified of a data security breach, the entity must provide notice to any resident "whose personal information was, or is reasonably believed to have been, acquired by an unauthorized person and the personal information was not secured."[285] Even if the entity does not own the personal information that it maintains, it must "notify the owner or licensee of the information of any breach of the security of the data immediately following discovery, if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person."[286] A covered entity is not required to disclose a breach that does not seem reasonably likely to subject customers to a risk of harm, including criminal activity.[287]

Coverage & Exceptions. A covered entity is any person or business that conducts business in this state and that owns or licenses computerized data that includes personal information.[288] *Personal information* under the pertinent statute refers to an individual's first name or first initial and last name, when combined with any of the following elements: (1) Social Security number; (2) driver's license or state identification card number; or (3) an account number, or credit or debit card number, along with "any required security code, access code, or password that would permit access to an individual's financial account;" (4) full date of birth; (5) private key that is unique to the individual and that is used to authenticate or sign an electronic record; (6) student, military, or passport identification numbers; (7) health insurance policy number or health insurance identification number; (8) any information about a consumer's medical history, mental or physical condition, or medical diagnosis or treatment; or (9) biometric data generated by automatic measurements of an individual's biological characteristics such as a fingerprint, voiceprint, eye retinas, irises, or other unique biological patterns or characteristics that is used to identify a specific individual. Personal information will also include a username or email address in combination with a password or security questions and answers that would permit access to an online account or any of the data elements or combination of data elements that would enable a

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[283] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015), *available at* https://www.irs.gov/pub/irs-drop/a-15-22.pdf.

[284] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015).

[285] WASH. REV. CODE § 19.255.010(1).

[286] WASH. REV. CODE § 19.255.010(2).

[287] WASH. REV. CODE § 19.255.010(1).

[288] WASH. REV. CODE § 19.255.010(1).

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person to commit identity theft against a consumer, even without the consumer's name. Personal information does not include data that is encrypted or information that is lawfully available publicly from federal, state, or local government records.[289]

Exceptions to the statute include:

- A covered entity that maintains and complies with its own notification procedure as part of an information security policy for the treatment of personal information is compliant with this statute, as long as notification is made in a timely manner consistent with the statute.
- Any entity covered by the federal Health Insurance Portability and Accountability Act that complies with federal requirements for the security of protected health information is deemed compliant with the Washington statute, although notice is still required to the attorney general in the event of a breach affecting more than 500 state residents.
- Certain financial institutions, if they provide notice to affected consumers as required by their primary regulators, are deemed compliant with the Washington statute, although notice is still required to the attorney general in the event of a breach affecting more than 500 state residents.[290]

Content & Form of Notice. Notice may be in one of the following formats:

- written notice;
- electronic notice, if it is consistent with the federal e-sign act; or
- substitute notice, if
  - the covered entity demonstrates that—
    - the cost of providing notice would exceed $250,000;
    - the affected class of persons to be notified exceeds 500,000; or
    - the covered entity does not have sufficient contact information.[291]

Substitute notice consists of all of the following:

- email notice, when the covered entity has an email address for the subject persons;
- conspicuous posting of the notice on the covered entity's website, if it maintains a website; and
- notification to major statewide media.[292]

The notice must be written in plain language and include, at minimum, the following information:

- the name and contact information of the reporting person or business;

[289] WASH. REV. CODE § 19.255.010(5).

[290] WASH. REV. CODE § 19.255.010(9)-(11).

[291] WASH. REV. CODE § 19.255.010(8).

[292] WASH. REV. CODE § 19.255.010(8).

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- a list of the types of personal information that were, or are reasonably believed to have been, the subject of the breach; and
- if the breach exposed personal information, the toll-free telephone numbers and addresses of the major credit reporting agencies.[293]

Timing of Notice. Notice must be given in the most expedient time possible and without unreasonable delay. *Without unreasonable delay* means no more than 30 calendar days after the breach was discovered, subject to the exceptions below.[294] Notification may be delayed if:

- a law enforcement agency determines that the notification will impede a criminal investigation;
- a covered entity needs time to determine the scope of the breach; or
- a covered entity needs time to restore the reasonable integrity of the data system.[295]

Additional Provisions. If a covered entity is required to issue a security breach notification to more than 502 Washington residents as a result of a single breach, the entity must also electronically submit a single sample copy of that security breach notification, excluding any personally identifiable information, to the state attorney general. The covered entity must provide to the attorney general the number of Washington consumers affected by the breach, or an estimate if the exact number is not known.[296] This notification must also include the types of personal information that are subject to the breach, a timeframe of exposure, and the steps taken to contain the breach.

3.3 Minimum Wage & Overtime

3.3(a) *Federal Guidelines on Minimum Wage & Overtime*

The primary source of federal wage and hour regulation is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime, and child labor standards for covered employers. The FLSA applies to businesses that have: (1) annual gross revenue exceeding $500,000; and (2) employees engaged in commerce or in the production of goods for commerce, or employees that handle, sell, or otherwise work on goods or material that have been moved in or produced for commerce. For more information on this topic, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

As a general rule, federal wage and hour laws do not preempt state laws.[297] Thus, an employer must determine whether the FLSA or state law imposes a more stringent minimum wage, overtime, or child labor obligation and, if so, apply the more stringent of the two standards. If an employee is exempt from either federal or state law, but not both, then the employee must be paid for work in accordance with whichever law applies.

[293] WASH. REV. CODE § 19.255.010(14).

[294] WASH. REV. CODE § 19.255.010(16).

[295] WASH. REV. CODE § 19.255.010(3), (16).

[296] WASH. REV. CODE § 19.255.010(15).

[297] 29 U.S.C. § 218(a).

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3.3(a)(i) *Federal Minimum Wage Obligations*

The current federal minimum wage is $7.25 per hour for most nonexempt employees.[298]

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage of $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[299]

An employer cannot keep tips received by employees for any purpose, including allowing managers or supervisors to keep a portion of employees' tips, regardless of whether the employer takes a tip credit.[300]

3.3(a)(ii) *Federal Overtime Obligations*

Nonexempt employees must be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a workweek.[301] For more information on exemptions to the federal minimum wage and/or overtime obligations, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.3(b) *State Guidelines on Minimum Wage Obligations*

Washington regulates wage and hour obligations under the state labor law and through regulations issued by the Washington State Department of Labor and Industries.

3.3(b)(i) *State Minimum Wage*

The minimum wage in Washington is $16.28 per hour.[302] Annually, on January 1, the rate adjusts based on the rate of inflation, *e.g.*, on January 1, 2025, it will increase to $16.66.[303]

Under federal law, the minimum wage is satisfied if the total compensation paid for the week, when divided by the total hours worked in the week, equals or exceeds the minimum wage rate.[304] Washington law, however, may require that minimum wage compliance for hourly employees be determined on an hour-by-hour basis. Specifically, a federal court has determined that the Washington courts are likely to adopt this approach.[305] The implication is that hourly employees who are not paid for particular tasks that qualify as time worked may be entitled to be paid the minimum wage for those tasks—even if their average hourly pay for the entire workweek already exceeds the minimum wage rate.

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[298] 29 U.S.C. § 206.

[299] 29 U.S.C. §§ 203, 206.

[300] 29 U.S.C. § 3(m)(2)(B).

[301] 29 U.S.C. § 207.

[302] WASH. REV. CODE § 49.46.020.

[303] WASH. REV. CODE § 49.46.020(2).

[304] *Adair v. City of Kirkland*, 185 F.3d 1055, 1062 n.6 (9th Cir. 1999).

[305] *Alvarez v. IBP, Inc.*, 339 F.3d 894, 912-13 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005).

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3.3(b)(ii) *Tipped Employees*

The generally-applicable minimum wage applies for tipped employees in Washington. Washington is one of the few states that prohibits the use of tip credits.[306] Thus, tips received by employees in industries where tips or other gratuities commonly occur are simply additional compensation to the employee above and beyond the state minimum wage.

Special provisions apply to establishments that utilize automatic service charges. Under Washington law, an employer must pay to its employees all tips and all service charges except those that are listed by statute as not being payable to the employee(s) servicing the customer. An employer that imposes an automatic service charge on the customer related to food, beverages, entertainment, or porterage must notify the customer—on both the itemized receipt and any menu—of the percentage of that charge that is paid to the employee(s) serving the customer.[307]

3.3(b)(iii) *Minimum Wage Exceptions & Rates Applicable to Specific Groups*

The definition of *employee* for purposes of the Washington minimum wage requirements excludes:

- certain agricultural employees paid on a piece-rate basis;
- individuals employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession;
- employees that fall under one of the state's white collar overtime exemptions as discussed in **3.3(d)**;
- individuals "engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously;"
- any newspaper vendor or delivery person selling or distributing newspapers on the street, to offices, to businesses or from house to house, and any freelance news correspondent or "who, using his or her own equipment, chooses to submit material for publication" (either for free or for a fee);
- carriers regulated by the Interstate Commerce Act;
- individuals engaged in forest protection and fire prevention activities;
- individuals employed by any charitable institution charged with childcare responsibilities engaged primarily in the development of character or citizenship, or in promoting health or physical fitness, or in providing recreational opportunities for young people or members of U.S. military;
- individuals whose duties require that they reside or sleep at the worksite or who otherwise spend a substantial portion of work time on call rather than in the performance of active duties;
- any resident, inmate, or patient of a state, county, or municipal correctional, treatment, or rehabilitative institution;

[306] WASH. ADMIN. CODE § 296-126-022.

[307] WASH. REV. CODE § 49.46.160.

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- vessel operating crews of the Washington state ferries;
- individuals employed as a seaman on a vessel other than an American vessel;
- farm interns; and
- individuals between the ages of 16 and 21 playing "for a junior ice hockey team that is a member of a regional, national, or international league and that contracts with an arena owned, operated, or managed by a public facilities district."[308]

Though not set forth in the statute, the Department of Labor and Industries takes the position that interns may be considered exempt from state minimum wage. If an internship meets the following criteria, an intern or trainee is not considered an employee and the internship may be unpaid:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in an educational environment or vocational school.
2. The training is for the benefit of the trainee.
3. The trainees do not displace regular employees, but work under their close supervision.
4. The business that provides the training derives no immediate advantage from the activities of the trainees, and may in fact be impeded.
5. The trainees are not necessarily entitled to a job at the conclusion of the training period.
6. The trainees understand they are not entitled to wages for the time spent in the training.[309]

This test is the test articulated by the U.S. Department of Labor to determine whether an intern is exempt for purposes of the federal FLSA.

3.3(b)(iv) *Local Minimum Wage Ordinances*

Some cities within the state of Washington have set their own local minimum wage rates. Local minimum wage ordinances often include their own notice, record-keeping, and wage statement requirements, so employers with operations in those localities must be aware of their overlapping state and local compliance obligations.

Table 9 includes some of the larger cities in Washington that have enacted minimum wage ordinances. To the extent smaller cities may have enacted similar ordinances, these are not covered here.

Table 9. Certain Local Minimum Wage Ordinances		
Jurisdiction	**Hourly Minimum Wage Rate**	**Additional Requirements[310]**

[308] WASH. REV. CODE § 49.46.010(3).

[309] Washington Dep't of Labor & Indus., *Administrative Policy, Hours Worked, ES.C.2, available at:* https://lni.wa.gov/workers-rights/_docs/esc2.pdf. In addition, for workers' compensation purposes, unpaid interns are those who are enrolled in a course of study at an institution of higher learning, such as college, community college, or vocational school and are participating in a work-training program for a defined period of time, approved and authorized by the institution. Such unpaid student interns are not considered workers or volunteers, and are not covered under the state workers' compensation law.

[310] *See* Table 6, Table 8 for further details.

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Table 9. Certain Local Minimum Wage Ordinances		
Jurisdiction	**Hourly Minimum Wage Rate**	**Additional Requirements[310]**
Bellingham	$17.28 per hour. The minimum wage is initially $1 more than the state minimum wage – which changes on January 1 – then increases to $2 more than the state minimum wage on May 1, 2025, *e.g.*, on January 1, 2025, it will increase to $17.66, and on May 1, 2025, it will increase to $18.66.[311] Beginning in 2026, the ordinance will transition to January 1 for future updates.	• records retention.
Burien	Beginning January 1, 2025, $3 more than the state minimum wage (*i.e.*, $19.66) for employers with 501 or more full-time equivalent employees (Level 1). Beginning July 1, 2025, $2 more than the state minimum wage (*i.e.*, $18.66) for employers with 21-499 full-time equivalent employees (Level 2). Beginning January 1, 2026, and each subsequent January 1, annually the rates are adjusted based on the rate of inflation.[312]	• workplace poster; and records retention.
King County[313]	Beginning January 1, 2025, the "general" minimum wage in the unincorporated areas of the county will be $20.29 plus an adjustment for inflation. For employers with 16 to 499 employees, and employers with 15 or fewer employees and gross revenue of $2 million or more, the minimum wage will be $2 less than the "general" minimum wage in 2025, then $1 less in 2026, then equal thereto in 2027 and future years. For employers with 15 or fewer employees and gross revenue of less than $2 million, the minimum wage will be $3 less than the "general" minimum wage in 2025, then $2.50 less in 2026, then $2.00 less in 2027, then $1.50 less in 2028, then $1.00 less in 2029, then $0.50 less in 2030, then equal thereto in 2031. Annually, on January 1, the "general" rate is adjusted based on the rate of inflation.	• records retention

311 BELLINGHAM, WASH. ORDINANCE (to be codified).

312 BURIEN, WASH. MUN. CODE §§ 15.050 – 15.240. We expect the city to clarify within which level to place employers with 500 full-time equivalent employees.

313 KING COUNTY, WASH. ORDINANCE 19762 (to be codified).

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Table 9. Certain Local Minimum Wage Ordinances		
Jurisdiction	**Hourly Minimum Wage Rate**	**Additional Requirements[310]**
Renton	*Large employers* (501+ employees): Beginning on July 1, 2024, $20.29 per hour.[314] Annually, on January 1, the rate is adjusted based on the rate of inflation. *Other employers* (15+ employees or annual gross revenue over $2 million): **Effective July 1, 2024**, $18.29 per hour. Initially, the rate will be $2 per hour less than the large employer rate, then $1 per hour less on July 1, 2025, and eventually equal to the large employer rate on July 1, 2026, at which time one rate will apply to all covered employers.	• records retention.
SeaTac	$19.71 per hour.[315] The ordinance applies only to certain hospitality and transportation workers and to employers that provide goods or services at the airport and are engaged in preparing food or beverage to be served in-flight by an airline from facilities that are located on property owned by the Port of Seattle in SeaTac. Annually, on January 1, the rate is adjusted based on the rate of inflation, *e.g.*, on January 1, 2025, it will increase to $20.17. Tips, gratuities, service charges, and commissions must not be credited as being any part of or be offset against the required wage rates.	• written notice each year of annual rate increase; and • records retention.
Seattle	*Large employers* (501+ employees): $19.97. Annually, on January 1, the rate is adjusted based on the rate of inflation, *e.g.*, on January 1, 2025, it will increase to $20.76.[316] *Small employers*: $17.25 per hour. Such employers	• written notice; • workplace poster; and • records retention.

[314] The ballot measure requires a minimum wage for large employers that is "an hourly wage of not less than the 2022 'living wage rate' in the City of SeaTac [] adjusted for 2023 by the annual rate of inflation," and the small employer rate is $2 per hour less. Tukwila announced that rather than using the consumer price index (CPI) adjusted rate that applies in SeaTac in 2023 ($19.06), the Tukwila rate is to be calculated by taking the 2022 SeaTac minimum wage and applying a CPI adjustment standard that differs from the one SeaTac uses. 2023 Minimum Wage Notice, *available at* https://www.tukwilawa.gov/wp-content/uploads/2023-Minimum-Wage-Notice.pdf. *See also* TUKWILA, WASH., MUN. CODE §§ 5.63.010 *et seq.* and TUKWILA, WASH. LABOR STANDARDS TLS 01-010 *et seq*.

[315] SEATAC, WASH., MUN. CODE §§ 7.45.010 *et seq*.

[316] SEATTLE, WASH., MUN. CODE §§ 14.19.010 *et seq*. In Seattle, large employers that pay toward an individual employee's medical benefits plan can pay a lower hourly minimum wage. *See* SEATTLE, WASH., MUN. CODE §§ 14.19.010, 14.19.030.

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Table 9. Certain Local Minimum Wage Ordinances		
Jurisdiction	**Hourly Minimum Wage Rate**	**Additional Requirements[310]**
	must also ensure that employees earn a minimum hourly compensation of $19.97.[317] Annually, on January 1, the minimum wage will increase 75 cents per hour each year through 2024, during which time the hourly minimum compensation will equal the large employer minimum wage. Beginning on January 1, 2025, one minimum wage rate will apply to all employers, *i.e.*, $20.76.	
Tukwila	*Large employers* (501+ employees): $20.29 per hour.[318] Annually, on January 1, the rate is adjusted based on the rate of inflation. *Other employers* (15+ employees or annual gross revenue over $2 million): $19.29 per hour ($1 per hour less than the large employer rate). On January 1, 2025, the rate increases to $1 per hour less than the annually adjusted large employer rate. On July 1, 2025, the rate will increase to the large employer rate, and one rate will apply to all covered employers.	• written notice; • workplace poster; • records retention; and • annual certification.

3.3(c) *State Guidelines on Overtime Obligations*

State and federal regulations generally require that a nonexempt employee be paid an overtime premium of an additional one-half times the individual's regular rate (which results in a total combined overtime rate of one and one-half times the employee's regular rate) for all hours of work in excess of 40 in a workweek.[319] Overtime pay due under state or federal law cannot be waived by an employee or by an employee's union representative.

An employee's regular rate is calculated as an hourly pay rate. The regular rate is generally calculated by dividing all of an employee's regular compensation for the week by the number of hours worked in the

[317] The minimum wage in addition to tips actually received by the employee and reported to the Internal Revenue Service, and money paid by the employer towards an individual employee's medical benefits plan.

[318] The ballot measure requires a minimum wage for large employers that is "an hourly wage of not less than the 2022 'living wage rate' in the City of SeaTac [] adjusted for 2023 by the annual rate of inflation," and the small employer rate is $2 per hour less. Tukwila announced that rather than using the consumer price index (CPI) adjusted rate that applies in SeaTac in 2023 ($19.06), the Tukwila rate is to be calculated by taking the 2022 SeaTac minimum wage and applying a CPI adjustment standard that differs from the one SeaTac uses. 2023 Minimum Wage Notice, *available at* https://www.tukwilawa.gov/wp-content/uploads/2023-Minimum-Wage-Notice.pdf. *See also* TUKWILA, WASH., MUN. CODE §§ 5.63.010 *et seq.* and TUKWILA, WASH. LABOR STANDARDS TLS 01-010 *et seq*.

[319] 29 U.S.C. § 207; WASH. REV. CODE § 49.46.130(1).

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week.[320] This calculation will require converting monthly salaries, commissions, bonuses, or noncash wages into an hourly figure. The regular rate is computed before any deductions are taken from an employee's wages. The regular rate must be calculated separately for each workweek that an employee works.

Employers should take care before relying on federal regulations that allow certain payments to be excluded from the calculation of the regular rate under the FLSA. The Washington courts have emphasized that these exclusions should be applied under Washington law only "narrowly."[321]

3.3(d) *State Guidelines on Overtime Exemptions*

Both the FLSA and the Washington wage law provide limited exemptions to overtime obligations for white collar employees (executives, administrators, and professionals), certain commissioned and outside sales employees, and employees in particular industries and occupations.[322] To be exempt from payment of overtime, an employee must be exempt under both state and federal law.[323] If employees are exempt, it means that the overtime rules (and, in certain cases, minimum wage rules) do not apply to them. Employers may, however, still be required to comply with other wage-related laws for exempt employees.

The most commonly used overtime exemptions are the white collar exemptions for persons employed in executive, administrative, or professional capacities. These exemptions are available under both federal and Washington law; indeed, the federal and state exemptions in this area are very similar—although not identical. In very general terms, for an employee to qualify as an exempt white collar employee under the executive, administrative, or professional exemptions, the employee must satisfy two criteria. First, the employee must be paid an appropriate type and amount of compensation. In most cases, this requires that the employee be paid on a salary basis, so this criterion is generally referred to as the *salary basis test*. Second, the employee's primary duty must involve exempt work, such as managing other employees. This is known as the *duties test*. The federal and state regulations provide detailed rules that expand upon these two basic tests for each of the white collar exemptions.

It is important to reiterate that federal wage and hour laws do not preempt state laws[324] and that the law most beneficial to the employee will apply. Therefore, even if an employee meets one of the exemptions discussed below under state law, if the employee does not meet the requirements of the federal exemption (or vice versa), including the salary thresholds, then the employee will not qualify as exempt.

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320 WASH. ADMIN. CODE § 296-128-550.

321 *Hisle v. Todd Pac. Shipyards Corp.*, 54 P.3d 687 (Wash. Ct. App. 2002), *aff'd*, 93P.3d 108 (Wash. 2004) (holding that bonus paid to induce ratification of collective bargaining agreement must be included in regular rate). Nonetheless, in two cases in 2012, Washington appellate courts excluded specific types of compensation from wages. In *Arzola v. Name Intelligence, Inc*., the court held that sums owed by the employer under a stock right cancellation agreement did not constitute wages for purposes of the wage statutes. 288P.3d 1154 (Wash. Ct. App. 2012). In *LaCoursiere v. CamWest Dev., Inc*., the court found that discretionary bonuses deposited into an employee's capital account with the employer did not constitute wages under chapter 49.52 of the Washington Revised Code. 289P.3d 683 (Wash. Ct. App. 2012).

322 29 U.S.C. §§ 217, 203(e)(2)-(3); WASH. REV. CODE §§ 49.46.010(5), 49.46.130(2).

323 29 C.F.R. § 778.5.

324 29 U.S.C. § 218(a).

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A number of other types of employees, in addition to those in white collar positions, are also partially or wholly exempt from overtime or other provisions of the FLSA and Washington law. The exemptions described below are by no means exhaustive. The Washington overtime requirements do not apply to the following categories of employees:

- any individual excluded from the minimum wage requirements, as set forth in **3.3(b)(iii)**;
- employees who request compensating time off in lieu of overtime pay;
- any individual employed as a seaman whether or not the seaman is employed on a vessel other than an American vessel;
- seasonal employees who are employed at concessions and recreational establishments at agricultural fairs, including those seasonal employees employed by agricultural fairs, within the state provided that the period of employment for any seasonal employee at any or all agricultural fairs does not exceed fourteen working days a year;
- any individual employed as a motion picture projectionist if that employee is covered by a contract or collective bargaining agreement which regulates hours of work and overtime pay;
- an individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act, if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week;
- certain workers employed on a farm, or in food packing or processing operations whether or not "on the farm;"
- workers employed in packing, packaging, grading, storing, or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity;
- workers employed in processing seafood and marine products;
- any industry in which federal law provides for an overtime payment based on a workweek other than forty hours;
- any hours worked by an employee of an air carrier subject to the provisions of the Railway Labor Act, when such hours are voluntarily worked by the employee pursuant to a shift-trading practice under which the employee has the opportunity in the same or in other workweeks to reduce hours worked by voluntarily offering a shift for trade or reassignment; and
- licensed real estate agents, unless the individual is providing real estate brokerage services under a written contract with a real estate firm which provides that the individual is an employee.[325]

3.3(d)(i) *Executive Exemption*

Under Washington law, the executive exemption applies to an employee:[326]

[325] WASH. REV. CODE § 49.46.130(2)..

[326] WASH. ADMIN. CODE §§ 296-128-510, 296-128-545.

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- whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- who customarily and regularly directs the work of two or more other employees;
- who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight; and
- who is compensated on a salary basis at a rate of not less than a specific multiplier of the state minimum wage for a 40-hour workweek, excluding board, lodging, or other facilities.
  - For employers with 51 or more employees, the multiplier is as follows:
    - 2023-24: 2.00 times the state minimum wage
    - 2025-26: 2.25 times the state minimum wage
    - 2027-28: 2.50 times the state minimum wage
  - For employers with 50 or fewer employees, the multiplier is as follows:
    - 2024-25: 2.00 times the state minimum wage
    - 2026-27: 2.25 times the state minimum wage
    - 2028 & Subsequent Years: 2.50 times the state minimum wage

An individual employed in a *bona fide* executive capacity also includes any employee who owns at least a *bona fide* 20% equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management.[327]

3.3(d)(ii) *Administrative Exemption*

Under Washington law, the administrative exemption applies to an employee:[328]

- whose primary duty is the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers;
- whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance; and
- who is compensated on a salary or fee basis at a rate of not less than a specific multiplier of the state minimum wage for a 40-hour workweek, excluding board, lodging, or other facilities.
  - For employers with 51 or more employees, the multiplier is as follows:
    - 2023-24: 2.00 times the state minimum wage
    - 2025-26: 2.25 times the state minimum wage
    - 2027-28: 2.50 times the state minimum wage
  - For employers with 50 or fewer employees, the multiplier is as follows:

[327] WASH. ADMIN. CODE § 296-128-510.

[328] WASH. ADMIN. CODE §§ 296-128-520, 296-128-545.

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- 2024-25: 2.00 times the state minimum wage
- 2026-27: 2.25 times the state minimum wage
- 2028 & Subsequent Years: 2.50 times the state minimum wage

An individual employed in a *bona fide* administrative capacity also includes any employee:

- whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof; and
- who is compensated on a salary or fee basis at a rate of not less than the above-referenced amount, excluding board, lodging, or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which they are employed.[329]

3.3(d)(iii) *Professional Exemption*

Under Washington law, the professional exemption applies to an employee:[330]

- whose primary duty consists of the performance of work:
  - requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
  - requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor; and
- who is compensated on a salary or fee basis at a rate of not less than a specific multiplier of the state minimum wage for a 40-hour workweek, excluding board, lodging, or other facilities.
  - For employers with 51 or more employees, the multiplier is as follows:
    - 2023-24: 2.00 times the state minimum wage
    - 2025-26: 2.25 times the state minimum wage
    - 2027-28: 2.50 times the state minimum wage
  - For employers with 50 or fewer employees, the multiplier is as follows:
    - 2024-25: 2.00 times the state minimum wage
    - 2026-27: 2.25 times the state minimum wage
    - 2028 & Subsequent Years: 2.50 times the state minimum wage

An individual employed in a *bona fide* professional capacity also includes any employee:[331]

- who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof; or

[329] WASH. ADMIN. CODE §§ 296-128-520, 296-128-545.

[330] WASH. ADMIN. CODE §§ 296-128-530, 296-128-545.

[331] WASH. ADMIN. CODE § 296-128-530.

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- who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession. Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession.

In the case of medicine, the exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term *physicians* includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry). Note that the salary or fee requirements do not apply to law or medicine professionals.

Finally, an individual employed in a *bona fide* professional capacity also means any employee:[332]

- who is a computer system analyst, computer programmer, software engineer, or other similarly skilled worker; and
- whose primary duty consists of one of the following:
  - the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
  - the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  - the design, documentation, testing, creation, or modification of computer programs related to machine operation systems; or
  - a combination of the aforementioned duties, the performance of which requires the same level of skills; and
- who is compensated on a salary or fee basis (see above, Generally) or on an hourly basis at a rate not less than 3.5 times the state minimum wage per hour.

However, the exemption for employees in computer occupations does not include:

- employees engaged in the manufacture, repair, or maintenance of computer hardware and related equipment; or
- employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (*e.g.*, engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations (*i.e.*, computer system analyst, computer programmer, software engineer, or other similarly skilled.[333]

3.3(d)(iv) *Commissioned Sales Exemption*

Commissioned employees are exempt when:

[332] WASH. ADMIN. CODE § 296-128-535.

[333] WASH. ADMIN. CODE § 296-128-535.

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- the employee works in a retail or service establishment;
- the employee's regular rate of pay is more than one and one-half times the greater of the federal and Washington minimum wage rates; and
- more than half of the employee's compensation for a representative period of not less than one month is commissions on goods or services.[334]

A determination of whether the employee's regular rate of pay satisfies the "more than one and one-half times the minimum wage rate" requirement must be made for each workweek. In any workweek in which the employee's compensation attributable to hours worked during that week, computed on an hourly basis, is less than this standard, the exemption will not apply.[335]

As indicated, the commissioned employee must work for a *retail or service establishment*, which is defined as "an establishment 75% of whose annual dollar volume of sales of goods or services, or both, is not for resale and is recognized as retail sales or services in the particular industry."[336] The federal regulations take a narrow view of what qualifies as a retail or service establishment. The regulations state that it includes only "the traditional local retail or service establishment," and that there are certain industries that inherently lack the "retail concept."[337] Some courts, however, have not been so narrow in their interpretation of this rule.[338] Moreover, the Washington courts have taken the view that an establishment qualifies as retail if it simply sells goods to the ultimate consumer.[339] Since this question is unsettled, employers should not rely on the commissioned employee exemption without first obtaining legal advice on whether their business would be considered to be a retail or service establishment.

Under Washington law, this exemption does not require that the worker be a salesperson or involved in sales.[340] Federal law, on the other hand, requires that the worker be engaged in making sales or obtaining orders.[341] An employer that relies on this exemption must include in its records a copy or memorandum of the commission agreement under which this exemption is claimed. The employer's records must specify the basis of compensation, the representative period of time (*e.g.*, monthly, quarterly, yearly) that is used to determine whether more than half of each commissioned employee's compensation is from commissions, the date the agreement was entered into, and how long it remains in effect. In addition, the employer's payroll records must include a notation identifying each employee who is paid pursuant to this exemption.[342]

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[334] 29 U.S.C. § 207(i); 29 C.F.R. §§ 779.410 *et seq*.; WASH. REV. CODE § 49.46.130(3).

[335] 29 C.F.R. § 779.419.

[336] WASH. REV. CODE § 49.46.010(7); *see also* 29 C.F.R. § 779.412 (same except for minor wording differences).

[337] 29 C.F.R. § 779.315-17.

[338] *Compare Martin v. Refrigeration Sch., Inc.*, 968 F.2d 3 (9th Cir. 1992) (federal regulation's exclusion of schools as lacking the "retail concept" invalidated as contrary to reason), *with Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290 (1959) (personal loan companies lack the "retail concept"), *and Goldberg v. Roberts*, 291 F.2d 532 (9th Cir. 1961) (letter shops lack the "retail concept").

[339] *Stahl v. Delicor of Puget Sound, Inc.*, 64P.3d 10 (Wash. 2003) (company engaged in sales through vending machine qualified as retail establishment).

[340] 64 P.3d 10 (vending machine route driver who was paid a commission on sales held exempt).

[341] 29 C.F.R. § 541.500(a)(1).

[342] 29 C.F.R. § 516.16.

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3.3(d)(v) *Outside Sales Exemption*

Under Washington law, the outside sales exemption applies to an employee:[343]

- whose primary duty is:
  - waking sales; including any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition; or
  - obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.
- who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty; and
- who is compensated by the employer on a guaranteed salary, commission, or fee basis and who is advised of the employee status as an "outside salesperson."

3.4 Meal & Rest Period Requirements

3.4(a) *Federal Meal & Rest Period Guidelines*

3.4(a)(i) *Federal Meal & Rest Periods for Adults*

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last 30 minutes or more) are not considered "hours worked" and can be unpaid.[344] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[345]

3.4(a)(ii) *Federal Meal & Rest Periods for Minors*

The FLSA does not include any generally applicable meal and rest period requirements for minors. The principles described above as to what constitutes "hours worked" for meal and rest periods applies to minors as well as to adults.

3.4(a)(iii) *Lactation Accommodation Under Federal Law*

The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), which expands the FLSA's lactation accommodation provisions, applies to most employers.[346] Under the FLSA, an employer must provide a reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth, each time the employee needs to express milk. The employer is not required to compensate an employee receiving reasonable break time for any time

[343] WASH. ADMIN. CODE § 296-128-540.

[344] 29 C.F.R. § 785.19.

[345] 29 C.F.R. § 785.18.

[346] 29 U.S.C. § 218d.

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spent during the workday for the purpose of expressing milk unless otherwise required by federal, state, or local law. Under the PUMP Act, break time for expressing milk is considered hours worked if the employee is not completely relieved from duty during the entirety of the break.[347] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.[348] Exemptions apply for smaller employers and air carriers.[349]

The Pregnant Workers Fairness Act (PWFA), enacted in 2022, also impacts an employer's lactation accommodation obligations. The PWFA requires employers of 15 or more employees to make reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related medical conditions.[350] Lactation is considered a related medical condition.[351] Reasonable accommodation related to lactation includes, but is not limited to breaks, space for lactation, and accommodations related to pumping and nursing during work hours.[352] For more information on these topics, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.4(b) *State Meal & Rest Period Guidelines*[353]

3.4(b)(i) *State Meal & Rest Periods for Adults*

Meal Periods. Under Washington law, employees cannot be required to work more than five hours without a meal period of at least 30 minutes. The meal period must begin no less than two hours, nor more than five hours, from the beginning of the shift. Employees working three or more hours longer than a normal work day must be allowed at least one 30-minute meal period prior to or during the overtime period.[354] Per the state labor department, if the employee works sufficient hours to qualify for more than one meal period, the second meal period must be given within five hours from the end of the first meal period, and for each five hours worked thereafter.

Meal periods may be unpaid if an employee is completely relieved from duty and receives 30 minutes of uninterrupted meal time. Meal periods are compensable when the "employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer."[355] It is not required that the employee be free to leave the employer's premises for a meal period to be noncompensable, as long as the employee is otherwise completely relieved of duty.[356]

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[347] 29 U.S.C. § 218d(b)(2).

[348] 29 U.S.C. § 218d(a).

[349] 29 U.S.C. § 218d(c), (d).

[350] 42 U.S.C. § 2000gg–1.

[351] 29 C.F.R. § 1636.3.

[352] 29 C.F.R. § 1636.3.

[353] Additional healthcare-industry-specific meal and rest period requirements exist. WASH. REV. CODE ch. 49.12.

[354] WASH. ADMIN. CODE § 296-126-092. A *normal workday* is the shift the employee is regularly scheduled to work.

[355] WASH. ADMIN. CODE § 296-126-092.

[356] Washington State Dep't of Labor & Indus., *Meal and Rest Periods for Nonagricultural Workers Age 18 & Over*, Admin. Policy No. ES.C.6.1 (rev. Dec. 1, 2017), *available at* https://lni.wa.gov/workers-rights/_docs/esc6.1.pdf.

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According to the Department of Labor and Industries, the meal period requirements do not apply to exempt white collar employees.[357]

Additional Payment for Work Performed During Paid Meal Periods. The Ninth Circuit Court of Appeals has interpreted Washington law as requiring payment for a full 30-minute meal period if an otherwise unpaid meal period is interrupted by work for any length of time.[358] Since that decision, Washington law has remained unsettled on the issue of whether employees who receive paid meal periods are also entitled to *additional compensation* if they perform work duties during their paid meal period. On one hand, the Washington Court of Appeals has held that if an employee is given a paid meal period, the employee is not entitled to additional compensation for being "on call" during the meal period, or for performing some work duties during the meal period.[359]

On the other hand, the Washington Court of Appeals distinguished its earlier rulings and affirmed a trial court determination that employees who received paid meal breaks were also entitled to receive additional compensation equal to the full meal period (*i.e.*, an additional 30 minutes of pay, on top of the 30 minutes of pay they had already received from the employer for their paid meal period) where the employees "were always engaged in work duties" during their meal period, "did not receive lawful breaks that complied with WAC 296-126-092," and "did not have sufficient time to take the meal . . . breaks as required by WAC 296-126-092."[360] In reaching this conclusion, the Court of Appeals specifically rejected the employer's contention that once an employer pays an employee for a meal period, "there are no limitations to requiring the employee to engage in work activities" during the meal break.[361]

In the same case, the court affirmed the trial court's ruling that, although an employer does not need to formally schedule meal and rest periods, the employer does have an affirmative obligation to ensure that such breaks are provided and taken.[362] The Supreme Court of Washington echoed this sentiment in 2015, explaining that courts should look "to the purpose rest breaks serve in light of how rest breaks were used (or not) by the employees in context."[363]

Meal Period Waiver. Per the Washington State Department of Labor and Industries, employees may choose to waive the meal period requirement. The department recommends obtaining a written request from an employee who chooses to waive the meal period. Any such waiver may be revoked. However, an employer can refuse to allow an employee to waive a meal period and require that a meal

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[357] *See, e.g.*, Washington State Dep't of Labor & Indus., *Industrial Welfare Act: Applications, Exemptions, and Interpretations*, Admin. Policy No. ES.C.1 (rev. June 24, 2005), *available at* https://lni.wa.gov/workers-rights/_docs/esc1.pdf.

[358] *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005).

[359] *White v. Salvation Army*, 75 P.3d 990 (Wash. Ct. App. 2003) (on call); *Iverson v. Snohomish Cnty.*, 72 P.3d 772 (Wash. Ct. App. 2003) (performance of duties).

[360] *Pellino v. Brink's Inc.*, 267 P.3d 383, 396 (Wash. Ct. App. 2011).

[361] 267 P.3d at 397.

[362] 267 P.3d at 394-95; *see also Brady v. Autozone Stores*, 397 P.3d 120, 124 (Wash. 2017) ("[An] employer is not automatically liable if a meal break is missed because the employee may waive the meal break. . . . [A]n employee asserting a meal break violation . . . can establish [a] prima facie case by providing evidence that he or she did not receive a timely meal break. The burden then shifts to the employer to rebut this by showing that in fact no violation occurred or that a valid waiver exists.").

[363] *Certification from U.S. Dist. Ct., W.D. Wash. v. Sakuma Bros. Farms, Inc.*, 355 P.3d 258, 263 (Wash. 2015).

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period be taken.[364] Further, "Washington does not allow most private employees to waive their right to a meal period through a [collective bargaining agreement]."[365]

An employer may seek a variance from the meal period rules by submitting a written application to the Labor Director. The application must contain the following:

- the reasons for the variance request; and
- evidence that the employer provided to the employees or to their representatives the following:
  - the intent to submit a variance;
  - a copy of the requested variance; and
  - the Labor Director's address or phone number or other contact information.[366]

The Labor Director may allow the employer and any involved employee, or their representatives, the opportunity to orally weigh in on the proposal whenever circumstances warrant. After reviewing the application, the Labor Director will grant the variance if it determines there is good cause for the variance. *Good cause* is defined as, but not limited to, "situations where the employer can justify the variance and can prove that the variance does not have a harmful effect on the health, safety, and welfare of the employees involved."[367]

The variance order will state the following:

- "the conditions the employer must maintain;" and
- "the practices, means, methods, operations, standards and processes which the employer must adopt under the variance."[368]

The order may be revoked or terminated at any time after the Labor Director gives the employer at least 30 days' notice. The Labor Director may issue a temporary variance valid for no more than 30 calendar days when the employer demonstrates good cause and where immediate action is necessary pending further review by the Director. Note that an employer need not present evidence it provided the aforementioned information to employees and/or their representatives to be granted a temporary variance.[369]

Rest Periods. Washington employees may not be required to work more than three hours at a time without a ten-minute rest period, and must be allowed a ten-minute rest period for each four hours of working time.[370]

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[364] Washington State Dep't of Labor & Indus., *Meal and Rest Periods for Nonagricultural Workers Age 18 & Over*, Admin. Policy No. ES.C.6.1 (rev. Dec. 1, 2017), *available at* https://lni.wa.gov/workers-rights/_docs/esc6.1.pdf.

[365] *Hill v. Garda CL Nw., Inc.*, 394 P.3d 390, 405 (Wash. Ct. App. 2017).

[366] WASH. ADMIN. CODE § 296-126-130.

[367] WASH. ADMIN. CODE § 296-126-130(4).

[368] WASH. ADMIN. CODE § 296-126-130.

[369] WASH. ADMIN. CODE § 296-126-130(6)-(7).

[370] WASH. ADMIN. CODE § 296-126-092(4); *Wingert v. Yellow Freight Sys., Inc*., 50 P.3d 256 (Wash. 2002).

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However, if the nature of the work is such that the employee may take intermittent rest periods equivalent to 10 minutes for each four hours worked, scheduled rest periods are not required.[371] Per the state labor department:[372]

- An *intermittent rest period* is an interval of short duration in which employees are allowed to rest, relax, and engage in brief personal activities while relieved of all work duties.
- A series of 10 one-minute breaks is not sufficient to meet the intermittent rest period requirement.
- Intermittent rest periods are not permitted when the nature of work requires employees to engage in constant mental or physical exertion, *e.g.*, engage in constant mental vigilance to protect life or property (such as service on an armored truck); continuous physical work activities (such as work on a production line). Employees must be given an uninterrupted ten-minute rest period under circumstances where the nature of the work requires constant mental or physical exertion.
- Even if an employee engages in brief personal activities, not all short breaks qualify as intermittent rest periods.
- Brief stops to run to the restroom or grab food or drink to consume are too short and hurried to be considered intermittent rest periods because these stops do not provide a true break from work activity and an opportunity for relaxation.
- Because employers must provide reasonable access to bathrooms and toilet facilities under state law, in most work settings this means an employer cannot impose unreasonable restrictions on accessing bathrooms or toilet facilities, including time use restrictions.

Unlike meal periods, the Washington State Department of Labor and Industries takes the position that employees may *not* choose to waive paid rest breaks.[373]

Rest periods that last 20 minutes or less must be paid. Rest periods longer than 20 minutes are not counted as compensable hours of work if the employee has substantial freedom to engage in personal activities during that time. Whether any period during which an employee is relieved of all duty during a workday can be considered to be noncompensable turns on whether the employee can use the period of time for their own benefit.[374] Depending on the circumstances, breaks of up to two hours have been found to be work time. Employees need not be paid extra compensation simply for being "on call" during paid rest periods.[375] However, in *Hill v. Garda CL Northwest, Inc.*, the Washington Court of Appeals held that rest periods that require employees to "remain vigilant" and that preclude their ability to relax or take care of personal business during their breaks are "much more involved than simply being on call" and violate Washington's rest period requirements.[376]

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[371] WASH. ADMIN. CODE § 296-126-092(5).

[372] Washington State Dep't of Labor & Indus., *Meal and Rest Periods for Nonagricultural Workers Age 18 & Over*, Admin. Policy ES.C.6.1 (rev. Dec. 1, 2017), *available at* https://lni.wa.gov/workers-rights/_docs/esc6.1.pdf.

[373] Washington State Dep't of Labor & Indus., *Meal and Rest Periods for Nonagricultural Workers Age 18 & Over*, Admin. Policy No. ES.C.6.1 (rev. Dec. 1, 2017).

[374] 29 C.F.R. § 785.16.

[375] *White v. Salvation Army*, 75 P.3d 990, 991 (Wash. Ct. App. 2003).

[376] 394 P.3d 390 (Wash. Ct. App. 2017).

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The rest period requirements do not apply to exempt white-collar employees.[377]

3.4(b)(ii) *State Meal & Rest Periods for Minors*

Minors aged 16 and 17 are entitled to an uninterrupted meal break of at least 30 minutes if they work more than five hours in a day. They also are entitled to at least a ten-minute paid rest break for every four hours worked. In addition, 16- and 17-year olds must receive a rest period no later than the end of the third hour of the shift.[378]

Minors aged 14 and 15 may not work more than four hours without a 30-minute uninterrupted meal period, separate from and in addition to rest breaks. They must also receive a paid rest break of at least 10 minutes for every two hours worked. Employees aged 14 and 15 years old must also receive a rest period after two hours for every four hours of work.[379]

3.4(b)(iii) *State Enforcement, Remedies & Penalties*

Washington's meal and rest break provisions are enforced in the same manner as the state's other wage and hour provisions, as discussed in **3.7(b)(xii)**. Employees who are not granted required rest periods may recover damages for lost wages.[380] In addition, an employer is liable for premium pay when an employee misses or is not given a break. An employee that does not receive a compliant ten-minute paid rest period and/or a 30-minute unpaid meal period must be paid for work performed and for the noncompliant rest and/or meal period.[381] This principle holds true for shortened, interrupted, and missed rest and meal periods.

3.4(b)(iv) *Lactation Accommodation Under State Law*

Washington law generally provides that a mother has the right to breast feed her child in any place of public resort, accommodation, assemblage, or amusement. Discrimination against a mother breast feeding her child is prohibited.[382] A woman seeking redress for violation of this law may file a complaint with the Washington State Human Rights Commission within six months of the alleged violation.[383]

Specific to employment, state law entitles an employee to reasonable accommodations for her pregnancy or related medical conditions, including the need to express breast milk. *Reasonable accommodations* include:

- providing reasonable break time for an employee to express breast milk for two years after the child's birth each time the employee has need to express the milk; and

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[377] Washington State Dep't of Labor & Indus., *Industrial Welfare Act: Applications, Exemptions, and Interpretations*, Admin. Policy No. ES.C.1 (rev. June 24, 2005), *available at* https://lni.wa.gov/workers-rights/_docs/esc1.pdf.

[378] WASH. ADMIN. CODE § 296-125-0287.

[379] WASH. ADMIN. CODE § 296-125-0285.

[380] The Washington Supreme Court held that nurses were entitled to overtime wages for "the first 10 minutes of each break they missed." *Washington State Nurses Assoc. v. Sacred Heart Med. Ctr.*, 287 P.3d 516, 521(Wash. 2012).

[381] Washington State Dep't of Labor & Indus., *Meal and Rest Periods for Nonagricultural Workers Age 18 & Over*, Admin. Policy No. ES.C.6.1 (rev. Dec. 1, 2017), *available at* https://lni.wa.gov/workers-rights/_docs/esc6.1.pdf.

[382] WASH. REV. CODE §§ 49.60.030, 49.60.215.

[383] WASH. REV. CODE § 49.60.230.

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- providing a private location, other than a bathroom, if such a location exists at the place of business or worksite, which may be used by the employee to express breast milk.[384]

If the business location does not have a space for the employee to express milk, the employer must work with the employee to identify a convenient location and work schedule to accommodate her needs.[385]

In addition, an employer is entitled to use the designation "infant-friendly" on promotional materials if it has an approved workplace breast-feeding policy that addresses at least the following:

- flexible work scheduling, including permitting breaks and work patterns that provide time for expressing breast milk;
- a convenient, sanitary, safe, and private locations (other than restrooms) allowing privacy for breast feeding or expressing breast milk;
- a convenient clean and safe water source with facilities for washing hands and rinsing breast-pumping equipment located in the private location; and
- a convenient hygienic refrigerator in the workplace for the mother's breast milk.[386]

An employer seeking approval of a workplace breast-feeding policy must submit it to the state health department.[387]

3.5 Working Hours & Compensable Activities

3.5(a) *Federal Guidelines on Working Hours & Compensable Activities*

In contrast to some state laws that provide for mandatory days of rest, the FLSA does not limit the hours or days an employee can work and requires only that an employee be compensated for "all hours" worked in a workweek. Ironically, the FLSA does not define what constitutes hours of work.[388] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call, training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[389]

As a general rule, employee work time is compensable if expended for the employer's benefit, if controlled by the employer, or if allowed by the employer. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as work time. An employee's *principal duties* include an employee's productive tasks. However, the phrase is expansive enough to encompass not only those tasks an employee is employed to perform, but also tasks that are an "integral and indispensable" part of the principal activities. For more information on this topic, including

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[384] WASH. REV. CODE § 43.10.005.

[385] WASH. REV. CODE § 43.10.005.

[386] WASH. REV. CODE § 43.70.640.

[387] WASH. REV. CODE § 43.70.640.

[388] The FLSA states only that to employ someone is to "suffer or permit" the individual to work. 29 U.S.C. § 203(g).

[389] *See, e.g.*, *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 519 (2014) (in determining whether certain preliminary and postliminary activities are compensable work hours, the question is not whether an employer requires an activity (or whether the activity benefits the employer), but rather whether the activity "is tied to the productive work that the employee is employed to perform").

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information on whether time spent traveling, changing clothes, undergoing security screenings, training, waiting or on-call time, and sleep time will constitute hours worked under the FLSA, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.5(b) *State Guidelines on Working Hours & Compensable Activities*

Hours worked under Washington law is defined as "all hours during which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed workplace."[390]

A workweek consists of any regular period of seven consecutive days established by the employer. Occasional changes to the workweek may be made as long as they are not done to evade the overtime laws. Moreover, with certain limited exceptions,[391] neither the FLSA, nor Washington law limit the number of hours an adult employee can be required to work as long as the required overtime pay is provided.

Special workweek options are available in particular industries, such as health care (8/80 workweek), law enforcement, and fire protection (28-day workweek) under both federal and Washington law.[392] While it is generally lawful for employers to impose mandatory overtime, it is unlawful for certain health care facilities in Washington to require hourly registered nurses or licensed practical nurses and certain other health care workers, to work overtime, unless required because of an unforeseeable emergency, the completion of a patient care procedure, prescheduled on-call time, or failure to find adequate staffing after reasonable efforts to do so. A covered employee that accepts overtime who works more than twelve consecutive hours must be provided the option to have at least eight consecutive hours of uninterrupted time off from work following the time worked.[393] Overtime that may not be required pursuant to this law is time in excess of an agreed, predetermined, regularly scheduled shift not exceeding 12 hours in a 24-hour period or 80 hours in a 14-day period.[394]

There are a number of issues considered when determining whether activities constitute work. This publication looks more closely at pay requirements for reporting time, on-call time, and travel time. Moreover, employers that operate in Seattle should be aware of special requirements there, briefly noted below.

Reporting Time. Washington does not have a statutory provision addressing reporting time. The Department of Labor and Industries has taken the position that employers are not required to pay workers if they report for their shift but are told they are not needed that day. Only actual hours worked must be paid.[395]

On-Call Time. For purposes of determining whether on-call time is compensable under state law, Washington courts generally apply the FLSA's requirements. The following factors will be considered:

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[390] WASH. ADMIN. CODE § 296-126-002(8).

[391] *See, e.g.*, WASH. REV. CODE § 49.28.140 (prohibiting mandatory overtime for nurses).

[392] 29 U.S.C. § 207(j), (k); WASH. REV. CODE § 49.46.130(2), (5).

[393] WASH. REV. CODE § 49.28.140.

[394] WASH. REV. CODE § 49.28.130(4).

[395] Washington State Dep't of Labor & Indus., *Hours Worked*, Admin. Policy No. ES.C.2 (rev. July 19, 2021), *available at* https://lni.wa.gov/workers-rights/_docs/esc2.pdf.

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- the parties' agreement;
- whether the employees are required to remain on the premises or at any particular place during the on-call time;
- the degree to which the employees are permitted to engage in their own activities during on-call time; and
- if the employee's availability during on-call time is predominantly for the employer's or the employee's benefit.[396]

Travel Time. Travel time to and from work generally is noncompensable.[397] Specific rules regarding travel time exist under federal law..[398] Washington state law does not incorporate the exclusions of preliminary and postliminary activities from the definition of compensable work. The Washington Administrative Code defines "hours worked" as all hours during which the employee is authorized or required to be on the employer's premises or at a prescribed workplace".[399] An appellate court in Washington found no indication that the Washington Legislature intended to adopt the exclusions of the Portal to Portal Act with regards to the definition of compensable work.[400]

Under the federal travel time rules, use of an employer's vehicle for travel and incidental activities is not considered to be work time if the employer does not pay for the time, the travel is within the normal commuting area of the employer's business, and there is an agreement between the employer and the employee as to the use of the vehicle.[401]

As a result of the Washington Supreme Court's decision in *Stevens v. Brink's Home Security*, the treatment of employee commute time in company-provided vehicles is different under Washington law than under federal law. Under Washington law as interpreted in the *Brink's* case, commute time between home and work in a company-provided vehicle is considered compensable work time if all of the following circumstances are present:

- the employer strictly controls the drive time;
- the employer prevents employees from using the vehicle for personal reasons;
- the employer requires employees to remain available to assist at other jobsites while en route to and from their homes;
- the nature of the employer's business requires employees to drive company vehicles to reach customers and carry necessary tools and equipment; and
- the vehicle serves as the location where employees often complete work-related paperwork.[402]

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396 *Chelan Cnty. Deputy Sheriffs' Ass'n v. County of Chelan*, 745 P.2d 1 (Wash. 1987).

397 29 U.S.C. § 254(a)(1); *Anderson v. Department of Soc. & Health Servs.*, 63 P.3d 134 (Wash. Ct. App. 2003).

398 *Anderson*, 63 P.3d at 136.

399 WASH. ADMIN. CODE § 296-126-002(8).

400 *Anderson v. State Dep't of Soc. & Health Services*, 115 Wash. App. 452, 63 P.3d 134 (2003).

401 29 U.S.C. § 254(a)(1).

402 *Stevens v. Brink's Home Sec., Inc.*, 169 P.3d 473 (Wash. 2007).

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The extent to which such drive time is compensable under Washington law under facts different from those in the *Brink's* case is uncertain at this point, and will depend upon the individual circumstances of each case.

Nonexempt employees on an out-of-town assignment must be compensated for all time associated with such an assignment, including travel to and from the airport, time spent waiting at the airport, whether or not they are actually working, and time spent on the plane. An appellate court held that all out of town travel time is "hours worked" because it is "at the behest and for the benefit of the employer and is a necessary part of the "assigned task".[403]

3.5(b)(i) *Local Predictive Scheduling Ordinances*

While there is no state-wide predictive scheduling ordinance, several local jurisdictions in Washington have enacted secure scheduling or work opportunity ordinances.

Renton

Effective July 1, 2024, the city of Renton's ordinance covers employers that employ at least 15 people, regardless of location, or have an annual gross revenue of over $2 million. Before a covered employer can hire additional employees, temporary service workers, or use a staffing agency, they must offer any additional hours of work to existing employees. Exceptions apply, such as when an employer would be required to compensate existing employees at time-and-a-half or another premium rate.[404]

SeaTac

Hospitality and transportation employers in SeaTac are subject to the city's work opportunity ordinance. Hospitality employers that operate any hotel in the city with 100 or more guest rooms and 30 or more workers, or who operate any industrial foodservice or retail operation employing ten or more non-managerial, non-supervisory employees, as well as certain transportation employers with 25 or more non-managerial, non-supervisory employees must offer additional hours of work to existing employees before hiring additional part-time workers or subcontractors. The additional hours of work must be in a job position already held by a covered worker.[405]

Seattle

Scheduling Limitations. The Seattle Secure Scheduling Ordinance imposes scheduling limitations on covered employers. Under the ordinance, an employer may not, without employee consent, require an employee to work "less than ten hours after the end of the previous calendar day's work shift."[406] The employer also may not schedule an employee for a shift taking place "less than ten hours following the end of a work shift that spanned two calendar days."[407] If an employee works a shift beginning within the ten-hour rest period, the employer must pay the employee time-and-a-half "for the hours worked that are less than ten hours apart."[408] For example, if an employee's next shift begins only eight hours after last leaving work, the employee is entitled to time-and-a-half for the two-hour shortfall.

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[403] *Port of Tacoma v. Sacks*, 495 P.3d 866 (Wash. Ct. App. 2021).

[404] RENTON, WASH., INITIATIVE 23.02 (2023).

[405] SEATAC, WASH., MUN. CODE §§ 7.45.010 *et seq.*

[406] SEATTLE, WASH., MUN. CODE § 14.22.035(A).

[407] SEATTLE, WASH., MUN. CODE § 14.22.035(A).

[408] SEATTLE, WASH., MUN. CODE § 14.22.035(B).

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Pay for On-Call Time. Employers in Seattle are subject to specific compensation requirements concerning on-call time. The Secure Scheduling Ordinance requires employers to pay employees "one-half times the employee's scheduled rate of pay per hour" for scheduled on-call shifts for which the employee does not need to report to work.[409] In other words, if an employee is scheduled to be on call for a specified number of hours, but is not actually called into work during that on-call shift, the employer must pay the employee one-half their scheduled hourly rate for all of the on-call hours. Some exceptions apply, including for mutually-agreed shift swaps among employees.

Pay for Employer-Initiated Changes. The Secure Scheduling Ordinance also makes certain time compensable to employees, where based on changes to the schedule initiated by the employer. If an employer alters the existing work schedule—either by adding or deleting hours—it must timely notify the employee in person or by telephone, email, text, or similar means. Significantly, the employee is not obligated to accept any additional hours. If an employee agrees to work either additional hours or a shift (of the same total hours) with different starting or ending times, the employer must compensate the employee with an extra hour of pay, on top of the employee's wages for the work performed. If an employee loses hours due to the employer's schedule change, the employer must pay the employee "one-half times the employee's scheduled rate of pay per hour" for cancelled hours. In other words, the employer must pay the employee for half of the shift not worked. This provision applies if hours are reduced, cancelled, or if the employee is not needed for an on-call shift.

There are numerous exceptions to these compensation requirements. For example, employees can mutually agree to swap shifts if they like, without financial consequence to the employer. Under certain circumstances, employees can also accept additional hours to cover shifts made available because other employees could not work their schedules. Employees can also voluntarily release hours by submitting requested changes in writing. Further exceptions include hours subtracted for disciplinary reasons, due to threats or natural disaster, or because of a loss of power or other utility service.[410]

Ordinance Enforcement, Remedies & Penalties. This Seattle ordinance is enforced by the Seattle Office for Civil Rights (SOCR).[411] The ordinance authorizes monetary damages, penalties, and fines for employer violations. If the SOCR determines that an employer has violated the law, the employer will be liable for all unpaid wages owed the employee plus interest. The SOCR may also assess liquidated damages, not to exceed double the amount of unpaid compensation.

The SOCR may also impose civil penalties. Fine amounts are adjusted annually for inflation and are increased for employers with subsequent violations.[412]

The Secure Scheduling Ordinance also prohibits retaliation against individuals exercising their rights thereunder. Retaliation offenses trigger enhanced relief, including a civil penalty and a fine per aggrieved employee.[413]

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[409] SEATTLE, WASH., MUN. CODE § 14.22.050.

[410] SEATTLE, WASH., MUN. CODE §§ 14.22.045, 14.22.050.

[411] SEATTLE, WASH., MUN. CODE § 14.22.075; *see also* SEATTLE, WASH., MUN. CODE §§ 14.22.085 (governing investigations), 14.22.090 (governing findings of fact and agency determinations), 14.22.095 (governing remedies), 14.22.100 (governing the appeals period), 14.22.105 (governing appeals procedure), 14.22.110 (governing time for judicial review), and 14.22.115 (governing failure to comply with a final order).

[412] SEATTLE, WASH., MUN. CODE § 14.22.095.

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Finally, the ordinance authorizes individual and class action lawsuits for alleged noncompliance. A complainant may sue if the individual allegedly suffered financial injury as a result of an employer violation or was subjected to retaliation. In addition, the law awards prevailing plaintiffs their reasonable attorneys' fees and costs and provides for liquidated damages of up to double the amount of unpaid wages.[414]

Tukwila

The city of Tukwila's ordinance covers employers that employ at least 15 people, regardless of location, or have an annual gross revenue of over $2 million. Before a covered employer can hire additional employees, temporary service workers, or use a staffing agency, they must offer any additional hours of work to existing employees. Exceptions apply, such as when an employer would be required to compensate existing employees at time-and-a-half or another premium rate. Recordkeeping, notice, and posting requirements apply.[415]

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks minors, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[416] Additional latitude is also granted where minors are employed by their parents.

Considerable penalties can be imposed for violation of the child labor requirements, and goods made in violation of the child labor provisions may be seized without compensation to the employer. Employers may protect themselves from unintentional violations of child labor provisions by maintaining an employment or age certificate indicating an acceptable age for the occupation and hours worked.[417] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.6(b) *State Guidelines on Child Labor*

3.6(b)(i) *State Restrictions on Type of Employment for Minors*

General Restrictions. In Washington, minors under age 18 cannot engage in employment involving any indecent or immoral conduct, or any practice that is dangerous or injurious to life, limb, health, or morals. Table 10 summarizes the state restrictions on type of employment by age.

Table 10. Restrictions on Type of Employment by Age	
Age Range	**Restrictions**

[413] SEATTLE, WASH., MUN. CODE §§ 14.22.070, 14.22.095.

[414] SEATTLE, WASH., MUN. CODE § 14.22.125. The ordinance does not require the employee to take any prerequisite steps prior to filing a lawsuit.

[415] TUKWILA, WASH., MUN. CODE §§ 5.63.020 *et seq.*; TUKWILA, WASH., LAB. STANDARDS 02-020 *et seq.*

[416] 29 C.F.R. §§ 570.36, 570.50.

[417] 29 C.F.R. § 570.6.

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Table 10. Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
Ages 16-17	*The following occupations are prohibited for minors under age 18:* • occupations in or about plants or establishments manufacturing or storing explosives or explosive components; • occupations involving regular driving of motor vehicles, outside helper, or flagger, though occasional driving may be permitted under very limited circumstances; • all mining occupations; • logging, work in saw, lath, shingle, or cooperage-stock mills; • operation, repair, oiling, cleaning, adjusting, or setting up of power-driven machinery and hoisting apparatus; • occupations involving slaughtering, meat packing, processing, or rendering; • brick, tile, or kindred product manufacturing; • wrecking, demolition, or ship-breaking; • roofing and excavation; • work in establishments or workplaces being picketed during the course of a labor dispute; • work as a nurse's aide or assistant (unless enrolled in a *bona fide* nurse training program); • work as a maid or bellhop in motels or hotels (unless the minor is accompanied by a responsible adult whenever the work requires the minor to enter an assigned guest room, whether or not it is occupied at the time). Minors may work unaccompanied in unassigned, unoccupied guest rooms; • work in sauna or massage parlors, body painting or tattoo studios, or adult entertainment establishments; • occupations requiring the wearing of personal protective equipment related to hazardous substance exposure and/or hazardous noise exposure (except where the only requirement is the wearing of gloves, boots, or eye protection and the occupation is not otherwise prohibited); • firefighting and fire suppression; • occupations where there is a risk of exposure to bodily fluids or transmission of infections agents (does not apply to state certified lifeguards with first aid training); • occupations involving exposure to hazardous substances; • sales to passing motorists of candy, flowers, or other merchandise; • work in boiler or engine rooms; • all work performed more than 10 feet above ground or floor level; • work in freezers, meat coolers, and all work in preparing meats for sale (wrapping, sealing, labeling, weighing, pricing, and stocking are permitted if work is performed away from meat-cutting and preparation areas). Occasional entry into freezers or coolers for obtaining stock or placing stock is not prohibited; and • service occupations if a minor works past 8:00 P.M. (unless supervised by a responsible adult employee who is on the premises at all times).

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Table 10. Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	Certain exemptions apply for minors in a *bona fide* cooperative vocational education program, diversified career education program, or work experience program, and to qualifying apprentices.[418]
Under Age 16	*In addition to the restrictions for minors aged 16 and 17, no minor under age 16 may be employed:* • manufacturing; • processing operations (including but not limited to filleting of fish, dressing poultry, cracking nuts, commercial processing, canning, freezing, or drying of foods); • public messenger service; • occupations connected with transportation, warehouse, and storage (office work permitted); • the following specific areas of retail, food service, or gasoline service station operations: (a) maintenance or repair work; (b) window washing or other work requiring worker to be positioned at higher than ground or floor level; (c) cooking and baking; (d) operating, setting up, adjusting, cleaning, oiling, or repairing power-driven food slicers and grinders, food choppers and cutters, and bakery-type mixers; • work in the operation of amusement parks, street carnivals, and traveling shows; • loading and unloading goods to or from trucks, railroad cars, or conveyors; • operation or repair, oiling, cleaning, adjusting, or setting up of or working in proximity to any power-driven machinery; and • door-to-door sales (without a variance).[419]
Under Age 14	In addition to the restrictions for minors aged 15-17 and subject to limited exceptions, minors under age 14 cannot be employed without the written permission of a superior court judge in the county where the minor lives.[420]

Restrictions on Selling or Serving Alcohol. Washington law sets forth the following guidelines on minors selling or serving alcohol or working in an establishment that sells or serves alcohol. Different rules apply, depending if the employees are working on or off the premises.

For "on-premises work," employees under age 21 may not perform the activities or functions of a bartender. Employees aged 18 and older working for a licensee that sells or serves alcohol—*i.e.*, a beer and/or wine restaurant, beer and/or wine private club, snack bar, spirits, beer, and wine restaurant, spirits, beer, and wine private club; or a sports entertainment facility—may take orders for, serve, and sell liquor in any part of the licensed premises except cocktail lounges, bars, or other areas classified as

[418] WASH. REV. CODE § 26.28.070; WASH. ADMIN. CODE § 296-125-030.

[419] WASH. ADMIN. CODE §§ 296-125-018, 296-125-033.

[420] WASH. REV. CODE § 26.28.060; WASH. ADMIN. CODE § 296-125-018.

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off-limits to persons under age 21. These employees also may enter such restricted areas to perform work assignments including picking up liquor for service in other parts of the licensed premises, performing clean-up work, setting up and arranging tables, delivering supplies, delivering messages, serving food, and seating patrons, so long as the employees remain in the areas off-limits to minors no longer than is necessary to carry out their duties.[421]

The following persons under 21 years are permitted to remain in any premises licensed under the provisions of Title 66 during the course of their employment:

- professional musicians, disc jockeys, sound and lighting technicians;
- persons 18 years or older performing janitorial services for the purpose of installing, maintaining, repairing, or removing an amusement device;
- security and law enforcement officers, and firefighters 18 or older in the course of their official duties and if they are not direct employees of the licensee, and related to casual, isolated incidents arising in the course of their duties; and
- persons under 18 or older performing services unrelated to the sale or service of alcohol, as a dishwasher, cook, chef, sanitation specialist, or other kitchen staff under the following conditions:
  - individual may not perform any services or work in the bar, lounge, or dining area of licensed premises;
  - individual may not serve food, drinks or otherwise interact with patrons;
  - individual is never in possession of or consume alcohol at any time; and
  - a supervisor at least 21 years of age is present at all times a person under 21 is working.[422]

For "off-premises work," employees between the ages 18 and 21 may sell, stock, and handle beer or wine in or about any establishment holding a grocery store or beer and/or wine specialty shop license exclusively, so long as there is an adult age 21 or older on duty supervising the sale of liquor at the licensed premises. Employees under age 21 may deliver beer and/or wine purchased from licensees holding grocery store or beer and/or wine specialty shop licenses exclusively, if the delivery is made to cars of customers adjacent to the licensed premises. This delivery is permissible *only* when the minor employee is accompanied by the purchaser.[423]

For "nonretail work," licensees holding nonretail liquor licenses may allow their employees or interns between the ages of 18 and 21 to stock, merchandise, and handle beer or wine at the premises, if there is an adult age 21 older on duty supervising such activities on the premises. Domestic wineries may also permit certain interns and employees between the ages of 18 and 21 to engage in wine production-related work.[424]

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[421] WASH. REV. CODE § 66.44.350.

[422] WASH. REV. CODE § 66.44.316.

[423] WASH. REV. CODE § 66.44.340.

[424] WASH. REV. CODE § 66.44.318.

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3.6(b)(ii) *State Limits on Hours of Work for Minors*

In Washington, minors age 16 and 17 cannot work:

- during school hours unless excused by the superintendent;
- more than four hours on a school day preceding another school day;
- more than eight hours on any other day;
- more than 20 hours per week during the school year;
- more than 48 hours per week during school vacation;
- more than six days per week;
- between 10:00 P.M. and 7:00 A.M. on any day preceding a school day;
- after midnight on Fridays, Saturdays, and days preceding school holidays and vacations, provided that minors employed past 8:00 P.M. in service occupations must be supervised by a responsible adult employee who is on the premises at all times; and
- before 5:00 A.M. during school vacations.[425]

Special rules apply to minors engaged in door-to-door sales. Additionally, minors who have received a certificate of educational competence, are enrolled in a *bona fide* college program, are named on a valid certificate of marriage, or are shown as a parent on a valid certificate of birth are permitted to work during the school year such hours as are permitted during school vacations.[426]

Minors under age 16 cannot work:

- during school hours;
- more than three hours on a school day preceding another school day;
- more than eight hours on any other day;
- more than 16 hours a week during the school year;
- more than 40 hours during school vacations;
- between 7:00 P.M. and 7:00 A.M. on any day preceding a school day;
- after 9:00 P.M. on Fridays, Saturdays, and the day preceding a school holiday or vacation, provided that minors employed past 8:00 P.M. in service occupations must be supervised by a responsible adult employee who is on the premises at all times; and
- more than six days per week.[427]

Minors under age 14 cannot work without the written permission of a superior court judge, with limited exceptions.[428]

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[425] WASH. ADMIN. CODE § 296-125-027.

[426] WASH. ADMIN. CODE § 296-125-027.

[427] WASH. ADMIN. CODE § 296-125-027.

[428] WASH. ADMIN. CODE § 296-125-018.

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3.6(b)(iii) *State Child Labor Exceptions*

Washington's child labor laws do not apply to employers expressly exempted, *e.g.*, certain agricultural occupations, minors employed by their parents (subject to restrictions), or employers exempted by federal statute.[429]

3.6(b)(iv) *State Work Permit or Waiver Requirements*

Employers employing minors under age 18 must obtain work permits for minor employees. The minor's parent or guardian must also consent to the minor's employment (unless the minor is emancipated), and the approval of the minor's school is also required (unless the minor is emancipated).[430]

If an employer plans to employ one or more minors, it must obtain, keep current, and post valid minor work permit endorsements prior to the minor's employment at each workplace where minors are employed.[431] An employer must keep work permits on file throughout the minor's employment. Employers must obtain and keep on file a completed parent/school authorization form for each minor employed, as well as any variances issued to the employer.[432] Upon termination of employment, the employer must return the work permit to the Department of Labor and Industries.

3.6(b)(v) *State Enforcement, Remedies & Penalties*

The Washington Department of Labor and Industries enforces the state's restrictions on employment of minors. There is no private right of action. The department is empowered to:

- enter any workplace where work is or has been performed by a minor, or where employment records are, or are required to be, maintained;
- inspect, transcribe, and copy all pertinent records;
- inspect and investigate any workplace and all pertinent conditions, structures, machines, apparatus, devices, equipment, supplies, and materials located there; and
- question privately any employer, owner, operator, agent, or employee.[433]

3.7 Wage Payment Issues

3.7(a) *Federal Guidelines on Wage Payment*

There is no federal wage payment law. The FLSA covers minimum wage and overtime requirements, but would not generally be considered a "wage payment" law as the term is used in state law to define when and how wages must be paid.

3.7(a)(i) *Form of Payment Under Federal Law*

Authorized Instruments. Wages may be paid by cash, check, or facilities (*e.g.*, board or lodging).[434]

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[429] WASH. ADMIN. CODE § 296-125-010.

[430] WASH. REV. CODE §§ 49.12.121, 49.12.123.

[431] WASH. ADMIN. CODE §§ 296-125-0200 to 296-125-0224.

[432] WASH. ADMIN. CODE §§ 296-125-0200 to 296-125-0224.

[433] WASH. REV. CODE §§ 49.12.140, 49.12.420; WASH. ADMIN. CODE § 296-125-0280.

[434] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf; *see also* 29 C.F.R. § 531.32 (description of "other facilities").

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Direct Deposit. Neither the FLSA, nor its implementing regulations, address direct deposit of employee wages. The U.S. Department of Labor (DOL) has briefly considered the permissibility of direct deposit by stating:

> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's payroll deposit account, if it is at a place convenient to their employment and without charge to them.[435]

According to the Consumer Financial Protection Bureau (CFPB), an employer may require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the direct deposit. Alternatively, an employer may give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash.[436]

Payroll Debit Card. Employers may pay employees using payroll card accounts, so long as employees have the choice of receiving their wages by at least one other means.[437] The "prepaid rule" regulation defines a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[438]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you

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[435] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c00.

[436] Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.

[437] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013) and Consumer Fin. Prot. Bureau, *Ask CFPB: Prepaid Cards, If my employer offers me a payroll card, do I have to accept it?* (Sept. 4, 2020), *available at* https://www.consumerfinance.gov/ask-cfpb/if-my-employer-offers-me-a-payroll-card-do-i-have-to-accept-it-en-407/.

[438] 12 C.F.R. § 1005.2(b)(3)(i)(A).

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choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[439] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[440]

The CFPB provides numerous online resources regarding prepaid cards, including Frequently Asked Questions. Employers that use or plan to use payroll card accounts should consult these resources, in addition to the prepaid card regulation, and seek knowledgeable counsel.[441]

3.7(a)(ii) *Frequency of Payment Under Federal Law*

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[442]

3.7(a)(iii) *Final Payment Under Federal Law*

Federal law does not address when final wages must be paid to discharged employees or to employees who voluntarily quit. However, as noted in **3.7(a)(ii)**, wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned.

3.7(a)(iv) *Notification of Wage Payments & Wage Records Under Federal Law*

Federal law does not generally require employers to provide employees wage statements when wages are paid. However, federal law does require employers to furnish pay stubs to certain unique classifications of employees, including migrant farm workers.

Federal law does not address whether electronic delivery of earnings statements is permissible.

3.7(a)(v) *Changing Regular Paydays or Pay Rate Under Federal Law*

There are no general notice requirements under federal law should an employer wish to change an employee's payday or wage rate. However, it is recommended that employees receive advance written notice before a change in regular paydays or pay rate occurs.

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[439] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *Guide to the Short Form Disclosure* (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_guide-to-short-form-disclosure.pdf; *Prepaid Disclosures* (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

[440] 12 C.F.R. § 1005.18.

[441] *See* Consumer Fin. Prot. Bureau, *Prepaid Cards*, *available at* https://www.consumerfinance.gov/ask-cfpb/category-prepaid-cards/ and *Prepaid Rule Small Entity Compliance Guide* (Apr. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

[442] 29 C.F.R. § 778.106; *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

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3.7(a)(vi) *Paying for Expenses Under Federal Law*

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[443] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[444] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[445] tools and equipment,[446] and business transportation and travel.[447] Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employer, the reimbursement cannot be included in the employee's regular rate.[448]

3.7(a)(vii) *Wage Deductions Under Federal Law*

Permissible Deductions. Under the FLSA, an employer can deduct:

- state and federal taxes, levies, and assessments (*e.g.*, income, Social Security, unemployment) from wages;[449]
- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[450]
- amounts as directed by an employee's voluntary assignment or order to pay an employee's creditor, donee, or other third party (the employer or agent cannot directly or indirectly profit or benefit from the transaction);[451]
- with an employee's authorization for:
  - the purchase of U.S. savings stamps or U.S. savings bonds;
  - union dues paid pursuant to a valid and lawful collective bargaining agreement;

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[443] *See* 29 U.S.C. §§ 203(m), 206; 29 C.F.R. §§ 531.2, 531.32(a), and 531.36(a); U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA)* (rev. July 2009).

[444] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[445] 29 U.S.C. § 203(m); 29 C.F.R. §§531.3, 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[446] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.35; U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[447] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[448] 29 C.F.R. § 778.217.

[449] 29 C.F.R. § 531.38.

[450] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[451] 29 C.F.R. § 531.40.

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  - payments to the employee's store accounts with merchants wholly independent of the employer;
  - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
  - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[452]
- the reasonable cost of providing employees board, lodging, or other facilities by including this cost as wages, if the employer customarily furnishes these facilities to employees;[453] or
- amounts for premiums the employer paid while maintaining benefits coverage for an employee during a leave of absence under the Family and Medical Leave Act if the employee fails to return from leave after leave is exhausted or expires, if the deductions do not otherwise violate applicable federal or state wage payment or other laws.[454]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[455]

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[456] Finally, if an employee is granted vacation pay before it accrues, with the understanding it constitutes an advance of pay, and the employee quits or is fired before the vacation is accrued, an employer can recoup the advanced vacation pay, even if this cuts into the minimum wage or overtime owed an employee.[457]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is

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[452] 29 C.F.R. § 531.40.

[453] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[454] 29 C.F.R. § 825.213.

[455] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[456] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-19NA (Oct. 8, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[457] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-17NA (Oct. 6, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

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reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[458]

During overtime workweeks, deductions can be made on the same basis in overtime weeks as in non-overtime weeks if the amount deducted does not exceed the amount which could be deducted if the employee had not worked overtime during the workweek. Deductions that exceed this amount for articles that are not "facilities" are prohibited. There is no limit on the amount that can be deducted for qualifying deductions for "board, lodging, or other facilities." However, deductions made only in overtime weeks, or increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[459]

Prohibited Deductions. The FLSA prohibits an employer from making deductions for administrative or bookkeeping expenses incurred by an employer to the extent they cut into the minimum wage and overtime owed an employee.[460]

3.7(b) *State Guidelines on Wage Payment*

3.7(b)(i) *Form of Payment Under State Law*

Washington defines *wages* as compensation due to an employee by reason of employment, payable in U.S. legal tender or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the Washington Department of Labor and Industries.[461]

Alternative methods of payment, such as mandatory direct deposit or payroll debit cards, are permissible if there is no cost to the employee. Employers that pay employees by direct deposit or other electronic means must ensure that such wage payments are made and available to employees on the established payday.[462]

3.7(b)(ii) *Frequency of Payment Under State Law*

In Washington, employers must pay employees all wages owed on an established regular payday at no longer than monthly intervals. They may elect to pay employees semi-monthly.[463] Only employers that pay employees on a monthly basis may withhold wages until the next pay period for work performed in the last seven days of the month. Employers that pay wages more frequently than monthly must pay employees no less than 10 calendar days following the end of the established pay period.[464]

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458 29 C.F.R. § 531.36.

459 29 C.F.R. § 531.37.

460 U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

461 WASH. REV. CODE § 49.48.082 ("Wage" has meaning provided in WASH. REV. CODE § 49.46.010 – minimum wage and overtime); *see also* Washington Dep't of Labor & Industries, ADMINISTRATIVE POLICY ES.C.2 (July 15, 2014).

462 WASH. ADMIN. CODE §§ 296-126-023, 296-128-0350.

463 WASH. ADMIN. CODE § 296-126-023.

464 WASH. ADMIN. CODE § 296-126-023.

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Payments must be made no later than the established payday. If a payday falls on a nonbusiness day, payment must be made by the next business day. Mailed paychecks must be postmarked by midnight on the day due. Employers that pay employees by direct deposit or other electronic means must ensure that payments are available on the established payday.[465]

3.7(b)(iii) *Final Payment Under State Law*

Upon discharge or voluntary resignation, an employee in Washington must be paid their final wages at the end of the established pay period.[466]

3.7(b)(iv) *Notification of Wage Payments & Wage Records Under State Law*

Employees must be provided with itemized statements of pay, separate from their paycheck (or at the time of direct deposit), at the time of payment of wages showing:

- pay basis (hours or days worked);
- rate or rates of pay;
- gross wages;
- deductions taken from pay;
- pay period;
- payment date;
- total of all actual hours worked, with regular and overtime hours shown separately;
- all rate(s) of pay, whether paid on hourly, salary, commission, piece rate, or a combination thereof, or other basis during the pay period; and
- workers paid on a rate other than hourly or salary are entitled to a detailed printed accounting of commissions, piece rate, or other methods of payment earned in the pay period.[467]

Employers must provide each with employee written or electronic notification not less than monthly, detailing the following:

- the amount of paid sick leave accrued;
- the paid sick leave reductions since the last notification including but not limited to; paid sick leave used by an employee, paid sick leave donated to a co-worker through a shared leave program, or paid sick leave not carried over to the following year;
- any unused paid sick leave available for use by the employee; and
- **effective January 1, 2024**, the amount of paid sick leave paid before usage to CBA-covered construction workers.

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[465] WASH. ADMIN. CODE § 296-126-023.

[466] WASH. REV. CODE § 49.48.010.

[467] WASH. ADMIN. CODE § 296-126-040.

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Employers need not provide monthly notification to an employee if the employee has no hours worked since the last notification. Employers may satisfy paid sick leave notification requirements by providing this information in regular payroll statements.[468]

The pay statement may be transmitted electronically, *e.g.*, by email, as long as each employee has computer access to receive the information. If an employee cannot receive an electronic pay statement at work or at home on the established payday, an employer must provide a written pay statement to the employee on payday.[469]

3.7(b)(v) *Wage Transparency*

Washington's equal pay statute also contains wage transparency protections. Under the statute, an employer may not:

- require nondisclosure by an employee of their wages as a condition of employment; or
- require an employee to sign a waiver or other document that prevents the employee from disclosing the amount of the employee's wages.[470]

The law also includes antiretaliation provisions. An employer may not discharge or in any other manner retaliate against an employee for:

- inquiring about, disclosing, comparing, or otherwise discussing the employee's wages or the wages of any other employee;
- asking the employer to provide a reason for the employee's wages or lack of opportunity for advancement; or
- aiding or encouraging another employee to exercise their rights under the statute.[471]

The statute does not require an employee to disclose their compensation.

Note that an employer may prohibit an employee who has access to other employees' compensation information as part of their essential job functions from disclosing the wages of other employees or applicants to individuals who do not otherwise have access to such information. This applies unless the disclosure is in response to a complaint or charge, in furtherance of an investigation, or consistent with the employer's legal duty to provide the information, and the disclosure is part of the employee's essential job functions. Such an employee otherwise has the protections of the statute, including to disclose their wages without retaliation.[472]

Employers are also required to implement greater transparency regarding the salary or wages an employee may expect to receive for a specific job position. See **1.3(f)(i)**.

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[468] WASH. ADMIN CODE §296-128-760 (2), (2)(a).

[469] WASH. ADMIN. CODE § 296-126-040.

[470] WASH. REV. CODE. § 49.58.040.

[471] WASH. REV. CODE. § 49.58.040.

[472] WASH. REV. CODE. § 49.58.110.

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3.7(b)(vi) *Changing Regular Paydays or Pay Rate Under State Law*

There are no general notice requirements under Washington law regarding making a change to regular paydays or an employee's rate of pay. Employers, however, should consider providing employees with advance written notice before a change occurs.

3.7(b)(vii) *Changing Regular Paydays or Pay Rate Under Local Guidelines*

Seattle's Wage Theft Ordinance. Employers in Seattle must comply with the Wage Theft Ordinance's notice requirements (see 2.1(b) for a summary of the law's initial notice requirements upon hire). This law requires Seattle employers to provide amended notice to employees if there are any changes to wage payment terms and conditions. Thus, for example, Seattle employers must issue a revised notice to employees if the established payday or pay rate changes. Ideally, this notice should be delivered prior to any change.[473]

3.7(b)(viii) *Paying for Expenses Under State Law*

In Washington, there is no general obligation to indemnify an employee for business expenses. However, employers are required to furnish or compensate employees for any required uniforms.[474] The employer may not require deposits or make deductions from employee wages for uniforms. Apparel that an employer requires an employee to wear during the course of employment is a uniform if it is:

- apparel of a distinctive style and quality that, when worn outside of the workplace, clearly identifies the person as an employee of a specified employer;
- apparel that is specially marked with an employer's logo;
- unique apparel representing an historical time period or an ethnic tradition; or
- formal apparel.[475]

Required apparel of a common color that conforms to a general dress code or style is not a uniform. If an employer changes the color or colors during a two-year period, the employer must furnish or compensate the employees for the apparel. *Common color* is limited to the following colors or light or dark variations: white, tan, or blue for tops; and tan, black, blue, or gray for bottoms.[476]

3.7(b)(ix) *Paying for Expenses Under Local Guidelines*

The city of Seattle requires an employer to indemnify an employee for all necessary expenditures or losses incurred by the employee as a direct consequence of the employee's duties, or of the employee's obedience to the directions of the employer. This applies even if the employer's directions were unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful. The ordinance applies to the hours that an employee works in the city limits, but not to employees that do not perform two hours of work in the city limits in any two-week period.[477]

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[473] SEATTLE, WASH., MUN. CODE § 14.20.025(D).

[474] Washington State Dep't of Labor & Indus., *Employee Wearing Apparel and Uniforms*, Admin. Policy No. ES.C.8.1 (Jan. 2, 2002), *available at* https://lni.wa.gov/workers-rights/_docs/esc8.1.pdf.

[475] WASH. REV. CODE § 49.12.450.

[476] WASH. REV. CODE § 49.12.450.

[477] SEATTLE, WA CODE §§ 14.20.010, 14.20.015, 14.20.020.

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3.7(b)(x) *Wage Deductions Under State Law*

Permissible Deductions. Washington law imposes restrictions on the types of deductions that may be taken from employee wages. During an ongoing employment relationship, the employer may deduct from wages for the following purposes, even if the deduction takes the employee's wages below the minimum wage:

- deductions required by state or federal law;
- deductions for medical, surgical, or hospital care or service;
- deductions to satisfy a court order, judgment, wage attachment, trustee process, bankruptcy proceeding, or payroll deduction notice for child support payments; and
- deductions an employee expressly authorizes in writing and in advance for a lawful purpose for the employee's benefit.[478]

For nonexempt employees, any deduction that is not for a *bona fide* debt or cash advance must be taken only from straight-time wages, not overtime, and must not reduce the employee's pay below minimum wage.[479]

If an employee provides express authorization in advance, an employer can deduct for the following items, which are considered for a lawful purpose for the employee's benefit, and can reduce an employee's pay below the minimum wage:

- employee purchases of the employer's goods or services;
- loans to the employee, including reasonable interest;
- pension, medical, dental, or other benefit plans; or
- payments to a creditor or third party, including the employer.

Deductions must be identified and recorded openly and clearly in employee payroll records.[480]

Prohibited Deductions. Several types of deductions are expressly prohibited, including deductions related to:

- a customer's bad check or credit card, even if accepted in violation or established policies;
- cash register shortages, when an employee performs an accounting at the beginning and end of a shift and has sole access to the register;
- customer walk-outs, even if the employee is not watching customers and ignores the fact customers are finished dining and are ready for their check; or
- damage or loss to stock or other employer property.[481]

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[478] WASH. ADMIN. CODE § 296-126-028.

[479] WASH. REV. CODE § 49.52.060; WASH. ADMIN. CODE § 296-126-028.

[480] WASH. ADMIN. CODE § 296-126-028.

[481] WASH. ADMIN. CODE § 296-126-028.

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Exemptions. All employees are subject to the limitations on deductions from wages that are imposed by Washington's statutes. The limitations imposed by Washington's regulations, however, exempt the following classes of employees:

- individuals employed in a bona fide executive, administrative or professional capacity, or in the capacity of outside salesperson;
- any individual registered as a volunteer with a state or federal volunteer program; and
- any person who performs any assigned or authorized duties for an educational, religious, governmental, or nonprofit charitable corporation by choice and receives no payment other than reimbursement for actual expenses necessarily incurred in order to perform such volunteer services.[482]

3.7(b)(xi) *Wage Assignments & Garnishments*

As set forth in **3.7(b)(viii)**, employers may lawfully deduct from employees' wages "when required or empowered so to do by state or federal law."[483] This includes deductions required by court orders issued pursuant to Washington's garnishment law[484] or permissible wage assignments (either voluntary or mandatory).

A creditor holding a judgment against an individual can have a writ of wage garnishment, or "continuing lien on earnings," issued against the individual's wages to the individual's employer after a certain time period.[485] The writ of garnishment must be served by personal service or certified mail.[486] Upon being served with a writ of garnishment, the employer must complete the accompanying form entitled "Answer to Writ of Garnishment,"[487] or "First Answer," and return it to the court of issuance, the affected employee, and the creditor or creditor's attorney, within 20 days. The employer must upon receipt of a writ of garnishment withhold a percentage of the employee's earnings.[488]

The percentage of an employee's earnings that is exempt from garnishment and that should not be withheld is, for a week of earnings, whichever is greater of: (1) 35 times the federal minimum hourly wage in effect at the time the earnings are payable; or (2) 75% of the disposable earnings of the defendant.[489] In the case of a garnishment based on a judgment or other order for child support or a court order for spousal maintenance, the exemption is just 50% of the disposable earnings of the employee.[490]

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[482] WASH. ADMIN. CODE § 296-126-002.

[483] WASH. REV. CODE § 49.52.060; *see also* WASH. ADMIN. CODE § 296-126-028(1).

[484] WASH. REV. CODE ch. 6.27.

[485] The period, or "stay of execution," depends on the court issuing the judgment. In Washington, it is 10 days in a superior court, or 30 days in a district court. Under certain circumstances, prejudgment writs of garnishment are also available.

[486] WASH. REV. CODE § 6.27.110.

[487] WASH. REV. CODE § 6.27.190.

[488] WASH. REV. CODE § 6.27.150.

[489] WASH. REV. CODE § 6.27.150(1).

[490] WASH. REV. CODE § 6.27.150(2).

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Continuing liens on earnings are effective for 60 days, dated from the day of service on the employer. Thereafter, the creditor is required to serve a form called the "Second Answer" on the employer, similar in form to the "First Answer." As with the First Answer, the Second Answer is required to be returned to all concerned parties within 20 days, and serves to renew the continuing lien on the employee's wages and requirement to withhold the nonexempt portion of the employee's wages. Employers should take care to fully and carefully answer writs of garnishment using the accompanying forms, as failure to do so can render the employer liable, upon notice and opportunity to be heard, for a default judgment in the amount of employee's unpaid debt to the creditor, plus attorneys' fees and costs.[491]

Washington prohibits employers from discharging employees as a result of a creditor subjecting their unpaid earnings to garnishment.[492] The employee is not entitled to this protection, however, if garnishments on three-or-more separate debts are served upon the employer within any period of 12 consecutive months.[493]

Additional rules apply regarding the garnishment of lump-sum income such as bonuses, commissions, and insurance settlements.[494]

3.7(b)(xii) *State Enforcement, Remedies & Penalties*

In Washington, employee actions to collect straight time wages are available under common-law contract theories and state wage collection statutes.[495] Actions to collect unpaid minimum wages and overtime wages are provided for under the Washington minimum wage law.[496] If a nonexempt employee engages in activities that are agreed to be unpaid but that are later determined to be compensable work, the employee's statutory recovery for non-overtime hours under Washington law is the minimum wage rate, not the employee's higher regular rate of pay.[497]

The Employee Standards Division of the Washington Department of Labor and Industries enforces the minimum wage act and other state wage and hour provisions. The Department of Labor and Industries has authority to order employers to pay wages owed, and to impose civil penalties for willful violations.[498] Washington employees may bring civil suits for unpaid wages, or may assign claims to the state, which may bring an action on the employee's behalf.[499] The statute of limitations for claims under the Washington minimum wage law is three years.[500] Additionally, employers that employ individuals under unlawful standards or conditions of labor commit a misdemeanor. If convicted, violators will be fined between $25 and $1,000.[501]

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491 WASH. REV. CODE § 6.27.200.

492 WASH. REV. CODE § 6.27.170.

493 WASH. REV. CODE § 6.27.170.

494 WASH. REV. CODE §§ 26.23.020 *et seq.*

495 *Seattle Prof'l Eng'g Employees Ass'n v. Boeing*, 991 P.2d 1126, 1133 (Wash. 2000); WASH. REV. CODE chs. 49.48, 49.52.

496 WASH. REV. CODE ch. 49.46.

497 *Seattle Prof'l Eng'g Employees Ass'n*, 991 P.2d at 1132.

498 WASH. REV. CODE § 49.48.083.

499 WASH. REV. CODE §§ 49.12.150, 49.48.090.

500 *Seattle Prof'l Eng'g Employees Ass'n*, 991 P.2d at 1133.

501 WASH. REV. CODE § 49.12.170; WASH. ADMIN. CODE § 296-126-226.

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The Department also enforces the wage transparency provisions in the Equal Pay Act. An employee may file an administrative complaint with the Department of Labor and Industries.[502] An employee may recover damages in the form of back pay via an administrative action, and the Department may impose civil penalties of up to $500 for a first violation and up to $1,000 or 10% of the employee's damages, whichever is greater, for a subsequent violation.[503] Likewise, these damages and penalties are available remedies in a civil action for a violation of the Act, which must be filed within three years of the alleged violation.[504]

Wage Recovery Act. In a claim for unpaid wages, an employee that prevails can secure a wage lien on an employer's real or personal property. The law applies to all employees except for highly compensated employees, meaning those who were a five percent owner of the business at which they were employed or who received compensation from the employer in the preceding year in excess of the indexed compensation pursuant to the federal Fair Labor Standards Act regulations for highly compensated employees.[505]

3.8 Other Benefits

3.8(a) *Vacation Pay & Similar Paid Time Off*

3.8(a)(i) *Federal Guidelines on Vacation Pay & Similar Paid Time Off*

To the extent an "employee welfare benefit plan" is established or maintained for the purpose of providing vacation benefits for participants or their beneficiaries, it may be governed under the federal Employee Retirement Income Security Act (ERISA).[506] However, an employer program of compensating employees for vacation benefits out of the employer's general assets is not considered a covered welfare benefit plan.[507] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[508]

3.8(a)(ii) *State Guidelines on Vacation Pay & Similar Paid Time Off*

There is no requirement under Washington law that an employer must offer employees other benefit compensation such as vacation pay, holiday pay, personal time off, bonuses, severance pay, or pensions. However, once an employer does establish a policy and promises vacation pay and other types of additional compensation, the employer may not arbitrarily withhold or withdraw these fringe benefits retroactively. It is important to draft clear, precise, and complete policies and procedures regarding

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[502] WASH. REV. CODE § 49.58.060.

[503] WASH. REV. CODE § 49.58.060.

[504] WASH. REV. CODE § 49.58.070.

[505] WASH. REV. CODE § 60.90.900 *et seq.*

[506] 29 U.S.C. § 1002.

[507] 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a; U.S. Dep't of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dep't of Labor, *Advisory Opinion 2004-03A* (Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

[508] 490 U.S. 107, 119 (1989).

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these benefits, as they can become contractual obligations and subject the employer to liability if withheld or reduced without notice.

Vacation Pay. An employee's right to vacation pay in Washington is a matter of contract.[509] This contractual right is created by the employer's vacation policy. Accordingly, "[v]acation time earned but not taken may accrue to the extent permitted under that contract. An employee may utilize his accrued vacation time at any time during his employment, subject, however, to reasonable scheduling thereof by the employer."[510] Vacation time is not, however, "a right to continue to work full time, receive full wages, and also receive additional pay in lieu of absenting oneself from employment," unless so agreed.[511] There is no "affirmative statutory entitlement to payment for [] accrued PTO;" instead, "in Washington an employee's right to payment for accrued PTO is only contractual."[512] Accordingly, employers can impose conditions for paying out this benefit, *e.g.*, at the end of employment paying out unused PTO at a reduced rate, requiring employees to provide a certain amount of notice to receive payment.[513] In other words, "use-it-or-lose-it" vacation policies are lawful if created by the parties' vacation pay agreement. Absent an agreement to the contrary, payout of accrued vacation is not required when employment ends.[514]

Internal Sick Leave Policies. Like vacation pay, sick leave may be a matter of contract—so long as it is consistent with state and local requirements. As such, accrued, unused sick leave provided under an employer's internal policy need not be paid upon termination of employment unless so provided by the policy or law.[515] For additional discussion of the Washington state sick leave law, as well as the relevant local ordinances, see **3.9(b)(ii).** Employers should be aware, for example, that SeaTac, Seattle, and Tacoma have their own sick leave laws.

3.8(b) *Holidays & Days of Rest*

3.8(b)(i) *Federal Guidelines on Holidays & Days of Rest*

There is no federal law requiring that employees be provided a day of rest each week, or be compensated at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(b)(ii) *State Guidelines on Holidays & Days of Rest*

Washington does not require employers to provide employees with a day of rest each week, or compensate employees at a premium rate for work performed on the seventh consecutive day of work or on holidays.

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509 *Walters v. Center Elec., Inc.*, 506 P.2d 883, 886 (Wash. Ct. App. 1973).

510 506 P.2d at 886.

511 506 P.2d at 886-87.

512 *Sornsin v. Scout Media, Inc.*, 450 P.3d 193 (Wash. Ct. App. 2019).

513 *Sornsin v. Scout Media, Inc.*, 450 P.3d 193 (Wash. Ct. App. 2019).

514 *See, e.g.*, *Lapo v. Avalon Music, Inc*., 2001 WL 583248 (Wash. Ct. App. May 31, 2001).

515 *Teamsters Local 117 v. Northwest Beverages, Inc.*, 976 P.2d 1262 (Wash. Ct. App. 1999).

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3.8(c) *Recognition of Domestic Partnerships & Civil Unions*

3.8(c)(i) *Federal Guidelines on Domestic Partnerships & Civil Unions*

Federal law does not regulate or define domestic partnerships and civil unions. States and municipalities are free to provide for domestic partnership and civil unions within their jurisdictions. Thus, whether a couple may register as domestic partners or enter into a civil union depends on their place of residence. States may also pass laws to regulate whether employee benefit plans must provide coverage for an employee's domestic partner or civil union partner.

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[516] ERISA does not preempt state laws that regulate insurance, so employer health benefit plans that provide benefits pursuant to an insurance contract are subject to state laws requiring coverage for domestic partners or civil union partners.

The federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide continuation coverage under the plan for a specified period of time to each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event (*e.g.*, the employee's death or termination from employment).[517] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[518] Here again, states may choose to extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

3.8(c)(ii) *State Guidelines on Domestic Partnerships & Civil Unions*

Washington recognizes domestic partnerships for couples in which at least one partner is 62 years of age or older. Any state-registered domestic partnership in which the parties are the same sex, and neither is 62 years of age or older, that had not been dissolved or converted to a marriage, were automatically deemed a marriage as of June 30, 2014. The date of marriage is considered to be the original state registered domestic partnership date.[519]

Washington law treats registered domestic partners as spouses. Domestic partners have the same rights and responsibilities of spouses under state law, and gender specific terms such as husband and wife used in any statute, rule, or other law must be construed to be gender neutral and applicable to spouses of the same sex.[520]

Any privilege, immunity, right, benefit, or responsibility granted or imposed by statute, administrative, or court rule, policy, common law, or any other law to an individual because the individual is or was a spouse, is extended to a state registered domestic partner.[521] All same-sex legal unions, other than

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[516] 29 U.S.C. § 1144.

[517] 29 U.S.C. § 1161.

[518] 29 U.S.C. § 1167(3).

[519] WASH. REV. CODE § 26.60.100.

[520] WASH. REV. CODE § 26.04.010.

[521] WASH. REV. CODE §§ 1.12.080, 26.60.15.

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marriages, performed out-of-state are recognized and treated as domestic partnerships under Washington law.[522] Accordingly, an employee may include a domestic partner as a dependent on their group health coverage policy, and the employee's partner will also be entitled to protection under the state mini-COBRA statute in the event the employee's employment terminates.

3.9 Leaves of Absence

3.9(a) *Family & Medical Leave*

3.9(a)(i) *Federal Guidelines on Family & Medical Leave*

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees up to 12 weeks of unpaid leave in any 12-month period:

- for the birth or placement of a child for adoption or foster care;[523]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[524]
- to take medical leave when the employee is unable to work because of a serious health condition;[525]
- for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or called to covered active duty status as a member of the National Guard, armed forces, or armed forces reserves (see **3.9(k)(i)** for information on "qualifying exigency leave" under the FMLA); and
- to care for a next of kin service member with a serious injury or illness (see **3.9(k)(i)** for information on the 26 weeks available for "military caregiver leave" under the FMLA).

A *covered employer* is engaged in commerce or in any industry or activity affecting commerce and has at least 50 employees in 20 or more workweeks in the current or preceding calendar year.[526] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the last 12 months at a location where 50 or more employees work within 75 miles of each other.[527] For information on the FMLA, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.9(a)(ii) *State Guidelines on Family & Medical Leave*

Washington employers must be aware of the state requirements under the Washington Paid Family and Medical Leave (WPFML) law in addition to the federal FMLA. The WPFML provides paid leave benefits for qualifying employees in the state.

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[522] WASH. REV. CODE § 26.60.090.

[523] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[524] 29 C.F.R. §§ 825.102, 825.112, and 825.113; *see also* U.S. Dep't of Labor, Wage & Hour Div., *Administrator's Interpretation No. 2010-3* (June 22, 2010), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf (guidance on who may take time off to care for a sick, newly-born, or adopted child when the employee has no legal or biological attachment to the child).

[525] 29 C.F.R. §§ 825.112, 825.113.

[526] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[527] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

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The Washington Family Leave Act (WFLA), which provided unpaid leave protections similar to the FMLA, was repealed December 31, 2019 and replaced by the paid leave law.

Coverage & Eligibility

Covered Employers. The WPFML applies to all employers in Washington, except for federal government employers. The law does not apply to independent contractors.[528]

Covered Employees. To be eligible for WPFML leave, an employee must work for at least 820 hours in employment during the qualifying period. *Qualifying period* means the first four of the last five completed calendar quarters or, if eligibility is not established, the last four completed calendar quarters immediately preceding the employee's application for leave.[529]

However, an employee is not entitled to paid family or medical leave benefits:

- for any absence occasioned by the employee's willful intention to cause injury or illness to themselves or another, or resulting from any injury or sickness the employee sustained in the perpetration of an illegal act; for any family or medical leave commencing before the employee becomes qualified for benefits;
- during a suspension from their employment; or
- for any day in which a family or medical leave care recipient works at least part of that day for remuneration or profit during the same or substantially similar working hours as those of the employer from which family or medical leave benefits are claimed, except that occasional scheduling adjustments with respect to secondary employments does not prevent receipt of family or medical leave benefits.

An employee is also disqualified for benefits for any week the employee has knowingly and willfully made a false statement or representation involving a material fact or knowingly and willfully failed to report a material fact and, as a result, has obtained or attempted to obtain any paid family and medical benefits.[530]

Permissible Reasons for Leave. An employee may take leave under the WPFML for one or more of the following reasons:

- the employee's own serious health condition;
- to participate in providing care for a family member, including physical or psychological care, made necessary by the family member's serious health condition;
- to bond with the employee's child during the first 12 months after the child's birth or adoption;
- because of any qualifying military exigency as permitted under the federal FMLA; or

[528] WASH. REV. CODE § 50A.05.010.

[529] WASH. REV. CODE §§ 50A.05.010, 50A.15.010.

[530] WASH. REV. CODE §§ 50A.05.010, 50A.15.060.

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- for the seven calendar days following the death of the employee's child for whom the employee would have qualified for medical leave for their birth, or would have qualified for family leave during their first 12 months after birth/placement.[531]

Only the employee that gives birth is eligible for medical leave related to the recovery from childbirth during the post-natal period. This leave is subject to maximum leave duration under the law and will be designated as medical leave except when medical leave is fully or partially exhausted before the child is born, or the employee chooses to use available family leave during the post-natal period. If the employee who gives birth is not eligible for family leave to bond with their child, they may only use medical leave for the post-natal period.[532]

A *serious health condition* means an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility, including any period of incapacity, or continuing treatment by a health care provider.

A *family member* means a child, grandchild, grandparent, parent, sibling, spouse, or registered domestic partner of an employee. The inclusion of registered domestic partners differs from the definition of family member in the federal FMLA. *Family member* also includes an individual who regularly resides in the employee's home, but not an individual who simply resides in the home with no expectation that the employee care for them. It also includes any individual where the relationship creates an expectation that the employee care for the person and the person depends on the employee for care.[533] Child includes a biological, adopted, or foster child, a stepchild, or a child to whom the employee stands in loco parentis, is a legal guardian, or is a de facto parent, regardless of age or dependency status.[534]

Length of Leave. The minimum claim duration payment is for eight consecutive hours of leave. The maximum duration of paid family or medical leave may not exceed 12 times the typical workweek hours during a period of 52 consecutive calendar weeks. This leave may be extended an additional two times the typical workweek hours if the employee experiences a serious health condition with a pregnancy that results in incapacity.

Paid family and medical leave benefits cannot exceed a combined total of 16 weeks per claim year, but an additional two weeks may be added if the employee experiences a serious health condition with a pregnancy that results in incapacity. A claim year is defined as the 52-week period beginning on Sunday of the week of the date an eligible employee files a complete initial application for benefits.

There is a waiting period for benefits during the first seven calendar days of leave. Thereafter, benefits are payable when family or medical leave is required. However, no waiting period is required for leave for the birth or placement of a child.

Successive periods of family and medical leave caused by the same or related injury or sickness are considered a single period of family and medical leave only if separated by less than four months.

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[531] WASH. REV. CODE § 50A.05.010.

[532] WASH. ADMIN. CODE § 192-610-025.

[533] WASH. REV. CODE § 50A.05.010.

[534] WASH. REV. CODE § 50A.05.010.

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The entitlement to family leave benefits for the birth or placement of a child expires at the end of the 12-month period beginning on the date of the birth or placement. The entitlement to medical leave benefits for the employee's own serious health condition expires at the end of the 12-month period beginning on the date the employee filed an application for medical leave benefits. The entitlement to family leave benefits for a family member's serious health condition or leave for qualifying exigency expires at the end of the 12-month period beginning on the date the employee filed an application for the benefits.[535]

Employer Obligations

Payment of Paid Leave Benefits Premiums. Employers of 50 or more employees must pay a portion of the paid leave benefits premium. Employers with fewer than 50 employees may elect not to pay, but those that do elect to pay premiums may be eligible for small business assistance grants.

The Washington State Employment Security Department will assess, for each employee, a premium based on the amount of the individual's wages. The employer must collect the premiums for each employee through payroll deductions and remit the amounts collected to the Department.

For family leave premiums, an employer may deduct from the wages of each employee up to the full amount of the premium required. For medical leave premiums, an employer may deduct from the wages of each employee up to 45% of the full amount of the premium required. An employer may elect to pay all or any portion of the employee's share of the premium for family leave or medical leave benefits, or both.

An employer may apply for a conditional waiver for the payment of family and medical leave premiums for any employee who is:

- physically based outside of the state;
- employed in the state on a limited or temporary work schedule; and
- is not expected to be employed in the state for 820 hours or more in a qualifying period.

If the employee exceeds the 820 hours or more in a qualifying period, the conditional waiver expires and the employer and employee will be responsible for their shares of all premiums that would have been paid during the qualifying period. Upon payment of the missed premiums, the employee will be credited for the hours worked and will be eligible for benefits as if the premiums were originally paid.[536]

Voluntary Employer Plans. An employer may implement a voluntary plan for the payment of either family leave benefits or medical leave benefits, or both, and apply to the Employment Security Department for approval of the plan. The benefits afforded to the employees must be at least equivalent to the benefits the employees are entitled to as part of the WPFML, including but not limited to the duration of leave. The employer must offer at least half of the length of leave with pay and provide a monetary payment in an amount equal to or higher than the total amount of monetary benefits the employee would be entitled to receive as part of the state-run program. The employer may offer the same duration of leave and monetary benefits as offered under the state program.[537]

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[535] WASH. REV. CODE §§ 50A.05.010, 50A.15.020, and 50A.15.065; WASH. ADMIN. CODE §§ 192-500-070; 192-610-055.

[536] WASH. REV. CODE §§ 50A.05.010, 50A.10.030, and 50A.10.040.

[537] WASH. REV. CODE § 50A.30.010.

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Benefits. If required under the federal FMLA, the employer must maintain an employee's existing health benefits in force for the duration of the leave as if the employee had continued to work from the date the employee commenced family or medical leave until the date the employee returns to employment. If the employer and employee share the cost of the existing health benefits, the employee remains responsible for the employee's share of the cost. However, an employee who is not in employment for an employer at the time of filing an application for paid leave benefits is not eligible for continuation of health benefits under this provision.[538]

Reinstatement. The reinstatement requirements apply to employers with 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Upon returning from leave, an employee who takes family or medical leave under the statute is entitled to be restored to the position of employment the employee held when the leave commenced or to be restored to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

To be eligible for reinstatement, an employee must have been employed by their current employer for 12 months or more, and must have worked for the current employer for at least 1,250 hours during the 12 months immediately preceding the date on which leave will commence.

Taking leave may not result in the loss of any employment benefits accrued before the date on which the leave commenced. However, an employee taking leave is not entitled to accrual of any seniority or employment benefits during any period of leave; or any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

An employer may deny reinstatement to any salaried employee who is among the highest paid 10% of its workforce within 75 miles of the facility at which the employee works if:

- denial is necessary to prevent substantial and grievous economic injury to the employer's operations;
- the employer notifies the employee that the employer intends to deny reinstatement on this basis at the time the employer determines that the injury would occur; and
- leave has commenced and the employee elects not to return to employment after receiving the notice.

Employers that choose to deny reinstatement must continue health benefits for the remainder of the employee's approved leave. If an employer chooses to deny reinstatement, it must notify the employee in writing as soon as the employer decides to deny reinstatement. The employer must serve the notice to the employee either in person or by certified mail. The notice must include:

- a statement that the employer intends to deny employment restoration when the leave has ended;
- the reasons behind the decision to deny restoration;
- an explanation that health benefits will still be paid for the duration of the leave; and

[538] WASH. REV. CODE § 50A.35.020.

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- the date in which eligibility for employer-provided health benefits ends.[539]

Notice to Employees. Whenever an employee who is qualified for benefits under the statute is absent from work to provide family leave, or to take medical leave for more than seven consecutive days, the employer must provide the employee with a written statement of the employee's rights under the statute on a form published or prescribed by the Employment Security Department. The employer must provide the notice within five business days after the employee's seventh consecutive day of absence due to family or medical leave, or within five business days after the employer has received notice that the employee's absence is due to family or medical leave, whichever is later. The employer must also post a notice of rights provided under the statute.[540]

Antiretaliation Provisions. Under the WPFML, an employer is prohibited from:

- interfering with, restraining, or denying the exercise of, or the attempt to exercise, any valid right provided under the statute;
- discharging or in any other manner discriminating against an employee for opposing any practice made unlawful the statute; or
- discharging or in any other manner discriminating against any employee because the employee has:
  - filed any complaint, or has instituted or caused to be instituted any proceeding, under or related to the statute;
  - provided or is going to provide any information in connection with an inquiry or proceeding relating to any right provided under the statute; or
  - testified, or is about to testify, in an inquiry or proceeding relating to any right provided under the statute.[541]

Employee Rights & Obligations

Required Notice. The employee must provide written notice of the need to take family or medical leave. For foreseeable leave based on the expected birth or placement of a child, the employee must provide not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave. If the date of the birth or placement requires leave to begin in fewer than 30 days, the employee must provide such notice as is practicable.

For foreseeable leave due to planned medical treatment for the employee's or a family member's serious health condition, the employee:

- must make a reasonable effort to schedule the treatment so as not to unduly disrupt the employer's operations, subject to the approval of the employee's or family member's health care provider; and
- must provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave, except that if the date of the treatment

[539] WASH. REV. CODE § 50A.35.010; WASH. ADMIN. CODE § 192-700-010.

[540] WASH. REV. CODE §§ 50A.20.010, 50A.20.020.

[541] WASH. REV. CODE § 50A.40.010.

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requires leave to begin in fewer than 30 days, the employee must provide such notice as is practicable.[542]

Certification. The employee must authorize their health care provider, or their family member's health care provider, to disclose health care information about the employee or family member for purposes of certifying the need to take leave. For leave due to a military exigency, the employer may require the employee to provide supporting documentation.

An employee need not provide certification for paid leave benefits used in the first six weeks after a child's birth if the employee was incapacitated due to pregnancy or prenatal care.

The statute does not prohibit an employer from requiring an employee on leave to report periodically to the employer on the employee's status and their intention to return to work.[543]

Fitness for Duty. An employer may require medical certification as a condition of reinstatement for an employee who has taken medical leave so long as the employer has a uniformly applied practice or policy that requires each such employee to receive certification from their health care provider that the employee is able to resume work.[544]

Compensation During Leave. Family and medical leave insurance benefits are payable to an employee during a period in which the employee is unable to perform their regular or customary work because the employee is on family and medical leave if the employee:

- files an application for benefits as required by rules adopted by the Employment Security Department;
- has met the eligibility requirements or the elective coverage requirements;
- consents to the disclosure of information or records deemed private and confidential under state law;
- discloses whether the employee owes child support obligations;
- provides their Social Security number;
- provides a document authorizing the employee's or family member's health care provider, as applicable, to disclose health care information for purposes of certification of a serious health condition;
- provides the employer with written notice of the intention to take family or medical leave and, in the employee's initial application for benefits, attests that written notice has been provided; and
- if requested by the employer, provides documentation of a military exigency.

The employee must submit an application to the Employment Security Department in order to receive paid leave benefits. The weekly benefit amount for family and medical leave is determined as follows:

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[542] WASH. REV. CODE § 50A.15.030.

[543] WASH. REV. CODE §§ 50A.15.040, 50A.35.010.

[544] WASH. REV. CODE § 50A.35.010.

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- if the employee's average weekly wage is 50% or less of the state average weekly wage, the employee's weekly benefit is 90% of the employee's average weekly wage.
- if the employee's average weekly wage is greater than 50% of the state average weekly wage, the employee's weekly benefit is the sum of:
  - 90% of the employee's average weekly wage up to 50% of the state average weekly wage; and
  - 50% percent of the employee's average weekly wage that is greater than 50% of the state average weekly wage.

Every year on September 30, the maximum weekly benefit amount will be adjusted to 90% of the state average weekly wage. The minimum weekly benefit cannot be less than $100 per week, except that if the employee's average weekly wage at the time of family and medical leave is less than $100 per week, the weekly benefit will be the employee's full wage.[545]

Use of Paid Time Off from Other Sources. An employer may allow an employee who has available accrued vacation, sick, or other paid time off to choose whether: (1) to use available accrued leave; or (2) not use accrued leave, and instead receive paid family or medical leave benefits provided under this statute.[546]

3.9(a)(iii) *State Guidelines on Kin Care Leave*

The Washington Family Care Act entitles employees to use accrued sick leave to care for a family member with a health condition.[547] If employees are entitled to sick leave or other paid time off, they may use their choice of sick leave or other paid time off to:

- care for a child with a health condition that requires treatment or supervision;
- care for a spouse, parent, parent-in-law, or grandparent who has a serious health condition or an emergency health condition; or
- care for a child 18 years or older with a disability.[548]

Sick leave or other paid time off means time allowed under the terms of appropriate state law, a collective bargaining agreement or employer policy, to an employee for illness, vacation, and personal holiday. If paid time is not allowed to an employee for illness, it also means time allowed to an employee for disability under a plan, fund, program, or practice that is not covered by ERISA and not established or maintained through the purchase of insurance.[549]

A parent may use available paid time off when their child has a *health condition*, which includes:

- a medical condition requiring treatment or medication that the child cannot self-administer;

[545] WASH. REV. CODE §§ 50A.05.010, 50A.15.040, and 50A.15.020.

[546] WASH. REV. CODE § 50A.15.060.

[547] WASH. ADMIN. CODE § 296-130-010.

[548] WASH. REV. CODE § 49.12.270.

[549] WASH. REV. CODE § 49.12.265(5).

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- a medical or mental-health condition which would endanger the child's safety or recovery without the presence of a parent; or
- a condition warranting treatment or preventive health care (*e.g.*, dental or optical services) when a parent must be present to authorize the treatment.[550]

An employee also may use available paid time off when a spouse, parent, parent-in-law, or grandparent has a serious or emergency health condition:

- requiring an overnight stay in a hospital or other medical-care facility and any period of incapacity or subsequent treatment or recovery in connection with inpatient care;
- requiring continuing treatment under the care of a health care services provider that includes any period of incapacity to work or attend to regular daily activities; or
- involving an emergency health condition demanding immediate action.[551]

Use of leave other than sick leave is governed by the terms of the appropriate collective bargaining agreement or employer policy.[552] An employee may not take leave until it has been earned.[553]

An employer is required to post a notice of Family Care Act rights in the workplace, as well as copies of its own leave policies.[554] An employer may not discharge, demote, or discipline an employee for exercising their rights under the Family Care Act.[555]

3.9(b) *Paid Sick Leave*

3.9(b)(i) *Federal Guidelines on Paid Sick Leave*

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[556] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

3.9(b)(ii) *State and Local Guidelines on Paid Sick Leave*

Under state law[557] and the laws of Seattle[558] and Tacoma,[559] all private employers are covered. However, in Seattle different standards apply based on whether has one to 49 full-time equivalent employees (Tier

[550] WASH. ADMIN. CODE § 296-130-020(10).

[551] WASH. ADMIN. CODE § 296-130-020(11).

[552] WASH. REV. CODE § 49.12.270(1).

[553] WASH. ADMIN. CODE § 296-130-030(2).

[554] WASH. REV. CODE § 49.12.275.

[555] WASH. REV. CODE § 49.12.287.

[556] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[557] WASH. REV. CODE §§ 49.46.010 *et seq*.

[558] SEATTLE, WA CODE §§ 14.16.010 *et seq*.

[559] TACOMA, WA CODE §§ 18.10.010 *et seq*.

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1), 50 to 249 full-time equivalent employees (Tier 2), or 250 or more full-time equivalent employees (Tier 3). In SeaTac the law only applies to transportation and hospitality employers.[560]

Under state law, employees are covered unless an exception exists, *e.g.*, an individual employed in a *bona fide* executive, administrative, or professional capacity or in the capacity of outside salesperson. In Seattle, employees who work in the city are covered, though additional requirements apply if an employee is based outside Seattle and works in the city on an occasional basis, *i.e.*, an employee must perform more than 240 hours of work in Seattle in a year. In Tacoma, to be covered an employee must work in the city more than 80 hours a year. In SeaTac, the law applies to nonmanagerial, nonsupervisory transportation and hospitality workers.

The state law generally applies to employees covered by a collective bargaining agreement (CBA); however, certain provisions of the law do not apply to construction workers covered by a collective bargaining agreement (CBA) if the union signatory to the CBA is an approved referral union program, the CBA establishes equivalent sick leave provisions,[561] and the law's requirements are expressly waived in the CBA in clear and unambiguous terms or in an addendum to an existing agreement including an agreement that is open for negotiation provided the sick leave portions were previously ratified by the membership.[562] In Seattle, the law's provisions that are more generous than state law may be waived by employees covered by a CBA under limited circumstances, and eventually waiver will not be permitted. In Tacoma, the law's requirements may be waived by employees covered by a CBA that are not covered under state law. In SeaTac, the law's requirements can be waived by employees covered by a CBA.

Under state law and the laws of Seattle and Tacoma, covered relations for "sick" time purposes include a child, grandchild, grandparent, parent, registered domestic partner, sibling, and/or spouse. Note that Tacoma uses this definition for "sick," "safe," and "other" time purposes, and SeaTac uses one definition: child and family member, though neither term is defined. Additionally, **effective January 1, 2025**, the state law definition will also include a child's spouse and an individual who regularly resides in the employee's home – except an individual who simply resides in the same home with no expectation that the employee will care for them – or where the relationship creates an expectation that the employee care for the person, and that individual depends on the employee for care. For an absence related to domestic violence, sexual assault, or stalking, a covered relation under state law is a child, grandparent, parent, parent-in-law, registered domestic partner, spouse, and/or person with whom the employee has a dating relationship. Under Seattle's law, a covered relation includes a child, grandchild, grandparent, parent, parent-in-law, registered domestic partner, spouse, persons with whom the employee has a dating relationship, persons with whom the employee has a child in common, adult person related to the employee by blood or marriage, adult person with whom the employee is presently residing or with whom the employee resided in the past, a person 16 years of age or older with whom the employee is presently residing or with whom the employee resided in the past and has or has had a dating relationship, and/or a person 16 years of age or older with whom an employee 16 years of age or older has or has had a dating relationship.

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[560] SEATAC, WA CODE §§ 7.45.010 *et seq*.

[561] This must meet the requirements of Wash. Rev. Code §§ 49.46.200-49.46.830 and corresponding rules, except payment of leave at the normal hourly compensation may occur before usage and, effective January 1, 2024, an employer can payout accrued and unused leave to certain CBA-covered construction workers if employment ends before they satisfy the 90-day waiting period.

[562] WASH. REV. CODE § 49.46.180.

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Generally, under the laws accrual starts when employment begins or on a law's effective date, whichever is later. Under most laws, employees must accrue at least one sick leave hour for every 40 hours worked. However, for Tier 3 employers in Seattle, employees must accrue one sick leave hour for every 30 hours worked. None of the laws cap accrual, but state law and the laws of Seattle and Tacoma allow employers to cap carry-over. Under state law and Tacoma's law, carry-over of more than 40 hours to the following year is not required. Under Seattle law, carry-over of more than 40 hours (Tier 1), 56 hours (Tier 2), or 72 or 108 hours (Tier 3, based on whether standalone sick time or PTO is used to comply) is not required. In SeaTac, accrued but unused leave must be cashed out at the end of each year. None of the laws allow employers to avoid accrual and/or carry-over requirements by front loading a specific number of leave hours at the beginning of each year.

Under state law and the laws of Seattle and Tacoma, employees are entitled to use accrued leave beginning on the 90th calendar day after employment begins. In SeaTac, employees can use leave as it is accrued. None of the laws cap how much leave an employee can use each year. Under state law, unless a variance is obtained from the state labor department, employers must allow use in increments consistent with their payroll system and practices, not to exceed 1 hour. However, in Seattle variances will not be granted. In Seattle, for overtime-eligible employees, leave must be used in hourly increments or, if an employer's payroll system tracks compensation in increments of less than 1 hour, in the smallest increment in which compensation is tracked; for exempt employees, an employer may make deductions of paid sick and safe time in accordance with state and federal laws. In Tacoma, unless a variance is obtained from the state labor department, for nonexempt employees employers may establish a minimum increment of use per state law, subject to the FLSA, if they do not require employees to use leave in increments greater than one hour unless necessary due to a reasonable business need; for exempt employees, unless a variance is obtained from the state labor department, leave generally, may be deducted in reasonable increments, in accordance with the FLSA, or in accordance with a pay system established by statute, ordinance, or regulation. In SeaTac, the law is silent on this issue.

Employees can use leave for "sick," "safe," or "other" time purposes. Employees can use leave for the following "sick" time purposes: eligible employees can use sick time for themselves or to care for a covered relation: a mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; preventive medical care. If a covered employee or relation is a victim of domestic violence, sexual assault, or stalking, leave can be used for the following "safe" time purposes: legal or law enforcement assistance or remedies to ensure health and safety, including, but not limited to, preparing for, or participating in, a civil or criminal legal proceeding; treatment by a health care provider for physical or mental injuries, or to attend to health care treatment; services from a domestic violence shelter, rape crisis center, or other social services program; mental health counseling; participate in safety planning, temporarily or permanently relocate, or take other actions to increase safety. Employees can generally use leave for the following "other" purposes: closure of the employee's place of business, or a child's school or place of care, by a public official. Under state law, **effective January 1, 2025**, employees will be able to use leave due to the closure of a child's place of care after the declaration of an emergency by a local or state government or agency, or by the federal government. Additionally, in Tacoma leave can be used for bereavement for the death of a family member.

State law provides that, unless an employer allows less advance notice, an employee must provide notice for a foreseeable absence at least 10 days, or as early as practicable, in advance of use. Seattle and Tacoma use the same standard, but use "possible" instead of "practicable" and specify written

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notice (Tacoma) or written or electronic notice (Seattle). SeaTac does not address employee notice requirements.

State law and the laws of Seattle and Tacoma require an employee to provide notice for an unforeseeable absence as soon as practicable, but state law and Seattle law add before the required start of the shift unless it is not practicable to do so. For "safe" time purposes, the state's model notice adds "no later than the end of the first day that the employee takes such leave." As noted, SeaTac does not address employee notice requirements.

Under state law and Seattle law, an employer can require documentation that leave was taken for a covered purpose if leave is used for more than three consecutive days (more than three days in Tacoma). In SeaTac, however, employees are not required to present certification of an illness.

Note that under state law and the laws of Seattle and Tacoma, "safe time" notice and documentation requirements must comply with the Washington State Domestic Violence Leave Act.

Under state law, leave must be paid at the employee's regular and normal hourly wage or the state minimum wage, whichever is greater, and employers must apply a consistent methodology when calculating the normal hourly compensation of similarly situated employees. Under the laws of Seattle and Tacoma, leave must be paid at the employee's normal hourly compensation (Seattle) or same hourly rate or the minimum wage (whichever is greater – Tacoma) and with the same benefits (including health care benefits) an employee would have earned when leave is taken. In SeaTac, leave must be paid at the employee's normal hourly compensation (any wages, tips, bonuses, and other payments reported as taxable income from the employment by or for an employee). o law requires an employer to cash-out accrued but unused leave when employment ends. However, effective January 1, 2024, under state law cash-out will be mandatory for certain construction workers who did not complete their 90-day waiting period for use before employment ended.

Under state law, employees must be notified of their paid sick and safe time rights, *i.e.*, entitlement to leave; rate of accrual; purposes for leave can be used; and that retaliation is prohibited.[563] Similar requirements exist under Tacoma's law: entitled to leave; amount of leave and terms of its use under the law; that retaliation is prohibited; and employees can file a complaint about violations. In Seattle, employers must display the city-created poster, though additional notice requirements apply if an employee is rehired or if an employer advances leave to an employee before it is accrued. Additionally, under state law and Tacoma's law, not less than monthly, employees must be provided written or electronic notification of the amount of leave accrued, leave reduced since the last notification, and leave available for use. An identical requirement exists in Seattle, but notification must occur each time wages are paid. Additionally, under state law as of January 1, 2024, the notice must include the amount of paid sick leave that was paid to a construction worker covered by a collective bargaining agreement before they used said leave.

3.9(c) *Pregnancy Leave*

3.9(c)(i) *Federal Guidelines on Pregnancy Leave*

Three federal statutes are generally implicated when handling leave related to pregnancy: the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964 ("Title VII") in

[563] Although the law does not contain a mandatory poster requirement, the law is discussed in a separately required poster ("Your Rights as a Worker").

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1978; the Family and Medical Leave Act; and the Americans with Disabilities Act. For additional information, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions under an employer's health or disability insurance or sick leave plan.[564] Policies and practices involving such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

An employer must allow individuals with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. However, an employer may not compel an employee to take leave because the employee is pregnant, as long as the employee is able to perform their job. Moreover, an employer may not prohibit employees from returning to work for a set length of time after childbirth. Thus, employers must hold open a job for a pregnancy-related absence for the same length of time as jobs are held open for employees on sick or disability leave.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for the employee's own serious health condition, such as severe morning sickness.[565] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[566] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

Several states provide greater protections for employees with respect to pregnancy. For example, states may have specific laws prohibiting discrimination based on pregnancy or providing separate protections for pregnant women, including the requirement that employers provide reasonable accommodations to pregnant employees to enable them to continue working during their pregnancies, provided that no undue hardship on the employer's business operations would result. These protections are discussed in **3.11(c)**. To the extent that a state law focuses primarily on providing job-protected leave for employees with disabling pregnancy-related health conditions, that state law is discussed below.

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[564] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

[565] 29 C.F.R. § 825.202.

[566] EEOC, Notice 915.003, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; *see also* EEOC, *Facts About Pregnancy Discrimination* (Sept. 8, 2008), *available at* https://www.eeoc.gov//facts/fs-preg.html.

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3.9(c)(ii) *State Guidelines on Pregnancy Leave*

In addition to provisions for pregnancy under the WPFML, the Washington Law Against Discrimination (WLAD) entitles women to job protected leave for the full period of physical disability because of pregnancy or childbirth. This right is set out in a regulation promulgated under the sex discrimination provisions of the WLAD.[567]

Coverage & Eligibility. The WLAD applies to all Washington employers with at least eight employees, except for religious and sectarian organizations not organized for private profit.[568] Moreover, all employers, no matter how small, are subject to being sued for wrongful discharge in violation of public policy if they terminate an employee contrary to the policies established in the WLAD.[569] All employees are eligible except those persons employed by a parent, spouse, or child, or those employed in domestic service.[570]

Terms & Conditions of Leave. Leave is available for the entire period of disability associated with pregnancy or childbirth.[571] An employee who takes leave under this law is entitled to return upon recovery to the same or a similar position with at least the same pay. Refusal to do so must be based on business necessity. There is no obligation to provide paid leave or benefits of any kind during this leave of absence. An employer must treat a woman on pregnancy-related leave the same as other employees on leave for sickness or other temporary disabilities (*e.g.*, with respect to paid leave, medical certification, benefits, etc.).[572]

In addition, as described in **3.11(c)(ii)**, Washington requires employers of 15 or more employees to provide reasonable accommodation for an employee due to pregnancy or a pregnancy-related health condition.

3.9(d) *Adoptive Parents Leave*

3.9(d)(i) *Federal Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of the employee's leave entitlement under the FMLA. For information on the FMLA, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.9(d)(ii) *State Guidelines on Adoptive Parents Leave*

Under Washington law, leave that is granted to biological parents to care for a newborn must be extended on equal terms to both men and women, and to adoptive and stepparents. Leave is available to fathers, adoptive parents, and stepparents to care for a newborn or newly-adopted child under the age of six, but only to the extent the employer provides child-care leave to biological parents. Leave may be restricted to those living with the child at the time of birth or initial placement for adoption. This

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567 WASH. ADMIN. CODE § 162-30-020(4).

568 WASH. REV. CODE § 49.60.040(11).

569 *Roberts v. Dudley*, 993 P.2d 901 (Wash. 2000).

570 WASH. REV. CODE § 49.60.040(10).

571 WASH. ADMIN. CODE § 162-30-020(4)(a).

572 WASH. ADMIN. CODE § 162-30-020.

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leave is not required merely because the employer grants pregnancy disability leave to women. The length of leave, benefits, and reinstatement rights are determined as they apply to biological parents.[573]

In addition, an eligible employee of a covered employer may take time off to care for a newly-adopted child as part of the employee's leave entitlement under the WPFML (see 3.9(a)(ii)).[574]

3.9(e) *School Activities Leave*

3.9(e)(i) *Federal Guidelines on School Activities Leave*

Federal law does not address school activities leave for private-sector employees.

3.9(e)(ii) *State Guidelines on School Activities Leave*

Washington law does not address school activities leave for private-sector employees.

3.9(f) *Blood, Organ, or Bone Marrow Donation Leave*

3.9(f)(i) *Federal Guidelines on Blood, Organ, or Bone Marrow Donation*

Federal law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(f)(ii) *State Guidelines on Blood, Organ, or Bone Marrow Donation*

Washington law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(g) *Voting Time*

3.9(g)(i) *Federal Voting Time Guidelines*

There is no federal law concerning time off to vote.

3.9(g)(ii) *State Voting Time Guidelines*

Washington previously provided for employee leave to vote in statewide elections. In 2011, however, Washington enacted a statewide vote-by-mail law and eliminated physical polling places, which rendered the voting leave law moot.[575] The state legislature then repealed the defunct voting leave law.

3.9(h) *Leave to Participate in Political Activities*

3.9(h)(i) *Federal Guidelines on Leave to Participate in Political Activities*

Federal law does not address leave for private-sector employees to participate in political activities.

3.9(h)(ii) *State Guidelines on Leave to Participate in Political Activities*

Washington law does not address leave for private-sector employees to participate in political activities.

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[573] WASH. REV. CODE § 49.12.360.

[574] WASH. REV. CODE § 50A.05.010.

[575] *See* WASH. REV. CODE § 29A.40.010.

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3.9(i) *Leave to Participate in Judicial Proceedings*

3.9(i)(i) *Federal Guidelines on Leave to Participate in Judicial Proceedings*

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[576] Employers are under no federal statutory obligation to pay employees while serving on a jury.

Employers may verify that an employee's request for civic duty is legally obligated by requiring the employee to produce a copy of the summons, subpoena, or other documentation. Also, an employer can set reasonable advance notice requirements for jury duty leave. Upon completion of jury duty, an employee is entitled to reinstatement.

An employer also may be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal administrative agencies, as required by a variety of additional federal statutes.[577] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

3.9(i)(ii) *State Guidelines on Leave to Participate in Judicial Proceedings*

In Washington, an employee must be provided with a sufficient unpaid leave of absence to serve on a jury.[578] An employer may not discharge an employee or threaten, coerce, harass, or deny an employee promotional opportunities because the employee receives a jury summons, responds to the summons, attends court for jury duty, or serves as a juror.[579]

3.9(j) *Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

3.9(j)(i) *Federal Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Federal law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(j)(ii) *State Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Washington's paid sick leave law provides paid leave for victims of domestic violence, sexual assault, or stalking. See 3.9(b)(ii) for information on this law.

There are also statutory provisions requiring employers in Washington to allow employees who are victims of domestic violence, sexual assault, or stalking (or who have a family member who is such a victim) to take an *unpaid* leave of absence. Eligible employees may take a reasonable leave of absence for any of the following reasons:

- to seek legal or law enforcement assistance or remedies to ensure the health and safety of the employee or the employee's family members.

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[576] 28 U.S.C. § 1875.

[577] *See, e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e 3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act).

[578] WASH. REV. CODE § 2.36.165.

[579] WASH. REV. CODE § 2.36.165.

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- to seek treatment by a health care provider for physical or mental injuries caused by domestic violence, sexual assault, or stalking, or to attend to health care treatment for family members who are victims;
- to obtain, or assist a family member in obtaining, assistance from social services programs, such as a domestic violence shelter or rape crisis center;
- to obtain, or assist a family member in obtaining, mental health counseling; or
- to participate in safety planning, to temporarily or permanently relocate, or to take other actions to increase the safety of the employee or their family members from future domestic violence, sexual assault, or stalking.[580]

Qualifying family members include children, spouses, parents, parents-in-law, grandparents, or any person with whom the employee has a dating relationship.[581]

In addition, Washington employers must provide reasonable safety accommodations to employees and applicants who are victims of domestic violence, sexual assault, or stalking. Reasonable safety accommodations include, but are not limited to: transfer, reassignment, modified schedule, changed work telephone number, changed work email address, changed workstation, installed lock, implemented safety procedure, or any other adjustment to a job structure, workplace facility, or work requirement in response to actual or threatened domestic violence, sexual assault, or stalking.[582] It is also an unlawful employment practice to:

- refuse to hire an otherwise qualified applicant because the individual is an actual or perceived victim of domestic violence, sexual assault, or stalking; or
- discharge, threaten to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation, or other terms, conditions, or privileges of employment because the individual is an actual or perceived victim of domestic violence, sexual assault, or stalking.[583]

Employee Rights & Obligations

Notification by Employee. Employees requesting this leave must provide the employer with advance notice of their intention to take leave. If the employer has a policy regarding this type of leave, the employee's timing of the request for leave must be consistent with that policy. However, if advance notice of the leave is not possible due to an emergency or unforeseen circumstances resulting from domestic violence, sexual assault, or stalking, the employee (or a designee) must notify the employer of the leave no later than the end of the day the employee takes the leave.[584]

Certification. The employer may require that the employee provide verification that the employee or a family member is a victim of domestic violence, sexual assault, or stalking and that the leave is being requested for a permissible purpose under the statute. Beyond this, the employer is not permitted to require the employee to produce or discuss any other information with the employer regarding the

[580] WASH. REV. CODE § 49.76.030.

[581] WASH. REV. CODE §§ 49.12.265, 49.76.020(1).

[582] WASH. REV. CODE § 49.76.115.

[583] WASH. REV. CODE § 49.76.115.

[584] WASH. REV. CODE § 49.76.040(1).

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need and circumstances of the leave. The request will be satisfied if the employee provides, for example, a police report, court order, or a written statement from the employee. The employee may also verify the existence of a familial relationship with a victim needing support from the employee by providing, among other things, a statement from the employee confirming the relationship, a birth certificate, or court records.[585]

Employer Obligations

Confidentiality. Employers are required to maintain the confidentiality of all information provided by the employee unless the employee requests or consents to disclosure, the employer is ordered to do so by a court or administrative agency, or such disclosure is otherwise required by federal or state law. It is unlawful for any employer to discriminate or retaliate against an employee who has exercised or has assisted other employees in exercising their rights under the statute.[586]

Compensation During Leave. Employees may elect to use sick leave or other paid time off, compensatory time, or unpaid leave. Employees who take leave for themselves or for their family members may not lose any pay or benefits that had already accrued before the leave starts. When an employee returns from leave, the employee must be restored to either the same position or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. Employers must also maintain health insurance coverage of employees who take leave in the same manner as if the employee had not taken the leave.[587]

Antiretaliation Provisions. An employer may not deny leave to an eligible employee, or discharge, threaten to discharge, demote, or in any way discriminate or retaliate against an employee because the employee exercises their rights under the statute.[588]

3.9(k) *Military-Related Leave*

3.9(k)(i) *Federal Guidelines on Military-Related Leave*

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to "serve" in the "uniformed services." USERRA also requires employers to reinstate employees returning from military leave who meet certain defined qualifications. An employer also may have an obligation to train or otherwise qualify those employees returning from military leave. USERRA guarantees employees a continuation of health benefits for the 24 months of military leave (at the employee's expense) and protects an employee's pension benefits upon return from leave. Finally, USERRA requires that employers not discriminate against an employee because of past, present, or future military obligations, among other things.

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585 WASH. REV. CODE § 49.76.040(5).

586 WASH. REV. CODE § 49.76.040(8).

587 WASH. REV. CODE § 49.76.050(4).

588 WASH. REV. CODE § 49.76.120.

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Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[589]

FMLA. Under the FMLA, eligible employees may take leave for: (1) any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the armed forces; or (2) to care for a next of kin servicemember with a serious injury or illness (referred to as "military caregiver leave").

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or member of the National Guard who faces recall to active duty if a qualifying exigency exists.[590] An eligible employee may also take leave for a qualifying exigency if a covered family member is a member of the regular armed forces and is on duty, or called to active duty, in a foreign country.[591] Notably, leave is only available for covered relatives of military members called to active federal service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.
2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

3.9(k)(ii) *State Guidelines on Military-Related Leave*

As summarized below, Washington requires employers to provide certain leave time and benefits to employees who perform military service as well as to their spouses or registered domestic partners.

Military Service Leave

Under the Washington Veterans Employment and Reemployment Act (WVERA), employers, regardless of size, must grant a leave of absence for employee military service. All employees who are Washington residents and/or are employed within the state of Washington are eligible.[592] Employees are entitled to a leave of absence of four years or less to serve in the uniformed services, other than state-ordered active duty. Any period of additional service imposed by law, from which one is unable to obtain orders relieving them from active duty, will not affect reemployment rights.[593] Employees are also entitled to a leave of absence of up to 12 weeks per calendar year to serve on state-ordered active duty. However,

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589 USERRA provides that: (1) nothing within USERRA is intended to supersede, nullify, or diminish a right or benefit provided to an employee that is greater than the rights USERRA provides (38 U.S.C. § 4302(a)); and (2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

590 29 C.F.R. § 825.126(a).

591 Deployment of the member with the armed forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. 29 C.F.R. § 825.126(a)(3).

592 WASH. REV. CODE § 73.16.031.

593 WASH. REV. CODE § 73.16.035(1)(e).

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the governor, when declaring an emergency that necessitates a longer period of service, may extend state-ordered active duty up to 12 months after which the employee is eligible for the benefits under the WVERA.[594]

The WVERA prohibits employers from discharging or otherwise discriminating against employees because of membership in the state-organized militia. Employers are additionally prohibited from discharging or otherwise discriminating against employees because of past or current membership in the uniformed services. Employers may not retaliate against employees who testify in a proceeding, assist in an investigation, or exercise rights provided under the WVERA, regardless of whether they have performed military service.[595]

Notification by Employee. An employee must notify their employer as to their membership in the uniformed services within a reasonable time of accepting employment or becoming a member of the uniformed services.[596] Otherwise, the WVERA does not have any notification or certification requirements.

Reinstatement. Employees are entitled to reinstatement unless reemployment would be impossible or unreasonable due to a change in the employer's circumstances, or if reinstatement would impose an undue hardship on the employer.[597] To be eligible for reinstatement, the employee must:

- furnish a receipt of an honorable discharge, report of separation, certificate of satisfactory service, or other proof of having satisfactorily completed their service; and
- make written application to the employer according to the length of service:
  - less than 31 days—not later than the beginning of the first full regularly scheduled work period on the first full calendar day following completion of service and expiration of eight hours following travel home; or as soon as possible if reporting within that period is impossible or unreasonable through no fault of the employee;
  - more than 30 but less than 181 days—not later than 14 days after completion of service or the next first full calendar day if submitting an application within that time is impossible or unreasonable through no fault of the applicant;
  - more than 180 days—not later than 90 days after completion of service;
  - if the employee is hospitalized for service-related reasons, the employee is entitled to reinstatement for up to two years from the date of injury (the two-year period may be extended by the minimum time required to accommodate circumstances beyond the applicant's control that make reporting within the two-year period impossible or unreasonable).[598]

[594] WASH. REV. CODE § 73.16.035(1)(f).

[595] WASH. REV. CODE §§ 73.16.032, 73.16.035(1)(a).

[596] WASH. REV. CODE § 73.16.035(1)(a).

[597] WASH. REV. CODE § 73.16.033.

[598] WASH. REV. CODE § 73.16.035(1).

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If the employee fails to timely report and apply for reinstatement, the employee is subject to the employer's conduct rules, established policies, and general practices pertaining to explanations and discipline with respect to absence from scheduled work.[599]

The employee must provide the employer, upon request, proof of the timeliness of the application and that the service obligation was under four years. An employee is still entitled to reemployment if documentation does not exist or is not readily available at the time of the employer's request. If, after reemployment, documentation becomes available that establishes that the employee did not meet one or more of the above requirements, the employee may be terminated. An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.[600]

If the employee is still qualified to perform the duties of their former position, the employee must be restored to that position or to a position of like seniority, status, and pay. If the employee is not so qualified as a result of disability sustained during their service in the uniformed services, but is nevertheless qualified to perform the duties of another position, they must be reemployed in such other position. However, the new position must provide them with like seniority, status, and pay.[601] A reinstated employee may not be discharged without cause for one year after reinstatement.[602]

With the exception of temporary employees, reinstated employees are considered as having been on furlough or leave of absence from employment during the period of active military duty or service and must be restored without loss of seniority. The employee is entitled to participate in insurance, vacations, retirement pay, and other benefits offered by the employer consistent with the employer's rules and practices concerning employees on furlough or leave of absence that were in effect at the time the employee entered military service.[603]

Family Military Leave

Under the Washington State Family Military Leave Act, an employee who is a military spouse or registered domestic partner is entitled to an unpaid leave of absence for a total of 15 days a year without pay during a period of military conflict.[604] Leave may be taken prior to deployment or during a leave from deployment. An employee taking leave may elect to substitute any of the accrued leave to which the employee may be entitled for any part of the family military leave.[605]

Covered Employees. An eligible employee is one whose spouse or registered domestic partner is a member of the military called to active duty and who works an average of 20 or more hours per week.[606] *Military conflict* is defined as either a period of war declared by Congress or a period of deployment for

[599] WASH. REV. CODE § 73.16.035(1).

[600] WASH. REV. CODE § 73.16.035.

[601] WASH. REV. CODE § 73.16.033.

[602] WASH. REV. CODE § 73.16.051.

[603] WASH. REV. CODE § 73.16.033.

[604] WASH. REV. CODE §§ 49.77.010, 49.77.030(1).

[605] WASH. REV. CODE § 49.77.030.

[606] WASH. REV. CODE § 49.77.020(2).

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which a member of a reserve component is ordered to active duty either by the governor or the President of the United States.[607]

Notification by Employee. An employee must notify their employer of the intention to take family military leave within five business days of receiving official notice that their spouse or partner will be called to active duty or on leave from deployment.[608]

Compensation & Benefits During Leave. Employees using family military leave may continue medical or dental insurance coverage at their own expense in accordance with state and federal law. Upon return from leave, the employee is entitled to be restored to the same or an equivalent position that the employee held when the leave commenced.[609]

Antiretaliation Provisions. The law prohibits an employer from interfering with, restraining or denying the exercise of, or the attempt to exercise leave rights, discharging or in any manner discriminating against an individual:

- for opposing any unlawful leave practice;
- who has filed a charge, or instituted any proceeding relating to leave rights;
- for giving, or who is about to give, information in connection with an inquiry or proceeding relating to leave rights; or
- who has testified, or is about to testify, in any inquiry or proceeding relating to leave rights.[610]

3.9(l) *Other Leaves*

3.9(l)(i) *Federal Guidelines on Other Leaves*

There are no federal statutory requirements for other categories of leave for private-sector employees.

3.9(l)(ii) *State Guidelines on Other Leaves*

Volunteer Firefighter & Civil Air Patrol Leave. Washington employers that had 20 or more full-time equivalent employees the previous year must permit employees who are volunteer firefighters or members of the civil air patrol to take leave to fulfill their duties.[611] Under the law, an employer cannot discharge or discipline:

- an employee who is a member of the civil air patrol because of leave taken related to an emergency service operation; or
- an employee who is a volunteer firefighter because of leave taken related to an alarm of fire or an emergency call.[612]

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607 WASH. REV. CODE § 49.77.020(4).

608 WASH. REV. CODE § 49.77.030(3).

609 WASH. REV. CODE § 49.77.030(2), (4).

610 WASH. REV. CODE §§ 49.77.030, 49.78.300.

611 WASH. REV. CODE § 49.12.460.

612 WASH. REV. CODE § 49.12.460(1).

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An *emergency service operation* is a mission designated by an applicable emergency management agency to conduct search and rescue operations, law enforcement, disaster relief, and humanitarian service.[613] *Alarm of fire or emergency call* means responding to, working at, or returning from a fire alarm or an emergency call, but not participating in training or other nonemergency activities.[614]

A volunteer firefighter may not use this leave if they are already at their place of employment when called to serve as a volunteer, unless the employer agrees to provide such an accommodation.[615]

3.10 Workplace Safety

3.10(a) *Occupational Safety and Health*

3.10(a)(i) *Fed-OSH Act Guidelines*

The federal Occupational Safety and Health Act ("Fed-OSH Act") requires every employer to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to employees.[616] Employers are also required to comply with all applicable occupational safety and health standards.[617] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see **LITTLER ON WORKPLACE SAFETY**.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[618] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

3.10(a)(ii) *State-OSH Act Guidelines*

Washington State, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[619] Thus, Washington is a so-called "state plan" jurisdiction, with its own detailed rules for occupational safety and health that parallel, but are separate from, Fed-OSHA standards.

Washington's workplace safety and health rules are administered by the Division of Occupational Safety and Health (DOSH) of the Department of Labor and Industries. DOSH administers and enforces the

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[613] WASH. REV. CODE § 49.12.460(3)(c).

[614] WASH. REV. CODE § 49.12.460(3)(a).

[615] WASH. REV. CODE § 49.12.460(3)(g).

[616] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

[617] 29 U.S.C. § 654(a)(2).

[618] 29 U.S.C. § 667(c)(2).

[619] 29 U.S.C. § 667.

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Washington Industrial Safety and Health Act of 1973 (WISHA).[620] As part of the DOSH Standards Innovations Project, DOSH has grouped its basic safety and health standards into one code section, chapter 296-800 of the Washington Administrative Code. These are referred to as "Core Rules." The Core Rules include requirements for Safe Workplace (similar to the Fed-OSHA General Duty Clause),[621] Accident Prevention Program,[622] First Aid,[623] Personal Protective Equipment,[624] Hazard Communication,[625] Safety Bulletin Board/Poster,[626] and several other areas of workplace safety guidelines.

DOSH is empowered with broad authority to enforce the WISHA, including, for example, the authority to obtain search warrants,[627] to enter the work facility to conduct inspections,[628] and to issue citations for noncompliance with the Core Rules or other workplace safety standards.[629] The WISHA contains detailed procedures regarding administrative and court appeal of citations issued by DOSH.[630]

In addition, the WISHA contains legal safeguards prohibiting discrimination or retaliation against workers who report potential workplace safety violations to DOSH.[631] These protections are in addition to, and not preclusive of, the common-law protections against retaliation.

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

Washington, like most other states, prohibits texting and using a cell phone while driving. Specifically, under state law, drivers may not use a personal electronic device to send, read, or write a text message.[632] *Use* or *using* means holding a personal electronic device in either hand or both hands, or use of a hand or finger to compose, send, read, view, access, browse, transmit, save, or retrieve email, text messages, instant messages, photographs, other electronic data, or watching video on a personal electronic device. However, the law does not preclude the minimal use of a finger to activate, deactivate, or initiate a function of the device.[633]

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620 WASH. REV. CODE ch. 49.17.

621 WASH. ADMIN. CODE §§ 296-800-110 to 296-800-130.

622 WASH. ADMIN. CODE § 296-800-140.

623 WASH. ADMIN. CODE § 296-800-150.

624 WASH. ADMIN. CODE § 296-800-160.

625 WASH. ADMIN. CODE ch. 296-901.

626 WASH. ADMIN. CODE §§ 296-800-190 to 296-800-200.

627 WASH. REV. CODE § 49.17.075.

628 WASH. REV. CODE § 49.17.070.

629 WASH. REV. CODE § 49.17.120.

630 WASH. REV. CODE §§ 49.17.140, 49.17.150.

631 WASH. REV. CODE § 49.17.160.

632 WASH. REV. CODE § 46.61.668(1).

633 WASH. REV. CODE § 46.61.668.

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Under the Washington statute, a *personal electronic device* means any portable electronic device that is capable of wireless communication or electronic data retrieval and is not manufactured primarily for hands-free use in a motor vehicle. Personal electronic device includes, but is not limited to, a cell phone, tablet, laptop, two-way messaging device, or electronic game. A personal electronic device does not include two-way radio, citizens band radio, or amateur radio equipment. *Driving* means to operate a motor vehicle on a public highway, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays. Pulling over to the side of, or off of, an active roadway and stopping in a location where the vehicle can safely remain stationary is not considered "driving."[634]

This restriction applies to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, this provision.

Notably, this restriction does not include entering a phone number or name in a wireless communication device for the purpose of making a call, though the driver may not hold the phone to their ear while making the call.[635] A driver may also use a wireless communication device to place a call in hands-free mode. *Hands-free mode* means the use of a wireless communications device with a speaker phone, headset, or earpiece.[636]

3.10(c) *Firearms in the Workplace*

3.10(c)(i) *Federal Guidelines on Firearms on Employer Property*

Federal law does not address firearms in the workplace.

3.10(c)(ii) *State Guidelines on Firearms on Employer Property*

Washington does not have a statute specifically addressing the possession or storage of firearms in the workplace or in company parking lots.

3.10(d) *Smoking in the Workplace*

3.10(d)(i) *Federal Guidelines on Smoking in the Workplace*

Federal law does not address smoking in the workplace.

3.10(d)(ii) *State Guidelines on Smoking in the Workplace*

Smoking is prohibited in any place of employment in Washington, including 25 feet from any entrance, window, or ventilation intakes of the workplace.[637] "No Smoking" signs must be posted at each entrance to the workplace. In the case of retail stores and retail service establishments, signs must be posted conspicuously at each entrance and in prominent locations throughout the facility.[638]

3.10(e) *Suitable Seating for Employees*

3.10(e)(i) *Federal Guidelines on Suitable Seating for Employees*

Federal law does not address suitable seating requirements for employees.

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634 WASH. REV. CODE § 46.61.668.

635 WASH. REV. CODE §§ 46.61.667(1), 46.61.668(1)(c).

636 WASH. REV. CODE § 46.61.668(2), (4).

637 WASH. REV. CODE §§ 70.160.020(3), 70.160.030, 70.160.075.

638 WASH. REV. CODE § 70.160.050.

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3.10(e)(ii) *State Guidelines on Suitable Seating for Employees*

Washington law does not address suitable seating requirements for employees.

3.10(f) *Workplace Violence Protection Orders*

3.10(f)(i) *Federal Guidelines on Workplace Violence Protection Orders*

Federal law does not address employer workplace violence protection orders. That is, there is no federal statute addressing whether or how employers might obtain a legal order (such as a temporary restraining order) on their own behalf, or on behalf of their employees or visitors, to protect against workplace violence, threats, or harassment.

3.10(f)(ii) *State Guidelines on Workplace Violence Protection Orders*

Washington law does not address employer workplace violence protection orders.

3.11 Discrimination, Retaliation & Harassment

3.11(a) *Protected Classes & Other Fair Employment Practices Protections*

3.11(a)(i) *Federal FEP Protections*

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[639] (2) the Americans with Disabilities Act (ADA);[640] (3) the Age Discrimination in Employment Act (ADEA);[641] (4) the Equal Pay Act;[642] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[643] (6) the Civil Rights Acts of 1866 and 1871;[644] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;
- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[645]

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[639] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[640] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[641] 29 U.S.C. §§ 623 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 623.

[642] 29 U.S.C. § 206(d). Since the Equal Pay Act is part of the FLSA, the Equal Pay Act applies to employers covered by the FLSA. *See* 29 U.S.C. § 203.

[643] 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42 U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

[644] 42 U.S.C. §§ 1981, 1983.

[645] 140 S. Ct. 1731 (2020). For a discussion of this case, see LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION.

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- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40); or
- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[646] Employees must first exhaust their administrative remedies by filing a complaint within 180 days—unless a charge is covered by state or local antidiscrimination law, in which case the time is extended to 300 days.[647]

3.11(a)(ii) *State FEP Protections*

In addition to understanding and complying with federal equal opportunity laws, Washington employers must also be familiar with a comprehensive set of state laws, county codes, and city ordinances that impose additional responsibilities and potential liabilities.

The Washington fair employment practices statute, known as the Washington Law Against Discrimination (WLAD), prohibits employment discrimination, unless based upon a *bona fide* occupational qualification, because of an applicant's or employee's:

- age (40+);[648]
- sex (including pregnancy and childbirth);[649]
- marital status;
- sexual orientation (actual or perceived, including gender identity);
- race (including traits historically associated or perceived to be associated with race, including but not limited to hair texture and protective hairstyles. *Protective hairstyles* includes but is not limited to hairstyles such as afros, braids, locks, and twists);
- creed (equated to religion);[650]
- color;
- national origin (including ancestry);
- honorably discharged veteran or military status;
- the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability;[651] or

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[646] The EEOC's website is available at http://www.eeoc.gov/.

[647] 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29C.F.R. § 1626.7.

[648] Although the WLAD includes age as a protected category, the main provision prohibiting age discrimination appears at section 49.44.090 of the Washington Revised Code, discussed later at **3.11(a)(iv)**.

[649] The WLAD's prohibition against sex discrimination is underscored by the Washington Constitution's declaration that "[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex." WASH. CONST. art. XXXI, § 1.

[650] *Kumar v. Gate Gourmet, Inc.*, 325 P.3d 193, 197 (Wash. 2014) (prohibition against discrimination on the basis of creed/religion imposes a duty to reasonably accommodate an employee's religious practices).

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- status as an actual or perceived victim of domestic violence, sexual assault, or stalking;[652]
- The WLAD also includes prohibitions on discrimination based on citizenship and immigration status. However, there is an exemption for any distinction or differential treatment based on citizenship or immigration status that is authorized by federal or state law, regulation, or government contract.[653]
- **Effective July 1, 2025**, Washington has amended the Washington Equal Pay and Opportunities Act to extend its protections to any protected class, not just gender. The amendment also allows a person alleging a violation of the Act to assert a claim for discrimination based on membership in more than one protected class. [654]

Employers of eight or more employees are subject to the WLAD, with the exception of nonprofit religious or sectarian organizations.[655] A "fraternal organization" that is "distinctly private" is exempt from the WLAD.[656] Moreover, an implied ministerial exception precludes claims by ministerial employees (ordained or not) against religious institutions.[657]

Employers must take note that while only businesses that employ eight or more persons are covered by the WLAD, employers of all sizes are covered under Washington's separate age discrimination provisions, discussed more fully in **3.11(a)(iv)**.

To meet the statutory eight-employee requirement under the WLAD, an employer need not actually have eight people working for it when the discrimination occurred. Rather, a company is subject to the WLAD if eight people have an employment relationship with the employer at the time of the discrimination claim.[658] Under both federal and state law, having a person on the payroll creates an employment relationship, even if that employee was not actually working at the relevant time.[659] Consequently, to avoid being subject to statutory claims under federal Title VII (including limited punitive damages) and under the WLAD (including administrative complaints of discrimination filed with the Washington Human Rights Commission), small employers should regularly review their payroll lists and make sure that former employees are not listed as being currently on the payroll.

Employee Eligibility. The WLAD's antidiscrimination laws do not protect an individual who is employed by their parent, spouse, or child, or persons in the domestic service of any other person.[660] Independent contractors are also not entitled to all of the same protections as employees under the WLAD. The regulations consider many factors in determining whether a worker qualifies as an employee, including:

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[651] WASH. REV. CODE §§ 49.60.040, 49.60.180, 49.60.190, 49.60.200, and 49.60.205.

[652] WASH. REV. CODE § 49.76.010.

[653] WASH. REV. CODE § 49.60.180

[654] WASH. REV. CODE §§ 49.58.005, 49.58.010, 49.58.020, 49.58.060, 49.58.070.

[655] WASH. REV. CODE § 49.60.040(11).

[656] *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 59 P.3d 655 (Wash. 2002).

[657] *Fontana v. Diocese of Yakima*, 157 P.3d 443 (Wash. Ct. App. 2007); *Elvig v. Ackles*, 98 P.3d 524 (Wash. Ct. App. 2004).

[658] *Anaya v. Graham*, 950 P.2d 16 (Wash. Ct. App. 1998).

[659] 950 P.2d 16; *see Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202 (1997) (discussing the rule in a Title VII case).

[660] WASH. REV. CODE § 49.60.040(10).

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control of work, tools and place of work, skill level involved, type of work, duration of work, method of payment, whether annual leave is given, the method of ending the work relationship, accrual of benefits, taxation, and other factors.[661] The determination of a worker's status as an employee versus an independent contractor is discussed more fully in **1.1(b)**.

The extent to which independent contractors are protected by the WLAD is not fully clear. Washington courts have found that an independent contractor can have a private cause of action for discrimination under the general antidiscrimination clause of the WLAD when the claim involves the making or performance of a contract for personal services.[662] A nonemployee can also assert a claim under the antiretaliation provisions of the WLAD.[663]

Individual Liability. Under federal law, individuals are not considered employers under Title VII and therefore cannot be held personally liable for discrimination or harassment. By contrast, under the WLAD supervisors and managers may be held individually liable for their own acts of discrimination or harassment.[664] However, while managers and supervisors may be held individually liable, coworkers who do not employ, manage, or supervise the plaintiff generally are not subject to individual liability for discrimination, harassment, or retaliation under the WLAD.[665]

Nonetheless, the potential exists for coworkers, as well as managers and supervisors, to be held personally liable for aiding and abetting an employer's discriminatory conduct. Persons who "aid, abet, encourage, or incite the commission of any unfair practice, or [who] attempt to obstruct or prevent any other person from complying with the provisions of [the WLAD] or any order issued thereunder" may be held liable under the WLAD.[666] An individual may not be held liable for aiding and abetting based on the individual's own acts of discrimination, however. Rather, the defendant must be shown to have caused a third party to engage in discriminatory conduct.[667]

Differences Between the WLAD & Title VII. Although many aspects of the WLAD mirror the federal laws in both content and intent, significant differences exist. For example, while Title VII applies only to employers with 15 or more employees, the WLAD applies to employers with eight or more employees.

That being said, there is no minimum-employee rule in the age discrimination context because another statutory provision—separate from the WLAD and discussed in **3.11(a)(iv)**—permits a cause of action for age discrimination against all employers regardless of their size.[668] For other protected classifications,

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[661] WASH. ADMIN. CODE § 162-16-230.

[662] WASH. ADMIN. CODE § 162-16-230(2); *Marquis v. City of Spokane*, 922 P.2d 43 (Wash. 1996) (cause of action exists where female golf professional paid less than male counterparts); *see also* WASH. REV. CODE § 49.60.030(1). *But see Kilian v. Atkinson*, 50 P.3d 638 (Wash. 2002) (independent contractor may not assert age discrimination claim under WLAD because age is not included in the civil right recognized in section 49.60.030(1)).

[663] *Galbraith v. TAPCO Credit Union*, 946 P.2d 1242, 1247-49 (Wash. Ct. App. 1997) (credit union member permitted to proceed on retaliation claim pursuant to the WLAD).

[664] *Brown v. Scott Paper Worldwide Co.*, 20 P.3d 921 (Wash. 2001).

[665] *Jenkins v. Palmer*, 66 P.3d 1119 (Wash. Ct. App. 2003) (rejecting harassment claim); *Malo v. Alaska Trawl Fisheries, Inc.*, 965 P.2d 1124 (Wash. Ct. App. 1998) (rejecting retaliation claim).

[666] WASH. REV. CODE § 49.60.220.

[667] *Rody v. Hollis*, 500 P.2d 97, 101 (Wash. 1972) (housing discrimination); *Jenkins*, 66 P.3d 1119; *see Woods v. Graphic Commc'ns*, 925 F.2d 1195, 1200 n.3 (9th Cir. 1991).

[668] WASH. REV. CODE § 49.44.090; *Bennett v. Hardy*, 784 P.2d 1258 (Wash. 1990).

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there is no minimum-employee rule because a common-law tort claim of discharge in violation of public policy may be asserted, based on the public policy reflected in the WLAD.

Furthermore, the WLAD, unlike Title VII, permits a nonemployee to sue for retaliation,[669] and in at least some cases permits independent contractors to sue for discrimination in the making and performance of personal service contracts.[670] While Washington generally takes guidance from federal law on issues regarding liability, the available damages are significantly different because the WLAD provides for different types of remedies than does Title VII.[671]

3.11(a)(iii) *State Enforcement Agency & Civil Enforcement Procedures*

The Washington Human Rights Commission enforces the provisions of the WLAD. The Commission's primary objective is to eliminate and prevent discrimination. This objective may or may not be consistent with the goals or objectives of a particular complainant or aggrieved person. As such, a complainant is free to pursue all other available remedies in addition to an administrative complaint.[672] Moreover, a complainant does not have to await the termination of the investigation or findings by the Commission to file a civil lawsuit. Thus, unlike plaintiffs under federal Title VII, individuals need not exhaust administrative remedies before suing in court for a violation of the WLAD.

Complainants who elect to file an administrative claim with the Commission must do so within six months of the alleged discriminatory action.[673] The time limit for filing a pregnancy discrimination claim is one year, and complaints alleging whistleblower retaliation must be filed within two years.[674] Complaints will be preliminarily evaluated and investigated by Commission staff.[675] Discovery may be taken, including the issuance of subpoenas, oral questions, written questions, and requests for documents.[676] The complaint may be dismissed for lack of jurisdiction or a finding of no reasonable cause.[677] If the Commission finds reasonable cause to believe that an unfair practice has occurred, it will attempt to eliminate such practice through conciliation, conference, and persuasion.[678] If those efforts are unsuccessful, the matter proceeds to an administrative hearing. The hearing will be based on an amended complaint, as well as the answer thereto, and the available record.[679] Additional discovery and motion practice are available before the administrative law judge.[680] After the hearing, the

[669] *Galbraith v. TAPCO Credit Union*, 946 P.2d 1242 (Wash. Ct. App. 1997) (credit union member permitted to proceed on retaliation claim pursuant to the WLAD).

[670] *Marquis v. City of Spokane*, 922 P.2d 43 (Wash. 1996) (cause of action exists where independent contractor female golf professional was paid less than male counterparts).

[671] *See, e.g.*, *Martini v. Boeing Co.*, 971 P.2d 45 (Wash. 1999) (declining to adopt federal rule that would limit availability of award for lost wages); *Dailey v. North Coast Life Ins. Co.*, 919 P.2d 589 (Wash. 1996) (no punitive damages under WLAD).

[672] WASH. ADMIN. CODE § 162-08-061(1).

[673] WASH. REV. CODE § 49.60.230.

[674] WASH. REV. CODE § 49.60.230.

[675] WASH. ADMIN. CODE §§ 162-08-093, 162-08-09401.

[676] WASH. ADMIN. CODE § 162-08-09501.

[677] WASH. ADMIN. CODE § 162-08-098.

[678] WASH. ADMIN. CODE §§ 162-08-098, 162-08-102.

[679] WASH. ADMIN. CODE §§ 162-08-201, 162-08-231, 162-08-251.

[680] WASH. ADMIN. CODE §§ 162-08-263 to 162-08-282.

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administrative law judge will prepare and circulate proposed findings of fact and conclusions of law, and will then issue a final decision.[681]

Complainants who choose to file suit without first pursuing an administrative claim before the Human Rights Commission must file suit within three years of the acts complained of. The WLAD does not contain its own limitations period; thus, discrimination claims must be brought within three years under the general three-year statute of limitations for personal injury actions.[682]

With respect to available remedies, if the employee establishes unlawful discrimination or retaliation, Washington courts may award back pay and future pay, including amounts for benefits and other economic losses, past and future. Both Washington and federal law allow for the potential recovery of remedies such as back and front pay.[683] Plaintiffs may be awarded compensatory damages, (*e.g.*, for emotional distress) and recover attorney's fees. In addition, the plaintiff may obtain injunctive relief in the form of reinstatement or changes in employment practices. However, unlike federal law, plaintiffs are not able to recover punitive damages for employment discrimination under Washington law.[684]

Washington law also prohibits employment agreements from requiring that an employee waive the right to publicly pursue a cause of action under Washington's employment discrimination laws. An agreement requiring such a waiver – or a waiver of the right to pursue a cause of action under federal antidiscrimination laws or to file a complaint with the appropriate state or federal agencies – is void and against public policy. The law also prohibits an employment agreement from requiring an employee to resolve discrimination claims in a confidential dispute resolution process.[685]

3.11(a)(iv) *Additional Discrimination Protections*

In addition to the WLAD, other Washington statutes protect employees from discrimination and retaliation. Key provisions are highlighted below.

Age Discrimination. While the WLAD makes it an unfair practice to discriminate because of age, a different Washington statute sets the threshold for the protected class at 40 years and older.[686] Because this statute is independent of the WLAD, Washington courts have held that there is an implied cause of action for violations of section 49.44.090. Consequently, this law covers employers of any size.[687] To establish a *prima facie* case of age discrimination, a claimant must show that at the time of discharge the claimant was 40 years of age or older, was doing satisfactory work, and was replaced by someone

[681] WASH. ADMIN. CODE §§ 162-08-291 to 162-08-301.

[682] WASH. REV. CODE § 4.16.080(2); *Loeffelholz v. Univ. of Wash.*, 272 P.3d 248 (Wash. 2012); *Antonius v. King Cnty.*, 103 P.3d 729, 732 (Wash. 2004).

[683] 42 U.S.C. § 2000e-5(g) (permitting orders of reinstatement with or without back pay); WASH. REV. CODE § 49.60.030(2) (recovery of "actual damages").

[684] *Dailey v. North Coast Life Ins. Co.*, 919 P.2d 589 (Wash. 1996).

[685] WASH. REV. CODE § 49.44.085.

[686] WASH. REV. CODE §§ 49.44.090, 49.60.180.

[687] *Bennett v. Hardy*, 784 P.2d 1258 (Wash. 1990).

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younger.[688] To constitute unlawful discrimination, age must be a "substantial factor" in the employer's adverse employment decision.[689]

Genetic Information. It is unlawful for Washington employers to require an employee or applicant to submit genetic information or submit to screening for genetic information as a condition of employment. Genetic information is defined as information about inherited characteristics that can be derived from any laboratory test, family history or medical examination.[690]

HIV / Hepatitis C. The WLAD prohibits employment discrimination against an individual with HIV or hepatitis C.[691]

Political Activity. Washington's Fair Campaign Practices Act prohibits an employer or labor organization from discriminating against an officer or employee in the terms or conditions of employment for:

- the failure to contribute to a candidate, ballot proposition, political party, or political committee;
- the failure in any way to support or oppose a candidate, ballot proposition, political party, or political committee; or
- in any way supporting or opposing a candidate, ballot proposition, political party, or political committee.[692]

This statute creates a cause of action for employees to challenge adverse employment decisions based on political activity or for their refusal to remain politically abstinent.[693]

First Amendment rights limit the application of this statute in some circumstances. In *Nelson v. McClatchy Newspapers*, the plaintiff, a politically active individual, was transferred by her newspaper employer from a position as a reporter to a swing shift copy editor. The newspaper viewed her political activism as a conflict of interest under its code of ethics, believing her political activity could impair the objectivity of the newspaper, as readers might believe her reporting to be biased. The Washington Supreme Court found that because the employer was a newspaper, its First Amendment concerns outweighed application of the statute.[694]

Employee Assistance Program Participation. Washington law prohibits employers from obtaining individually identifiable information regarding participation in an employee assistance program. The law

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[688] *Kuyper v. Department of Wildlife*, 904 P.2d 793, 795 (Wash. Ct. App. 1995) (citing *Sellsted v. Washington Mut. Sav. Bank*, 851 P.2d 716 (Wash. Ct. App. 1993)); *Carle v. McChord Credit Union*, 827 P.2d 1070 (Wash. Ct. App. 1992).

[689] *Mackay v. Acorn Custom Cabinetry, Inc.*, 898 P.2d 284, 288 (Wash. 1995).

[690] WASH. REV. CODE § 49.44.180.

[691] WASH. REV. CODE § 49.60.172.

[692] WASH. REV. CODE § 42.17A.495.

[693] *Nelson v. McClatchy Newspapers*, 936 P.2d 1123 (Wash. 1997).

[694] 936 P.2d 1123.

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also prohibits employers from discriminating against employees on the basis of participation or nonparticipation in an employee assistance program.[695]

Off Duty Cannabis Use., An employer is prohibited from discriminating against an applicant for employment if the discrimination is based on (1) the person's use of cannabis off the job and away from the workplace; or (2) an employer-required drug screening test that has detected nonpsychoactive cannabis metabolites in the person's hair, blood, urine, or other bodily fluids.[696] Additional information regarding preemployment testing related to cannabis use is discussed in **1.3(e)(i)**.

Captive Audience. employers are prohibited from subjecting, or threatening to subject, an employee to discipline or discharge, or otherwise penalizing or taking adverse employment action against an employee who does the following:

- refuses to attend or participate in an employer-sponsored meeting where the primary purpose is to communicate the employer's opinion concerning religious or political matters;
- refuses to listen to speech or view communications, including electronic communications, for which the primary purpose is to communicate the employer's opinion concerning religious or political matters; or
- makes a good-faith report of a violation or suspected violation of the law.[697]

3.11(a)(v) *Local FEP Protections*

In addition to the federal and state laws, employers with operations in King County, Seattle, Spokane, and Tacoma are subject to local fair employment practices ordinances.

- **King County.** Private employers that employ, either directly or indirectly, eight or more persons in unincorporated King County must extend antidiscrimination protections on the basis of: race; color; age (18 years or older); gender; marital status; sexual orientation, including gender identity; religion; ancestry; national origin; disability; and use of a service or assistive animal by an individual with a disability. In addition, an employer may not prohibit any person from speaking in a language other than English in the workplace.[698] An individual alleging a violation of the provisions may file a written complaint with the King County Office of Civil Rights within 180 days of the time of the alleged unfair employment practice or within 180 days of when the charging party, through exercise of due diligence, should have had notice or been aware of the occurrence of the alleged discriminatory act or practice.[699]
- **Seattle.** Protected classifications include: race (including hair texture and protective hairstyles); color; age (40 years or older); sex (including but not limited to pregnancy, childbirth, or related medical conditions); marital status; sexual orientation; gender identity; genetic information; political ideology; creed; religion; ancestry; caste; national origin;

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695 WASH. REV. CODE § 49.44.220.

696 WASH. S.B. 5123 (2023), to be codified at WASH. REV. CODE § 49.44.

697 WASH. S.B. 5778 (2024), to be codified at WASH. REV. CODE § 49.44.

698 KING CNTY., WASH., CODE §§ 12.18.020 (religious or sectarian organizations not organized for private profit are exempt from coverage by the ordinance), 12.18.030 (exceptions, including *bona fide* occupational qualifications).

699 KING CNTY., WASH., CODE § 12.18.040.

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honorably discharged veteran or military status; disability; citizenship or immigration status; and an individual's actual, potential, perceived, or alleged pregnancy outcomes. "Discrimination" and "discriminate" includes all forms of harassment, including racial harassment, sexual harassment, and harassment based on status in any other protected class. The antidiscrimination protections apply to any employer that employs one or more employees, the employer's designee, or any person acting in the interest of such employer.[700] An aggrieved party may file a charge with the Office for Civil Rights of the City of Seattle ("Office") within one year and six months after the occurrence of the alleged unfair practice.[701] Additionally, an individual alleging a violation of the ordinance may file a civil action or seek an injunction for violations of the provisions not later than three years after the occurrence of the alleged unfair employment practice or 90 days after a determination of reasonable cause by the Director of the Office, whichever occurs last, and whether or not an administrative charge has been filed with the Office.[702]

- **Snohomish County.** Employers that employ eight or more persons, not including any religious or sectarian organization not organized for private profit, within Snohomish County may not discriminate on the bases of: race; age (40 years to 70 years); creed; color; sex (includes gender); national origin; marital status; sexual orientation; honorably discharged veteran or military status; or, the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability. The prohibition against discrimination because of such disability will not apply if the particular disability prevents the proper performance of the particular worker involved. As well, the law does not require an employer to establish employment goals or quotas based on sexual orientation. An individual alleging a violation may file a complaint with the Snohomish County Office of Human Rights in writing under oath or by declaration, within six months from the date of the occurrence of the alleged unlawful practice. A final order issued by a hearing examiner may be appealed to a court.[703]
- **Spokane.** Employers that directly or indirectly employs persons within the City of Spokane, or that solicit individuals within Spokane to apply for employment within Spokane must extend antidiscrimination protections on the basis of: race; religion; creed; color; sex (includes gender); national origin (includes ancestry); marital status; familial status; domestic violence victim status; age (40 years or older); sexual orientation (includes gender expression or identity); gender identity; honorably discharged veteran or military status; refugee status; disability; the use of a guide dog or service animal; and the use or eligibility for the use of housing choice or other subsidy program or alternative source of income.[704] An individual alleging a violation may file a complaint with the Spokane Human Rights

[700] SEATTLE, WASH., MUN. CODE §§ 14.04.030, 14.04.040, and 14.04.050 (exclusions from unfair practices, including *bona fide* occupational qualifications, and certain security or public safety needs).

[701] SEATTLE, WASH., MUN. CODE §§ 14.04.080, 14.04.090.

[702] SEATTLE, WASH., MUN. CODE § 14.04.185.

[703] SNOHOMISH COUNTY, WASH., CODE OF ORDINANCES §§ 2.460.060 (definitions), 2.460.070 (exception for bona fide occupational qualification), 2.460.100, 2.460.180 (retaliation prohibited), 2.460.210, 2.460.250.

[704] SPOKANE, WASH., MUN. CODE §§ 18.01.030, 18.02.010 (exceptions, including *bona fide* occupational qualifications), 18.02.70 (exemptions, including religious or sectarian organizations not organized for profit).

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Commission within six months from the date of the occurrence of the alleged unlawful practice.[705]

- **Tacoma.** Employers employing eight or more persons, excluding any religious or sectarian organization not organized for private profit, must extend antidiscrimination protections on the basis of: race; religion; color; national origin or ancestry; sex; gender identity; sexual orientation; age (40 years or older); marital status; familial status; honorably discharged veteran or military status; and disability.[706] An aggrieved individual may file a complaint alleging an unlawful discriminatory employment practice with the Tacoma Human Rights Commission within six months after the alleged act of discrimination.[707]

3.11(b) *Equal Pay Protections*

3.11(b)(i) *Federal Guidelines on Equal Pay Protections*

The Equal Pay Act requires employers to pay male and female employees equal wages for substantially equal jobs. Specifically, the law prohibits employers covered under the federal Fair Labor Standards Act (FLSA) from discriminating between employees within the same establishment on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs—"the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[708] The prohibition does not apply to payments made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[709]

3.11(b)(ii) *State Guidelines on Equal Pay Protections*

Washington Equal Pay Act. Under Washington's Equal Pay and Opportunity Act, an employer is prohibited from discriminating in providing compensation based on gender between similarly employed employees.[710] Beginning in 2025, an employer is prohibited from discriminating in any way in providing compensation among similarly situated employees based on *any* protected class. "Protected class" means a person's age, sex, marital status, sexual orientation, race, creed, color, national origin, citizenship or immigration status, honorably discharged veteran or military status, or the presence of

[705] SPOKANE, WASH., MUN. CODE §§ 18.01.050, 18.01.070.

[706] TACOMA, WASH., MUN. CODE §§ 1.29.040, 1.29.050 (exceptions, including *bona fide* occupational qualifications).

[707] TACOMA, WASH., MUN. CODE § 1.29.150.

[708] 29 U.S.C. § 206(d)(1).

[709] 42 U.S.C. § 2000e-5.

[710] WASH. REV. CODE § 49.58.020.

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any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability.[711]

Compensation means discretionary and nondiscretionary wages and benefits provided by an employer to an employee as a result of the employment relationship.[712] Employees are *similarly employed* if the individuals work for the same employer, the performance of the job requires similar skill, effort, and responsibility, and the jobs are performed under similar working conditions. Job titles alone are not determinative of whether employees are similarly employed.[713]

A pay differential is permissible if based in good faith on a *bona fide* job-related factor or factors that are consistent with business necessity, are not derived from a gender-based differential (or a differential based on a protected class), and that account for the entire differential. More than one factor may account for the differential. *Bona fide* factors include, but are not limited to:

- education, training, or experience;
- a seniority system;
- a merit system;
- a system that measures earnings by quantity or quality of production; or
- a *bona fide* regional difference in compensation levels.[714]

A differential in compensation based in good faith on a local government ordinance providing for a minimum wage different from state law does not constitute discrimination under the statute. However, an individual's previous wage or salary history is not a defense under the statute.[715]

An employer is further prohibited, on the basis of gender, from limiting or depriving an employee of career advancement opportunities that would otherwise be available, though a differential in career advancement based on a bona fide job-related factor or factors that meet the criteria specified above does not constitute discrimination.[716] Beginning in 2025, the prohibition is expanded to encompass this type of discrimination based on any protected class.

An employee alleging a violation of the Act may file a civil action within three years of the alleged violation.[717] An employee may also file an administrative complaint with the Department of Labor and Industries.[718] An employee may recover damages in the form of back pay via an administrative action, and the Department may impose civil penalties of up to $500 for a first violation and up to $1,000 or

[711] WASH. H.B. 1905 (2024).

[712] WASH. REV. CODE § 49.58.010.

[713] WASH. REV. CODE § 49.58.020.

[714] WASH. REV. CODE § 49.58.020.

[715] WASH. REV. CODE § 49.58.020.

[716] WASH. REV. CODE § 49.58.030.

[717] WASH. REV. CODE § 49.58.070.

[718] WASH. REV. CODE § 49.58.060.

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10% of the employee's damages, whichever is greater, for a subsequent violation.[719] Likewise, these damages and penalties are available remedies in a civil action for a violation of the Act.[720]

For purposes of the statute of limitations, a violation occurs when an employer adopts a discriminatory compensation decision or other practice, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[721]

Washington Human Rights Commission Guidance. In addition, the Washington Human Rights Commission has issued guidelines for job titles and classifications. An employer is prohibited from using a sex-specific job title in any help-wanted advertisement, job description, job announcement, or any other notice, statement, or publication, unless the employer has shown the applicability of a *bona fide* occupational qualification exception. The guidance sets forth examples such as waitress, foreman, salesman, and maid and provides suggested substitutes such as waiter/waitress, supervisor, salesperson, and housekeeper, respectively.[722]

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in **3.9(c)(i)**, the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or

[719] WASH. REV. CODE § 49.58.060.

[720] WASH. REV. CODE § 49.58.060.

[721] WASH. REV. CODE § 49.58.080.

[722] WASH. ADMIN. CODE § 162-16-260(3).

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- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[723]

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;
- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or
- temporary suspension of an employee's essential job function(s).[724]

The PWFA also provides for reasonable accommodations related to lactation, as described in **3.4(a)(iii)**.

An employee seeking a reasonable accommodation must request an accommodation.[725] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[726] An employee is not required to accept an accommodation. However, if the employee rejects a reasonable accommodation, and, as a result of that rejection, cannot perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[727]

An employer is not required to seek documentation from an employee to support the employee's request for accommodation but may do so when it is reasonable under the circumstances for the employer to determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When determining whether an accommodation would impose an undue hardship, the following factors are considered:

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[723] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[724] 29 C.F.R. § 1636.3.

[725] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[726] 29 C.F.R. § 1636.3.

[727] 29 C.F.R. § 1636.4.

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- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and
- the employer's operations, including:
  - the composition, structure, and functions of the workforce; and
  - the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[728]

The following modifications do not impose an undue hardship under the PWFA when they are requested as workplace accommodations by a pregnant employee:

- allowing an employee to carry or keep water near and drink, as needed;
- allowing an employee to take additional restroom breaks, as needed;
- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- allowing an employee to take breaks to eat and drink, as needed.[729]

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

Where a state law focuses primarily on providing job-protected leave for pregnancy or childbirth—as opposed to a pregnancy accommodation—it is discussed in **3.9(c)(ii)**. For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.11(c)(ii) *State Guidelines on Pregnancy Accommodation*

Washington employers of 15 or more employees must provide reasonable accommodation for an employee due to her pregnancy or a pregnancy-related health condition, including the need to express breast milk, unless doing so imposes an undue hardship on the employer's business operations.[730] *Reasonable accommodation* means:

- providing more frequent, longer, or flexible restroom breaks;
- modifying a no food or drink policy;
- job restructuring, part-time or modified work schedules, reassignment to a vacant position, or acquiring or modifying equipment, devices, or an employee's workstation;
- providing seating or allowing the employee to sit more frequently if her job requires her to stand;

[728] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[729] 29 C.F.R. § 1636.3.

[730] WASH. REV. CODE § 43.10.005.

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- providing for a temporary transfer to a less strenuous or less hazardous position;
- providing assistance with manual labor and limits on lifting;
- scheduling flexibility for prenatal visits;
- providing reasonable break time for an employee to express breast milk and a private location, other than a bathroom, if such a location exists at the place of business or worksite; and
- any further pregnancy accommodation an employee may request, and to which an employer must give reasonable consideration in consultation with information provided on pregnancy accommodation by the Washington Department of Labor and Industries or the employee's attending health care provider.[731]

An employer cannot require a pregnant employee to take leave if another reasonable accommodation is available that would allow the employee to continue working.[732]

The law does not require an employer to create additional employment that the employer would not otherwise have created, unless the employer does so or would do so for other classes of employees who need accommodation. Further, an employer is not required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job, unless the employer does so or would do so to accommodate other classes of employees who need accommodation.[733]

Most accommodations require an employee to submit medical certification from her treating health care professional to support the need for the accommodation. However, an employer cannot require an employee to submit certification for the following accommodations:

- providing more frequent, longer, or flexible restroom breaks;
- modifying a no food or drink policy;
- providing seating or allowing the employee to sit more frequently if her job requires her to stand; or
- limits on lifting over 17 pounds.[734]

The state attorney general enforces the terms of the pregnancy accommodation law. An employee alleging a violation of the law may file utilize the attorney general's administrative complaint process or file a civil action.[735]

[731] WASH. REV. CODE § 43.10.005.

[732] WASH. REV. CODE § 43.10.005.

[733] WASH. REV. CODE § 43.10.005.

[734] WASH. REV. CODE § 43.10.005.

[735] WASH. REV. CODE § 43.10.005.

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3.11(d) *Harassment Prevention Training & Education Requirements*

3.11(d)(i) *Federal Guidelines on Antiharassment Training*

While not expressly mandated by federal statute or regulation, training on equal employment opportunity topics—*i.e.*, discrimination, harassment, and retaliation—has become *de facto* mandatory for employers.[736] Multiple decisions of the U.S. Supreme Court[737] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important role that training plays in establishing a legal defense to harassment and discrimination claims.[738] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see LITTLER ON HARASSMENT IN THE WORKPLACE and LITTLER ON EMPLOYEE TRAINING.

3.11(d)(ii) *State Guidelines on Antiharassment Training*

Harassment Training & Education Requirements. Every hotel, motel, retail, security guard entity, or property services contractor with one or more employees must provide mandatory training to managers, supervisors, and employees to:

- prevent sexual assault and sexual harassment in the workplace;
- prevent sexual discrimination in the workplace; and
- educate the employer's workforce regarding protection for employees who report violations of a state or federal law, rule, or regulation.[739]

In addition, these employers must:

- adopt a sexual harassment policy; and
- provide a list of resources for the employer's employees to utilize. At minimum, the resources must include contact information for the federal Equal Employment Opportunity Commission, the Washington State Human Rights Commission, and local advocacy groups focused on preventing sexual harassment and sexual assault.[740]

Such employers must also provide a panic button to each employee. *Employee* means an individual who spends a majority of her or his working hours alone, or whose primary work responsibility involves working without another coworker present, and who is employed by an employer as a janitor, security guard, hotel or motel housekeeper, or room service attendant. *Panic button* means an emergency

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[736] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[737] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524U.S. 775 (1998); *see also Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

[738] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html; *see also* EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), *available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

[739] WASH. REV. CODE § 49.60.515.

[740] WASH. REV. CODE § 43.10.005(1)(c).

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contact device carried by an employee by which the employee may summon immediate on-scene assistance from another worker, a security guard, or a representative of the employer.[741]

Property services contractors are required to submit the following information to the Department of Labor & Industries on a form or in a manner determined by the Department:

- the date of adoption of the required sexual harassment policy;
- the number of managers, supervisors, and employees trained as required under the statute; and
- the physical address of the work location or locations at which janitorial services are provided by workers of the property services contractor, and for each location, the total number of workers or contractors of the property services contractor who perform janitorial services, and the total hours worked.[742]

Property services contractor means any person or entity that employs workers to perform labor for another person to provide commercial janitorial services, or on behalf of an employer to provide commercial janitorial services.[743]

Requirements for Employment-Related Agreements. Washington law prohibits an employer from requiring an employee, as a condition of employment, to sign a nondisclosure agreement, waiver, or other document that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises. Any nondisclosure agreement, waiver, or other document signed by an employee as a condition of employment that does not comply with these requirements is against public policy and is void and unenforceable. However, the law does not prohibit a settlement agreement between an employee or former employee alleging sexual harassment and an employer from containing confidentiality provisions.

The law prohibits an employer from discharging or otherwise retaliating against an employee for disclosing or discussing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between employees, or between an employer and an employee, off the employment premises. It clarifies that "employee" does not include human resources staff, supervisors, or managers when they are expected to maintain confidentiality as part of their assigned job duties. It also does not include individuals who are notified and asked to participate in an open and ongoing investigation into alleged sexual harassment and requested to maintain confidentiality during the pendency of that investigation.[744]

Likewise, state law sets forth certain requirements for the applicability of nondisclosure policies or agreements in civil actions for sexual harassment or assault. The law permits the discovery of past instances of sexual harassment or sexual assault in civil lawsuits, even if there are nondisclosure policies or agreements in place. Also, witnesses to past instances of sexual harassment or sexual assault may

[741] WASH. REV. CODE § 43.10.005(2)(d).

[742] WASH. REV. CODE § 43.10.005(2)(iii).

[743] WASH. REV. CODE § 43.10.005(2)(e).

[744] WASH. REV. CODE § 49.44.211.

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testify in a civil lawsuit despite nondisclosure policies or agreements. It is contrary to public policy for a provision of a nondisclosure policy or agreement to limit, prevent, or punish disclosure of past instances of sexual harassment or sexual assault. The law requires courts to enter orders ensuring the anonymity of witnesses or victims of sexual harassment or sexual assault, unless the victim consents to disclosure. It also clarifies that the new law does not alter admissibility standards of evidence in deciding whether the probative value of evidence outweighs the potential prejudice.[745]

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

3.12(a)(i) *Federal Guidelines on Whistleblowing*

Protections for whistleblowers can be found in dozens of federal statutes. The federal Occupational Safety and Health Administration ("Fed-OSHA") administers over 20 whistleblower laws, many of which have little or nothing to do with safety or health. Although the framework for many of the Fed-OSHA-administered statutes is similar (*e.g.*, several of them follow the regulations promulgated under the Wendell H. Ford Aviation Investment and Reform Act (AIR21)), each statute has its own idiosyncrasies, including who is covered, timeliness of the complaint, standard of proof regarding nexus of protected activity, appeal or objection rights, and remedies available. For more information on whistleblowing protections, see LITTLER ON WHISTLEBLOWING & RETALIATION.

3.12(a)(ii) *State Guidelines on Whistleblowing*

Washington has a whistleblower statute for the protection of state employees.[746] In the absence of a general statutory remedy for private employees, however, private-sector employees may assert whistleblower claims as common-law torts if the alleged adverse employment action violates established public policy.[747]

Additionally, the state Whistleblower Award and Protection Act prohibits an employer from retaliating against an employee for reporting violations of state and federal securities laws. Under the Act, no employer may directly or indirectly terminate, discharge, demote, suspend, threaten, harass, or in any other manner retaliate against an individual because of any lawful act done by the individual:

- for providing information to the state or law enforcement agency concerning a possible violation of state or federal securities laws;
- for initiating, testifying in, or assisting in any investigation, or administrative or judicial action of the securities administrator, securities division, or other law enforcement agency;
- for making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002, the Securities Act of 1933, the Securities Exchange Act of 1934, or other law, rule, or regulation subject to the jurisdiction of the SEC; or
- for making disclosures to a person with supervisory authority over the employee, or such person working for the employer who has the authority to investigate, discover, or

[745] WASH. REV. CODE § 4.24.840.

[746] WASH. REV. CODE ch. 42.40.

[747] *Roberts v. Dudley*, 993 P.2d 901 (Wash. 2000) (allowing a claim for wrongful discharge, outside the WLAD remedies, where the alleged termination would violate clearly articulated public policy against sex discrimination).

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terminate misconduct, regarding matters subject to the jurisdiction of the securities administrator, securities division, or the SEC.

No person may take action to impede an individual from communicating directly with the securities division staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement with respect to such communications. An individual who alleges any act of retaliation in violation of the Act may bring action for relief. A prevailing individual may be reinstated with the same compensation, fringe benefits, and seniority status that the individual would have had. In addition, the individual may receive two times the amount of back pay otherwise owed to the individual, with interest, compensation for litigation costs, expert witness fees, reasonable attorney's fees, actual damages, an injunction to restrain a violation, in any combination. An action must be brought within six years after the date on which the violation occurred or within three years after the date when facts material to the right of action are known, or reasonably should have been known, by the employee alleging a violation.[748]

3.12(b) *Labor Laws*

3.12(b)(i) *Federal Labor Laws*

Labor law refers to the body of law governing employer relations with unions. The National Labor Relations Act (NLRA)[749] and the Railway Labor Act (RLA)[750] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

Labor policy in the United States is determined, to a large degree, at the federal level because the NLRA preempts many state laws. Yet, significant state-level initiatives remain. For example, *right-to-work laws* are state laws that grant workers the freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment.

3.12(b)(ii) *Notable State Labor Laws*

Washington is not a right-to-work state and does not have a right-to-work law. Its "strikebreaker" statute has been held preempted by the NLRA.[751]

However, Washington State has enacted a law that requires employers to provide exclusive bargaining representatives reasonable access to new employees for the purposes of presenting information about

[748] WASH. REV. CODE §§ 21.40.005 *et seq.*

[749] 29 U.S.C. §§ 151 to 169.

[750] 45 U.S.C. §§ 151 *et seq*.

[751] WASH. REV. CODE § 49.44.100; *State v. Labor Ready, Inc.*, 14 P.3d 828 (Wash. Ct. App. 2000).

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the representative to the new employee. Employees may not be mandated to attend the meetings or presentations by the representative.

For purposes of the law, *reasonable access* means that the access:

- occurs within 90 days of the employee's start date within the bargaining unit;
- lasts for no less than 30 minutes; and
- occurs during the new employee's regular work hours at the employee's regular worksite or a location mutually agreed to by the employer and the representative.

Employers are not prohibited from agreeing to longer or more frequent new-employee access. However, employers may not agree to less access than provided by the new law.[752]

3.12(c) *Washington Cares Fund*

Washington's Long-Term Services and Supports Trust Act, now called the WA Cares Fund, is a mandatory, public, state-run long-term care insurance program for workers. The WA Cares Fund will be funded by employee premiums via a mandatory payroll deduction. Employers collect and remit these employee premiums, and submit a quarterly report of the premiums to the Washington State Employment Security Department (ESD).

The ESD will assess each individual employed in Washington a premium based on the employee's wages equal to $0.58 per $100 of earnings (*i.e.*, if employees earn $750/biweekly pay period, they would be assessed a $4.35 biweekly premium). The premium rate will be reassessed every other year beginning January 1, 2024, but is capped at 0.58%. The employer will withhold this amount and pay it to the WA Cares Fund. All Washington employees must contribute to the LTSS Trust, unless they are approved for an exemption.

There is no cap on the employee premium collected. Thus, highly compensated employees will contribute more to the Fund based on their earnings, but will be eligible only to receive the same lifetime benefit of $36,500, indexed for inflation, as all other employees.

Opting Out of the WA Cares Fund. Employees over the age of 18 can apply for an exemption from the premium assessment if they attest that they have purchased private long-term care insurance before November 1, 2021. Employees approved for an exemption will receive a formal exemption approval letter from the ESD, and must notify their current and future employers by providing a copy of the approval letter. Exemptions are effective beginning the first day of the quarter following the date of the approval letter.

Benefits Under the Fund. The WA Cares Fund provides eligible Washington workers who pay into the program and who receive care in Washington, with long-term care benefits up to a maximum of $36,500 per person (to be adjusted annually for inflation). Starting January 1, 2025, workers who have vested in the Fund and need long-term care, can access their earned WA Cares Fund benefits.

WA Cares Fund benefits can be used for long-term care services and supports, such as professional care at home, a licensed residential facility, or a nursing facility, among others.

[752] WASH. REV. CODE § 41.56.037.

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Effective January 1, 2026, certain individuals who have elected coverage under the program may continue participation after relocating outside of Washington.

Benefits under the fund will be paid directly to a registered provider or qualified family member on behalf of the eligible beneficiary, not to the beneficiary.[753]

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[754] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local government where the closing or layoff is to occur.[755] There are exceptions that either reduce or eliminate notice requirements. For more information on the WARN Act, see LITTLER ON REDUCTIONS IN FORCE.

4.1(b) *State Mini-WARN Act*

Washington does not have a mini-WARN law requiring advance notice to employees of a plant closing.

4.1(c) *State Mass Layoff Notification Requirements*

Washington does not require that an employer notify the state unemployment insurance department or another department in the event of a mass layoff.

4.2 Documentation to Provide When Employment Ends

4.2(a) *Federal Guidelines on Documentation at End of Employment*

Table 11 lists the documents that must be provided when employment ends under federal law.

Table 11. Federal Documents to Provide at End of Employment

Category	Notes
Health Benefits: Consolidated Omnibus	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the

[753] WASH. REV. CODE § 50B.04.010 *et seq*.

[754] 29 U.S.C. § 2101(1)-(3). Business enterprises employing: (1) 100 or more full-time employees; or (2) 100 or more employees, including part-time employees, who in aggregate work at least 4,000 hours per week (exclusive of overtime) are covered by the WARN Act. 20 C.F.R. § 639.3.

[755] 20 C.F.R. §§ 639.4, 639.6.

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Table 11. Federal Documents to Provide at End of Employment	
Category	**Notes**
Budget Reconciliation Act (COBRA)	covered employee (if any) of the right to continuation coverage provided under the plan.[756] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[757]

4.2(b) *State Guidelines on Documentation at End of Employment*

Table 12 lists the documents that must be provided when employment ends under state law.

Table 12. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Mini-COBRA, etc.	**Generally**: Every insurer that issues policies providing group coverage for hospital or medical expense shall offer the policyholder an option to include a policy provision granting a person who becomes ineligible for coverage under the group policy, the right to continue the group benefits for a period of time and at a rate agreed upon. However, the law does not require the employers to provide coverage or notification of continued coverage to an employee upon termination.[758] **Exception for payment of premiums by employee in event of suspension of compensation due to labor dispute:** Any employee whose compensation includes group disability or blanket disability insurance providing health care services, the premiums for which are paid in full or in part by an employer or paid by payroll deduction, may pay the premiums

[756] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[757] See the section "Notice given to participants when they leave a company" at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

[758] WASH. REV. CODE § 48.21.250.

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Table 12. State Documents to Provide at End of Employment	
Category	**Notes**
	as they become due directly to the policyholder whenever the employee's compensation is suspended or terminated directly or indirectly as the result of a strike, lockout, or other labor dispute, for a period not exceeding six months and at the rate and coverages as the policy provides. When the employee's compensation is so suspended or terminated, the employee shall be notified immediately by the employer in writing, by mail addressed to the address last on record with the policyholder, that the employee may pay the premiums to the policyholder as they become due as provided in this section.[759]
Unemployment Notice	**Generally.** When individuals become unemployed, employers must make available to them a printed statement with information about applying for unemployment. Additionally, the printed notice must be conspicuously posted.[760] **Multistate Workers.** In the case of a multistate worker, an employer must notify the employee as to which state covers any unemployment insurance claim.[761] In addition to that notice requirement, employers must comply with the covered jurisdiction's general notice requirement, if applicable.

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

Federal law does not specifically address providing former employees with references.

4.3(b) *State Guidelines on References*

Washington law does not require an employer to give workers notice before termination. Nonetheless, upon receiving a written request from a former employee, an employer must provide the employee with a signed, written statement providing "the reasons for and effective date of discharge."[762] This document must be furnished within 10 business days of receipt of the former employee's written request.

With respect to references, Washington employers are immune from civil liability if they provide honest and accurate job references on current or former employees at the request of a prospective employer or employment agency.[763] Washington law presumes an employer is acting in good faith if the disclosed information relates to:

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[759] WASH. REV. CODE § 48.21.075.

[760] WASH. REV. CODE § 50.20.140; WASH. ADMIN. CODE § 192-310-100. Unemployment forms and publications are available at https://esd.wa.gov/unemployment/forms-and-publications.

[761] WASH. ADMIN. CODE § 192-300-150.

[762] WASH. ADMIN. CODE § 296-126-050.

[763] WASH. REV. CODE § 4.24.730(1).

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- the employee's ability to perform their job;
- the diligence, skill, or reliability with which the employee carried out job duties and responsibilities; or
- any illegal or wrongful act committed by the employee when related to the duties of their job.[764]

The presumption may only be rebutted by clear and convincing evidence showing that the information disclosed by the employer was "knowingly false, deliberately misleading, or made with reckless disregard for the truth."[765]

The statute also advises (but does not require) that the employer keep a written record of the identity of the person to whom the information is disclosed, for a period of two years from the date of disclosure. If the employer creates these records, they must be maintained in the former employee's personnel records and the employee or former employee has a right to inspect the records.[766]

In contrast, *blacklisting* is the intentional prevention of the future employment of an employee by a former employer. Blacklisting usually occurs when the former employer makes representations to prospective employers that an individual should not be hired. It should be distinguished from a reference, which is protected. Blacklisting is an unlawful employment practice in Washington.[767]

[764] WASH. REV. CODE § 4.24.730(1).

[765] WASH. REV. CODE § 4.24.730(3).

[766] WASH. REV. CODE § 4.24.730(2).

[767] WASH. REV. CODE § 49.44.010.

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