

A Walk Through the Neighborhood: Wage and Hour Law Updates from Oregon, Washington, and the Ninth Circuit Court of Appeals

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Oregon SB828

- Senate Bill 828
- Known as the “Fair Work Week Act”
- Signed by the Governor Kate Brown on August 8, 2017.
- Changes go into effect on July 1, 2018.
- Enforcement will not begin until January 1, 2019.

Covered Employers

- Covered employers include employers and successor employers in retail, hospitality, or food services establishments that employ 500 or more employees worldwide, including chains and integrated enterprises.

Covered Employees

- An employee who is employed in a retail establishment, a hospitality establishment, or a food service establishment that provides services related to retail trade, hotels and motels, or food services.
- Salaried employees who are exempt from minimum wage, workers supplied by a worker leasing company, and employees of a business that provides services to or on behalf of an employer, are not covered by this law.

Required at the time of hire...

- **Good faith estimate of work schedule.** Employers must provide a new employee a written good faith estimate of the work schedule at the time of hire that:
 - States the median number of hours the employee is expected to work in an average month;
 - Explains the **voluntary standby** list;
 - May be based on prior year schedule if it is a good-faith estimate of seasonal or episodic work.

Advance Notice of Work Schedule

- The employer must provide an employee with a work schedule, in writing, at least seven (7) calendar days before the first day on the schedule.
 - 14 days after July 1, 2020.
- The work schedule must be posted in a conspicuous and accessible location.

Rest Between Shifts

- Unless the employee requests or consents to work such hours, the employer may not schedule or require an employee to work during:
 - The first 10 hours following the end of a previous calendar day's work or on-call shift; or
 - The first 10 hours following the end of a work or on-call shift that spanned two calendar days.

Compensation for work schedule changes

- An employer is required to provide compensation to an employee for each **employer-requested change** that occurs to a written work schedule without advance notice (seven days effective July 1, 2018; 14 days starting July 1, 2020), as follows:
 - One hour at the regular rate of pay, in addition to wages earned when the employer:
 - Adds more than 30 minutes of work to the employee's shift;
 - Changes the date or start time or end time of the employee's work shift with no loss of hours; or
 - Schedules the employee for an additional work or on-call shift.

Compensation for work schedule changes

- One-half times the employee's regular rate of pay, per hour, for each scheduled hour that the employee does not work when the employer:
 - Subtracts hours from the employee's work shift before or after the employee reports for duty;
 - Changes the date or start time or end time of the employee's shift, resulting in a loss of work shift hours;
 - Cancels the employee's work shift; or
 - Does not ask the employee to perform work when the employee is scheduled for an on-call shift.



WHAT'S GOING ON OVER IN WASHINGTON

- **State and Municipal Minimum Wage and Overtime Laws**
 - **Washington Minimum Wage Act - RCW 49.46.005-920**
 - Every employer must pay nonexempt employees at least minimum wage in Washington (**11.50/hour**)
 - WMWA covers individuals and entities that act directly or indirectly in an employer's interest concerning an employee
 - "Employee" includes any individual employed by an employer, except individuals who fall within an exempt status
 - Definitions of exempt status may differ from FLSA, and any applicable WMWA standard that is more favorable to employees will control
 - WMWA requires all nonexempt employees be paid overtime – all time worked over 40 hours per workweek at least 1.5 x the employee's regular hourly rate



WHAT'S GOING ON OVER IN WASHINGTON

- **State and Municipal Minimum Wage and Overtime Laws**
 - **Seattle's Minimum Wage Ordinance -Seattle Mun. Code §§ 14.19.010 - 14.19.120**
 - Sets minimum wage for employees working within Seattle city limits
 - **\$15.45/hour** = Applicable minimum wage for Schedule 1 employers (large employers) with more than 500 employees in the US
 - Can be lowered to \$15.00/hour by paying towards employee medical benefits plans (enrollment in silver level or higher plan as defined by ACA)
 - **\$14.00/hour** = Applicable minimum wage for Schedule 2 employers (small employers) with 500 or fewer employees in the US
 - Can be lowered to \$11.50/hour in wages plus qualifying tips and/or medical coverage
 - Regular increases in minimum wage rates and adjustments for exceptions may take place annually effective January 1



WHAT'S GOING ON OVER IN WASHINGTON

- **Seattle Secure Scheduling Ordinance - Seattle Mun. Code §§ 14.22.010 - 14.22.150** (Effective July 1, 2017)
 - Secure scheduling requirements for hourly employees working for large food services and retail establishments with the Seattle city limits
 - Requires **predictable work schedules** for employees who work at fixed, point of sale locations in Seattle, including providing a written work schedule for all regular and on-call shifts at least 14 calendar days before the first shift of the work schedule
 - Applies to:
 - Retail and food service establishments with 500 or more employees worldwide regardless of where employees are located
 - Full service restaurants with 500 or more employees and 40 or more full-service restaurant locations worldwide



WHAT'S GOING ON OVER IN WASHINGTON

- **Tacoma's Minimum Wage Ordinance – Tacoma Mun. Code §§ 18.20.010 - 18.20.130 (effective February 1, 2016)**
 - Almost all employees who work 80 or more hours per year within the Tacoma city limits must be paid **\$12.00/hour** (some uncommon exceptions apply)
 - Rate will be adjusted annually by the rate of inflation
 - Applies to all employers (private, non-profit, and government) with qualifying employees
- **Seattle-Tacoma Ordinance – SeaTac Mun. Code §§ 7.45.010 – 7.45.110**
 - Sets the minimum wage for hospitality and transportation employees in and near Seattle-Tacoma International Airport
 - Covered workers must be paid at least \$15.00/hour
- **Notice to Employees Required For All of These State and Municipal Wage Laws**
 - Seattle ordinances require notices of rights in English, Spanish and any other language commonly spoken at the particular workplace



WHAT'S GOING ON OVER IN WASHINGTON

- **State and Municipal Paid Sick Leave Laws**
 - **Washington Paid Sick Leave – RCW 49.46.200 (effective January 1, 2018)**
 - Covered employers = any employer as defined by WMWA
 - Non-exempt employees under WMWA, including FT, PT, seasonal and temporary may receive paid sick leave
 - Accrues at a rate of at least 1 hour for every 40 hours worked
 - Accrued time is available starting on 90th calendar day after employment start date
 - No maximum or minimum caps on accrual or annual usage
 - Employees may carry over up to 40 hours of accrued unused sick leave
 - Sick time must be paid at employee's normal hourly compensation



WHAT'S GOING ON OVER IN WASHINGTON

- **State and Municipal Paid Sick Leave Laws**
 - **Washington Paid Sick Leave – RCW 49.46.200 (effective January 1, 2018)**
 - Paid sick leave may be used for:
 - Employee's illness or medical appointment
 - To care for a family member's health needs
 - Circumstances related to domestic violence under Domestic Violence Leave Act
 - For closure of the employee or spouse's workplace or child's school or place of care for health-related reasons



WHAT'S GOING ON OVER IN WASHINGTON

- **Seattle Paid Sick and Safe Time – (effective September 1, 2012; amended in 2017 to adopt employee-friendly portions of state paid sick leave law)**
 - Covers employees who perform work in Seattle, including FT, PT, temporary and occasional basis
 - Accrual based on size of employer within 1 of 3 tiers
 - (Tier 1) 1-49 Employees = 1 hour for every 40 hours worked
 - (Tier 2) 50-249 Employees = 1 hour for every 40 hours worked
 - (Tier 3) 250 + Employees = 1 hour for every 30 hours worked
 - No cap on use is permitted
 - Must allow minimum carryover cap of up to 40/56/72 hours per calendar year
 - Accrued time can be used for illness or preventative care for employee or family member; domestic violence, sexual assault or stalking related issues; closure of workplace or school for health-related reasons



WHAT'S GOING ON OVER IN WASHINGTON

- **Tacoma Paid Sick Leave – (effective February 1, 2016; amended in 2018 to align with state paid sick leave law)**
 - Covers employees who perform work within Tacoma for more than 80 hours in a calendar year, including FT, PT, and temporary
 - Accrues at rate of 1 hour for every 40 hours worked in Tacoma (no annual cap on accrual)
 - Employees are eligible to use sick leave 90 days after hire (no cap on use)
 - Employees may carry over up to 40 hours to the following year
 - Can be used for employee or family member's illness, injury, health condition, diagnosis or preventative medical care; domestic violence, sexual assault or stalking related legal/law enforcement assistance or safe accommodations for employee or family member; closure of workplace or school for any health-related reason; bereavement following death of a family member
- **Spokane Earned Sick and Safe Leave – (effective January 1, 2017; sunset/expired December 31, 2017 when state law took effect)**



Don't Forget Equal Pay Laws!

- **Equal Pay Act (“EPA”) of 1963– A Quick Refresher**
 - Prohibits an employer from paying unequal wages on the basis of sex to employees in the same workplace for equal work on jobs requiring substantially equal skill, effort and responsibility and which are performed under similar working conditions.
 - **4 Exceptions (affirmative defenses):**
 - (1) Seniority system
 - (2) Merit system
 - (3) System measuring earnings by quantity or quality of production
 - (4) Differential based on any other factor other than sex (“catchall” exception)



Don't Forget Equal Pay Laws!

- **Equal Pay Act (“EPA”) of 1963– A Quick Refresher**
 - The EPA, is part of the Fair Labor Standards Act of 1938, as amended (FLSA) and is administered and enforced by the EEOC
 - EPA claims can be brought directly in a court action without the EEOC charge process
 - EPA has a 2-year statute of limitations to file a lawsuit for violations, which is extended to 3 years for willful violations
 - Collective actions under the FLSA/EPA have far less onerous requirements than class actions under Fed. R. Cv. 23



Don't Forget Equal Pay Laws!

- **EPA is 55 years old, but many commentators agree EPA has not eradicated gender-based wage discrimination as intended**
 - Statistics still showing significant disparity between average earnings of men and women
 - Reasons may include courts' narrow interpretation of "equal work" and the same workplace requirements
 - Other courts have applied the "factor other than sex" defense expansively thereby allowing employers to avoid liability

Don't Forget Equal Pay Laws!

- **What Does This Mean For Federal and State Wage Enforcement?**
 - **EEOC's 2013-2016 and 2017-2021 strategic plans confirm prioritization of equal pay enforcement, and EEOC has increased lawsuits directed to gender pay equity**
 - Will this trend continue under the current administration?
 - Will EEOC go after systematic wage discrimination as well as single plaintiff cases?
 - **States are enacting equal pay legislation and amending existing legislation to implement more robust and comprehensive equal pay laws**
 - **One trend is prohibiting inquiries about prior pay history in the application and/or hiring process**



Don't Forget Equal Pay Laws!

- **Ninth Circuit Has Set Forth An Unequivocal Rule In *Rizo v. Yovino*, (9th Cir. 2018), *en banc*:**
 - **A new hire's prior pay, alone or in combination with other factors, cannot justify her pay differential with male hires in the same job under the EPA's "factor other than sex" catchall exception**

Don't Forget Equal Pay Laws!

Rizo v. Yovino, (9th Cir. 2018)

- Plaintiff was hired by Fresno County Office of Education as a math consultant. Pursuant to County's hiring schedule consisting of 10 stepped salary levels, a new hire's salary was determined by taking hire's prior salary + 5% and placing him/her on corresponding step
- Accordingly, Plaintiff's starting salary was based on her prior salary as a middle and high school math teacher in Maricopa County, AZ
- 2 years later, Plaintiff learned her male colleagues had been subsequently hired as math consultants at higher salary steps
- County asserted that the prior salary system constituted an affirmative defense to Plaintiff's claim under the "the factor other than sex" catchall exception to the EPA

Don't Forget Equal Pay Laws!

- ***Rizo v. Yovino*, (9th Cir. April 9, 2018)**
 - The Ninth Circuit: “ ‘any other factor other than sex’ ” is limited to legitimate, job-related factors such as a prospective employee’s experience, educational background, ability or prior job performance,” and prior salary “is not job related”
 - Basing a new hire’s starting pay on her prior pay is simply perpetuating pre-existing sex based pay disparities – i.e. the catchall does not create an exception for basing wage disparities on those very disparities the EPA is intended to eliminate
 - Court clarifies it is not attempting to resolve application of prior pay as a factor in all circumstances, including for e.g. individually negotiated salaries
 - What about pay determinations for subsequent raises and promotions?
 - Concurring justices agree with result for this case, but disagree that EPA completely bars consideration of prior salary as a factor “other than sex”

Don't Forget Equal Pay Laws!

- **State and Municipal Equal Pay Laws**
- Several states and municipalities have passed, or are considering passing, laws prohibiting employers from enacting policies forbidding discussion of salary:
- **California**, Colorado, Connecticut, Illinois, Louisiana, Maine, **Massachusetts**, Michigan, Minnesota, New Hampshire, New Jersey, **Oregon**, and Vermont

Equal Pay Act and Assembly Bill 168 - California

- Became effective January 1, 2018.
- “No employer may do any of the following:
 - (a) Require, as a condition of employment, that an employee refrain from disclosing the amount of his or her wages.
 - (b) Require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of his or her wages.
 - (c) Discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages.”
 - Cal. Lab. Code § 1197.5(j)(1).

Equal Pay Act - Oregon

- Goes into effect January 1, 2019 (though signed into law on June 1, 2017).
- Employers may not:
 - seek salary history information from applicants for employment, other than after making an offer of employment that includes amount of compensation.
 - discriminate against employees in the payment of wages based on any “protected class” including race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, or age.
- Applies to the payment of all types of compensation including wages, salaries, bonuses, benefits, fringe benefits, & equity-based compensation for comparable work.

Equal Pay Act - Oregon

- Oregon's law does permit affirmative defenses for employers in cases where an employer can justify differences in compensation levels using bona fide factors related to the position and is based on:
 - (1) a seniority system,
 - (2) a merit system,
 - (3) a system that measures earning by quantity or quality of production,
 - (4) workplace location,
 - (5) travel,
 - (6) education,
 - (7) training,
 - (8) experience, or
 - (9) a combination of factors.

Equal Pay Law - Massachusetts

- Became effective July 1, 2018
- Prohibits:
 - employers from forbidding employees from discussing or inquiring about pay.
 - retaliation for engaging in such activities.
 - employers from contracting with employees to avoid pay transparency obligations.
- Permits:
 - prohibiting employees who have access to the pay data of others due to their job responsibilities from disclosing other employees' compensation information without first obtaining the permission of the other employee.
- Employers are not obligated to disclose employee wages to any third party.

Additional States

- Washington
 - New legislation creates additional pay equity requirements for Washington employers. Signed on March 21, 2018, HB 1506 will update and expand the state's Equal Pay Act (EPA) for the first time since it was enacted in 1943.
- Delaware
 - HS1 prohibits employers from screening applicants based on pay history and from seeking an applicant's compensation history from current or former employers. Effective December 14, 2017.

Additional States

- Puerto Rico
 - Effective 3/8/2018. Puerto Rico Equal Pay Act (PR EPA) bans salary history inquiries and prohibits pay discrimination based on sex as among employees performing comparable work requiring the same skill, effort, or responsibilities under similar conditions. While this law took effect in 2017, enforcement and liability for private employers attaches a year after enactment.
- New Jersey (passed, vetoed, passed, signed 4/24/18)
- Texas, Florida, New Hampshire (legislation drafted)