



As we start 2022 (and, unfortunately, slog into our third year of the COVID-19 pandemic), employers will want to take note of several recent significant changes to Oregon and Washington employment laws.

OREGON EMPLOYMENT LAW LEGISLATIVE UPDATES FOR JANUARY 2022

For ease of reference, we'll highlight the pandemic-related legislative updates first, followed by some other important changes, including in the areas of prohibitions on discrimination and further limits on non-competition agreements.

Pandemic-Related Legislative Updates

Oregon Family Leave Act (OFLA) Changes:

Last month, Governor Brown extended Oregon's state of public health emergency to June 30, 2022. That extension significantly changes leave eligibility for many employees, including under the most recent OFLA amendments. Effective as of January 1, 2022, employee eligibility for OFLA is expanded during time periods covered by a public health emergency to include employees who have only worked **at least 30 calendar days** (instead of at least 180 calendar days) prior to leave (and an average of at least 25 hours per week during that period). Therefore, many recently hired employees will be eligible for OFLA leave on an accelerated basis, at least through this Spring. ("Public health emergency" is newly defined in the statute and means a public health emergency declared by the Governor, such as the currently extended one related to COVID-19.)

With the Omicron variant currently surging and schools back in session after the holidays, don't forget that one of the new qualifying reasons for OFLA leave is to **care for a child of the employee who requires home care due to the closure of the child's school or child care provider as a result of a public health emergency**. As a reminder, employers are permitted to request verification of the need for OFLA leave for that purpose, but may only request (1) the name of the child, (2) the name of the school or child care provider subject to closure, (3) a statement from the employee that no other family member of the child is willing and able to care for the child, and (4) a statement that special circumstances exist that require the employee to provide home care for a child during the day—if the child is older than 14 years of age.

In addition, another significant change to OFLA includes a requirement that, if an OFLA-eligible employee is terminated or laid off and then **reemployed within 180 days**, the employee is eligible for OFLA upon rehire/return to work. (This also applies to employees subject to a temporary cessation of scheduled hours of 180 days or less.) However, any OFLA leave taken by the employee within the one-year OFLA leave period continues to count against the length of leave the employee is entitled to take that OFLA leave year.

Further, the new amendments make the OFLA pregnancy-disability provisions gender-neutral. In other words, an OFLA-eligible employee—without regard to the employee's gender—may take the additional 12 weeks of leave within any one-year period for an illness, injury or condition related to the eligible **employee's own pregnancy or childbirth** that disables the employee from performing any available job duties offered by the employer. (HB 2474)



Extension of Timeline to File a BOLI Complaint Regarding Health and Safety:

Citing a ten-fold increase in workplace safety complaints during the pandemic, the Oregon legislature also extended the timeline to file a complaint with the Bureau of Labor and Industries (BOLI) alleging retaliation or discrimination for reporting an unlawful practice or exercising rights relating to safety and health in the workplace. Effective as of January 1, 2022, employees have one year (not just 90 days) to file a BOLI complaint based on health and safety practices of the employer. (HB 2420)

Rebuttable Presumption that Prohibited Retaliation or Discrimination has Occurred if Employee is Terminated Within 60 Days of Protected Activity:

As Oregon HR professionals are aware, it is an unlawful employment practice for an employer to retaliate against an employee (or prospective employee) because that person has reported or opposed a workplace health or safety violation, filed a complaint, or testified in a proceeding under the Oregon Safe Employment Act. Last year, the legislature strengthened this protection in favor of employees and applicants by creating a new rebuttable presumption that prohibited retaliation or discrimination has occurred if, within 60 days of an employee/applicant engaging in protected activities, the employer bars or discharges that employee from employment or otherwise discriminates against that person. This rebuttable presumption went into effect immediately upon passage last year. (SB 483)

Temporary Exemption of Hiring/Retention Bonuses and Vaccine Incentives from Definition of “Compensation” under Oregon’s Pay Equity Act:

The Oregon Pay Equity Act generally requires that employees performing work of comparable character be paid equal compensation, unless the disparity can be justified by certain factors listed in the statute. However, to help Oregon employers combat staffing shortages during the pandemic, until March 1, 2022, hiring and retention bonuses are temporarily exempted from the definition of “compensation” under Oregon’s wage equity laws.

In addition, during a public health emergency, vaccine incentives paid to employees to encourage vaccination are also exempted from the definition of “compensation.” “Vaccine incentives” means monetary or nonmonetary incentives, including but not limited to additional paid time off or protected time off from work provided by employers to employees who have been immunized against infectious diseases for which a public health emergency has been declared. That said, any vaccine incentive policy must be crafted carefully to avoid potential discriminatory effect on employees based on protected classes, including disability and religion. (HB 2818)

Additional Important Employment-Related Oregon Legislative Updates

Employers will also want to take note of several important employment law updates that are not directly related to the pandemic.



Creating a Respectful and Open World for Natural Hair (CROWN) Act:

In 2021, Oregon joined a number of other states in prohibiting discrimination based on hairstyles associated with a person's race. Under Oregon's CROWN Act, effective January 1, 2022, Oregon prohibits employers (as well as public schools) from discriminating against individuals based on physical characteristics historically associated with race, including hair texture and protective hairstyles. Protective hairstyles are defined as "hair color or manner of wearing hair that includes, but is not limited to, braids, regardless of whether the braids are created with extensions or styled with adornments, locs, and twists." The law also expands the statutory definition of "race" to include "physical characteristics that are historically associated with race, including but not limited to natural hair, hair texture, hair type, and protective hairstyles."

The CROWN Act also provides that employers' dress codes or policies must not have a disproportionate adverse impact on members of a protected class to a greater extent than the policy impacts persons generally. (HB 2935)

Driver's License May Not be Required Unless the Ability to Drive is an Essential Function of the Job or Job-Related:

Noting a prevalence of job listings requiring a driver's license regardless of job duties, the Oregon legislature also passed a new law limiting employers from requiring employees or prospective employees to have a valid driver's license. Effective as of January 1, 2022, Oregon prohibits employers from requiring a valid driver's license as a condition of employment, unless the ability to drive legally is an essential function of the job or is related to a legitimate business purpose. As a result, businesses should reassess job duties and descriptions, and update them to address this issue.

For purposes of verifying identity, employers must accept, as an alternative to a driver's license, any other identification document(s) that are deemed acceptable for the purpose of verifying identity as provided in the federal Form I-9 instructions. Of course, the law does not prohibit employers from accepting a valid driver's license as an identification document if the employee or prospective employee voluntarily offers it as proof of identity. (SB 569)

Further Limits on Noncompetition Agreements:

In 2021, the Oregon legislature also further limited employers' ability to enforce noncompetition agreements. The statutory amendments to Oregon's noncompete law include making such agreements not just *voidable* but *void and unenforceable*, unless all of the conditions of the statute are met. Those conditions include a new salary threshold: the total amount of the exempt employee's annual gross salary and commissions, calculated on an annual basis, at the time of termination, must exceed \$100,533.00 (which will be adjusted annually for inflation).

Significantly, the amendments also reduce the length of time that a noncompetition agreement may be enforced—to **12 months** (previously, noncompetes could be enforced for up to 18 months).

The amendments also shorten the length of time from 18 months to 12 months that an employer may nevertheless enforce a noncompetition agreement as to an employee who was not exempt or



not paid the requisite minimum level of compensation at the time of termination, where the employer agrees *in writing* to provide the employee, for the time the employee is restricted from working, the greater of: (a) at last half the employee's annual gross base salary and commissions at the time of termination or (b) half of the \$100,533 (adjusted annually for inflation).

The new amendments apply only to noncompetition agreements entered into on or after January 1, 2022. (SB 169)

New Local Taxes:

Given a number of new and continuing required deductions for local taxes, it would be prudent to do a payroll audit early this year to ensure compliance. Here are a couple of new required withholdings for employers in the Portland Metro area:

- **Metro Supportive Housing Services Personal Income Tax (Portland Metro):** Starting this month, employers within in the Metro boundary are required to withhold this tax through payroll deductions for employees who earn more than \$200,000 annually or for employees who opt into having the tax withheld. This tax was approved by voters in 2020, as a measure to raise money for supportive housing services for people experiencing homelessness. The tax is owed by individuals with Metro taxable income above \$125,000 if filing single or \$200,000 if filing joint who live in Metro, work in Metro, or have income from Metro sources. The Portland.gov website has a Metro Boundary Address Lookup tool to assist in determining whether an address is within the Metro boundary.
- **Preschool for All Personal Income Tax (Multnomah County):** Also starting this month, Multnomah County employers are required to withhold a new tax to establish a tuition-free preschool program through payroll deductions for employees who earn more than \$200,000 annually or for employees who opt into having the tax withheld. The personal income tax rate is 1.5% on Multnomah County taxable income over \$125,000 for individuals or \$200,000 for joint filers, and an additional 1.5% on Multnomah County taxable income over \$250,000 for individuals or \$400,000 for joint filers. The tax, approved by voters in 2020, is owed by individuals with Multnomah County taxable income above the thresholds who live or work in Multnomah County or have income from Multnomah County sources.

Also keep in mind **Oregon Workers' Benefit Fund (OWBF)** deductions. The rate remains at 2.2 cents per hour worked in 2022. (There is no rate change from 2021.) Each pay period, Oregon employers must retain from the money earned by each employee an amount equal to one-half the OWBF assessment rate multiplied by the number of hours or parts of an hour the employee worked in that pay period. Employers are responsible for paying the other half of the OWBF assessment based on the total number of hours worked for all employees during the pay period. Remember that employers may collect *no more than half of the assessment from the employee* (i.e., no more than **1.1 cents per hour worked in 2022**).



Another Minimum Wage Increase:

Finally, don't forget that, on July 1, 2022, Oregon's minimum wage increases again. The amount depends on where the employer is located. The new rates will be \$13.50 for standard counties, \$14.75 for the Portland Metro region, and \$12.50 for non-urban counties.

WASHINGTON EMPLOYMENT LAW LEGISLATIVE UPDATES FOR JANUARY 2022

Washington's Wage Recovery Act

Sit up and read carefully, Washington's new Wage Recovery Act became effective January 1, 2022 and provides most employees (certain highly compensated employees do not qualify under this Act) with the right to file a lien on their employer's property to recover unpaid wages (and related interest, statutory damages, liquidated damages, attorney fees). The legislature enacted this law to help employees recover on wage claims. With revisions to RCW 43.24 and Title 60 RCW, employees can actually file a wage lien on employer's property located within the State of Washington before or after a court adjudicates a wage claim. This Wage Recovery Act creates real risk and exposure for employers, as summarized below.

Employees or former employees must file the wage lien within two years of the date the wages are due and owing. The employees can file a lien on the following:

- 1) real property in the State of Washington;
- 2) goods and tangible chattel paper (which can include certain security interests); and
- 3) accounts and payment intangibles.

In addition, if there is a finding of a willful failure to pay the wages, which essentially means that the employer knows that the wages were due and owing and not paid, the lien can be filed against the personal property of any officer, vice principal, or agent (this includes property held in the name of that individual's spouse, domestic partner, or heirs).

Employees are not able to waive the right to file a wage lien.

Under the Act, a wage lien is extinguished if:

- 1) the employee who filed the lien then fails to file an action for the underlying wage claim within eight months of the date the wage lien was recorded or if the required notice was not recorded within 8 months of the date the wage lien was recorded; or
- 2) if the action for the underlying wage claim is dismissed with prejudice and no appeal is filed within the applicable appeals period. If an appeal is filed, the wage lien continues in force until there is a final judgment; or
- 3) upon payment and acceptance of payment for the employee's wage claim; or
- 4) upon proper recording or notice of a bond meeting the requirements under the Act and, if required, notification of the lien claimant is provided.



If an employer finds that the employee has filed a frivolous wage lien, the employer can file a motion to show cause and the prevailing party can recover attorney fees.

With this law, employers are going to face increased wage claims and related attempts to file liens. It will be critical to ensure that all wages are paid correctly and to promptly address any written demand for unpaid wages.

Non-Competition Enforceability Thresholds for 2022

As you are aware, Washington revised its noncompetition statute in 2021 imposing new restrictions including that a noncompete agreement is void and unenforceable unless the annual earnings from the employer are more than the threshold set by the Department of Labor and Industries each year. For 2021, the threshold was \$101,390.00 for an employee or \$253,475.00 for an independent contractor. For 2022, the threshold increased to \$107,301.04 for employees and \$268,252.59 for independent contractors. Employers must carefully review the noncompetition restrictions and ensure compliance before asking an employee to enter into such an agreement or before attempting to enforce such an agreement.

Changes to the Posting Requirements for WISHA Citation and Notices

The Washington Industrial Safety and Health Act (WISHA) requires employers to post all WISHA citation and notices which provide notice of WISHA inspection results, specific violations or other WISHA-related issues. Now, employers are required to keep the posting of the WISHA citation and notice on the employee bulletin board for 7 business days (not just 3) which does not include weekends and holidays. Also, employers may elect to supplement this notice by not only posting the citation and notice but also by providing electronic means such as sending the citation and notice via email to the employee.

Paid Family Medical Leave Act Greatly Expands Definition of “Family Member”

In an attempt to acknowledge the reality that many families do not fall into a cookie cutter mold, the Legislature revised its definition of “family member” under the Paid Family Medical Leave Act. Initially, “family member” included: child, grandchild, grandparent, parent, sibling, or spouse. Now, the definition has been expanded to include: “any individual who regularly resides in the employee’s home or where the relationship creates an expectation that the employee care for the person, and that individual depends on the employee for care.” These revisions create new issues regarding how an employee will prove that the relationship meets this standard and the scope of inquiry, if any, allowed by the employer. We will provide an update as we learn more.

Paid Family Medical Leave – New Pandemic Leave Aid

Under the PFML, to qualify for the benefit, an employee must have worked 820 hours during the “qualifying period” defined as “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 application for leave.” As many are aware, a large number of Washington employees lost their employment due to the pandemic and lost their potential eligibility. To address this impact of the pandemic, the



Legislature revised the law to allow for a “pandemic leave assistance grant” if the employee worked: either 820 hours during the first through fourth quarter of 2019; or 820 hours during the second through fourth calendar quarter of 2019 and the first quarter of 2020. Employees may apply if their claims have an effective start date in 2021 or through March 31, 2022. The program expires on June 30, 2023. There may be certain grants available to smaller employers to aid the company with the cost of workers on leave such as to hire a temporary worker or other wage-related costs.

Minimum Wage and Exempt Salary Basis Increases

The Washington minimum wage increased for all employees over the age of 16 to \$14.49 per hour. Seattle has its own minimum wage rates: \$15.75 or \$17.27 depending on different factors. Further, SeaTac has a higher minimum wage for transportation and hospitality workers at \$17.53 per hour.

For employees to qualify as exempt from overtime, the employee’s salary basis must be at least \$52,743.60 annually for 2022.

Contact Us:

If you have any questions about the above employment law changes or would like any assistance reviewing employee handbooks or policies for compliance, please contact FWW attorneys Kelly Tilden, Trish Walsh or Kim McGair.

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