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Washington Legislature Has Small, But Significant, Impact on Employers During 2020 Session

The best laid plans of mice and men often go awry. Washington state's 60-day legislative session ended on Thursday, March 12, 2020, after the rapid spread of COVID-19 around the state drastically changed the outcome of this year's session. The Washington legislature approved using \$200 million in state budget reserves to fund its response to the virus, significantly cut the spending it had originally proposed for the state's supplemental operating budget, and passed some notable legislation for employers along the way. Overall, this year's legislative session had less impact on employers than some recent years, but the legislature still made significant changes to employment laws in Washington that every employer should know.

Changes to Washington Employment Laws Employers Should Know

First, the Washington legislature passed several amendments to the Washington Law Against Discrimination (WLAD), including amendments prohibiting employers from discriminating against individuals based on their hair, citizenship, or immigration status.

Protective Hairstyles

The legislature amended the definition of "race" under the WLAD to include any "traits historically associated or perceived to be associated with race, including . . . hair texture and protective hairstyles" including, but not limited to, hairstyles such as "afros, braids, locks, and twists." House Bill 2602.

Citizenship or Immigration Status

The legislature also amended the WLAD to prohibit employers from discriminating against individuals based on their citizenship or immigration status, except for differential treatment as authorized by federal or state law. Engrossed Senate Bill 5165. Prior to enactment of the new law, Washington state prohibited discrimination against individuals based on race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, veteran status, or disability. The new amendment adds "citizenship or immigration status" as a protected class in the areas of employment, real estate, credit transactions, and insurance transactions. The new amendment also grants protections to undocumented immigrants who are otherwise engaging in lawful behavior. Employers, however, must still comply with federal and state law regarding the employment of undocumented workers. Nevertheless, employees may now bring citizenship and immigration status discrimination claims against employers under the WLAD.

Long-Term Care Workers

The Washington legislature created a new chapter under RCW 49 that grants specific protections to long-term care workers. Engrossed Second Substitute Bill 6205. Specifically, the bill requires covered employers to: (1) implement a plan to prevent and protect long-term care workers from abusive conduct, to assist employees working in environments with challenging behavior, and work to resolve issues affecting the provision of personal care; (2) inform employees of instances of discrimination and abusive conduct occurring in or around the service recipient's home care setting prior to assigning the employee to that service recipient; and (3) keep a record of any reported incidents of discrimination or abusive conduct. The new chapter also mandates the state Department of Social and Health Services to convene a stakeholder work group to recommend policy changes and best practices, and permits the department to conduct investigations to ensure compliance with the new law.

Pregnancy Accommodations

The Washington legislature amended Washington's law on workplace pregnancy accommodations to prohibit employers from requiring written certification from employees' healthcare providers for employees to be able to use reasonable break time to express breast milk at work. House Bill 2266. As a result, employers should refrain from requesting written certification from employees' healthcare providers regarding employees' routine requests to use reasonable break time to express breast milk.

Paid Sick Leave

The Washington legislature amended Washington's Paid Family and Medical Leave Act, RCW 50A, to refine several definitions and to provide employees with a private right of action against employers who violate the statute. Substitute House Bill 2614. Specifically, the legislature clarified that "employment" under the act does not include "casual labor," and defined casual labor to mean (1) work that is performed infrequently and irregularly, and (2) if performed for an employer, does not promote or advance the employer's customary trade or business. *Id.* This means that an employee who performs casual labor does not qualify for paid leave benefits under the act. Additionally, the act provides that an employer may offer "supplemental benefit payments" to an employee on family or medical leave in addition to any paid family or medical leave benefits an employee receives, and that supplemental benefit payments will not reduce an employee's weekly benefit payments under the act. The amendments clarified that an employer's supplemental benefit payments include "paid time off," which it defined as "vacation leave, personal leave, medical leave, sick leave, compensatory leave, or any other paid leave offered by an employer" under an established policy." *Id.* This means that an employee's benefits under Washington's Paid Family and Medical Leave Act will not be reduced if an employee chooses to use their employer's paid time off benefits in addition to their benefits under the act. *Id.*

The amendment also provides employees with a private right of action to recover damages in the event their employer violates the law. Employees are entitled to recover wages, benefits, or any other compensation lost, interest on damages, attorneys' fees, reasonable expert witness fees, and costs for bringing the action in addition to double damages if an employer's violation is found to be willful. *Id.* Employers should carefully review their paid time off policies to ensure compliance with Washington's Paid Family and Medical Leave Act.

Unemployment Compensation

The legislature amended Washington's unemployment compensation statute to prevent employees discharged because of their inability to satisfy a job prerequisite required by law or administrative rule from receiving unemployment benefits. Substitute House Bill 2613. For example, an employee under 21 years of age, who is terminated because of his or her inability to legally serve alcohol, is now ineligible to receive unemployment benefits.

The Washington legislature also amended the unemployment compensation statute to require all Washington employers to include standard occupational classifications or job titles of employees in their quarterly unemployment insurance reports to Washington's Employment Security Department. Substitute House Bill 2308. Significantly, employers' obligations to report the standard occupational classification or job title of every worker is optional until October 1, 2022, but employers should be aware of this requirement and should begin reporting their workers' occupational classifications or job titles to ensure compliance with the law.

Changes on the Horizon Employers Should Monitor

For the second year in a row, the Washington legislature failed to pass several proposed consumer data privacy protection laws, including the Washington Privacy Act (Senate Bill 6281), which would have implemented data-privacy protections similar to those in Europe and even more protective than the California Consumer Protection Act (CCPA). The final proposed version of the Washington Privacy Act's definition of "consumer" as written does not include any individual acting in an "employment context," but employers should expect a new version of the Washington Privacy Act to be proposed once again during the 2021 legislative session and should keep an eye on any updates to the developing area of data privacy protection laws in Washington.

Takeaways for Employers

The Washington legislature made several changes to Washington employment laws during its 2020 legislative session that every employer should know. Employers should review their employment handbooks and practices carefully to ensure compliance with WLAD's new amendments prohibiting discrimination based on an individual's hair, citizenship, and immigration status. Employers should also be aware of the new changes to Washington's Pregnancy Discrimination Act, Washington's Paid Family and Medical Leave Act, and unemployment benefits laws. Employers should consult with trusted legal counsel if they have any questions or concerns regarding any of the new changes to Washington's employment laws.

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