Spring 2015

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The Pacific N.W. Employer

A Bulletin on Employment, Labor, Benefits and Immigration Law for Clients and Friends of Jackson Lewis P.C.

Washington Workplace Bills to Watch

Washington's new legislative session addresses key issues that affect employers, including on minimum wage and paid sick and safe leave. Indeed, the persistent focus of Washington's elected officials on these topics is unmistakable and likely fueled by recent developments at the municipal level.

Minimum Wage

House Bill 1355 and companion Senate Bill 5285 propose to increase the Washington minimum wage over a four-year period to $12.00 per hour. This bill extends the phase-in period to four years, which is a key distinction from the three-year phase-in period provided in last year's version of the bill. Under the 2015 proposed legislation, the first increase would take effect on January 1, 2016, raising the minimum wage from $9.47 to $10.00 per hour. The rate would increase on the first of each year thereafter through 2020, followed by annual increases keyed to inflation.

A separate, more complicated bill, Senate Bill 5384, seeks to increase Washington's minimum wage on an annual basis, beginning January 1, 2016, based to inflation.

At a current hourly rate of $9.47, Washington's minimum wage is the highest state-mandated wage in the country. Oregon's minimum hourly rate of $9.25, which took effect on January 1, 2015, is a close second. Fueling the push to increase the state minimum wage are several cities in the Pacific Northwest that have increased or are considering an increase to the minimum wage, including Seattle, SeaTac, and Tacoma in Washington, and Portland in Oregon. These developments accord with a trend in states throughout the country increasing their minimum wage to reduce the income gap.

Paid Sick & Safe Leave

House Bill 1356 and companion Senate Bill 5306 seek to require employers to provide paid sick and safe leave to all Washington workers. The proposed law would apply to all employers with more than four full-time employees or equivalents (FTE's), including part-time, temporary and occasional basis employees.

The proposed leave accrual rate is based on the employer's size. Employees of small (5-49 employees) and medium (50-249 employees) employers would accrue one hour of leave for every 40 hours worked. Employees of larger employers (250 or more FTE's) would accrue one hour for every 30 hours worked. Different minimum-use and carry-over limits also depend on the employer's size.

Under the proposed law, accrued leave may be used to provide care for a child, grandparent, parent (including in-laws), or spouse who needs medical diagnosis, care, treatment, or preventive medical care. It also may be used for domestic violence leave, as set forth in RCW 49.76.030.

The bills are similar to the City of Seattle's Paid Sick and Safe Leave Ordinance and reflect the growing trend requiring employers to provide paid leave to their workers and expanding the scope of coverage to include domestic violence leave.

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Seattle April 1 Minimum Wage Increase

Employers with employees in Seattle will have to pay one of the highest minimum wages in the country beginning April 1, 2015.

Under an ordinance signed by Seattle's Mayor on June 3, 2014, the City's minimum wage will climb to $15.00 per hour, phased-in over the next three to seven years. How quickly the $15.00-per-hour rate will be reached depends on the size of the employer's workforce. All employees are counted, including:

- Full-time employees
- Part-time employees
- Temporary employees
- Employees who work outside of Seattle

The new legislation is codified at Seattle Municipal Code §14.19, et seq.

Different Rules for Different Employers

Starting April 1, 2015, businesses that employ more than 500 employees in the United States ("Schedule 1 employers") must pay their Seattle employees at least $11.00 per hour.

Employers with 500 or fewer employees ("Schedule 2 employers") also will be required to compensate their Seattle employees at least $11.00 per hour beginning April 1, but these employers can use a credit of $1.00 per hour for those employees who receive tips, or of money paid by the employer towards the employee's qualifying medical insurance plan.

After April 1, 2015, annual increases in the minimum wage will go into effect every January 1 for all employers. Larger businesses will ratchet up their pay scales more quickly than smaller businesses.

Covered Employees

The law applies to every hour worked by employees within Seattle's geographic boundaries, subject to a few limitations. Employees who work in Seattle occasionally are covered only if they perform more than two hours of work within the City during a two-week period.

Employees are not covered if their time in Seattle is spent solely for traveling through the City from a point of origin to a destination, both of which are outside Seattle, and they make no employment-related or commercial stops in Seattle, except for refueling or for personal meals or errands. However, an employee who is not covered is still counted in determining the size of the employer.

Challenge to the Law

Shortly after passage of the law, the International Franchise Association and several local business owners filed a lawsuit on behalf of affected franchises. The lawsuit challenges the law under several theories, the primary one based on its treatment of independently owned franchises as Schedule 1 employers even if they employ fewer than 500 individuals. The legislation requires that a local franchise combine its employees with all other franchises of the same franchisor nationwide — regardless of actual ownership — to determine its size. A federal court has refused to grant the plaintiffs a preliminary injunction. *International Franchise Association Inc. et al. v. City of Seattle et al.*, No. 2:14-cv-00848 (W.D. Wash. Mar. 18, 2015). The court stated the "plaintiffs have not met their burden of demonstrating the requisite irreparable harm." In response to the ruling, IFA reportedly said that it will continue to fight the new law in court.

Rules Expected

Seattle intends to publish final rules interpreting the law by April 1. These rules should address what constitutes working in Seattle on an "occasional basis" and joint employer liability issues, among other things. (The final rules were not available at this writing, although a draft is at http://www.seattle.gov/civilrights/labor-standards/minimum-wage.)

Next Steps

Affected business owners should review the minimum wage law and its draft rules with legal counsel to ensure compliance. Assessing the legal obligation to pay higher wages starting April 1, 2015, the impact this increase may have on positions not directly affected by the new law (e.g., will other employees expect a similar wage increase), and how to pay for these new obligations are issues employers need to consider.

If you have any questions about this or other workplace issues, please contact a Jackson Lewis attorney in our Seattle office.

Will Oregon Employers Soon Need to Accommodate Medicinal Marijuana Use?

Oregon voters approved recreational marijuana use (Measure 91), officially known as the "Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act," in November 2014. Since 1998, Oregon has allowed the medical use of marijuana through the Oregon Medical Marijuana Act (OMMA). Particularly with the recent legalization of marijuana use, many Oregon employers are wondering what changes, if any, must be made to their personnel policies regarding drug use.

By way of background, through Measure 91, Oregon became the third state to legalize the recreational use of marijuana. Effective July 1, 2015, Measure 91 permits the personal use and possession of recreational marijuana for adults at least 21 years of age. A recreational user may possess up to eight ounces (8 oz.) of marijuana and may grow up to four marijuana plants at home, although an entire residence is limited to four plants. In addition, an individual may carry only up to one ounce (1 oz.) of marijuana in public and is prohibited from consuming marijuana in any public place. At some point in 2016, marijuana will be available for purchase through a network of retail stores licensed by the Oregon Liquor Control Commission ("OLCC").

Fortunately, Measure 91 alone is not likely to have a significant impact on employers wishing to maintain a drug-free workplace. Employers have wide latitude to control employee behavior during the workday, including banning cigarette smoking and employees from working under the influence of alcohol. Similarly, employers should be able to bar employees from possessing recreational marijuana at the workplace or being under the influence of recreational marijuana during working time.

One thing is clear: Measure 91 will increase the percentage of workers under the influence of marijuana. According to a report issued in August 2014 by Qwest, a leading provider of drug testing diagnostic information, the 2013 marijuana positivity rate in Colorado increased by 20 percent and the rate in Washington rose 23 percent following legalization in those states in 2012.

In light of the data from Colorado and Washington, Oregon employers should prepare for an increase in marijuana use and positive test results among workers. Before Measure 91 takes effect in July 2015, Oregon employers should determine if they want to accommodate an employee's off-duty recreational use of marijuana.

Despite the law, employers still may prohibit employees from engaging in the recreational use of marijuana and may discipline any employee who tests positive for marijuana. In addition, employers who suspect an employee may be impaired on the job should be familiar with Oregon law and should have an established policy and procedure in place for testing employees.

Aside from issues surrounding recreational marijuana use, potential changes at the federal level could impact significantly an employers' ability to maintain a workplace totally free of marijuana use. Although Oregon legalized medicinal marijuana use through the OMMA, Oregon courts have held that employers are not required under state disability discrimination law to accommodate such drug use. The courts' analysis has focused on the fact that marijuana is listed as a "Schedule I" drug at the federal level. Schedule I drugs, which include heroin and LSD, are deemed by the federal government not to have any legitimate medical use. It follows that Oregon employers should not be forced by state law to violate federal law, the courts have reasoned.

Marijuana's status as a Schedule I drug, however, may be coming to an end. The U.S. Surgeon General, Vivek Murphy, recently acknowledged that preliminary data shows marijuana can be helpful for certain medical conditions and symptoms. In addition, the FDA is evaluating whether marijuana should remain a Schedule I drug or should be classified under a different schedule. Rescheduling marijuana would not make it legal, but it may facilitate additional research into the medical benefits of the drug.

If marijuana is removed from Schedule I, employers may be obligated to engage in an individualized interactive dialogue with disabled employees to assess the reasonableness of medicinal marijuana use. It is certainly possible that courts may rule that marijuana should be treated like Methadone, a Schedule II drug used to treat opiate addition. The Equal Employment Opportunity Commission has taken the position that employers cannot exclude automatically applicants or employees who use Methadone without conducting an individualized assessment to determine whether the employee or applicant can perform the essential functions of the job while using Methadone or presents a direct threat to the employee or others.

For now, employers should review carefully the applicable medical and recreational marijuana laws in the states where they operate to determine whether these laws impose any additional obligations on employers or impact current drug free workplace policies. In addition, employers should update their policies to specifically address the recreational use of marijuana to ensure workplace expectations are clear and should also ensure that all drug testing policies are consistently enforced. Lastly, employers who intend to drug test employees who reasonably appear to be under the influence of marijuana at work should have established policies and procedures in place for doing so and should ensure that managers are trained to recognize the signs of marijuana use.

Please contact our Portland office if you have any questions.

JACKSON LEWIS NEWS

We are pleased that 119 of the firm's attorneys have been named in the 2015 edition of *The Best Lawyers in America*©, selected by professional peers as being among the best in the area of employment and labor law. The firm's presence in this prestigious publication has grown steadily each year, with the number of attorneys listed more than tripling since the 2010 edition.

We are also pleased that our Seattle office is named in the Puget Sound Business Journal's Top Law Firms List. The List features the area's most prominent law firms.

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- **PERM Labor Certification 101**
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