

Chapter 26:

Employment Issues

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For reference purposes, this chapter was prepared from laws, cases, and materials selected by the authors, which were available as of January 31, 2007.

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Chapter Outline

- 26.1 Chapter Summary26-4**
- 26.2 The Employment Relationship26-4**
 - 26.2.1 Employment-At-Will
 - 26.2.1.1 Statutes which Affect Employment-At-Will
 - 26.2.1.2 Promises Made by Employers
 - 26.2.1.3 Illegal Conduct or Other Public Policy Violations
 - 26.2.3.1 Clarity
 - 26.2.3.2 Jeopardy
 - 26.2.3.3 Causation
 - 26.2.3.4 Employer’s Justification for Dismissal
 - 26.2.2 Employment Contracts
 - 26.2.2.1 Statute of Frauds
 - 26.2.2.1 Confidentiality Agreements
 - 26.2.2.1 Ownership of Inventions
 - 26.2.2.1 Non-Competition Agreements
 - 26.2.2.1 Agreements to Arbitrate Employment Disputes
- 26.3 Recruitment and Hiring26-12**
 - 26.3.1 Affirmative Action
 - 26.3.2 Advertising
 - 26.3.3 Pre-employment Inquiries
 - 26.3.3.1 Questions about Protected Class Status
 - 26.3.3.2 Questions about Disabilities
 - 26.3.3.3 Citizenship
 - 26.3.3.4 Reference Checks
 - 26.3.3.5 Criminal History Checks
 - 26.3.4 Pre-employment Tests
 - 26.3.4.1 Medical Examinations
 - 26.3.4.2 Psychological Tests
 - 26.3.4.3 Physical Agility/Fitness Tests
 - 26.3.4.4 HIV or Hepatitis C Tests
 - 26.3.4.5 Drug Tests
 - 26.3.4.6 Polygraph Tests
 - 26.3.5 Reporting of New Hires
- 26.4 Wages and Hours26-19**
 - 26.4.1 Wages
 - 26.4.1.1 Minimum Wage
 - 26.4.1.2 Overtime Pay
 - 26.4.1.3 FLSA Exemptions
 - 26.4.1.3.1 Executive Exemptions
 - 26.4.1.3.2 Administrative Exemptions
 - 26.4.1.3.3 Professional Exemptions
 - 26.4.1.3.4 Certain Healthcare Professions
 - 26.4.1.3.5 Creative Professions
 - 26.4.1.3.6 Outside Sales Exemptions
 - 26.4.1.3.7 Computer Employee Exemptions
 - 26.4.1.3.8 Highly Compensated Workers
 - 26.4.1.4 Compensatory Time off in Lieu of Payment
 - 26.4.1.5 Payment of Wages
 - 26.4.1.6 Record Keeping Requirements
 - 26.4.2 Hours
 - 26.4.3 Meal Periods and Breaks

Volume 3: Financing and Engaging in the Business of Healthcare

26.5	Child Labor Laws	26-27
26.5.1	Record Keeping	
26.5.2	Conditions of Employment for Minors	
26.5.2.1	Hours of Work: Non-Agricultural	
26.5.2.2	Meals and Rest Breaks	
26.5.2.3	Minimum Wage	
26.5.2.4	Prohibited Duties	
26.5.3	Regulation of Employers of Minors	
26.6	Terminations	26-30
26.6.1	Payment of Wages upon Termination	
26.6.2	Written Notice of Reason for Discharge	
26.6.3	Severance Pay	
26.6.3.1	Worker Adjustment Retraining and Notification Act	
26.6.3.2	Employment Retirement Income Security Act	
26.6.4	Consolidated Omnibus Budget Reconciliation Act of 1986	
26.6.5	Separation Agreements and Releases	
26.6.5.1	General Principles	
26.6.5.1	Older Worker Benefit Protection Act	
26.6.5.1	Confidentiality	
26.6.5.1	Tax Issues	
26.7	Leaves of Absence	26-34
26.7.1	Washington Family Care Act	
26.7.2	Family and Medical Leave Act	
26.7.2.1	Covered Employers	
26.7.2.2	Eligible Employees	
26.7.2.3	Key Employees	
26.7.2.4	Twelve Month Period	
26.7.2.5	Serious Health Condition	
26.7.2.6	Leave Requests	
26.7.2.7	Medical Certification	
26.7.2.8	Pay and Benefits During Leave	
26.7.2.9	Right to Reinstatement	
26.7.2.10	Posters and Notices	
26.7.2.11	Record Keeping Requirements	
26.7.2.12	Enforcement and Remedies	
26.7.3	Washington Family Leave Act	
26.7.4	Pregnancy and Disability Leave	
26.7.5	Americans with Disabilities Act	
26.7.6	Military Leave	
26.7.7	Jury Duty	
26.8	Labor Laws	26-43
26.8.1	Union Campaigns and Elections	
26.8.1.1	Union Campaigns	
26.8.1.2	Bargaining Units	
26.8.1.3	Union Recognition	
26.8.2	Unions and Other Collective Bargaining Agreement	
26.8.3	Subjects of Bargaining	
26.8.3.1	Mandatory	
26.8.3.2	Permissive	
26.8.3.3	Illegal Subjects of Bargaining	
26.9	Privacy/Confidentiality	26-47
26.9.1	Video or Telephone Monitoring	
26.9.2	Employee Medical Information	
26.9.3	Searching an Employee's Desk or Locker	
26.9.4	Accessing Employee Computer Files	
26.9.5	Drug Testing	

- 26.10 Federal Antidiscrimination Laws26-48**
 - 26.10.1 General Information on Federal Antidiscrimination Laws
 - 26.10.1.1 Employers Covered by EEOC-Enforced Laws
 - 26.10.1.2 How Employees Are Counted
 - 26.10.1.3 Record Keeping Requirements
 - 26.10.1.4 Reporting Requirements
 - 26.10.1.5 Charge Processing Procedures
 - 26.10.2 Title VII of the Civil Rights Act of 1964
 - 26.10.2.1 Disparate Treatment and Disparate Impact
 - 26.10.2.2 Sexual Harassment
 - 26.10.2.3 Racial and Ethnic Harassment
 - 26.10.2.4 Pregnancy Discrimination
 - 26.10.2.5 Religious Accommodation
 - 26.10.2.6 Remedies
 - 26.10.3 Equal Pay Act of 1963
 - 26.10.4 Americans with Disabilities Act
 - 26.10.4.1 Qualified Individuals with Disabilities
 - 26.10.4.2 Essential Functions of the Job
 - 26.10.4.3 Reasonable Accommodation
 - 26.10.4.4 Undue Hardship
 - 26.10.4.5 Discriminatory Job Criteria
 - 26.10.4.6 Illegal Drug Use
 - 26.10.4.7 Health and Safety Considerations
 - 26.10.4.8 Insurance
 - 26.10.4.9 Accessibility
 - 26.10.4.10 Posters
 - 26.10.4.11 Enforcement
 - 26.10.5 Title VI of the Civil Rights Act of 1964
 - 26.10.6 Rehabilitation Act of 1973
 - 26.10.7 Age Discrimination in Employment Act
 - 26.10.8 Employee Retirement Income Security Act
 - 26.10.9 Immigration Reform and Control Act
 - 26.10.10 Uniformed Services Employment and Re-employment Act
- 26.11 State Antidiscrimination Laws26-60**
 - 26.11.1 Washington’s Law Against Discrimination (WLAD)
 - 26.11.2 Sex Discrimination and Sexual Harassment
 - 26.11.3 Statute of Limitations under WLAD and the “Continuing Violation” Doctrine
 - 26.11.4 Age Discrimination
 - 26.11.5 Disability Discrimination
 - 26.11.5.1 Accommodation
 - 26.11.5.1 Disparate Treatment
 - 26.11.6 HIV Positive Employees
 - 26.11.7 Whistleblower Acts/Retaliation
- 26.12 Worker Safety26-65**
 - 26.12.1 Bloodborne Pathogen Standard
- 26.13 Workers’ Compensation26-66**

Volume 3: Financing and Engaging in the Business of Healthcare

Editors Notes: This chapter covers employment laws generally applicable to Washington health care providers. For general information about licensing requirements of hospital employees, see Chapter I-1, “Hospital Regulations.” For general information about Washington laws specifically applicable to government employers, see Section G of Chapter I-4, “Governmental Health Care Providers: Acute Care Facilities.”

26.1. Chapter Summary

This chapter outlines federal and state laws governing the employment relationship, including recruitment, hiring, employment contracts, and anti-discrimination laws. Most of these laws are applicable to both the private and the public health care provider. If certain requirements exist for only public entities, a comment to that effect will appear. These laws change frequently and this outline is intended as a starting point for research or analysis, rather than the definitive authority on applicable statutes, regulations, or case law.

26.2. The Employment Relationship

26.2.1. Employment-At-Will

Washington is an “employment-at-will” state. The employment at will doctrine provides that an employer may terminate an employee at any time with or without cause and with or without notice.¹ There are three general exceptions to the employment-at-will doctrine under Washington law. First, an employer may not terminate an employee for a reason that contravenes a statute. Second, an employer may not terminate an employee if doing so breaches a “promise” made to that employee, either orally or in writing, to treat that employee in a specific manner under specific circumstances. Third, an employer may not discharge an employee for reasons that violate the public policy of Washington State.

26.2.1.1. Statutes Which Affect Employment-At-Will

An employer may not terminate an employee in violation of state and federal law. There are several federal and state statutes that may affect the at-will status of an employee:

Federal Statutes. The following federal statutes limit an employer’s right to terminate its employees:

- **National Labor Relations Act (NLRA) (29 U.S.C. § 158):** An employer may not terminate an employee for exercising his or her rights under the NLRA.
- **Fair Labor Standards Act (FLSA) (29 U.S.C. § 215):** It is illegal to discharge an employee for filing a complaint alleging FLSA violations or for instituting a proceeding under the FLSA.
- **Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 623):** Employers with 20 or more employees may not discharge an employee because that employee is over 40 years of age.
- **Occupational Safety & Health Act (OSHA) (29 U.S.C. § 660(c)):** No employee may be discharged for filing a complaint alleging OSHA violations, for instituting a proceeding under OSHA, or for testifying in such a proceeding.
- **Rehabilitation Act of 1973 (29 U.S.C. § 794):** An employer who receives federal funding may not discharge an employee because of his or her disability.
- **Employee Retirement Income Security Act (ERISA) (29 U.S.C. § 1140):** It is illegal to discharge an employee for exercising his or her rights under ERISA or to discharge an employee for the purpose of interfering with the attainment of any right to which that employee may become entitled under a

¹ *Thompson v. St. Regis Paper Company*, 102 Wn.2d 219, 685 P.2d 1081 (1984); *Roberts v. Arco*, 88 Wn.2d 887, 568 P.2d 764 (1977).

- plan governed by ERISA. It is also illegal to discharge an employee for giving information or for testifying in a proceeding relating to ERISA.
- **Employee Polygraph Protection (29 U.S.C. § 2002):** No employee may be discharged for refusing to take a lie detector test or because of results on a lie detector test.
 - **Worker Adjustment and Retraining Notification Act (WARN) (29 U.S.C. § 2102):** An employer with 100 or more employees may not terminate employees through a plant closing or a mass layoff until it has provided 60 days' advance written notice to its employees.
 - **Family Medical Leave Act (FMLA) (29 U.S.C. § 2615):** Employers with 50 or more employees may not discharge an employee for opposing FMLA violations.
 - **False Claims Act (31 U.S.C. § 3730):** An employee may not be terminated in retaliation for reporting Medicaid or Medicare fraud.²
 - **Employment & Reemployment Rights of Members of Uniformed Services (38 U.S.C. § 4301):** An employer may not discharge an employee for serving in the uniformed services.
 - **Title VII of Civil Rights Act of 1964 (42 U.S.C. § 2000e-2):** Employers with 15 or more employees may not terminate an employee because of his or her race, color, religion, sex or national origin.
 - **Government Employees Rights Act of 1991 (42 U.S.C. § 2000e-16a and 16b):** Presidential appointees under 2 U.S.C. § 1219 and state employees chosen or appointed by an elected state or local official may not be terminated based on age, race, color, religion, sex, national origin, or disability.
 - **Americans with Disabilities Act (ADA) (42 U.S.C. § 12112):** No employer with 15 or more employees may discharge an employee because of a disability unless that employee's condition, with accommodation, prevents him or her from performing the essential functions of the job.

At least one federal statute mandates that an employer terminate an employee under certain circumstances:

- **Drug Free Workplace Act (41 U.S.C. § 703):** An employer who is a federal grant recipient or contractor must discharge an employee who has been convicted of a drug crime.

State Statutes. The following state statutes affect an employer's right to terminate its employees:

- **Termination for Garnishment (RCW 6.27.170):** An employer may not discharge an employee because a creditor of that employee has served the employer with a writ of garnishment unless the employer receives garnishments on three separate debts within any 12 month period.
- **Washington Industrial Safety and Health Act (RCW 49.17.160):** No person shall discharge or in any manner discriminate against any employee because the employee has filed a complaint or instituted or caused to be instituted any proceeding under WISHA, or has testified or is about to testify in any such proceeding or because of the exercise by the employee on behalf of himself or others of any right afforded by WISHA.
- **Health and Safety – Asbestos (RCW 49.26.150):** Any employee who notifies the Department of Labor & Industries of any activity that the employee reasonably believes to be a violation of asbestos safety laws or regulations has the same rights and protections against discharge or discrimination as afforded to employees under RCW 49.17. (WISHA)
- **Unfair Employment Practices – Age Discrimination (RCW 49.44.090):** Employers may not discharge an employee over age 40 because of his or her age.

² *Marion v. Rehabworks, Inc.*, 206 F.R.D. 643 (E. D. Mo. 2001).

- **Washington Law Against Discrimination (WLAD) (RCW 49.60.180):** No employer with 8 or more employees may discharge an employee because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person.
- **Unfair practices with respect to HIV or Hepatitis C infection (RCW 49.60.172):** No person may require an individual to take an HIV test or a hepatitis C test, as a condition of employment unless the absence of HIV or hepatitis C infection is a bona fide occupational qualification for the job in question. No person may discharge any individual on the basis of the results of an HIV test or hepatitis C test unless the absence of HIV or hepatitis C infection is a bona fide occupational qualification of the job in question.
- **Whistleblower Protection (RCW 49.60.210):** It is illegal for an employer to discharge any person because he or she has opposed any practices forbidden by the WLAD, or because he or she has filed a charge, testified, or assisted in any proceeding under the WLAD.
- **Worker Right to Know Act (RCW 49.70.110):** No employer may discharge any employee for exercising his or her right to obtain specified information regarding hazardous substances from an employer, as established in this statute.
- **Industrial Insurance Act (Worker's Compensation) (RCW 51.48.025):** No employer may discharge an employee because that employee filed or communicated to the employer an intent to file a claim for worker's compensation. However, nothing in the statute prevents an employer from taking any action against a worker for other reasons including, but not limited to, the worker's failure to observe health or safety standards adopted by the employer, or the frequency or nature of the worker's job-related accidents.

26.2.1.2. Promises Made by Employer

While employment that is indefinite in duration is generally terminable at will by either the employer or employee, courts have held that employers, through their employee manuals or through conduct, can “promise” that an employee will be discharged only for cause.³

Promises of specific treatment in specific situations found in an employee manual or handbook may obligate the employer to act consistently with those promises.⁴ An employee seeking to enforce promises made in a handbook or manual must prove: (1) the handbook's statements amounted to a promise of specific treatment in specific situations; (2) the employee justifiably relied on the promise; and (3) the promise of specific treatment were breached.⁵

An employer may be able to avoid a modification of the at-will status of its employees by including a disclaimer in the handbook that affirmatively states that nothing contained in the handbook should be read as a promise of specific treatment in specific situations or as a contract of employment.⁶ Employers are also advised to obtain a written receipt signed by the employee that the employee has received the handbook and read it, and understands that the guidelines and benefits described in the handbook may be changed or deleted at any time with or without notice.⁷ In addition to reserving the right to alter policies at

³ *Thompson*, 102 Wn.2d at 223; *Winspear v. Boeing Co.*, 75 Wn. App. 870, 880-81, 880 P.2d 1010 (1994).

⁴ *Clark v. Sears Roebuck & Co.*, 110 Wn. App. 825, 830, 41 P.3d 1230 (2002).

⁵ *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 340-41, 27 P.3d 1172 (2001).

⁶ *Birge v. Fred Meyer, Inc.*, 73 Wn. App. 895, 872 P.2d 49, *rev. denied*, 124 Wn.2d 1020, 881 P.2d 253 (1994)

⁷ *Id.*

any time, employers are also advised to include disclaimer language that the employer may depart from or act outside of these policies at any time and with or without notice.⁸

This type of handbook disclaimer is not a panacea. Courts have held that a well-worded disclaimer can be negated by an employer's inconsistent representations or practices after the disclaimer is made.⁹ If the employee can provide evidence of statements "espousing job security, permanent, continuous, or future employment, and statements speaking of salary in specific periodic terms," or "contradictory employment practices," a court may deem these statements sufficient to nullify the handbook disclaimer.¹⁰

If an employer adopts a progressive disciplinary procedure and sets this procedure out in a policy manual or a handbook, an employee may be able to assert that his or her termination was wrongful because the employer failed to follow the disciplinary procedure.¹¹ However, including a disclaimer in the policy that the employer reserves the right to skip any or all steps of the progressive discipline process and terminate an employee without utilizing every step should protect an employer from such claims.

26.2.1.3. Illegal Conduct or Other Public Policy Violations

A third exception to the at-will employment doctrine is the rule that an employer may not discharge an employee for reasons that contravene a clear mandate of public policy.¹² In order to establish a claim for wrongful discharge in violation of public policy, an employee must prove (1) the existence of a clear public policy (*clarity* element); (2) that discouraging the conduct in which the employee engaged would jeopardize the public policy (*jeopardy* element); and (3) that the public-policy-linked conduct caused the dismissal (*causation* element).¹³ Finally, the employer must be unable to offer an overriding justification for the dismissal (*absence of justification* element).

The public policy exception has generally been recognized in four different situations: where an employee is fired (1) for refusing to commit an illegal act; (2) for performing a public duty or obligation; (3) for exercising a legal right or privilege; and (4) in retaliation for reporting employer misconduct.¹⁴

26.2.1.3.1. Clarity

In determining whether a clear mandate of public policy is violated, courts will ask whether an employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy.¹⁵

Whether a particular statute contains a clear mandate of public policy is a question of law.¹⁶ The following statutes provide clear mandates of Washington public policy and discharging an

⁸ *Carlson v. Lake Chelan Community Hospital*, 116 Wn.App. 718, 731-32, 75 P.3d 533 (2003).

⁹ *Kuest v. Regent Assisted Living, Inc.*, 111 Wn. App. 36, 53, 43 P.3d 23 (2002); *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 532, 826 P.2d 664 (1992).

¹⁰ *Swanson*, 118 Wn.2d at 532.

¹¹ *Gagliardi v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991).

¹² *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996); *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.2d (2000).

¹³ *Id.* at 941.

¹⁴ *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989).

¹⁵ *Thompson v. St. Regis Paper Company*, 102 Wn.2d at 232.

Volume 3: Financing and Engaging in the Business of Healthcare

employee for complaining about an employer's violation of such statutes could give rise to a wrongful discharge claim:

- **Industrial Welfare Act (RCW 49.12.130):** An employer who discharges an employee because that employee has testified in a Department of Labor & Industries investigation is guilty of a misdemeanor.
- **Health and Safety – Underground Workers (RCW 49.24.060):** Any employer who violates laws mandating safety precautions for underground workers would be guilty of a gross misdemeanor punishable by fine or imprisonment.
- **Health and Safety – Asbestos (RCW 49.26.140):** A person or individual who previously has been assessed a civil penalty for violating asbestos safety laws or regulations, and who knowingly violates such laws or regulations will be guilty of a misdemeanor.
- **Voting Rights (RCW 49.28.120):** Every employer shall allow employees up to two working hours to cast votes in any election.
- **Hours of Work (RCW 49.28):** An employer's violation of laws limiting an employee's hours of work constitutes a misdemeanor.
- **Labor Organizing (RCW 49.32):** Employers may not condition employment on an agreement from an employee that he or she will not join a labor union.
- **Lie Detector Testing (RCW 49.44.120):** It is unlawful for any person to condition employment on subjecting to a lie detector or similar test.
- **Assignment of Patents (RCW 49.44.140):** An employer may not terminate an employee for refusing to execute an assignment of inventions or patents unless in a form specifically permitted by this statute.
- **Genetic Screening (RCW 49.44.180):** It is unlawful for any person to require that any employee or prospective employee submit genetic information or submit to screening for genetic information as a condition of employment or continued employment.
- **Minimum Wage Act (RCW 49.46.100):** Any employer who discharges any employee because the employee has complained to his employer or to the government about violations of the minimum wage law be guilty of a gross misdemeanor.
- **Payment of Wages (RCW 49.48.010):** It is unlawful for any employer to withhold or divert any portion of an employee's wages unless the deduction is required by state or federal law; specifically agreed to orally or in writing by the employee and employer; or for medical, surgical or hospital care or service.
- **Wages—Non-Payment of Wages or False Records of Payments or Deductions (RCW 49.52.050):** It is unlawful for any employer to wrongfully withhold wages owing to an employee. It is also unlawful for any person to make false entries into an employer's books as to the amount of wages paid to any employee or the amount of deductions taken from such wage payments.

¹⁶ *Roberts v. Dudley*, 140 Wn.2d 58, 65, 993 P.2d 901 (2000); *Hubbard v. Spokane County*, 146 Wn.2d 699, 50 P.3d 602 (2002) (RCW 42.23.070(1) creates a valid public policy in favor of prohibiting municipal officers from granting special privileges or exemption to others; wrongful discharge claim allowed to proceed).

- **Unemployment Compensation – Violations by Employers (RCW 50.36.020):** Any person required to collect and pay unemployment compensation contributions, who willfully fails to collect or truthfully account for and pay such contributions, and any person who willfully attempts to evade making such contributions is guilty of a gross misdemeanor.
- **Washington Law Against Discrimination (RCW 49.60.180).** It is unlawful for an employer to discriminate on the basis of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person. Terminating or retaliating against employees for opposing discriminatory actions by the employer violates Washington public policy.¹⁷

26.2.1.3.2. Jeopardy

An employee must show that he or she engaged in particular conduct, and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy.¹⁸ This requires the employee to demonstrate that other means for promoting the policy are inadequate.¹⁹ The employee must also show how the threat of dismissal will discourage others from engaging in the desirable conduct.

26.2.1.3.3. Causation

Most reported cases do not deal with the causation element. Typically, if the employee can link the dismissal with his or her protected activity, that evidence will suffice to pass summary judgment on the element of causation.²⁰

26.2.1.3.4. Employer’s Justification for Dismissal

Some public policies, even if clearly mandated, may not be strong enough to warrant interfering with employers' personnel management.²¹ Court will balance the public policies raised by an employee against an employer’s legitimate reason for a discharge and determine whether those public policies outweigh the employer’s concerns.²²

26.2.2. Employment Contracts

Employers may modify an employee’s at-will status by entering into a written employment contract with an employee.

26.2.2.1. Statute of Frauds

The Washington statute of frauds requires that a contract of employment for more than a year be in writing.²³ In *French v. Sabey Corp.*,²⁴ the Washington Supreme Court held that an oral agreement to employ the plaintiff for 5 years was void under the statute of frauds.

¹⁷ *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990)

¹⁸ *Gardner*, 128 Wn.2d at 945.

¹⁹ *Id.* at 945.

²⁰ *Ellis*, 142 Wn.2d at 464.

²¹ *Gardner*, 128 Wn.2d at 947.

²² *Id.*

²³ RCW 19.36.010; *Greaves v. Medical Imaging Systems*, 124 Wn.2d 389, 879 P.2d 276 (1994).

²⁴ *French v. Sabey Corp.*, 134 Wn.2d 547, 552, 951 P.2d 260 (1998).

Volume 3: Financing and Engaging in the Business of Healthcare

A written employment contract should include the job title, the terms of employment, notice requirements for termination, compensation, vacation and other benefits, and a general description of duties. Optional provisions include the confidentiality of proprietary business information or trade secrets, the ownership of inventions, permissible outside business activities, an agreement by the employee not to compete with the employer, an agreement by the employee not to solicit employees or customers after the contract terminates, and a provision requiring that any disputes be subject to arbitration. These provisions are discussed in greater detail below.

26.2.2.2. Confidentiality Agreements

Most businesses have proprietary information which they wish to keep confidential, either because that information would be valuable to competitors or because of concerns about the privacy rights of clients.

The Uniform Trade Secrets Act prohibits the misappropriation of trade secrets by employees. Not all employer information constitutes a trade secret. Trade secrets include information, such as formulas, patterns, compilations, programs, devices, methods, techniques, or processes that (1) has value because it is not generally known to, or readily ascertainable by, a company's competitors, and (2) the employer has taken steps to keep secret.²⁵

The best way to ensure the confidentiality of proprietary business information is to clearly identify information deemed confidential, restrict access to this information, and have employees with access sign a written confidentiality agreement.

26.2.2.3. Ownership of Inventions

It is a violation of public policy for an employer to require an employee to assign to that employer any 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.²⁶

An employer may require employees to assign their intellectual property rights to inventions developed for the employer, but that agreement must disclose that the assignment does not extend to inventions described in RCW 49.44.140.

26.2.2.4. Non-Competition Agreements

In the absence of a covenant not to compete, an employee is free to compete with a former employer.²⁷ Courts will enforce non-compete agreements that are validly formed and are reasonable. The general rule in Washington is that consideration exists if the employee enters into a non-compete agreement when he or she is first hired.²⁸ A non-compete agreement entered into after employment will be enforced only if supported by independent consideration. Independent consideration for an existing employee may include

²⁵ RCW Ch. 19.108.

²⁶ RCW 49.44.140.

²⁷ *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004).

²⁸ *Id.* at 835.

a wage increase, a promotion, a bonus, a fixed term of employment, or access to protected information. An agreement to continue the employment of an existing employee in exchange for the non-competition agreement is likely not sufficient consideration.²⁹

The terms of a non-compete agreement must be reasonable. Courts determine reasonableness by looking at the duration of the non-compete period. Two- and three-year restrictions after termination have been found reasonable.³⁰ However, employers hoping to enforce two or three year non-compete agreements should consult with counsel to ensure that the geographic and substantive scope of the agreement are reasonable and tailored to protect the employer's interests.

Non-compete provisions should also have a reasonable geographic restriction. For example, if an employer has no operations outside the Puget Sound area, then a court will expect that employer to restrict competition only within the Puget Sound area. A geographical restriction should be tied to the employer's market area.³¹

Finally, an employer cannot completely restrict a professional employee, such as a physician, accountant, or sales person, from engaging in his or her profession. Thus, non-competition agreements can prohibit an employee from soliciting the business of clients or customers for whom that employee provided services while employed, but cannot prohibit the professional employee from competing with the employer for new clients or customers.³²

Washington courts will not void an overly broad non-competition agreement. They have the discretion to sever the unenforceable clauses and to "blue line" the agreement to make it legally enforceable.³³

26.2.2.5. Agreements to Arbitrate Employment Disputes

Employers may request employees to enter into an agreement to arbitrate disputes arising out of the employment relationship, even disputes of discrimination.³⁴ However, the arbitration agreements will be scrutinized carefully to ensure both procedural and substantive fairness.³⁵ Reported cases provide guidance for what an employer may or may not require of an employee:

- **Provide employee with time to review agreement.** Any waiver of the right to file a lawsuit in court and to present one's case to a jury must be "knowing, voluntary, and intelligent." If the employee is

²⁹ Id. at 835.

³⁰ *John Davis & Co. v. Miller*, 104 Wash. 444, 177 P. 323 (1918).

³¹ Id.

³² *Knight, Vale & Gregory v. McDaniel*, 37 Wn. App. 366, 680 P.2d 448 (1984). See also, *City Ice & Cold Storage Co. v. Kinnee*, 140 Wash. 381, 249 P. 782 (1926); *National School Studios v. School Photo Serv.*, 40 Wn.2d 263, 242 P.2d 691 (1952); *Copier Specialists, Inc. v. Gillen*, 76 Wn. App. 771, 887 P.2d 919 (1995); *Organon, Inc. v. Hepler*, 23 Wn. App. 432, 595 P.2d 1314 (1979).

³³ See e.g., *Wood v. May*, 73 Wn.2d 307, 438 P.2d 587 (1968); *Perry v. Moran*, 109 Wn.2d 691, 748 P.2d 224 (1987), aff'd, 111 Wn.2d 885, 766 P.2d 1096, cert. denied, *Moran v. Perry*, 492 U.S. 911, 109 S.Ct. 3228, 106 L.Ed.2d 577 (1989).

³⁴ *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.2d 773 (2004); *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254 (9th Cir. 2005).

³⁵ Id.

- not given the opportunity to review and understand the terms of the arbitration agreement, it could be invalidated.³⁶
- **Do not draft agreement with “hidden” terms.** The arbitration agreement should be clearly labeled as such, in bold, capital letters, and should be written in normal typeface and font.³⁷
 - **Do not mandate arbitration fee splitting.** Most courts considering arbitrator fee-sharing provisions have found them to be unfair.³⁸
 - **Do not shorten limitations periods.** Although Washington law generally allows contracting parties to agree to shortened limitations periods, provisions requiring employees to bring discrimination claims within a year of the alleged adverse employment action have been invalidated.³⁹
 - **Do not limit remedies available to employee in arbitration.** The Ninth Circuit has held that provisions limiting remedies, such as capping the employer’s monetary exposure, are unfair and unenforceable.⁴⁰
 - **Make the arbitration obligation run both to the employee and employer.** Arbitration agreements that do not require the employer to arbitrate claims against the employee have been found to be overly harsh and one-sided.⁴¹
 - **Do not insist on confidentiality.** The Washington Supreme Court has invalidated a clause within an arbitration agreement that required the employee to maintain the confidentiality of the process and the ultimate award.⁴²
 - **Do no reserve the right to unilaterally terminate or modify the arbitration agreement.** The Ninth Circuit has held that such a clause is unfair and could render the entire arbitration agreement invalid. While the Ninth Circuit and the Washington Supreme Court have indicated that unfair terms within an arbitration agreement can be severed from an otherwise enforceable arbitration agreement, if the number of unconscionable provisions is so significant as to pervade the entire agreement, a court may invalidate the arbitration agreement in its entirety.⁴³

26.3. Recruitment and Hiring

Employers should be aware of various state and federal laws applicable to the recruitment and hiring of employees.

26.3.1. Affirmative Action

Generally, employers are legally obligated to enact affirmative action plans only if they fall within one three groups of employers: (a) public employers; (b) private employers with government contracts; and (c) private employers receiving federal financial assistance.

Most state and federal employers are required to take affirmative action to ensure equal employment opportunities for underrepresented groups, including racial minorities, women, persons in protected age groups,

³⁶ *Adler*, 153 Wn.2d at 349. Compare *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004) (employee given 15 days to consider terms of arbitration agreement, court deems this opportunity to be sufficient).

³⁷ *Zuver*, 153 Wn.2d at 306.

³⁸ *Al-Safin*, 394 F.3d at 1261; *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1177-78 (9th Cir. 2003).

³⁹ *Adler*, 153 Wn.2d at 355 (180 day limitations period held to be unconscionable); *Ingle*, 328 F.2d at 1175 (1 year limitations period held to be unconscionable).

⁴⁰ *Ingle*, 328 F.3d at 1178-79; *Al-Safin*, 394 F.3d at 1261. The Washington Supreme Court has agreed with this analysis. *Zuver*, 153 Wn.2d at 315-16.

⁴¹ *Ingle*, 328 F.3d at 1173-74.

⁴² *Zuver*, 153 Wn.2d at 313-315.

⁴³ *Adler*, 153 Wn.2d at 359; *Ingle*, 328 F.3d at 1179.

persons with disabilities, Vietnam-era veterans, and disabled veterans.⁴⁴ The applicable state and federal laws mandate equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin.⁴⁵

Federal law specifically extends affirmative action requirements to federal government contractors and contractors or subcontractors performing under government contracts.⁴⁶ These provisions implement Executive Order 11246,⁴⁷ prohibiting discrimination in hiring on the basis of race, color, gender, religion, and national origin. Among other things, these regulations require any contractor or subcontractor with a federal contract in excess of \$50,000 and with 50 or more employees to develop a written affirmative action program designed to remedying the under representation of the groups identified above.⁴⁸

Federal law also requires government contractors and subcontractors to have written affirmative action plans designed to employ other underrepresented groups. Under the Rehabilitation Act of 1973,⁴⁹ any contractor or subcontractor with a federal contract in excess of \$10,000 must develop a written affirmative action plan to employ qualified individuals with disabilities.⁵⁰ Under the Employment and Training of Veterans Act⁵¹ any contractor or subcontractor with a federal contract in excess of \$10,000 must maintain a written affirmative action plan to employ disabled veterans and Vietnam-era veterans.⁵²

Private employers are permitted to have voluntary affirmative action plans.⁵³

26.3.2. Advertising

Generally, public and private employers may not print or circulate advertisements for employment that express a preference for applicants based on age, race, color, national origin, sex, or disability,⁵⁴ unless the preference

44 See RCW Ch. 49.74 (setting forth affirmative action requirements within Washington state government and institutions of higher learning); 5 U.S.C. § 7201 (setting forth affirmative action requirements for federal civil service employment); see also 5 C.F.R. Part 720 (setting out standards for implementation of federal equal recruitment program).

45 Id.

46 41 C.F.R. Parts 60-1 to 60-4. There some minor exceptions to requirements, which are contained in 41 C.F.R. § 1.5.

47 3 C.F.R. § 339 (1965).

48 41 C.F.R. § 60-1.20.

49 29 U.S.C. § 793.

50 41 C.F.R. § 60-741.

51 38 U.S.C. § 4212.

52 41 C.F.R. § 60-250.1.

53 See *Johnson v. Transportation Agency*, 480 U.S. 616, 632-33, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987) (recognizing that civil rights laws were intended to encourage employers to adopt affirmative action plans).

54 State Law: see RCW 49.60.180 (defining unfair practices to include employment advertisements with limitations based on age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person); RCW 49.44.090(2) (unfair practice for employment advertisement to contain limitation on applicant age); RCW 49.60.205 (same). Federal law: 42 U.S.C. § 2000e-3(b) (defining unlawful employment practice to include advertisements with limitations based on race, color, religion, sex, or national origin); see also 29 U.S.C. Chapter 14: Age Discrimination in Employment Act (ADEA); 29 U.S.C. § 623(c) (prohibiting employment classification based on age); 42 U.S.C. Chapter 126: Americans with Disabilities Act (ADA); 42 U.S.C. § 12112(a) (prohibiting discrimination in hiring based on disability).

Volume 3: Financing and Engaging in the Business of Healthcare

qualifies as a bona fide occupational qualification (“BFOQ”).⁵⁵ A BFOQ is understood to be a qualification necessary to the performance of the job at issue.⁵⁶

Employers seeking to fulfill affirmative action requirements may include language in ads containing non-exclusionary phrases, such as “Minorities, women, and/or disabled persons are encouraged to apply.”

Advertisements issued by federal contractors must state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.⁵⁷

26.3.3. Pre-employment Inquiries

26.3.3.1. Questions about Protected Class Status

With limited exceptions, employers may not inquire about an applicant’s age, sex, marital status, race, creed, color, national origin.⁵⁸ Employers may ask questions that relate to a BFOQ for the particular position. Employers may ask applicants to voluntarily identify a protected characteristic if the purpose of collecting the information is to maintain records required by the Equal Employment Opportunity Commission (EEOC) or some other governmental entity or to comply with affirmative action plan reporting requirements.⁵⁹

The prohibition of pre-employment questions about marital status, child rearing, or child bearing plans exists because such questions have been used to discriminate against women.

26.3.3.2. Questions about Disabilities

With limited exceptions, employers are also prohibited from asking job applicants about the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person.⁶⁰ Employers may inquire about an applicant’s ability to perform job-related tasks.⁶¹

Employers must nonetheless be careful to avoid inquiries regarding an individual’s ability to perform job functions that might elicit information about that individual’s disability. For example, employers may ask whether an applicant has a driver’s license if driving is a job function, but may not ask whether the applicant has a visual disability.

26.3.3.3. Citizenship

Both state and federal law prohibit discrimination based upon an applicant’s national origin.⁶² Nonetheless, employers are required to verify an applicant’s eligibility to become lawfully employed in this

55 RCW 49.60.180; WAC 162-12-135; 42 U.S.C. § 2000e-3(b).

56 See RCW 49.60.180(1).

57 41 C.F.R. § 60-1.4(a)(2).

58 RCW 49.60.180(4); WAC 162-12-140 (identifying permitted inquiries and exceptions to rule for BFOQ, voluntary affirmation action programs or federal statutory requirements).

59 WAC 162-12-150 (queries required by state or federal governmental entities, including courts); WAC 162-12-160 (queries required for affirmative action plan compliance); WAC 162-12-170 (same).

60 RCW 49.60.180(4); WAC 162-12-140 (identifying permitted inquiries and exceptions to rule for BFOQ, voluntary affirmation action programs or federal statutory requirements); 42 U.S.C. § 12111; 29 C.F.R. § 1630.13(a) (prohibiting questions relating to disability).

61 Id.

country.⁶³ The Immigration Reform and Control Act (IRCA),⁶⁴ makes it unlawful for employers to hire any person who is not legally authorized to work in this country. An “unauthorized alien” is any person who is not a citizen or national of the United States, and who is not (a) lawfully admitted for permanent residence, or (b) authorized to be employed by the statute or by the United States Attorney General.⁶⁵ Under IRCA, employers must obtain proof of citizenship and employment eligibility as set out in the statute before hiring any person. Employers are required to maintain documentation showing that they have verified employment eligibility.⁶⁶

The IRCA has antidiscrimination provisions designed to prevent employers from trying to comply with the IRCA’s requirements by discriminating against foreign-looking and foreign-sounding applicants.⁶⁷ The IRCA does, however, permit preferential hiring of United States citizens or nationals if two candidates are equally qualified. The IRCA’s antidiscrimination laws apply to any employer with more than three employees. But IRCA discrimination complaints cannot overlap with discrimination claims based on other federal discrimination statutes.⁶⁸

26.3.3.4. Reference Checks

Employers are entitled to request and to check an applicant’s references. Reference checks are a critical tool to protect against hiring an employee with a history of performance or behavioral problems at a former employer and to protect against a later charge of negligent hiring. Beginning July 24, 2005, an employer who discloses information about a former or current employee to a prospective employer or employment agency, at the request of the prospective employer or agency, will be immune from civil liability for the disclosure of information relating to (1) the employee’s ability to perform his or her job; (2) the employee’s diligence, skill or reliability in carrying out job duties; or (3) illegal or wrongful acts committed by the employee when related to job duties. A presumption that an employer acted in good faith may be rebutted by clear and convincing evidence that the information disclosed was knowingly false, deliberately misleading, or made with reckless disregard for the truth.⁶⁹

26.3.3.5. Criminal History Checks

Employers investigating prospective employees for positions involving access to information affecting national security, trade secrets, confidential or proprietary business information, money or items of value may obtain a transcript of a conviction record from the Washington State Patrol.⁷⁰

Employers investigating prospective employees for positions involving unsupervised access to children under the age of sixteen, developmentally disabled persons or vulnerable adults must obtain a transcript of

62 RCW 49.60.180(1); 42 U.S.C. § 2000d.

63 8 U.S.C. § 1324a.

64 8 U.S.C. § 1324a, et seq.

65 8 U.S.C. § 1324a(h)(3).

66 8 U.S.C. § 1324a(b).

67 8 U.S.C. § 1324b.

68 Id.

69 See HB 1625, adding a new section to RCW Ch. 4.24.

70 RCW 43.43.815(1)(b).

a conviction record from the Washington State Patrol.⁷¹ The law applies to any Washington business or organization, state agency or governmental entity that "educates, trains, treats, supervises, houses or provides recreation" to children, vulnerable adults or the disabled. Employers must obtain from each applicant a disclosure listing the applicant's conviction history for certain crimes against children or vulnerable adults, civil adjudications involving sexual or domestic abuse of children or the disabled, drug-related crimes or financial exploitation of vulnerable adults. The disclosure must be in writing, signed and sworn under penalty of perjury. Prior to requesting conviction information from the State Patrol, employers must notify prospective employees of their intent to obtain this information.⁷² The disclosure should inform the applicant that fingerprinting may be required and that successful applicants may be hired on a conditional basis, pending the receipt of a satisfactory report from the State Patrol. Employers are permitted to reject applications for employment involving unsupervised access to children or vulnerable adults based upon information confirming any drug related convictions.⁷³

Nursing homes and other licensed facilities that provide care and treatment to children and vulnerable adults have a similar, but slightly different, background check requirement that applies to both applicants and current employees. Nursing homes are prohibited from hiring or retaining any employee, directly or by contract, or from accepting any volunteer or student, who has a criminal history, has abused or exploited vulnerable adults or has a sexual abuse finding in a dependency or domestic action. Nursing homes must inform the applicant of the background inquiry, require the person to sign a disclosure, require the applicant to sign a statement acknowledging that the inquiry will be made, verbally inform the applicant of the result within 72 hours, offer to provide the applicant with a copy of the result within ten days and notify the appropriate licensing or certifying agencies of particular results.

Most health care facilities face yet another set of background check requirements. These Department of Health licensing regulations require facilities to obtain disclosure statements from all persons associated with the facility who will have direct contact with children, developmentally disabled persons or vulnerable adults. This expands the application of the previous rules to include not only employees and volunteers, but independent contractors, interns, residents and medical staff.

These regulations apply to hospitals, home health and home care agencies, hospices, boarding homes, child birth centers, certain residential treatment centers and rural health care facilities. These facilities as well as nursing homes should consult legal counsel or the applicable regulations before undertaking State Patrol background inquiries.

26.3.4. Pre-employment Tests

Except as noted below, employers can use any kind of pre-employment test to determine job qualifications.

26.3.4.1. Medical Examinations

Under the Americans with Disabilities Act (ADA), employers may not require a job applicant to take a medical examination, to respond to medical inquires or to provide information about workers'

71 RCW 43.43.832(1); RCW 43.43.830(1)(a).

72 RCW 43.43.834(1).

73 RCW 43.43.835.

compensation claims before the employer makes that applicant a job offer.⁷⁴ The ADA restricts pre-offer inquiries to whether an applicant can perform job related functions.

After a job offer is made, but before the applicant begins employment, an employer may require medical examinations and may make disability-related inquiries if it does so for all applicants for the same job and maintains the confidentiality of such information.⁷⁵ If a post-offer medical exam screens out an individual because of disability, the reason for not hiring must be job-related and consistent with business necessity. The employer must also show that no reasonable accommodation was available that would enable the individual to perform the essential job functions or that accommodation would impose an undue hardship.⁷⁶ A post-offer medical examination may also disqualify an individual who poses a “direct threat” to health or safety.⁷⁷

After a person starts work, any request for a medical examination or inquiry of an employee must be job-related and a business necessity.⁷⁸ Employers may conduct employee medical examinations when evidence of job performance or safety problems exists, when the examination is required by federal laws and is necessary to determine current fitness to perform a particular job or when the examination is voluntary and part of an employee health program. The ADA requires that information regarding medical condition or history be maintained confidentially and separately from personnel files.⁷⁹

26.3.4.2. Psychological Tests

Employers may ask job applicants to undergo psychological tests relating to an individual’s skills.⁸⁰ Employers may not administer a psychological examination prior to a conditional offer of employment if the exam is considered a medical exam under the ADA.⁸¹ Employers may not administer psychological examinations that tend to screen out an individual or class of individuals with disability, unless the testing criteria is limited to job function and is consistent with business necessity.⁸²

26.3.4.3. Physical Agility/Fitness Tests

Employers may administer physical agility or fitness tests that do not include medical monitoring because they are not considered medical exams. Such tests may be given at any point in the application or employment process. Such tests must be administered to all similarly situated applicants or employees regardless of disability. If the tests screen out or tend to screen out individuals or a class of individuals with a disability, the test must be job-related and consistent with business necessity.⁸³

74 42 U.S.C. § 12112(d); 29 C.F.R. §§ 1630.13, 1630.14.

75 42 U.S.C. § 12112(d)(3); 29 C.F.R. §§ 1630.13(b), 1630.14(b).

76 29 C.F.R. § 1630.14(b)(3).

77 29 C.F.R. § 1630.2(r).

78 42 U.S.C. § 12112(d)(4); 29 C.F.R. § 1630.14(c).

79 29 C.F.R. § 1630.14(c).

80 RCW 49.44.120(2).

81 29 C.F.R. §§ 1630.13, 1630.14.

82 29 C.F.R. §§ 1630.10, 1630.11.

83 29 C.F.R. §§ 1630.10, 1630.11.

26.3.4.4. HIV or Hepatitis C Tests

State law prohibits employers from testing for HIV or Hepatitis C infections as a condition of hiring, promotion or continued employment, unless the absence of the HIV or Hepatitis C infection is a BFOQ for the job in question.⁸⁴ A BFOQ exists when performance of a particular job presents a “significant risk” of transmitting either infection to other persons and there is no way to eliminate the risk by restructuring the job. Significant risk is as defined by the Board of Health.⁸⁵

Employers may not disclose the fact that any applicant or employee has had an HIV test. Test results can be released only to the tested individual and certain other specified persons.⁸⁶

26.3.4.5. Drug Tests

Generally, state and federal law does not prohibit private employers from engaging in pre-employment testing for drug use.⁸⁷ The ADA specifically permits employers to ensure that the workplace is free from illegal use of drugs and alcohol and to comply with other federal laws and regulations regarding alcohol and drug use. The ADA permits employers to use drug tests to find out if applicants or employees are currently illegally using drugs. State and federal law also permits employers to refuse to hire an applicant or to discharge an employee based on a test result that indicates use of illegal drugs.⁸⁸

Public employers, however, do not have the same right. Government-ordered drug testing is considered a search subject to the Fourth Amendment’s prohibition on warrantless searches and seizures.⁸⁹ To engage in such a “search,” public employers must show individualized suspicion of wrongdoing or some other special need beyond the normal need for law enforcement. The public employer’s need for the drug test, in the absence of evidence that the employee is under the influence, must be important enough to override the employee’s privacy.⁹⁰

Under the Drug Free Workplace Act of 1988, federal contractors⁹¹ and grant recipients⁹² are required to publish a statement notifying employees that the illegal use of drugs is prohibited in the workplace, to establish a drug-free awareness program for employees and to take certain other steps to make a good faith effort to maintain a drug-free workplace.

84 RCW 49.60.172.

85 Id.

86 RCW 70.24.105

87 See 42 U.S.C. § 12114 (permitting testing for use of illegal drugs and alcohol); see also RCW 49.44.180 (precluding use of genetic screening, but excluding results from drug or alcohol testing as genetic information); *Roe v. Quality Transp. Servs.*, 67 Wn. App. 604, 838 P.2d 128 (1992) (recognizing that no clear public mandate precludes drug testing by private employer).

88 Id.

89 *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997) (striking law requiring drug test for public officials); *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 103 L.Ed. 2d 639, 109 S.Ct. 1402 (1989) (mandatory drug testing of railway employees following a train accident constitutes a special need).

90 Id.

91 41 U.S.C. § 701.

92 41 U.S.C. § 702.

26.3.4.6. Polygraph Tests

Generally, both state and federal law prohibit the use of polygraph examinations. Washington law prohibits employers from requiring polygraph tests as a condition of employment, unless applying for a position with a law enforcement agency, a job involving the manufacture, distribution, or dispensing of controlled substances, or a position directly involving national security.⁹³ The Polygraph Protection Act of 1988 prohibits most employers from requiring or requesting that a job applicant submit to a lie detector test and from refusing to hire a person who declines to take a lie detector test.⁹⁴

26.3.5. Reporting of New Hires

Washington employers are required to report to the State Department of Social and Health Services (DSHS) both new hires and rehires, meaning those returning to work after a period of temporary separation.⁹⁵ Employers may report by providing a copy of the W-4 form or by other approved means such as hard copy of the DSHS form or computer disk in appropriate format. The report must provide the employee's name, address, Social Security number, and date of birth, along with the employer's name, address, and IRS identifying number. With a few exceptions, this information must be provided within 20 days of the hiring, rehiring, or return to work of the employee.⁹⁶

26.4. Wages and Hours

26.4.1. Wages

The Washington Minimum Wage Act⁹⁷ and the federal Fair Labor Standards Act⁹⁸ (FLSA) set standards for minimum wages, overtime pay, the payment of wages, and record keeping requirements.

26.4.1.1. Minimum Wage

Minimum wage under state law is adjusted each January 1 by the Department of Labor & Industries:

On September 30, 2000, and on each following September 30th, the department of labor and industries shall calculate an adjusted minimum wage rate to maintain employee purchasing power by increasing the current year's minimum wage rate by the rate of inflation. The adjusted minimum wage rate shall be calculated to the nearest cent using the consumer price index for urban wage earners and clerical workers, CPI-W, or a successor index, for the twelve months prior to each September 1st as calculated by the United States department of labor. Each adjusted minimum wage rate calculated under this subsection (4)(b) takes effect on the following January 1st.

93 RCW 49.44.120, RCW 49.44.135.

94 29 U.S.C. § 2001, et seq.

95 RCW 26.23.040.

96 Id.

97 RCW Ch. 49.46 et seq.

98 29 U.S.C. 201 et seq.

Volume 3: Financing and Engaging in the Business of Healthcare

RCW 49.46.020. Washington’s minimum wage for 2007 is \$7.93 per hour. For 14 and 15 year old employees, the minimum wage is 85 percent of the adult rate, or \$6.74 an hour for 2007. The state minimum wage can be verified for any particular year at www.lni.wa.gov.

Under federal law, minimum wage for covered, non-exempt employees is currently \$5.15 an hour.⁹⁹

Both state and federal law provides that if two minimum wages apply, the higher of the two must be paid. More information is found at www.dol.gov.

26.4.1.2. Overtime Pay

Both the FLSA and state law require the payment of overtime pay at the rate of one and one-half times the employees’ regular rate for time worked in excess of 40 hours a week.¹⁰⁰

Employers who are covered by both the federal and state overtime laws need to follow whatever law or regulation is most favorable to employees, and following the federal FLSA regulations will not necessarily mean that an employer is in compliance with state law. For example, the Washington regulations that describe exempt duties generally are more favorable to employees, except for part of the revised federal executive exemption requiring such executives to have hire/fire authority or that their recommendations be given particular weight. Even though employers covered by state law cannot take advantage of some of the revised FLSA regulations, employers should nevertheless audit their wage and hour practices to determine what changes may be necessary to comply with both laws.

26.4.1.3. FLSA Exemptions

Anyone employed as a bona fide executive, administrative, professional, and outside sales employee is “exempt” from federal overtime pay laws. Certain “computer professional employees” are similarly exempt.

To qualify for any of these exemptions under federal law, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee’s specific job duties and salary must meet all the requirements of the Department of Labor’s regulations.

26.4.1.3.1. Executive Exemption¹⁰¹

To qualify for the executive exemption, all of the following tests must be met:

- The employee must be compensated on a **salary basis**¹⁰² (as defined in the regulations) at a rate not less than \$455 per week;
- The employee’s **primary duty**¹⁰³ must be **managing**¹⁰⁴ the enterprise, or **managing a customarily recognized department or subdivision**¹⁰⁵ of the enterprise;

⁹⁹ 29 U.S.C. 206.

¹⁰⁰ 29 U.S.C. 207; RCW 49.46.130(1).

¹⁰¹ 29 CFR 541.100. See WAC 296-128-510 for the “Executive” exemption under Washington law.

¹⁰² Salary basis defined at 29 CFR 541.602.

- The employee must **customarily and regularly**¹⁰⁶ direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given **particular weight**.¹⁰⁷

Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.¹⁰⁸

26.4.1.3.2. Administrative Exemption¹⁰⁹

To qualify for the administrative exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis¹¹⁰ at a rate not less than \$455 per week;
- The employee's primary duty¹¹¹ must be the performance of office or non-manual work **directly related to the management or general business operations**¹¹² of the employer or the employer's customers; and

103 "Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. See 29 CFR 541.700.

104 "Management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures. 29 CFR 541.102.

105 The phrase "a customarily recognized department or subdivision" is intended to distinguish between a collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. 29 CFR 541.103.

106 The phrase "customarily and regularly" means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks. 29 CFR 541.701.

107 Factors to be considered in determining whether an employee's recommendations as to hiring, firing, advancement, promotion or any other change of status are given "particular weight" include whether it is part of the employee's job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive's recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. An employee's recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status. 29 CFR 541.105.

108 29 CFR 541.101.

109 29 CFR 541.200. See examples of administrative exempt positions at 29 CFR 541.203. See also WAC 296-128-520 for the "Administrative" exemption under Washington law.

110 "Fee basis" is defined at 29 CFR 541.605.

111 "Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

112 To meet the "directly related to management or general business operations" requirement, an employee must perform work directly related to assisting with the running or servicing of the business. This includes work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement;

- The employee’s primary duty includes the exercise of discretion and independent judgment¹¹³ with respect to matters of significance.

The administrative exemption is also available to those employees whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment.

Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field.¹¹⁴ Employees engaged in academic administrative functions include the superintendent or other head of an elementary or secondary school system; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject matter departments; academic counselors and other employees with similar responsibilities.

26.4.1.3.3. Professional Exemption¹¹⁵

To qualify for the learned professional exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than \$455 per week;
- The employee’s **primary duty**¹¹⁶ must be the performance of work requiring **advanced knowledge**,¹¹⁷ defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a **field of science or learning**;¹¹⁸ and
- The advanced knowledge must be customarily acquired by a **prolonged course of specialized intellectual instruction**.¹¹⁹

advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities. 29 CFR 541.201.

113 The exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. Factors to consider include whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation. 29 CFR 541.202.

114 29 CFR 541.204.

115 29 CFR 541.300. See WAC 296-128-530 for “Professional” exemption under Washington law.

116 “Primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole. 29 CFR 541.301(a).

117 “Work requiring advanced knowledge” means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. Advanced knowledge cannot be attained at the high school level. 29 CFR 541.301(b).

118 Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning. 29 CFR 541.301(c).

26.4.1.3.4. Certain Health Care Professions

Physicians. An employee holding a valid license or certificate permitting the practice of medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of medicine.¹²⁰

Nurses. Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.¹²¹

Physician assistants. Physician assistants who have successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants generally meet the duties requirements for the learned professional exemption.¹²²

Registered or certified medical technologists. Registered or certified medical technologists who have successfully completed three academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association generally meet the duties requirements for the learned professional exemption.¹²³

Dental hygienists. Dental hygienists who have successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.¹²⁴

26.4.1.3.5. Creative Professions

To qualify for the creative professional exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than \$455 per week;

119 The professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word “customarily” means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. 29 CFR 541.301(d).

120 29 CFR 541.304.

121 29 CFR 541.301(e)(2).

122 29 CFR 541.301(e)(4).

123 29 CFR 541.301(e)(1).

124 29 CFR 541.301(e)(3).

Volume 3: Financing and Engaging in the Business of Healthcare

- The employee's primary duty must be the performance of work requiring **invention, imagination, originality or talent**¹²⁵ in a recognized field of artistic or creative endeavor.

26.4.1.3.6. Outside Sales Exemption¹²⁶

To qualify for the outside sales exemption, all of the following tests must be met:

- The employee's primary duty must be **making sales**,¹²⁷ or obtaining orders or contracts for services or for the use of facilities¹²⁸ for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.¹²⁹

The salary requirements of the regulation do not apply to the outside sales exemption.

26.4.1.3.7. Computer Employee Exemption¹³⁰

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated **either** on a salary or fee basis at a rate not less than \$455 per week **or**, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:
 - 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - 2) 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;

¹²⁵ This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The exemption depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. 29 CFR 541.302.

¹²⁶ 29 CFR 541.500. See WAC 296-128-540 for "Outside Sales" exemption under Washington law.

¹²⁷ "Sales" includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition. 29 CFR 541.501(b).

¹²⁸ Obtaining orders for "the use of facilities" includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies. The word "services" extends the exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order. 29 CFR 541.501(c).

¹²⁹ An outside sales employee makes sales at the customer's place of business, or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. 29 CFR 541.502.

¹³⁰ 29 CFR 541.400. See WAC 296-128-535 for "Professional Computer Employee" exemption under Washington law.

- 3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. 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 identified in the primary duties test described above, are not exempt under the computer employee exemption.¹³¹

26.4.1.3.8. Highly-Compensated Workers

The FLSA regulations contain a special rule for “highly-compensated” workers who are paid total annual compensation of \$100,000 or more.¹³² A highly compensated employee is deemed exempt under the FLSA if:

- The employee earns total annual compensation of \$100,000 or more, which includes at least \$455 per week paid on a salary basis;
- The employee’s primary duty includes performing office or non-manual work; and
- The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

The required total annual compensation of \$100,000 or more may consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period, but does not include credit for board or lodging, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits.

26.4.1.4. Compensatory Time off in Lieu of Payment

The FLSA does not authorize compensatory time in lieu of overtime for private employers.¹³³ State law does allow a private employer to provide compensatory time to an employee in lieu of overtime pay. However, compensating time may be as agreed on by the employer and the individual employee **only** at the request of the employee, and may not be imposed by the employer in lieu of overtime pay on any employee who has not requested compensating time off.¹³⁴

¹³¹ 29 CFR 541.401.

¹³² 29 CFR 541.601.

¹³³ RCW 72.01.042 governs overtime or compensatory time for employees of state institutions.

¹³⁴ WAC 296-128-560.

Volume 3: Financing and Engaging in the Business of Healthcare

26.4.1.5. Payment of Wages

Employers must pay wages on regularly scheduled paydays at intervals of 30 days or less.¹³⁵ Employers must provide an itemized statement indicating the hours worked, the number of days in the pay period, the rate of pay, gross wages, all deductions, and the employer's name, address and phone number.¹³⁶

The deductions permitted by law are those required by state and federal law (such as income tax withholdings and Social Security deductions), deductions specifically agreed to in writing between the employee and employer, and deductions for health care plans.¹³⁷ Certain regulations prohibit deductions in pay for cash shortages, accepting bad checks, or loss or breakage of equipment under certain circumstances.¹³⁸

26.4.1.6. Record-Keeping Requirements

Federal and state law requires employers to maintain records of the name, address, occupation or job title, dates of employment, rates of pay, the number of hours worked by every employee, and any deductions taken from wages.¹³⁹ These records must be maintained for three years.¹⁴⁰

26.4.2. Hours

In general, the FLSA does not limit the number of hours an employee can work per week or pay period. State law does contain some maximum work hour limitations.

State employees or employees of government contractors. It is illegal to require government employees or employees of government contractors to work in excess of eight hours per day.¹⁴¹

Nurses. It is illegal for an employer to require a licensed practical nurse or a registered nurse to work overtime, defined by statute as more than 12 hours within a 24-hour period or more than 80 hours in a consecutive 14-day period,¹⁴² if the nurse provides direct patient care in a hospital or clinic and is paid an hourly wage. The exceptions to this rule include work that occurs: (1) because of an unforeseeable emergent circumstance; (2) because of prescheduled on-call time; (3) when the employer documents that the employer has used reasonable efforts to obtain staffing; or (4) when an employee is required to work overtime to complete a patient care procedure already in progress where the absence of the employee could have an adverse effect on the patient.¹⁴³ A health care facility violating this statute can be fined up to \$5,000.¹⁴⁴

135 WAC 296-126-023; WAC 296-128-035; WAC 296-131-010.

136 WAC 296-126-040; WAC 296-131-015.

137 RCW 49.48.010; RCW 49.52.060.

138 WAC 296-126-025.

139 29 USC 211(c) (FLSA); RCW 49.46.070; WAC 296-128-010.

140 29 CFR 516.5; WAC 296-126-050; WAC 296-128-020; WAC 296-131-017. But see 29 CFR 516.6 (time cards need to be retained only 2 years).

141 RCW 49.28.010.

142 RCW 49.28.130-140.

143 RCW 49.28.140(3).

144 RCW 49.28.150.

Domestic workers. It is illegal to employ a domestic worker for more than 60 hours in one week period.¹⁴⁵

26.4.3. Meal Periods and Breaks

Employees must be provided a meal period of at least 30 minutes starting no less than two hours and no more than five hours from the beginning of the shift. Meal periods are considered to be on the employer's time 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. No employee shall be required to work more than five consecutive hours without a meal period.

Employees working three or more hours longer than a normal work day shall be allowed at least one 30-minute meal period prior to or during the overtime period.

Employees must be given a rest period of not less than 10 minutes, on the employer's time, for each 4 hours of working time. Rest periods must occur as near as possible to the midpoint of the work period. No employee can be required to work more than three hours without a rest period.¹⁴⁶

26.5. Child Labor Laws

Both state and federal laws govern the employment of minors.¹⁴⁷ To hire a person under the age of 18 in Washington, employers must have a current minor work permit.¹⁴⁸ Responsibility for obtaining a minor work permit falls with the employer. The permit must be posted. Employers can apply for a minor work permit with a Master Business License application, which can be obtained from the Department of Licensing, the Department of Revenue or any Department of Labor and Industries service location.¹⁴⁹

26.5.1. Record Keeping

Employers must obtain a parent/school authorization form for each minor before they can begin working. Employers are responsible for ensuring the form is complete and that a copy is kept on file. Employers are also responsible for renewing these forms annually, as they expire each year on September 30th. The forms can be obtained from the Department of Labor and Industries.¹⁵⁰

Minors must provide the following information on the parent/school authorization form: name, address, date of birth, whether he/she is employed elsewhere and total hours for any such job and his/her signature. Employers must verify a minor's date of birth with a birth certificate and social security card, a driver's license, a baptismal record and social security card, or a notarized statement from a parent or guardian.¹⁵¹

Employers must provide the following information on the parent/school authorization form: location of the minor's workplace, complete description of job duties, earliest and latest work hours, maximum hours per week, permit number, business identifier and a signature. The form must be signed by a parent or legal

145 RCW 49.28.080.

146 WAC 296-126-092.

147 RCW 26.28.060-.070; 29 U.S.C. § 203; 29 C.F.R. Part 570.

148 RCW 26.28.060(a); WAC 296-125-018.

149 WAC 296-125-0200 – 0231.

150 WAC 296-125-0260 – 0262.

151 WAC 296-125-0263.

guardian. If the minor will be working during the school year, the form must also be authorized by a school official.¹⁵²

Employers must have a special variance form for any deviation from the minor employment regulations. Such a variance is permitted upon a showing of good cause.¹⁵³ The rules allow for exemptions from hours of work and prohibited duty regulations for 16 and 17-year-old minors. Prohibited duty exemptions include state-certified apprenticeship programs, residential schools, vocational education programs, diversified career education, work experience, and cooperative education programs.¹⁵⁴

Employers are required to maintain the records for each minor employee, including each parent/school authorization and any variance form, for a period of three years.¹⁵⁵

26.5.2. Conditions of Employment for Minors

26.5.2.1. Hours of Work: Non-Agricultural

Hours for 14 and 15-year-old minors: Workers in this age group may work up to three hours on a school day preceding another school day. They may work a maximum of eight hours on any other day. They may work up to 16 hours a week during the school year, and 40 hours a week when school is not in session. They cannot work more than six days a week. Starting time is no earlier than 7 a.m. Quitting time during the school year is no later than 7 p.m. weekdays and 9 p.m. Fridays and Saturdays. Quitting time during vacations is 9 p.m.¹⁵⁶

Hours for 16 and 17-year old minors: Workers in this age group may work up to four hours on a school day preceding another school day. They may work a maximum of eight hours per day on any other day. Workers in this age group may work up to 20 hours a week without a special variance, and up to 28 hours a week with the special variance. They can work up to 48 hours a week when school is not in session. They cannot work more than six days a week. Starting time is no earlier than 7 a.m. during the school year, and no earlier than 5 a.m. when school is not in session. Quitting time during the school year is 10 p.m. Sunday through Thursday, midnight Friday, Saturday and before holidays. Quitting time during vacations is midnight.¹⁵⁷

26.5.2.2. Meal and Rest Breaks

Minors ages 14 and 15 may not work more than four hours without a 30-minute uninterrupted meal period. They must also have a scheduled ten-minute rest period every two hours if scheduled for four hours of work.¹⁵⁸

¹⁵² WAC 296-125-0264 – 0265.

¹⁵³ WAC 296-125-0600 – 0640.

¹⁵⁴ WAC 296-125-0640.

¹⁵⁵ WAC 286-125-0275.

¹⁵⁶ WAC 296-125-027.

¹⁵⁷ Id.

¹⁵⁸ WAC 296-125-0285.

Minors ages 16 and 17 may not work more than five hours without a 30-minute uninterrupted meal period. They must also have a scheduled ten-minute rest period every three hours if scheduled for four hours of work.¹⁵⁹

26.5.2.3. Minimum Wage

The minimum wage for minors is determined by the Director of the Department of Labor and Industries.¹⁶⁰ The minimum wage for 16 and 17-year-olds is equal to the hourly rate for adults under RCW 49.46.020. Minors under the age of 16 must receive 85% of that rate.¹⁶¹

26.5.2.4. Prohibited Duties

Both state and federal laws specify jobs that are prohibited for minor workers.¹⁶² The prohibition extends to jobs that pose a significant health and safety risk. For example, no minor maybe employed in the following general categories of jobs: nurses aid or assistant; working in saunas, massage parlors or tattoo studios; jobs requiring personal protective equipment; jobs with possible exposure to bodily fluids, radioactive and hazardous substances ; jobs involving explosives, boilers, engine rooms, elevators, earth moving machines, flagging, excavating, logging, mining, roofing, power-driven machines or fire fighting; work in freezers, meat coolers or in preparing meats for sale; sales to passing motorists on any public right of way; work performed more than ten feet above ground or floor level; manufacturing of brick, tile, and kindred products; wrecking, demolition, and ship-breaking operations; and slaughtering, meat packing or processing.¹⁶³

Minors under the age of 16 are prohibited from engaging in the following general categories of jobs: manufacturing, processing operations, public messenger, transportation, warehouse and storage, communications and public utilities, construction, certain aspects of retail food service and gasoline service operations, amusement parks, loading or unloading trucks, and the operation or repair of any power-driven machinery.¹⁶⁴

26.5.3. Regulation of Employers of Minors

Employers of minors are regulated by the Department of Labor and Industries. If proper working conditions are not met or if conditions that are detrimental to the health, safety, or welfare of minor workers exist, the Department of Labor and Industries can revoke an employer’s minor work permit.¹⁶⁵

The Department of Labor and Industries can assess civil penalties up to \$1,000 as well as criminal penalties on employers who violate child labor laws. The size of the civil penalty depends on the severity of the violation. In most cases the employer will be asked to correct the violation before a penalty is imposed. Anyone violating child labor laws may be charged with a Class C felony if the violation results in the death or permanent

159 WAC 296-125-0287.

160 RCW 49.46.020(5).

161 WAC 296-125-043.

162 RCW 26.28.060-070; RCW 49.12.121; WAC 296-125-030-.033; 29 C.F.R. § 570.50-68.

163 WAC 296-125-030; 29 C.F.R. §§ 570.50-.68.

164 WAC 296-125-033; 29 C.F.R. § 570.31-.38, 570.118-.119.

165 WAC 296-125-0230.

Volume 3: Financing and Engaging in the Business of Healthcare

disability of a minor. Additionally, an employer who knowingly or recklessly violates child labor laws may be charged with a gross misdemeanor.¹⁶⁶

26.6. Terminations

26.6.1. Payment of Wages upon Termination

On termination of employment, either by resignation or discharge, employers must pay any wages owed, plus any vacation or sick leave pay to which that employee is entitled, no later than the end of the next regularly scheduled pay period.¹⁶⁷ Washington law prohibits an employer from withholding wages from a discharged employee without that employee's prior written consent.¹⁶⁸

If an employee prevails in a lawsuit to recover wages wrongfully withheld by an employer, that employee is entitled to recover judgment in the amount of the wages, attorneys' fees and costs incurred to bring the lawsuit. If the withholding is found to have been willful, the court may award double damages.¹⁶⁹ Washington law also provides that any officer, vice principal or agent of the employer (the individual making the decision to withhold the wages) can be personally liable for the back pay, attorneys' fees and double damages.¹⁷⁰ Employers who can prove that there was a bona fide dispute over whether the wages were owed or the amount owed may avoid liability for double damages under RCW 49.52.070.¹⁷¹

Washington courts have interpreted the attorney fee provision broadly. Attorney fees are recoverable for breach of an employment contract, including breach of a labor contract.¹⁷² The term "wages or salary owed" in RCW 49.48.030 has been construed to include back pay,¹⁷³ front pay,¹⁷⁴ reimbursement for sick leave,¹⁷⁵ and commissions.¹⁷⁶

26.6.2. Written Notice of Reasons for Discharge

An employee is entitled to receive a signed, written statement of the reasons for a discharge within ten working days after the employee makes such a request.¹⁷⁷

¹⁶⁶ RCW 48.12.390, .410.

¹⁶⁷ RCW 49.48.010.

¹⁶⁸ RCW 49.48.010; RCW 49.52.050.

¹⁶⁹ RCW 49.48.030; RCW 49.52.070; *Intl' Ass'n Firefighters v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002); *Paul v. All Alaskan Seafoods, Inc.*, 106 Wn. App. 406, 24 P.3d 447 (2001), *rev. granted*, 145 Wn.2d 1015, 41 P.3d 484 (2002).

¹⁷⁰ RCW 49.52.050, RCW 49.52.070; *Ellerman v. Centerpoint Prepress, Inc.* 143 Wn.2d 514, 22 P.3d 795 (2001).

¹⁷¹ *Schilling v. Radio Holdings, Inc.* 136 Wn.2d 152, 961 P.2d 371 (1998).

¹⁷² *Gaglidari*, 117 Wn.2d at 450; *Kohn v. Georgia-Pacific Corp.*, 69 Wn. App. 709, 727, 850 P.2d 517 (1993); *Naches Valley School Dist. No. JT3 v. Cruzen*, 54 Wn. App. 388, 399, 775 P.2d 960 (1989).

¹⁷³ *Gaglidari*, 117 Wn.2d at 449-450.

¹⁷⁴ *Hayes v Trulock*, 51 Wn. App. 795, 806, 755 P.2d 830 (1988).

¹⁷⁵ *Naches Valley*, 54 Wn. App. at 398.

¹⁷⁶ *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 151-53, 948 P.2d 397 (1997).

¹⁷⁷ WAC 296-126-050.

26.6.3. Severance Pay

In Washington, employers generally have no legal obligation to pay severance pay when an employee is discharged. There are some exceptions to this rule.

26.6.3.1. Worker Adjustment Retraining and Notification Act

Under the Worker Adjustment Retraining and Notification Act (WARN),¹⁷⁸ certain employers must give an employee 60 days notice of a plant closing, a mass layoff, or a reduction in hours.¹⁷⁹ WARN applies to private employers, hospitals, and nonprofit organizations. WARN does not apply to government employers. Employees who do not receive the requisite 60-day notice are entitled to bring a lawsuit to recover wages for that period. An employer who fails to provide notice as required to the local government is subject to a civil penalty not to exceed \$500 for each day of violation. This penalty may be avoided if the employer satisfies the liability to each aggrieved employee within three weeks after the closing or layoff is ordered by the employer.

26.6.3.2. Employee Retirement Income Security Act

The Employee Retirement Income Security Act (ERISA)¹⁸⁰ is a federal law that sets minimum standards for most voluntarily established pension and health plans in private industry and to provide protection for individuals in these plans. ERISA establishes requirements for setting up, managing, and funding “employee welfare benefit plans” and “employee pension benefit plans.” A severance pay plan may qualify as an ERISA welfare plan or a pension plan.¹⁸¹

Generally, one-time lump sum severance payments triggered by a single event, such as the termination of an employee, will not make that severance pay an ERISA plan and trigger ERISA’s administrative requirements.¹⁸² If, however, an employer sets up a plan, fund, or program intended to benefit a class of beneficiaries, this type of plan may impose ERISA regulatory and administrative obligations on the employer.¹⁸³

26.6.4. Consolidated Omnibus Budget Reconciliation Act of 1986

The Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA)¹⁸⁴ gives workers and their families who lose health benefits as the result of a “qualifying event” the right to choose to continue group health benefits for limited periods of time. “Qualifying events” include voluntary or involuntary job loss, reduction in the hours worked, transition between jobs, death, or divorce.¹⁸⁵ Qualified individuals may be required to pay the entire premium for coverage up to 102 percent of the cost to the plan.¹⁸⁶

¹⁷⁸ 29 USC 2101 et seq.; 20 CFR Part 639.

¹⁷⁹ WARN applies to employers with more than 100 employees, not counting employees who have been with the employer for less than six months and those employees working less than 20 hours per week. See www.doleta.gov/programs/factsht/warn.htm.

¹⁸⁰ 29 USC § 1001 et seq.

¹⁸¹ 29 USC § 1002(2)(B)(i).

¹⁸² *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12, 96 L.Ed.2d 1, 107 S. Ct. 2211 (1987); *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 321 F.3d 933 (9th Cir. 2003).

¹⁸³ See *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982); *Williams v. Wright*, 927 F.2d 1540, 1544 (11th Cir. 1991).

¹⁸⁴ 29 USC § 1161-1169. See also *Construction and Application of ERISA Provisions Governing Continuation Coverage Under Group Health Plans*, 126 A.L.R. Fed. 97 (2005).

¹⁸⁵ 29 USC § 1161.

¹⁸⁶ 29 USC § 1162(3).

Volume 3: Financing and Engaging in the Business of Healthcare

COBRA generally requires that group health plans sponsored by employers with 20 or more employees in the prior year offer employees and their families the opportunity for a temporary extension of health coverage (called continuation coverage) in certain instances where coverage under the plan would otherwise end.

COBRA outlines how employees and family members may elect continuation coverage. The plan administrator must give appropriate notice of COBRA rights on two separate occasions. Covered employees and their spouses must be notified of their rights under COBRA at the time of commencement of coverage under the plan.¹⁸⁷ The second round of notices is triggered by the “qualifying event.”¹⁸⁸ Termination of employment is a qualifying event.¹⁸⁹

In the event of termination of a covered employee, the employer must notify the administrator of the group health plan within 30 days of the termination.¹⁹⁰ The plan administrator must then notify the discharged employee within 14 days of his or her COBRA rights and allow at least 60 days for the employee to decide whether or not to elect continuation of the group health plan coverage.¹⁹¹ Discharged employees generally may elect such coverage for up to 18 months following their termination.¹⁹²

An administrator who fails to provide the requisite COBRA notice can be held liable for an employee’s medical bills incurred during the 18-month period.¹⁹³ Moreover, the court in its discretion may assess a penalty of up to \$100 a day from the date of the failure to notify the employee of his/her COBRA rights and other relief “as it deems proper.”¹⁹⁴ The court may also award attorneys’ fees and costs to the prevailing party.¹⁹⁵

26.6.5. Separation Agreements and Releases

26.6.5.1. General Principles

Employment claims, including claims for statutory remedies, may be waived by an employee as long as the waiver is knowing and voluntary and supported by adequate consideration.¹⁹⁶ In Washington, employers may request that a terminated employee execute a release of liability in exchange for compensation to which that employee would not otherwise be entitled. A release is “knowing and voluntary” when the employee understands the effect of the release, signs it voluntarily, and is given adequate consideration.¹⁹⁷

187 29 U.S.C. § 1166(a)(1).

188 29 USC § 1166(a)(4).

189 29 USC § 1163(2).

190 29 USC § 1166(a)(1).

191 29 USC § 1165(1), 1166(a)(4), and (C), and 1167(3)(B).

192 29 USC § 1162(2)(A)(i).

193 *Phillips v. Riverside, Inc.*, 796 F. Supp. 403, 411 (E.D. Ark. 1992).

194 29 USC § 1132(c)(1).

195 *Id.*

196 *Alexander v. Gardner-Denver*, 415 U.S. 36, 52 n. 15, 94 S. Ct. 1011, 39 L.Ed.2d 147 (1974).

197 *Chadwick v. Northwest Airlines, Inc.*, 33 Wn. App. 297 (1982). *aff’d* 100 Wn.2d 221, 222 (1983) (contract principles apply to releases of claims under the WLAD); *Long v. Sears Roebuck*, 105 F.3d 1529, 1538 (3d Cir. 1997), cert. denied, 522 U.S. 1107 (1998).

An employer must provide the terminated employee consideration beyond the employment benefits to which the employee was already entitled.¹⁹⁸

26.6.5.2. Older Worker Benefit Protection Act

The Older Worker Benefit Protection Act (OWBPA)¹⁹⁹ sets out the method of obtaining a valid release of liability from employees age 40 or older.

If an employer wishes to obtain a release of claims from any person over 40, that employer may do so only under the following conditions: (1) the release is written in plain language; (2) the release must specifically reference the release of claims under the Age Discrimination in Employment Act; (3) the waiver of claims does not extend to claims arising after the date of the release; (4) the employee must receive something in exchange for the release — something to which the employee is not otherwise entitled; (5) the employee must be advised in writing to consult with an attorney before signing the release; (6) the employee must receive at least 21 days to consider the release or in the case of a group layoff, 45 days and (7) the employee must have seven days after signing to consider rescinding the release.²⁰⁰

In *Oubre v. Entergy Operations, Inc.*, the United States Supreme Court held that a release that does not comply with the OWBPA is invalid and an employee may bring an age discrimination claim without having to return the money received from the employer under a separation agreement.²⁰¹

26.6.5.3. Confidentiality

Employers may ask an employee signing a separation agreement to keep the terms of the agreement confidential.²⁰² A confidentiality provision cannot, however, prevent an employee from cooperating with the EEOC in an investigation brought by other employees.²⁰³ A confidentiality provision similarly cannot prevent an employee from testifying in another proceeding about facts that led to his or her separation from employment.²⁰⁴

26.6.5.4. Tax Issues

Amounts paid to an employee as severance pay under a separation agreement may be taxable. Under the Small Business Job Protection Act of 1996,²⁰⁵ damages received for “nonphysical personal injuries,” including emotional distress, are taxable to the recipient. Employers making payments in exchange for a release of liability for a nonphysical personal injury must report the income on a Form 1099 unless the payments are “wages” in which case they should be reported as W-2 income. Under the Federal Unemployment Tax Act,²⁰⁶ if an employer’s separation payments are “wages,” the employer must

198 *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991).

199 29 USC § 626(f).

200 29 U.S.C. § 626(f).

201 522 U.S. 422 (1998).

202 *Smith v. Phillips*, 881 F.2d 902, 905 (10th Cir. 1989).

203 *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738 (1st Cir. 1996).

204 *Hamad v. Graphic Arts Center, Inc.*, 72 Fair Empl. Prac. Cas. (BNA) 1759 (D. Or. 1997).

205 26 U.S.C. § 104(a)(2).

206 26 U.S.C. § 3101 et seq.

Volume 3: Financing and Engaging in the Business of Healthcare

withhold income taxes and Social Security taxes and must pay the employer's share of FUTA and Social Security taxes.²⁰⁷

Under the Civil Rights Tax Relief Act, passed in October 2004, legal fees and court costs incurred by a taxpayer to prosecute a discrimination claim are deductible from gross income.²⁰⁸

26.7. Leaves Of Absence

The state and federal statutes governing leaves of absence are:

- Washington Family Care Act
- Family and Medical Leave Act (FMLA)
- Washington Family Leave Act
- Pregnancy Discrimination Act
- Americans with Disabilities Act (ADA)
- The Uniformed Services Employment and Re-employment Rights Act (USERRA) and
- Washington's Jury Duty Law.

26.7.1. Washington Family Care Act

If an employer allows employees to take sick leave or other time off with pay, then an employee must be allowed to use accrued sick leave or paid leave to care for a child with a health condition or a spouse, parent, parent-in-law, or grandparent with a serious health condition.²⁰⁹ Permissible uses include injury, illness, doctor's appointments, and the need to provide the child with medications that the child cannot self-administer. To qualify as a "child," the person in need of care must be under the age of eighteen or "incapable of self care because of a mental or physical disability." Biological, adopted, foster, and step children all meet the definition of "child."

Every employer must display a poster describing its employees' rights under this statute in a conspicuous place. Every employer must also post its leave policies, if any, in a conspicuous place.²¹⁰ The Washington Family Care Act also prohibits employers from discharging, threatening to discharge, demoting, suspending, disciplining, or discriminating against employees who exercise their rights under the Act.

26.7.2. Family and Medical Leave Act

The Family and Medical Leave Act (FMLA)²¹¹ requires "covered employers" to provide "eligible employees" up to 12 weeks of unpaid leave during any 12-month period for the birth of a child, the placement of an adopted or foster care child, the care of a family member with a serious health condition, or the employee's serious health condition.

²⁰⁷ 26 U.S.C. § 3101 3301, 3306(b).

²⁰⁸ Section 703 of American Jobs Creation Act of 2004, HR 4520.

²⁰⁹ RCW 49.12.270

²¹⁰ RCW 49.12.275.

²¹¹ 28 U.S.C. 2601 et seq.

26.7.2.1. Covered Employers

FMLA applies to all public employers, all private elementary and secondary schools, and private employers with 50 or more employees for each working day for 20 or more work weeks.²¹²

26.7.2.2. Eligible Employees

FMLA applies to employees who have been employed for at least 12 months (non-consecutive) and who have worked at least 1,250 hours during this 12-month period.²¹³ The determination of whether an employee has worked for the employer at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences.²¹⁴

Under a memorandum released from the Department of Labor in 2005, the time that a member of the National Guard or a reservist serves in active duty will count toward that employee's hours of work eligibility for FMLA leave from a civilian employer.²¹⁵

An employee who is employed at a worksite with less than 50 employees, if the total number of employees employed by that employer within 75 miles of that worksite is less than 50, is not eligible for FMLA leave.²¹⁶

26.7.2.3. Key Employees

If restoring certain "key employees" to their job will cause "substantial and grievous economic injury to an employer's operations," that employer may refuse to reinstate such employees after using FMLA leave.²¹⁷

A "key employee" is a salaried "eligible" employee who is among the highest paid 10 percent of the employees within 75 miles of the work site.²¹⁸ The 75 mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the employee needing leave is employed.

To legally refuse reinstatement to a "key employee," the employer must:

- notify the employee of his/her status as a "key" employee in response to the employee's notice of intent to take FMLA leave;
- notify the employee as soon as the employer decides it will deny job restoration, and explain the reasons for this decision;
- offer the employee a reasonable opportunity to return to work from FMLA leave after giving this notice; and

212 29 C.F.R. 825.104.

213 29 C.F.R. 825.110.

214 29 C.F.R. 825.110(d).

215 USERRA Protects the Family and Medical Leave Rights of Reservists and National Guard, www.dol.gov/vets/media/fmlr.pdf.

216 29 USC 2611(2)(B)(ii).

217 29 C.F.R. § 825.216.

218 29 C.F.R. § 825.217

- make a final determination as to whether reinstatement will be denied at the end of the leave period if the employee then requests restoration.²¹⁹

26.7.2.4. Twelve Month Period

An employer is permitted to choose any one of the following methods for determining the 12-month period in which the 12 weeks of leave entitlement occurs: (1) the calendar year; (2) any fixed 12-month leave year, such as a fiscal year, a year required by state law, or a year starting on an employee's anniversary date; (3) the 12-month period measured forward from the date any employee's first FMLA leave begins; or (4) a rolling 12-month period measured backward from the date an employee uses any FMLA leave.²²⁰

Married employees who work for same employer together may take only 12 weeks total to care for their newborn, newly adopted or newly placed foster child.

Employees may have the right to use FMLA leave by working intermittently or a reduced work schedule (part-time), if the employee's or family member's health care provider certifies intermittent leave or a reduced work schedule is medically necessary.

26.7.2.5. Serious Health Condition

A serious health condition is defined as inpatient care, continuing treatment by a health care provider for an illness or impairment of a duration of more than three calendar days, or continuing treatment by a health care provider for a long-term condition which, if untreated, would last more than three days.²²¹

26.7.2.6. Leave Requests

For foreseeable leaves of absence for childbirth or placement, an employee must request the leave at least 30 days in advance of the need for the leave.²²²

For foreseeable leaves based on planned medical treatment, the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, and 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. If treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.²²³

If the need for leave is unforeseeable, the employee must notify the employer as soon as practicable under the circumstances.

The employee need not request FMLA specifically. The DOL maintains the employer is responsible for obtaining any needed additional information to determine if the occurrence qualifies under the FMLA. It is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice to

²¹⁹ 29 C.F.R. § 825.219

²²⁰ 29 C.F.R. 825.200(b).

²²¹ 29 U.S.C. 2611(11); 29 C.F.R. 825.114; 29 C.F.R. 825.800.

²²² 29 USC 2612(e)(1).

²²³ 29 U.S.C. 2612(e)(2).

the employee.²²⁴ The leave requested may be intermittent, but the employer is entitled to request reasons why such leave is necessary.²²⁵

Once the employer is on notice of an employee absence that is potentially covered by the FMLA, the U.S. DOL requires the employer to deny or designate the absence – paid or unpaid – as FMLA leave time. According to the DOL, such designation must be completed promptly, generally within two business days absent extenuating circumstances. The U.S. DOL’s regulations concerning employer designation have encountered mixed support in the courts. In *Ragsdale v. Wolverine World Wide, Inc.* 535 U.S. 81 (2002), an employee took 7 months of leave due to her own serious health condition, after which her employer terminated her. Because her employer had failed to formally designate her leave as FMLA, she argued that the “clock” on her 12 workweeks of FMLA leave had never commenced to run. The Supreme Court held that under those circumstances, the DOL regulation (which provides that leave taken by an employee does not count against the employee’s FMLA leave entitlement unless the employer designates it as FMLA leave) is contrary to the FMLA and beyond the authority of the Secretary of Labor. Important to the Court’s decision was the fact that the employee had not detrimentally relied on the employer’s failure to designate; in other words, Ragsdale’s leave was not volitional and she had to take the time off whether or not the employer had designated it as FMLA. The Supreme Court’s decision implies, however, that employees who have a choice whether to take time off, and who detrimentally rely on their employer’s failure to designate leave as FMLA, may be entitled to additional leave. Thus, employers are well advised to continue designating FMLA leave; however, in situations where the failure to designate does not result in detrimental reliance, employers can assert that Ragsdale’s invalidation of 29 C.F.R. § 825.700(a) as a defense against offering additional FMLA leave.

If an employers knows the reason for the leave, but has not been able to confirm whether the leave qualifies for FMLA, or the employer has requested medical certifications and is waiting for the returned forms, the employer should make a preliminary designation and notify the employee at the time the leave begins, or as soon as the reason for the leave is known. Upon receipt of the information from the employee or the medical certification which confirms that the leave qualifies for FMLA, the preliminary designation should become final. If the medical certification confirms that the leave is not FMLA qualifying, the employer must withdraw the designation and inform the employee in writing.

26.7.2.7. Medical Certification

An employer may request certification by the health care provider of the serious health conditions both prior to the leave and at reasonable intervals during the leave.²²⁶

This certification must be provided by the employee, but he or she must be given 15 days to obtain it. The employer may request (a) the date the condition began; (b) the probable duration of the illness or impairment; (c) medical facts, such as diagnosis and treatment; (d) if care is required for a family member, a statement that the employee is needed to care for the family member; (e) if leave results from the employee’s own condition, a statement that the employee is unable to perform any work or that he or she is

224 29 CFR 825.208.

225 29 CFR 825.203.

226 29 U.S.C. 2613(a); 29 C.F.R. 825.305.

Volume 3: Financing and Engaging in the Business of Healthcare

unable to perform the essential functions of the job. The employer cannot request any additional information.²²⁷ The Department of Labor has prepared forms for this certification (Form WH-380).

Health care providers who may provide certification of a serious health condition include:

- Doctors of medicine or osteopathy authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices;
- Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors authorized to practice in Washington and performing within the scope of their practice under state law;
- Nurse practitioners, nurse-midwives, and clinical social workers authorized to practice under state law and performing within the scope of their practice as defined under state law;
- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts;
- Any health care provider recognized by the employer or the employer's group health plan's benefits manager; and
- A health care provider listed above who practices in a country other than the United States and who is authorized to practice under the laws of that country.²²⁸

An employer may seek a second opinion at its expense.²²⁹ The employer may select the health care provider, but the provider may not be employed or regularly used by the employer, unless access to health care providers is geographically limited.²³⁰

26.7.2.8. Pay and Benefits During Leave

FMLA leave is unpaid leave, unless the employee elects to use paid leave to which the employee is otherwise entitled based upon the terms of the employer's paid leave policies/plans or state laws like the Washington Family Care Act.²³¹ The employer may choose to have employees use accrued vacation, personal, family leave, or sick leave during the FMLA leave.²³²

Employers must maintain health coverage for an employee on FMLA leave.²³³ Both the employer and employee must continue their respective contributions to the employer's group health insurance plans during FMLA leave. The employer's duty ceases if the employee fails to pay his or her share of the premium payments, the employee's FMLA leave entitlement is exhausted, or when the employee notifies the employer of his or her intent not to return to work.²³⁴

²²⁷ 29 C.F.R. 825.306.

²²⁸ 29 CFR 825.800.

²²⁹ 29 U.S.C. 2613(c); 29 CFR 825.307.

²³⁰ Id.

²³¹ 29 USC 2612(c); 29 CFR 825.207.

²³² 29 USC 2612(d).

²³³ 29 USC 2614(c)(1).

²³⁴ 29 USC 2614(c)(2).

26.7.2.9. Right to Reinstatement

At the end of an FMLA leave, an employer must reinstate the employee to the former job or to an equivalent job, at the employer's option.²³⁵ An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.²³⁶

An employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave because of a serious health condition to obtain a certification from the employee's health care provider that the employee is able to resume work.²³⁷

An employer may deny reinstatement to highly compensated employees ("key employees" in the regulations) where "necessary to prevent substantial and grievous economic injury to the operations of the employer." To qualify for this exemption, the employer must be able to show that the employee is within the top ten percent of the highest paid salaried employees within a 75 mile radius. The employer must notify the highly compensated employee of its intent to deny job restoration and may terminate the employee only after her or she elects not to return to work after receiving this notice.²³⁸

If, after exhausting all FMLA leave, the employee remains unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employer may have a legal obligation to grant additional leave of absence under the "reasonable accommodation" provisions of the Americans with Disabilities Act (ADA).²³⁹

26.7.2.10. Posters and Notices

Covered employers must provide the following FMLA information to employees:²⁴⁰

1. Post a notice approved by the Secretary of Labor (WH Publication 1420) explaining rights and responsibilities under FMLA;
2. Include information about employee rights and obligations under FMLA in employee handbooks or other written material, including Collective Bargaining Agreements (CBAs); or
3. If handbooks or other written material do not exist, provide general written guidance about employee rights and obligations under FMLA whenever an employee requests leave (a copy of the Department of Labor's Fact Sheet No. 28 will fulfill this requirement); and
4. Provide a written notice designating the leave as FMLA leave, detailing specific expectations and obligations of an employee who is exercising his/her FMLA entitlements. The employer may use the

²³⁵ 29 USC 2614(a)(1); 29 CFR 825.100(c); 29 CFR 825.214.

²³⁶ 29 CFR 825.215.

²³⁷ 29 CFR 310.

²³⁸ 29 USC 2614(b)(1); 29 CFR 825.217.

²³⁹ 29 CFR 825.214(b).

²⁴⁰ 29 C.F.R. 825.300.

Department of Labor's "Employer Response to Employee Request for Family or Medical Leave" (optional form WH-381) to meet this requirement.

5. This employer notice should be provided to the employee within **one or two business days** after receiving the employee's notice of need for leave and include the following:
 - that the leave will be counted against the employee's annual FMLA leave entitlement;
 - any requirements for the employee to furnish medical certification and the consequences of failing to do so;
 - the employee's right to elect to use accrued paid leave for unpaid FMLA leave and whether the employer will require the use of paid leave, and the conditions related to using paid leave;
 - any requirement for the employee to make co-premium payments for maintaining group health insurance and the arrangement for making such payments;
 - any requirement to present a fitness-for-duty certification before being restored to his/her job;
 - rights to job restoration upon return from leave;
 - employee's potential liability for reimbursement of health insurance premiums paid by the employer during the leave if the employee fails to return to work after taking FMLA leave; and
 - whether the employee qualifies as a "key" employee and the circumstances under which the employee may not be restored to his or her job following leave.

26.7.2.11. Record Keeping Requirements

Employers must keep records reflecting FMLA leaves taken and employer leave policies for at least three years for inspection by DOL.²⁴¹

26.7.2.12. Enforcement and Remedies

It is unlawful to (a) interfere with, restrain, or deny an employee's exercise or attempted exercise of FMLA rights; (b) discharge or discriminate against employees for opposing violations of FMLA; or (c) discharge or discriminate against employees who take legal action to enforce their FMLA rights or who provide information or testify in any proceeding to enforce FMLA.²⁴²

Employees may file a complaint with the DOL, which may investigate or seek relief in court. Employees may also bring a lawsuit on their own behalf and seek lost wages and benefits, out-of-pocket costs, such as the cost to obtain care for a seriously ill family member, plus attorneys' fees, court costs, and expert witness fees.²⁴³

26.7.3. Washington Family Leave Act

During the 2006 legislative session, the Washington legislature amended the Washington Family Leave Act (WFLA) in order to align it more closely to the provisions of the FMLA.²⁴⁴ The changes to the law went into effect on June 7, 2006. One of the most significant changes is that WFLA now applies to employers with 50 or more employees at the place where the employee requesting leave works, rather than the 100 or more under the previous version.²⁴⁵

Under the amended WFLA, an eligible employee may take up to 12 weeks unpaid leave during a 12-month period for (1) the employee's own serious health condition; (2) the care of a spouse, parent or child with a

²⁴¹ 29 CFR 825.500.

²⁴² 29 USC 2615.

²⁴³ 29 USC 2617; 29 CFR 825.400.

²⁴⁴ RCW 49.78.010, *et seq.*

²⁴⁵ RCW 49.78.020(5).

serious health condition; or (3) the care of a newborn, newly adopted or new foster child.²⁴⁶ If using the leave for the birth or placement of a child (whether due to adoption or foster care), the leave must be used within 12 months of the birth or placement.²⁴⁷ Eligible employees are those who have been employed for 12 months and have worked at least 1,250 hours during the previous 12 months.²⁴⁸ WFLA does not require the employer to continue to pay for the employee's group health plan coverage, but if eligible, the employee must be allowed to elect COBRA benefits.²⁴⁹ The employee's job is protected while out on leave under WFLA, and the employer must return the employee to the same or equivalent position upon return to work.²⁵⁰

Leave under WFLA is "stacked" on top of leave under Washington's Maternity Disability regulations.²⁵¹ Thus, WFLA leave can only be taken at the conclusion of a period of maternity disability. Although this is not a change from the previous version of the law, it will require policy changes for employers with 50-100 employees who are now subject to WFLA.

26.7.4. Pregnancy and Disability Leave

The Pregnancy Discrimination Act requires employers to treat disabilities caused or contributed by pregnancy or childbirth the same as disabilities caused or contributed by other conditions.²⁵²

The state antidiscrimination regulations require employers to provide pregnant employees with a leave of absence for the period they are sick or temporarily disabled due to pregnancy or childbirth.²⁵³ If an employee takes a leave of absence for the actual period of disability, she is entitled to be reinstated to her same position or to a similar job of like pay, unless business necessity required her position to be filled during her absence.²⁵⁴ Although the FMLA runs concurrently with the Washington pregnancy disability regulations, the Washington Family Leave Act does not. The Washington Family Leave Act provides a pregnant employee with time off in addition to the leave of absence due to pregnancy disability. Thus, if an employee works at an employer with more than 100 employees, than she is entitled to "stack" her 12 weeks of time under the Washington Family Leave Act on top of any time off for illness or temporary disability due to pregnancy or childbirth.

The Americans with Disabilities Act (ADA)²⁵⁵ also requires an employer to provide a disabled pregnant employee with a leave of absence if such a leave of absence would constitute a reasonable accommodation.

26.7.5. Americans with Disabilities Act

This federal statute will be covered in detail in section 26.10.4 below.

²⁴⁶ RCW 49.78.220(1).

²⁴⁷ RCW 49.78.220(2).

²⁴⁸ RCW 49.78.020(4)(a).

²⁴⁹ RCW 49.78.240; RCW 49.78.290.

²⁵⁰ RCW 49.78.280.

²⁵¹ RCW 49.78.390.

²⁵² 42 U.S.C. 2000e(k).

²⁵³ WAC 162-30-020.

²⁵⁴ Id.

²⁵⁵ 42 USC 12101 et seq.

Volume 3: Financing and Engaging in the Business of Healthcare

26.7.6. Military Leave²⁵⁶

Under the Uniformed Services Employment and Re-employment Rights Act (USERRA),²⁵⁷ it is unlawful to deny employment, re-employment, promotion, or any other benefit of employment on the basis of that person's membership in the military or performance of military service.²⁵⁸

Employers must grant a leave of absence to any employee required to report for military service.²⁵⁹ The employee is entitled to whatever rights and benefits that the employer generally provides to employees having similar seniority, status, and pay who are on furlough or leave of absence.²⁶⁰

Any employee who leaves the job to undertake military service, whether voluntary or involuntary, must be reinstated if the employee has provided advance notice of the service to the employer (if reasonable to do so), the cumulative length of the leave of absence does not exceed five years, and the employee submits an application for re-employment in the manner prescribed by the statute.²⁶¹ The request for re-employment must be made within certain statutorily prescribed time periods, depending on the employee's length of military service.²⁶²

If the returning employee was away for less than 90 days, he or she must be reinstated to the position the person would have held if the employment had not been interrupted by military service,²⁶³ or if not available, then to the position the person held on the date he or she commenced the military service. If the returning employee was away for more than 90 days, he or she must be reinstated to the position the person would have held if the employment had not been interrupted by military service or to a position of like seniority, status, and pay.²⁶⁴

If the returning employee has a disability incurred through military service and the employee is no longer qualified to perform the prior position, the employer must reinstate the employee to any other equivalent position in seniority, status, and pay for which the employee is qualified or can be trained to be qualified.²⁶⁵

If the employer provides a group health plan to its employees, the employee leaving for military service must be provided with the option to continue this health care coverage for a period not to exceed 18 months. The rights are similar to those established under COBRA.²⁶⁶

Interim final rules outlining the rights of returning veterans were published March 10, 2005 and will be located at 20 C.F.R. §1002 *et seq.*

²⁵⁶ 38 USC 101 *et seq.*

²⁵⁷ 38 USC 4301 *et seq.*

²⁵⁸ 38 USC 4311.

²⁵⁹ 38 USC 4316(b).

²⁶⁰ *Id.*

²⁶¹ 38 USC 4312.

²⁶² 38 USC 4312(e).

²⁶³ 38 USC 4313.

²⁶⁴ *Id.*

²⁶⁵ 38 USC 4313(a)(3).

²⁶⁶ 38 USC 4317.

26.7.7. Jury Duty²⁶⁷

Washington employers must give leaves of absence to employees summoned to jury duty.²⁶⁸ The employer is prohibited from terminating or threatening or denying a promotion to an employee based on the employee's absence for jury duty. Private employers are not required to pay nonexempt employees who are called to jury duty. Under the FLSA, employers must continue to pay exempt employees who are on jury duty for any absence less than a full work week.²⁶⁹

26.8. Labor Laws

Under both state and federal labor laws employees have the right to organize and to bargain collectively. The National Labor Relations Act (NLRA) governs private businesses that affect interstate commerce.²⁷⁰ State and federal government employees specifically covered by other labor laws do not fall within the scope of the NLRA. The Federal Labor Relations Authority (FLRA) covers federal government employees.²⁷¹ The Public Employees' Collective Bargaining statutes cover Washington state governmental employees.²⁷² These acts regulate the rights of employees to organize, the methods employees can use to select a union to represent them, union and management activities, and grievance procedures for labor disputes. The following is an outline of some of the basic provisions of labor law.

26.8.1. Union Campaigns and Elections

26.8.1.1. Union Campaigns

Employees have the right to organize and join a union.²⁷³ Employers may not restrain, coerce, or interfere with an employee's right to join or to vote for a union.²⁷⁴ Employers have the right to let its employees know of its opposition to a union, but employers cannot make direct or indirect promises of benefits in return for an employee's decision not to support the union. Threats of retaliation if an employee supports the union are also prohibited.²⁷⁵

- **Employee Solicitation During Free Time:** Employees may solicit their fellow employees for union support during nonworking "free time." This includes lunch time, scheduled coffee breaks, time before or after the start of a regularly scheduled shift, and even time standing in line to punch a time clock.²⁷⁶
- **Solicitation During Work Time:** Employers need not allow employees to solicit during work time other than that outlined above. Employers cannot keep employees from verbalizing their feelings

267 38 USC 101 et seq.

268 RCW 2.36.165.

269 29 C.F.R. 541.118(a).

270 29 U.S.C. § 141, et seq.

271 5 U.S.C. § 7101, et seq.

272 RCW 41.56.010, et seq.

273 29 U.S.C. § 157.

274 29 U.S.C. 158(a)(1).

275 Id.

276 *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

- regarding unions during work time when they are not otherwise restricted from discussing other topics.²⁷⁷
- **Distribution of Union Handbills:** Employees may distribute union handbills or leaflets to other employees in nonworking areas, but not in work areas. Examples of non-work areas are an employee lunchroom, lounge, or restroom. Employers may deny permission to a non-employee union organizer to come onto the premises to distribute literature. But such a restriction can only be enforced when the employer has withheld permission for any non-employee solicitation; *i.e.*, the employers' actions cannot not simply be discrimination against the union. Generally, solicitation by a charity is an exception to this rule unless such solicitations are broadly permitted, in which cases a finding of discrimination is possible. The NLRB will generally not enforce any policy limiting the distribution of handbills if it is implemented to coincide with a union organizing company.²⁷⁸
 - **Union Buttons/Insignias:** Employers may not forbid the wearing of union buttons or insignias by employees. There may be exceptions to this rule, such as when employees have customer contact. But if such a ban is to be implemented, the employer must make a careful review of the circumstances.²⁷⁹
 - **Unilateral Changes To Wages/Benefits:** After a union campaign gets under way, employers cannot make unilateral changes to wages or benefits. While there is no clear rule as to when the campaign begins, common sense dictates that it is when the company becomes aware of the union's intent to organize employees. A union cannot notify a company of an expected campaign as a way to prevent wage changes if it has no actual intent to organize the work force. The facts of each situation will be determinative. There are, however, exceptions to this ban, such as when the change was planned before the start of the campaign. Before any changes are made, employers must carefully evaluate the circumstances.²⁸⁰
 - **Predictions of Impact Of Unionization:** During an organizing campaign, employers can make predictions as to the possible consequences of employees supporting the union if the predicted results are beyond the employer's control. This means that threats of plant closure or relocation due to unionizing are prohibited. But statements that the added financial burden of the union could put the company out of business are permissible, providing that some current financial hardship exists.²⁸¹
 - **Benefits Of Non-Union Status & Impact of Union Policies:** Employers can discuss any benefits that employees currently have without a union. Employees may not realize the extent of their total benefit package. Employers can also draw attention to the union's policies and practices in dealing with its members.
 - **Pre-election Speeches:** Neither side may make speeches to the employees during the 24 hour period before the election.²⁸²

26.8.1.2. Bargaining Units

The majority of any company's employees in any appropriate "bargaining unit" may choose to have a union represent them in their dealings with the company. Through the National Labor Relations Act

²⁷⁷ *Our Way, Inc.*, 268 NLRB ___ 61 (1983).

²⁷⁸ *F.W. Woolworth Co. v. NLRB*, 530 F.2d 1245 (2nd Cir. 1976), cert. denied, 429 U.S. 1023 (1976).

²⁷⁹ *Republic Aviation v. NLRB*, 324 U.S. 793 (1945).

²⁸⁰ *Red's Express*, 268 NLRB 1154 (1984).

²⁸¹ *Patsy Bee, Inc. v. NLRB*, 654 F.2d 515 (8th Cir. 1981).

²⁸² *Peerless Plywood Co.*, 107 NLRB 427 (1953).

(NLRA), Congress assigned to the NLRB broad discretion in determining the appropriate unit for collective bargaining purposes. The NLRB has not established a hard and fast rule to define an appropriate unit, but instead applies certain “tests” to each petition submitted by employees, unions, or companies.²⁸³

These “tests” identify:

- 1) the extent and type of union organization currently in place among the employees;
- 2) the bargaining history in the industry;
- 3) the similarity of duties, skills, interests, and working conditions of the employees;
- 4) the organizational structure of the company; and
- 5) the desires of the employees.

26.8.1.3. Union Recognition

If a union or employees gather what is believed to be a sufficient number of authorization cards, they may petition the company directly for recognition. In the event a company is asked to recognize a union, it has two choices: (1) if it is convinced the union represents a majority of the employees, it may voluntarily recognize the union, or (2) if it has a good faith basis for doubting the union’s claim of majority status, it may petition or ask the union or employees to petition the NLRB for a representation election.

Caveat. If an employer determines that the union has the support of a majority of the employees but still refuses to bargain, the NLRB may issue a bargaining order without an election.²⁸⁴ Employers can avoid such an order by not polling employees or authenticating authorization cards presented by the union.

Before the NLRB will order an election, it must determine that a substantial number of employees in the appropriate bargaining unit wish to be represented by the union. By rule, the NLRB has defined this as 30 percent or more of the employees in the appropriate bargaining unit.²⁸⁵ If the NLRB issues a bargaining order, all employees, pro-union and pro-company, will be in the appropriate unit and will be part of the collective bargaining process. If the NLRB directs an election, a simple majority of the eligible employees actually voting is all that is required to have the union certified as the bargaining agent for all employees in the appropriate unit.²⁸⁶

26.8.2. Unions and the Collective Bargaining Agreement

Once an employer’s work force is represented by a union, it is obligated to bargain with the union representative in good faith in an attempt to reach a Collective Bargaining Agreement (CBA). The union representative is also obligated to bargain in good faith with the employer.

Good faith means that the employer and the union must meet with the honest intention of reaching agreement. Good faith does not mean that a CBA must be reached. The NLRB and the courts will look to all the circumstances surrounding the negotiations to determine whether the employer and union bargained in “good faith.” An employer’s obligation to bargain in good faith goes beyond just meeting at reasonable times with the union. The employer must also provide information to the union, including any and all information that is

²⁸³ *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944).

²⁸⁴ *Sullivan Electric Co.*, 199 NLRB 809 (1974).

²⁸⁵ NLRB rules and regulations Series 8, as amended § 101.18(a).

²⁸⁶ 29 U.S.C. § 159(a); *RCA Mfg. Co.*, 2 NLRB 159 (1936).

relevant and needed by the union to fulfill its obligation to negotiate with the employer. Failure to furnish the required information will be considered by the NLRB and the courts as part of the “totality of the circumstance” in determining whether an employer is negotiating in good faith.²⁸⁷

If an employer claims an economic inability to pay as a basis for not being able to agree to a wage and/or benefit increase, the financial condition of the employer becomes relevant to the negotiations. Under these circumstances, the employer must then provide financial data to the union.

26.8.3. Subjects of Bargaining

The subjects covered while negotiating a CBA generally fall into three areas: mandatory, permissive, and illegal.

26.8.3.1. Mandatory

Mandatory subjects of bargaining include rates of pay, wages, hours of employment, or other conditions of employment.²⁸⁸ An employer and a union may reach an impasse on negotiating a mandatory item. An impasse during negotiations of a CBA is that point at which further negotiations would be fruitless. At that point or before, the union may initiate a strike against the employer or, if the employer has not already done so, it may lock out employees. If impasse is reached, the employer may implement the last contract proposal that was presented to the union. Before implementing any of these options, professional advice should be obtained.

26.8.3.2. Permissive

Permissive subjects of bargaining are those items that fall outside the mandatory framework. An impasse cannot be reached over permissive subjects of bargaining.²⁸⁹

26.8.3.3. Illegal subject of bargaining

Illegal subjects of bargaining are any topics that by their very nature violate some rule of law, such as:

- **A closed shop requirement.**²⁹⁰ In a closed shop, union membership is required by an applicant prior to being considered for employment or hired for a position. A union shop clause in a contract is permissible, except in “right-to-work” states.²⁹¹ In a union shop, membership is not required for consideration to be hired, but is required at some point after being hired.
- **Hiring preferences.** A union may not give hiring preferences to its membership or exclude nonunion job applicants.
- **Hot cargo agreements.** The parties to a CBA cannot agree not to handle goods of a third party (called “hot cargo”).²⁹²

²⁸⁷ *K-Mart v. NLRB*, 626 F.2d 704 (9th Cir. 1980).

²⁸⁸ 29 U.S.C. 159(a).

²⁸⁹ *NLRB v. Wooster Div. Borg-Warner Corp.* 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed 2d 823 (1957).

²⁹⁰ *Panello v. Mine Workers*, 88 F. Supp 935 (D.D.C. 1950)

²⁹¹ Washington is not a right to work state.

²⁹² 29 U.S.C. 159(e).

26.9. Privacy/Confidentiality

State and federal law provide various privacy protections to employees. Employers can be penalized for violations of an employee's privacy rights. But an employee's right to privacy is not absolute.

26.9.1. Video or Telephone Monitoring

Under the Washington Privacy Act, it is illegal for an employer to intercept or record any private communication between two or more individuals transmitted by telephone, telegraph, radio, or other device, unless all participants consent.²⁹³ Violations of this act may subject an employer to criminal sanctions.²⁹⁴

26.9.2. Employee Medical Information

Employees have a limited right to privacy in their medical records. Under the Americans with Disabilities Act, all information concerning an employee's medical condition must be maintained as confidential and cannot be included in the regular personnel file.²⁹⁵ An employer may request medical information concerning an employee if it is job related and consistent with business necessity, such as when there is a fitness-for-duty question.²⁹⁶ The employer however, must have safeguards in place to prevent inadvertent disclosures to other employees who do not have a need-to-know the medical information.²⁹⁷

26.9.3. Searching an Employee's Desk or Locker

An employee's right to privacy as to the contents of a desk or locker will depend on whether the employer is public or private, whether the employee has a reasonable expectation of privacy in the contents, and whether the search was justifiable factually. Whether there is a reasonable expectation of privacy will depend on whether the employee has notice of the potential search. The Fourth Amendment of the U.S. Constitution limits the actions of a public/government employer by prohibiting unreasonable search and seizure of private property by any government entity.²⁹⁸

26.9.4. Accessing Employee Computer Files

The Electronic Communications Privacy Act (ECPA) generally prohibits the nonconsensual interception of electronic communications.²⁹⁹ However, cases interpreting this statute generally hold that its protections do not extend to an employer's review of electronic communications created or transmitted or stored on a company-owned system. The case law also recognizes a business use exception to the ECPA when an employer provides

293 RCW 9.73.030.

294 RCW 9.73.080.

295 29 C.F.R. § 1630.14(c).

296 42 U.S.C. § 12112(d)(4); 29 C.F.R. 1630.14(c); *see, e.g., Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999) (to satisfy the "job related and consistent with business necessity" requirement, sufficient evidence must exist for a reasonable person to inquire as to whether the person is fit for the job), cert. denied, 530 U.S. 1262, 120 S.Ct. 2718, 147 L.Ed.2d 983 (2000).

297 *Doe v. Southeastern Pennsylvania Transportation Authority*, 72 F.3d 1133 (3rd Cir. 1995), cert. denied, 519 U.S. 808, 117 S.Ct. 51, 136, L.Ed.2d 15 (1996).

298 *See Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1331, 1335 (9th Cir. 1987) (plaintiff had reasonable expectation of privacy in locked desk and credenza absent notice that items could be searched); *United States v. DeWeese*, 632 F.2d 1267, 1271 (5th Cir. 1980) (crew member had legitimate expectation of privacy in foot locker accessible to only one individual), 454 U.S. 878, 102 S.Ct. 358, 70 L.Ed. 2d 188 (1981); *Gillard v. Schmidt*, 579 F.2d 825, 828 (3rd Cir. 1978) (guidance counselor who maintained sensitive student records had reasonable expectation of privacy in school desk); *United States v. Speights*, 557 F.2d 362, 363 (3rd Cir. 1977) (police officer had reasonable expectation of privacy in locker when no regulations or practices would have alerted him to possibility of unconsented searches).

299 18 U.S.C. § 2511.

notice of the potential monitoring.³⁰⁰ A consistently enforced written policy prohibiting the use of computers for personal business will generally limit an employee's privacy expectations. Under such a policy, all records on computers and floppy disks should be business-related material and, therefore, open to the employer's inspection.

26.9.5. Drug Testing

Whether employers can require drug testing varies with whether a public or private employer is involved, whether the circumstances of employment demonstrate a need for such testing and whether the employer provides notice and equally applies the drug testing policy at issue.

When a public employer conducts a drug test, its reasonableness and constitutionality will depend on how intrusive it is, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.³⁰¹ Such tests must satisfy the Fourth Amendment of the United State's Constitution. For example, if the job involves the direct handling of drugs, then a drug test for job applicants is more likely to be viewed by the courts as reasonable. Absent safety concerns, however, the courts generally require that drug tests be administered only based on an individual's suspicious behavior. Aside from situations where there is a strong public safety issue, random-testing programs and across-the-board programs are the most constitutionally difficult to justify.

The courts generally look at whether the decision to conduct a drug test was based on a reasonable individualized suspicion. The question is whether an individual's activities and behavior created a "reasonable" suspicion of drug use.³⁰² Reasonable suspicion can be based solely on off-duty activities, although standards vary from court to court. For example, the Ninth Circuit has held that the Department of Labor could test employees in certain designated sensitive positions, including nurses, based on reasonable suspicion of off-duty drug use.³⁰³

26.10. Federal Antidiscrimination Laws

26.10.1. General Information on Federal Antidiscrimination Laws

The Equal Employment Opportunity Commission (EEOC) enforces the federal laws that prohibit employment discrimination on the basis of an individual's race, color, religion, sex, national origin, age, or disability.

26.10.1.1. Employers Covered by EEOC-Enforced Laws

Most of the federal antidiscrimination laws apply to employers over a certain size. For example, Title VII of the Civil Rights Act of 1964 (Title VII) applies to employers with 15 or more employees.³⁰⁴ The Age Discrimination in Employment Act of 1967 (ADEA) applies to employers with 20 or more employees.³⁰⁵

Other statutes apply to employers of any size. The Equal Pay Act of 1963 (EPA) applies to most

300 See *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107 (3d Cir., 2003) (search of employee email is not prohibited by the ECPA because employer's subsequent review email is not deemed an "intercept" and because statute excepts review of material stored on employer's systems, including servers and computer hard drives); *Adams v. City of Battle Creek*, 250 F.3d 980 (6th Cir., 2001) (no search under business use exception when notice of monitoring is given).

301 *O'Connor v. Ortega*, 480 U.S. 709, 725-726, 107 S. Ct. 1492, 94 L.Ed.2d 714 (1987).

302 *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 649 (1989).

303 *American Federation of Government Employees AFL-CIO, Local 2391 v. Martin*, 969 F.2d 788 (9th Cir. 1992)

304 42 U.S.C. § 2000e(b).

305 29 U.S.C. §§ 621-634.

employers, regardless of the size and prohibits wage discrimination between men and women in substantially equal jobs within the same establishment.³⁰⁶

26.10.1.2. How Employees Are Counted

All employees, including part-time and temporary workers, are counted for purposes of determining whether an employer has a sufficient number of employees under these statutes. An employee is someone with whom the employer has an employment relationship. The existence of an employment relationship is most readily (but not exclusively) shown by a person's appearance on the employer's payroll. Independent contractors are not counted as employees.

26.10.1.3. Record Keeping Requirements

Employers must generally keep all personnel or employment records for one year.³⁰⁷ If an employee is involuntarily terminated, his/her personnel records must be retained for one year from the date of termination.³⁰⁸ If a claim of discrimination is filed, all relevant personnel records must be retained until final disposition of the matter.³⁰⁹

Under ADEA and FLSA record keeping requirements, employers must keep all payroll records for three years.³¹⁰ Additionally, employers must keep on file any employee benefit plan (such as pension and insurance plans) and any written seniority or merit system for the full period the plan or system is in effect and for at least one year after its termination.³¹¹ In addition, employers must keep for at least two years all records (including wage rates, job evaluations, seniority and merit systems, and collective bargaining agreements) that explain the basis for paying different wages to employees of opposite sexes in the same establishment.³¹²

26.10.1.4. Reporting Requirements

The EEOC requires certain employers to file an EEO-1 report each year, which provides a breakdown of the employer's work force by race, sex, and national origin.³¹³ Employers with fewer than 100 employees and federal contractors with fewer than 50 employees and contracts under \$50,000 are exempt from this requirement.

26.10.1.5. Charge Processing Procedures

An employee or applicant for employment who believes that he or she has been discriminated against can file a charge of discrimination in any EEOC field office. The EEOC will send a copy of the charge to the employer within ten days. The EEOC will dismiss charges that raise no legal claim under EEOC-enforced laws and will investigate charges to determine whether there is reasonable cause to believe discrimination

306 29 C.F.R. § 1627.3(b)(1).

307 Id.

308 Id.

309 29 C.F.R. § 1627.3(3).

310 29 U.S.C. §§ 621-34; 29 C.F.R. § 1627.3(a); 29 U.S.C. § 201, et seq.; 29 C.F.R. § 516.5(a).

311 29 C.F.R. § 1627.3.

312 29 C.F.R. § 516.6(a).

313 29 C.F.R. § 1602.12.

occurred. The EEOC may request that the employer provide information in response to the issues raised in the charge.³¹⁴

If the evidence shows there is no reasonable cause to believe discrimination occurred the EEOC will notify both the charging party and the employer. The EEOC will then close the agency's investigation and issue a notice of right to sue to the charging party, permitting pursuit of legal action in court.³¹⁵

If the evidence shows there is reasonable cause to believe discrimination occurred, the EEOC must seek to conciliate the charge by working with the employer to achieve a voluntary resolution. In conciliation, the EEOC will require the employer to provide the appropriate remedy(ies) for the discrimination. If conciliation fails, the case may be litigated by the EEOC or the charging party.³¹⁶

26.10.2. Title VII of the Civil Rights Act of 1964

Title VII prohibits employers from discriminating against any individual with respect to compensation, terms, conditions or privileges of employment because of that individual's race, color, religion, sex, pregnancy, or national origin.³¹⁷

26.10.2.1. Disparate Treatment and Disparate Impact

Title VII prohibits both intentional, overt discrimination (disparate treatment)³¹⁸ and employment practices that are neutral on their face but are discriminatory in operation (disparate impact).³¹⁹ Title VII does not require an employer to provide preferential treatment to any individual or group of individuals to remedy statistical imbalances in an employer's work force, nor does Title VII prohibit the establishment of a bona fide seniority or merit system, as long as the differences in terms and conditions of employment are not based on an intent to discriminate.³²⁰

26.10.2.2. Sexual Harassment

Sexual harassment is a form of unlawful sex discrimination prohibited by Title VII. It includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that are made a condition of employment, that unreasonably interfere with work performance, or that create an intimidating, hostile, or offensive work environment. Employers are responsible for maintaining a workplace free of sexual harassment. Employers may be held liable for the unlawful conduct of their agents, supervisory employees, employees and, in certain circumstances, even non-employees who sexually harass employees at work.³²¹

314 See 42 U.S.C. § 2000e-5.

315 Id.

316 Id.

317 42 U.S.C. § 2000e-2.

318 See, e.g., *Calabritto v. Dillon*, 920 F.Supp. 370 (E.D.N.Y. 1996) (paternalistic treatment of female employees with respect to hazardous assignments will support disparate treatment claim).

319 See, e.g., *Meecham v. Knolls Atomic Power Lab*, 381 F.3d 505 (5th Cir. 2004) (disparate impact found in reduction in force practices).

320 See, e.g., *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (disparate treatment); *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263 (11th Cir. 2000) (disparate impact)

321 See, e.g., *Porter v. California Dep't of Corrections*, 383 F.3d 1018 9th Cir. 2004)

26.10.2.3. Racial and Ethnic Harassment

Harassment on the basis of an individual's race or national origin violates Title VII. Racial or ethnic slurs, jokes, offensive or derogatory comments, or other verbal or physical conduct based on race or nationality are unlawful if the conduct creates an intimidating, hostile, or offensive work environment, or if it unreasonably interferes with an employee's work performance. Employers are responsible for maintaining a workplace free of racial and ethnic harassment. Employers may be held liable for unlawful conduct by their agents, supervisory employees, employees, and in certain circumstances, non-employees who harass employees at work.³²²

26.10.2.4. Pregnancy Discrimination

Discrimination based on pregnancy, childbirth, or related medical conditions are unlawful sex discrimination under Title VII.³²³ “[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work[.]”³²⁴ An employer is not required provide paid pregnancy or maternity leave, but once an employer establishes any paid medical leaves or provides medical benefits, it is unlawful to exclude pregnancy coverage from such policies or plans.³²⁵

Employers who have more than 50 employees are required to have a family medical leave policy, including leave for pregnancy, childbirth and related medical conditions to the extent defined by statute.³²⁶

26.10.2.5. Religious Accommodation

Discrimination based on religion is prohibited by Title VII.³²⁷ An employer is required to provide an accommodation for employees' sincerely held religious observances or practices unless the accommodation would impose an undue hardship on the employer's business. Undue hardship can be claimed if an accommodation imposes more than a “de minimis” cost, which generally means more than ordinary administrative costs. Undue hardship can also be claimed if an accommodation requires violating the terms of a seniority system.

26.10.2.6. Remedies

An employee who establishes that an employer has violated the provisions of Title VII may recover back pay, front pay, emotional distress damages, attorneys' fees and costs. In addition, an employee may recover punitive damages if he or she proves that the discrimination was made with malice or with reckless indifference to the rights of the employee.³²⁸

³²² See, e.g., *Patrolmen's Benevolent Ass'n of City of New York, Inc. v. City of New York*, 310 F.2d 43 (2nd Cir. 2002), cert. denied, 538 U.S. 1032 (2003)

³²³ 42 U.S.C. § 2000e(k) (Pregnancy Discrimination Act of 1978).

³²⁴ Id.

³²⁵ See, e.g., *California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 277, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987) (describing how Congress amended Title VII to specify that sex discrimination included discrimination on the basis of pregnancy)

³²⁶ 29 U.S.C. § 2610, et seq. (Family Medical Leave Act).

³²⁷ See, e.g., *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004).]

³²⁸ 42 U.S.C. § 1981(a).

26.10.3. The Equal Pay Act of 1963

The Equal Pay Act of 1963 (EPA) was enacted as an amendment to the FLSA,³²⁹ providing that:

No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skills, effort, and responsibility, and which are performed under similar working conditions. . . .³³⁰

The EPA applies to every employer covered by the minimum wage law, including state and local governments.³³¹

In order for an employee to prevail under the EPA, he or she must establish the equality of jobs and the inequality of pay.³³² Most of the reported cases analyze the issue of what is an “equal job.” The test is whether men and women held positions requiring equal skill, effort, and responsibility under similar working conditions.³³³ The jobs need not be identical in every respect, but they must be “substantially equal.”³³⁴ A wage differential is justified only if it compensates for an appreciable variation in skill, effort, or responsibility between otherwise comparable work activities. In determining whether a female performs a substantially equal job as a male, the court may look at experience, training, education and ability.³³⁵

Actions under the EPA must be filed within two years of the date of discrimination, unless the employer’s actions were willful violations, which allows an employee to file a claim up to three years after a violation. A prevailing employee may be awarded back pay, attorneys’ fees, and possible liquidated damages in an amount equal to the back pay.

26.10.4. Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (ADA)³³⁶ makes it unlawful for employers with 15 or more employees to discriminate in employment against a qualified individual with a disability. An employee may also bring claims if she believes that she was “regarded as” disabled and discriminated against, even if that person does not have a qualifying disability. The ADA covers all employment practices, such as recruitment, pay, hiring, firing, promotion, job assignments, training, leaves, lay offs, benefits and all other employment related activities. The ADA also makes it unlawful to discriminate against an applicant or employee, whether disabled or not, because of the individual’s family, business, social or other relationship with an individual with a disability. The ADA also prohibits an employer from retaliating against an applicant or employee for

329 29 U.S.C. § 201, et seq.

330 29 U.S.C. § 206(d).

331 See, e.g., *Usery v. Charleston County School District*, 558 F.2d 1169 (4th Cir. 1977).

332 *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1077 (D.C. Cir. 1984).

333 *Id.*

334 *Id.* at 1083.

335 *Spaulding v University of Washington*, 740 F.2d 686, 698 (9th Cir.) (citing 29 C.F.R. § 800.125), *cert. denied*, 469 U.S. 1036, 105 S.Ct. 511, 83 L. Ed. 2d 401 (1984).

336 42 U.S.C. § 12012, et seq.

asserting his or her rights under the Act. The ADA applies to private employers, state and local governments, employment agencies, labor organizations and labor-management committees.

26.10.4.1. Qualified Individuals with Disabilities

To be protected under the ADA, an individual must have a record of or be regarded as having a substantial impairment; *i.e.*, one that significantly limits or restricts a major life activity, such as hearing, seeing, speaking, breathing, performing manual tasks, walking, caring for oneself, learning or working.³³⁷ The ADA also protects individuals who have a record of a substantially limiting impairment and people who are regarded as having a substantially limiting impairment.³³⁸

The determination as to whether a person has a disability under the ADA is made without regard to mitigating measures, such as medications, auxiliary aids and reasonable accommodations. If an individual has an impairment that substantially limits a major life activity, he or she is protected under the ADA regardless of whether the condition or its effects can be corrected or controlled. The ADA does not cover temporary impairments, such as broken bones, because they do not substantially limit a major life activity and will have no long term effect.³³⁹ The ADA has been interpreted to apply to persons with AIDS and the HIV infection.

An individual with a disability must be qualified to perform the essential functions of the job with or without reasonable accommodation in order to be protected by the ADA. The applicant or employee must: (1) satisfy the job requirements for educational background, employment experience, skills, licenses and any other qualification standards that are job related; and (2) be able to perform those tasks that are essential to the job with or without reasonable accommodation.³⁴⁰

The ADA does not interfere with an employer's right to hire the best qualified applicant, nor does the ADA impose any affirmative action obligations. The ADA simply prohibits employers from discriminating against a qualified applicant or employee because of a disability.

26.10.4.2. Essential Functions of the Job

Essential functions are the basic job duties that an employee must be able to perform with or without reasonable accommodation.³⁴¹ An employer should carefully examine each job to determine which functions or tasks are essential to performance. It is particularly important that this determination be made before taking an employment action such as recruiting, advertising, hiring, promoting, or firing.

Factors to consider in determining if a function is essential include:

- whether the reason the position exists is to perform that function,
- the number of other employees available to perform the function or among whom the performance can be distributed, and
- the degree of expertise or skill required to perform the function.

337 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2.

338 29 C.F.R. § 1630.2.

339 EEOC Compliance Manual § 915.002; 29 C.F.R. § 1630.2(j); *McDonald v. Commonwealth of Pennsylvania*, 62 F.3d 92 (3rd Cir. 1995).

340 29 C.F.R. § 1630.2(m).

341 29 C.F.R. § 1630.2(n).

In evaluating the essential functions of a job, the EEOC will examine whether the employer made a decision about which functions are essential to the position and whether there was a written job description prepared before advertising or interviewing for a job. The EEOC will also consider (1) actual work experience of present or past employees in the job, (2) the time spent performing a function, (3) the consequences of not requiring that an employee perform a function, and (4) the terms of any applicable collective bargaining agreement.

26.10.4.3. Reasonable Accommodation

Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job or to enjoy the benefits and privileges of employment equal to those enjoyed by employees without disabilities.³⁴² For example, reasonable accommodation may include:

- acquiring or modifying equipment or devices;
- job restructuring;
- part-time or modified work schedules;
- reassignment to a vacant position;
- adjusting or modifying examinations, training materials, or policies;
- providing readers and interpreters; and
- making the workplace readily accessible to and usable by people with disabilities.

Frequently, when a qualified individual with a disability requests a reasonable accommodation, the appropriate accommodation is obvious. The individual may suggest a reasonable accommodation based on his or her own life or work experience. When the appropriate accommodation is not readily apparent, an employer must make a reasonable effort to identify one. The best way to do this is to consult informally with the applicant or employee about potential accommodations that would enable the individual to participate in the application process or perform the essential functions of the job. Accommodations must be made on a case-by-case basis because the nature and extent of a disabling condition and the requirements of the job will vary. The principal test in selecting a particular type of accommodation is that of effectiveness; *i.e.*, whether the accommodation will enable the person with a disability to perform the essential functions of the job. While some consideration should be given to the preference of the individual involved, the accommodation does not have to be the best or preferred accommodation. The employer has the discretion to choose between effective accommodations and may select one that is less expensive or easier to provide.

When an employee with a disability is unable to perform his or her present job even with the provision of a reasonable accommodation, an employer may need to consider reassigning the employee to an existing position that can be performed with or without a reasonable accommodation. Reassignment applies only to existing employees, not to new applicants. An employer is not required to create a position or to bump another employee in order to create a vacancy, nor is an employer required to promote an employee with a disability to a higher level position.

³⁴² 29 C.F.R. § 1630.2(o).

26.10.4.4. Undue Hardship

Failure to provide reasonable accommodation for the known physical or mental limitations of a qualified individual with a disability violates the ADA, unless to do so would impose an undue hardship on the operation of the employer's business. Undue hardship means that an accommodation would be unduly costly, extensive, substantial or disruptive or would fundamentally alter the nature or operation of the business.³⁴³ Among the factors considered in determining whether an accommodation is an undue hardship are the cost of the accommodation, the employer's size, financial resources, and the nature and structure of its operation.

If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that would not pose such a hardship. If cost causes the undue hardship, the employer must also consider whether funding for an accommodation is available from an outside source, such as a vocational rehabilitation agency, and whether the cost of the accommodation can be offset by state or federal tax credits or deductions. The employer must also give the applicant or employee the opportunity to provide the accommodation or pay for that portion of the accommodation that constitutes an undue hardship.

26.10.4.5. Discriminatory Job Criteria

The ADA also prohibits the use of discriminatory job criteria. Job criteria that unintentionally screen out, or tend to screen out, individuals with a disability may not be used, unless the employer demonstrates that the criteria are job-related and consistent with a business necessity.³⁴⁴ For example, if the employer has safety requirements, vision or hearing requirements, walking requirements, or lifting requirements, or if the employer is using employment tests as a method of screening job applicants, the employer should be sure that these criteria are job-related and necessary to the business.

26.10.4.6. Illegal Drug Use

The ADA does not protect illegal drug use. An applicant may be denied employment and an employee may be fired for such use.³⁴⁵ Although individuals who currently use drugs illegally are specifically excluded from the ADA's protections, the ADA does not exclude persons who have successfully completed or are currently in a rehabilitation program and are no longer illegally using drugs. Thus, individuals recovering from a drug or alcohol addiction are protected under the ADA.

26.10.4.7. Health and Safety Considerations

The ADA permits an employer to require that an individual not pose a direct threat to the health and safety of the individual or others in the workplace.³⁴⁶ A direct threat means a significant risk of substantial harm. An employer cannot refuse to hire an applicant because of a slightly increased risk of harm to himself or others, nor can an employer do so based on a speculative or remote risk. The determination that an individual poses a direct threat must be based on objective, factual evidence regarding the individual's present ability to perform essential job functions. If an applicant or employee with a disability poses a

343 29 C.F.R. § 1630.2(p).

344 29 C.F.R. § 1630.10.

345 29 C.F.R. § 1630.3.

346 29 C.F.R. § 1630.2(r).

direct threat to the health or safety of himself or others, the employer must consider whether the risk can be eliminated or reduced to an acceptable level with a reasonable accommodation.

26.10.4.8. Insurance

The ADA requires that an employer provide an employee with a disability equal access to whatever health insurance coverage it is providing to other employees, but does not require the employer to provide more coverage.³⁴⁷ For example, if the health insurance coverage for certain treatments are limited to a specified number per year, the ADA does not require that the employer provide additional coverage for an employee who needs additional treatments because of a disability.

26.10.4.9. Accessibility

The ADA requires that workers with disabilities have equal access to all benefits and privileges of employment that are available to similarly situated employees without disabilities. The duty to provide reasonable accommodation applies to all facilities provided or maintained by an employer for its employees. This includes cafeteria lounges, auditoriums, company-provided transportation and counseling services. If making an existing facility accessible would be an undue hardship, the employer must provide a comparable facility that will enable a person with a disability to enjoy benefits and privileges of employment similar to those enjoyed by other employees, unless this would be an undue hardship.

If an employer contracts with a third party to provide off-site training for employees, it is required by the ADA to provide a location that is readily accessible to and usable by the employee with a disability, unless to do so would create an undue hardship.³⁴⁸

26.10.4.10. Posters

The ADA requires that an employer post a notice in an accessible format to applicants, employees and members of labor organizations describing the provisions of the Act. The EEOC will provide employers with a poster summarizing these and other Federal legal requirements for nondiscrimination. The EEOC will also provide guidance on making this information available in accessible formats for people with disabilities.

26.10.4.11. Enforcement

The ADA prohibitions on job discrimination are enforced by the EEOC. A charge of disability discrimination must be filed within 180 days of the discrimination, unless there is a state or local law that also provides relief for discrimination on the basis of disability. In those cases, the complainant has 300 days to file a charge.³⁴⁹ The EEOC will investigate and initially attempt to resolve the charge through conciliation, following the same procedures used to handle charges of discrimination filed under Title VII of the Civil Rights Act of 1964.

The ADA also incorporates the remedies contained in Title VII. These remedies include hiring, promotion, reinstatement, back pay, attorney's fees and costs. Under the Civil Rights Act of 1991, an employer may also be liable for compensatory and punitive damages; however, the maximum exposure is limited by the number of employees. The ADA provides the additional remedy of reasonable accommodation.

³⁴⁷ 29 C.F.R. § 1630.5.

³⁴⁸ 29 C.F.R. § 1630.6

³⁴⁹ 29 C.F.R. § 1630.13.

26.10.5. Title VI of the Civil Rights Act of 1964

Title VI³⁵⁰ provides that no person shall be excluded from participation in, be denied benefits of, or be subjected to discrimination because of race, color, or national origin in any program or activity receiving federal financial assistance. A private cause of action has been recognized under Title VI but remedies are limited to declaratory and injunctive relief.³⁵¹

26.10.6. Rehabilitation Act of 1973

The Rehabilitation Act of 1973³⁵² prohibits discrimination on the basis of handicap by the federal government, federal contractors, and recipients of federal financial assistance. In addition, any federal contractor with a contract in excess of \$10,000 is required to maintain an affirmative action plan.³⁵³ Any person who believes that a contractor has failed to comply may file a complaint with the U.S. Department of Labor.³⁵⁴ The Act also prohibits discrimination based on a disability.³⁵⁵ Any person aggrieved by an act or failure to act by a recipient of federal assistance may seek remedies available under Title VI of the Civil Rights Act of 1964.

26.10.7. Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA)³⁵⁶ prohibits age discrimination against workers over the age of 40 in all aspects of employment, including hiring, firing, promotion, and benefits.³⁵⁷

To establish age discrimination, the employee must usually demonstrate that he or she was treated differently than a “substantially younger employee,”³⁵⁸ or in the case of a group layoff, that the employer did not treat the age of those laid off neutrally.³⁵⁹ The person treated preferentially need not be under the age of 40.³⁶⁰

Generally, four types of evidence have been used to establish age discrimination: (1) direct evidence, such as discriminatory comments uttered by an employer’s decision-maker; (2) circumstantial evidence, such as a statistical imbalance in an employer’s work force; (3) direct evidence that the employer’s proffered reason for discharge is pretextual, such as a contradiction between the proffered reason and the documentation; and (4) circumstantial evidence that the reason is pretextual, such as evidence that the articulated reason is not based in fact.³⁶¹

350 42 U.S.C. § 2000d.

351 *Drayden v. Needville Independent School District*, 642 F.2d 129 (5th Cir. 1981).

352 29 U.S.C. § 701, et seq.

353 29 U.S.C. § 793(a).

354 29 U.S.C. § 793(b).

355 29 U.S.C. § 794.

356 29 U.S.C. §§ 621-634.

357 29 U.S.C. §623(a)(1) ; 29 C.F.R. § 1625.5.

358 *Palmer v. United States*, 794 F.2d 534, 537 (9th Cir. 1986).

359 *Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988).

360 See 29 C.F.R. § 1625(a) (it is unlawful to give preference because of age between individuals 40 and over); see *Kralman v. Illinois Dept. of Veterans' Affairs*, 23 F.3d 150, 156 (7th Cir. 1994).

361 *Giacoletto v. Amax Zinc Co., Inc.*, 954 F.2d 424, 426 (7th Cir. 1992).

Volume 3: Financing and Engaging in the Business of Healthcare

Other types of evidence that have been used to establish pretext include evidence that the company considered the higher employment costs of older employees in deciding who to lay off and who to retain,³⁶² evidence that the employees who had been retained or rehired had a history of not meeting performance goals,³⁶³ evidence that the plaintiff had a long history of satisfactory job performance,³⁶⁴ and comments from supervisors that older employees were not as fast or as competent as younger employees.³⁶⁵

Most age discrimination results from stereotypical assumptions based on age. To avoid violating the ADEA, employers should carefully avoid basing employment actions – particularly hiring, firing, and promotion decisions – on stereotypical beliefs that older workers are inflexible, set in their ways, unable to learn new procedures, unable to perform certain jobs safely, unable to work for younger supervisors, and likely to retire. Employment decisions regarding older workers should be based on their individual skills, abilities, and merit.

An employer is not required to provide equal health insurance, life insurance, or disability benefits to older workers if it costs more to do so. An employer may be only required to spend the same amount on benefits for both older and younger workers. Because of the ADEA's cost exception, small employers can hire older workers without concern about additional or undue expenses for such employee benefits.³⁶⁶

Any person wishing to bring suit under the ADEA must file a charge of discrimination with the EEOC.³⁶⁷ In Washington, the charge must be filed within 300 days of the date of the unlawful practice.³⁶⁸ If age discrimination is found to exist under the ADEA, a court may award “such legal and equitable relief as will effectuate the purposes” of the statute.³⁶⁹ The ADEA incorporates by reference the damages provisions of the FLSA.³⁷⁰ Thus, damages recoverable under the ADEA include back pay, double damages if the violation is found to be “willful,” a penalty of \$10,000, and attorneys’ fees and costs.³⁷¹ To prove “willfulness” an employee must demonstrate that the employer knew, or showed reckless disregard for, whether its conduct violated the ADEA.³⁷² Punitive damages, as enacted in the Civil Rights Act of 1991, are not available under the ADEA.³⁷³

362 *Denison v. Swaco Geograph Co.*, 941 F.2d 1416, 1421 (10th Cir. 1991); but see *Chiaromonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 398 (7th Cir. 1997) *cert denied*, 523 U.S. 1118, 118 S.Ct. 1795, 140 L. Ed. 936 (1998) (employer does not violate ADEA by terminating employees to reduce salary costs).

363 *Clements v. General Accident Ins. Co. of America*, 821 F.2d 489, 492 (8th Cir. 1987).

364 *Id.*

365 *Id.*

366 29 C.F.R. § 1625.10 (costs and benefits under employee benefit plans).

367 29 U.S.C. § 626(d).

368 29 C.F.R. § 1601.13.

369 29 U.S.C. § 626(c).

370 29 U.S.C. §§ 216, 217.

371 29 U.S.C. § 216(a)-(b).

372 *Trans World Airlines v. Thurston*, 469 U.S. 111, 128, 105 S. Ct. 613, 83 L.Ed.2d 523 (1985).

373 42 U.S.C. § 1981a.

26.10.8. Employee Retirement Income Security Act

The Employee Retirement Income Security Act (ERISA)³⁷⁴ regulates employer pension and benefits plans. It is unlawful to discharge, discipline, or discriminate against an employee for exercising any right to which that employee is entitled under ERISA or for the purpose of interfering with the attainment of a right under a pension or welfare benefit plan.³⁷⁵ Any person with a claim of ERISA discrimination or retaliation may file a lawsuit to recover benefits due, to enforce rights under a plan, or to clarify rights to future benefits.³⁷⁶ ERISA permits an award of attorneys' fees and costs.³⁷⁷

26.10.9. Immigration Reform and Control Act

The Immigration Reform and Control Act of 1986 (IRCA)³⁷⁸ makes it unlawful for an employer to hire any person who is not legally authorized to work in the United States, and it requires employers to verify the employment eligibility of all new employees. IRCA also prohibits discrimination in hiring and discharge based on national origin (as does Title VII) and on citizenship status. IRCA's antidiscrimination provisions are intended to prevent employers from attempting to comply with the Act's work authorization requirements by discriminating against foreign-looking or foreign sounding job applicants.

IRCA's antidiscrimination provisions apply to smaller employers than those covered by EEOC-enforced laws. IRCA's national origin discrimination provisions apply to employers with between four and 14 employees (who would not be covered by Title VII). IRCA's citizenship discrimination provisions apply to all employers with at least four employees. IRCA is enforced by the U.S. Department of Justice.

IRCA prohibits the employment of unauthorized aliens. An unauthorized alien is any person not a citizen or national of the United States who is not (a) lawfully admitted for permanent residence or (b) authorized to be employed by the statute or by the U.S. Attorney General.³⁷⁹ Every employer is required to maintain documentation to establish that it has verified that its employees are not unauthorized aliens.³⁸⁰ Although the immigration laws prohibit hiring unauthorized aliens, they also prohibit employers with four or more employees from discriminating based on citizenship and national origin. The statute permits a preference for United States citizens or nationals if two applicants are equally qualified.³⁸¹

26.10.10. Uniformed Services Employment and Re-Employment Act

The Uniformed Services Employment and Re-Employment Act (USERRA)³⁸² prohibits discrimination against employees who are involved in the armed services based on that service:

374 29 U.S.C. §§ 1001-1461; 29 C.F.R. Parts 2509-2589 (Employment Benefits Security Administration) 4000-4907 (Pension Benefit Guarantee Corporation).

375 29 U.S.C. § 1140.

376 29 U.S.C. § 1132.

377 29 U.S.C. § 1132(g).

378 8 U.S.C. § 1324a.

379 8 U.S.C. § 1324a(h)(3).

380 8 U.S.C. § 1324a(b).

381 8 U.S.C. § 1324b (a)(1), (2) & (4).

382 38 U.S.C. § 4301, et seq.

Volume 3: Financing and Engaging in the Business of Healthcare

A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.³⁸³

An employee who provides such services is entitled to maintain insurance coverage during the period of military service.³⁸⁴ An employee whose USSERA rights have been violated by a state or private employer can choose pursue a private right of action.³⁸⁵

26.11. State Anti-Discrimination Laws

26.11.1. Washington's Law Against Discrimination (WLAD)

Employers with eight or more employees are statutorily prohibited from discriminating against employees based on age, sex, marital status, religion, race, creed, color, national origin, or disability.³⁸⁶ RCW 49.60.030(2) authorizes a person discriminated against in violation of WLAD to bring a civil action. The statute and case law provide for the recovery of back pay,³⁸⁷ front pay, an additional sum to offset federal income tax consequences of the awards, and reasonable attorney fees and costs.³⁸⁸

To prove discrimination an employee or applicant must establish that (1) he or she is within one of the statutorily protected groups; (2) the employee was discharged or subjected to an adverse employment action; (3) the employee's work performance was satisfactory; and (4) the employee was treated differently than someone outside the protected class.³⁸⁹

An employer must articulate a legitimate, nondiscriminatory reason for the adverse employment action. The employee must then show that the reasons articulated by the employer are unworthy of belief or a mere pretext for what is, in fact, a discriminatory purpose.³⁹⁰

Employees have demonstrated that an articulated reason is not worthy of credence in one of three ways: (1) the company's reason has no basis in fact; (2) if based in fact, it was not really the motivating factor; or (3) the articulated reason was insufficient to motivate the adverse action taken.³⁹¹

In order to prevail under RCW 49.60.180(2), an employee or applicant will have to show that his or her protected class status was a "substantial factor" in an employer's adverse employment action.³⁹²

383 38 U.S.C. § 4311.

384 38 U.S.C. § 4317.

385 38 U.S.C. § 4323.

386 RCW 49.60.030; RCW 49.60.040; RCW 49.60.180; *Griffin v. Eller*, 130 Wn.2d 58, 70, 922 P.2d 788 (1996).

387 *Martini v. Boeing Co.*, 137 Wn.2d 357, 367-68, 971 P.2d 45 (1999).

388 *Blaney v. Int'l Ass'n of Machinists*, 151 Wn.2d 203, 210, 87 P.3d 757 (2004); RCW 49.60.030(2).

389 *Domingo v. Boeing Employees Credit Union*, 124 Wn. App. 71, 80, 98 P.3d 1222 (2004).

390 *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 185, 23 P.3d 440 (2001); *Sellsted v. Washington Mutual Savings Bank*, 69 Wn. App. 852, 851 P.2d 716 (1993).

391 *Domingo*, 124 Wn. App. at 88.

Managers or employees acting on behalf of an employer may be held individually liable for employment discrimination.³⁹³ Managers and employees may also be held liable for aiding and abetting the commission of a discriminatory act.³⁹⁴

The Washington Supreme Court has extended the protection of the Washington Law Against Discrimination to independent contractors.³⁹⁵ Businesses should be careful to treat independent contractors with the same non-discrimination practices and procedures as their employees.

26.11.2. Sex Discrimination and Sexual Harassment

RCW 49.60.010, .030, and .180 make it an unfair practice for an employer “[t]o discriminate against any person in compensation or in other terms or conditions of employment because of . . . sex.” Sexual harassment is a form of sex discrimination and is prohibited by RCW 49.60.180.

Two types of sex discrimination claims are recognized--the *quid pro quo* sexual harassment claim, where the employer requires sexual consideration from the employee for job benefits, and the hostile work environment claim. The four elements of a prima facie hostile work environment claim are: (1) the harassment was unwelcome, (2) the harassment was because of sex, (3) the harassment affected the terms and conditions of employment, and (4) the harassment is imputable to the employer.³⁹⁶ The third element requires that the harassment be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment[,] . . . to be determined with regard to the totality of the circumstances."³⁹⁷

An employer will be held vicariously liable for the sexual harassment of its employees, unless it took prompt and adequate corrective action reasonably calculated to end the harassment upon learning of the harassment.³⁹⁸

Once the employer has actual knowledge of a complaint through higher managerial or supervisory personnel, the employer must take remedial action reasonably calculated to end the harassment.³⁹⁹ Employers who fail to establish a protocol to ensure the careful and complete investigations of sexual harassment complaints run a risk of liability for failing to take effective remedial action.⁴⁰⁰ Remedial actions must be designed to prevent harassment and to send a strong statement to employees that a harasser’s behavior is inappropriate.⁴⁰¹

Where the harasser is the owner, partner, or corporate officer, this conduct is imputed to the employer.⁴⁰² To hold the employer liable for the actions of a supervisor or a co-worker, the employee must show that the

392 *MacKay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995).

393 *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 358, 20 P.3d 921 (2001).

394 RCW 49.60.220.

³⁹⁵ *Marquis v. City of Spokane*, 130 Wn.2d 97 (1996)

396 *Glasgow v. Georgia Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985).

397 *Glasgow*, 103 Wn.2d at 406-07.

398 *Id.*

399 *Id.* at 407.

400 *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 796, 98 P.3d 1264 (2004).

401 *Id.* at 803.

402 *Glasgow*, 103 Wn.2d at 407; *Robel*, 148 Wn.2d at 47.

employer (a) authorized, knew or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action.⁴⁰³

26.11.3. Statute of Limitations under WLAD and the “Continuing Violation” Doctrine

WLAD does not contain its own limitations period. Discrimination claims must be brought within three years under the general three-year statute of limitations for personal injury actions.⁴⁰⁴

The Washington Supreme Court has adopted the United States Supreme Court’s analysis of the continuing violation doctrine in *AMTRAK v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed.2d 106 (2002) for purposes of determining under state law whether a discrimination claim is timely.⁴⁰⁵

In *Morgan*, the Supreme Court held that in cases involving discrete retaliatory or discriminatory acts, such as termination, failure to promote, denial of transfer, or refusal to hire, the limitations period runs from the act itself, and if the limitations period has run, a discrete act is not actionable even if it relates to acts alleged in timely filed charges.⁴⁰⁶ In cases involving a hostile work environment claim, the claim is composed of a series of separate acts that collectively constitute one unlawful employment practice.⁴⁰⁷ It held that “[i]t does not matter that some of the acts of the hostile work environment fall outside the statutory time period,” provided that an act contributing to the claim occurs within the filing period. Under such a circumstance, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.⁴⁰⁸ A hostile work environment claim will not be untimely if at least one of the acts of harassment occurs during the limitations period and the acts occurring outside the limitations period are “part of the same unlawful employment practice.”⁴⁰⁹

26.11.4. Age Discrimination

There are two separate statutes prohibiting age discrimination in Washington. RCW 49.60.180 makes it unlawful for an employer with eight employees or more to discriminate on the basis of age. RCW 49.44.090 makes it unlawful for any employer, regardless of size, to discriminate against individuals between 40 and 70 on the basis of age. There is an express cause of action under RCW 49.60.180 and an implied cause of action under RCW 49.44.090.⁴¹⁰

While independent contractors can assert a claim of sex discrimination under RCW 49.60,⁴¹¹ the Washington Supreme Court has not extended the age discrimination statute to apply to a non-employee or allow an independent contractor to assert a claim of age discrimination.⁴¹²

⁴⁰³ Id.

⁴⁰⁴ *Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729 (2004); RCW 4.16.080(2).

⁴⁰⁵ Id.

⁴⁰⁶ *Morgan*, 536 U.S. at 108-113.

⁴⁰⁷ Id. at 117.

⁴⁰⁸ Id.

⁴⁰⁹ Id. at 122.

⁴¹⁰ *Bennett v. Hardy*, 113 Wn.2d 912, 921, 784 P.2d 1258 (1990).

⁴¹¹ *Marquis v. City of Spokane*, 130 Wn.2d 97, 106, 922 P.2d 43 (1996).

⁴¹² *Kilian v. Atkinson*, 147 Wn.2d 16, 22, 50 P.3d 638 (2002).

26.11.5. Disability Discrimination

Washington anti-discrimination law has long had a much broader definition of “disability” than that found in the federal Americans with Disabilities Act (ADA). The ADA definition requires a physical or mental impairment that “substantially limits” a “major life activity.”⁴¹³ For years, Washington regulations have defined disability as any sensory, mental, or physical “abnormality” that is the reason the employee was discriminated against – regardless of whether the abnormality actually limited the employee’s ability to do anything. Under this definition, seemingly trivial conditions qualified as “disabilities” under Washington law. In 2006, the Washington Supreme Court issued a sweeping decision that fully aligned the Washington definition of “disability” with the ADA.⁴¹⁴

At the time of publication, legislation on the propriety of this new definition of disability was pending before both houses of the Washington State Legislature.⁴¹⁵ Thus, whether the definition of disability under Washington law will remain aligned with the ADA definition is currently unknown.

26.11.5.1. Accommodation

State law requires employers to reasonably accommodate a disabled employee unless the accommodation would be an undue hardship on the employer.⁴¹⁶ An employee must prove four elements to establish discrimination based on lack of accommodation:

- 1) the employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job;
- 2) the employee was qualified to perform the essential functions of the job in question;
- 3) the employee gave the employer notice of the abnormality and its accompanying substantial limitations; and
- 4) upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality.⁴¹⁷

An employer’s duty to accommodate is limited to those steps reasonably necessary to enable the employee to perform his or her job.⁴¹⁸ The term “reasonable” is linked to necessity and limits the duty to removing sensory, mental or physical impediments to the employee’s ability to perform his or her job.⁴¹⁹

The employer does not have a duty to reassign an employee to an already occupied position, create a new position, alter the fundamental nature of the job, eliminate or reassign essential job functions, provide a new supervisor, give the employee preference over a more qualified employee, or necessarily grant a specific request.⁴²⁰

⁴¹³ 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2.

⁴¹⁴ *McClarty v. Totem Electric*, 137 P.3d 844, 137 P.3d 844 (2006).

⁴¹⁵ S.B. 5340, 2007-2008 Leg., Reg. Sess. (Wa., 2007); H.B. 1322, 2007-2008 Leg., Reg. Sess. (Wa., 2007).

⁴¹⁶ *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000).

⁴¹⁷ *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 192-93, 23 P.3d 440 (2001); *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 532, 70 P.3d 126 (2003).

⁴¹⁸ *Doe v. Boeing Co.*, 121 Wn.2d at 18.

⁴¹⁹ *Id.* at 21.

⁴²⁰ *Pulcino*, 141 Wn.2d at 643-44; *Snyder v. Medical Services Corp.*, 145 Wn.2d 233, 241, 35 P.3d 1158 (2001).

The employee must prove that accommodation is medically necessary.⁴²¹ Where the need to accommodate an employee is not medically confirmed, it is not reasonable to require the employer to provide accommodation.⁴²² The medical necessity requirement is to prevent employees from requesting accommodations based upon their own perception of a need for accommodation where there is no medical confirmation that such need exists.⁴²³

26.11.5.2. Disparate Treatment

Under RCW 49.60.180, an employer may not refuse to hire a person or otherwise discriminate against a person because a person has a disability if the person is qualified to do the job.⁴²⁴

To present a *prima facie* case disparate treatment, the employee must produce evidence that (i) he or she was disabled, (ii) he or she was able to perform the job, (iii) he or she was fired or not hired, and (iv) a non-disabled person was either retained or hired.⁴²⁵

Washington courts recognize a disability-based hostile work environment claim.⁴²⁶

26.11.6. HIV Positive Employees

RCW 49.60.172 prohibits an employer from requiring an applicant for employment to take an HIV test, and prohibits an employer from discharging or segregating an employee or adversely affecting an employee's terms or condition of employment because an employee is HIV positive, unless the absence of HIV infection is a bona fide occupational qualification (BFOQ) for the job in question. A BFOQ exists only when performance of a particular job can be shown to present a significant risk of transmitting HIV infection to other persons and there is no means of eliminating the risk by restructuring the job. "Significant risk" of infection is to be defined by the State Board of Health by rule.

RCW 49.60.172 also provides a qualified immunity to employers who comply with the law; they are immune from civil action for damages arising out of the transmission of HIV to others unless such transmission occurs as a result of the employer's gross negligence.⁴²⁷

RCW 49.60.174 provides that claims of discrimination because of HIV infection shall be treated the same as other claims of discrimination because of a sensory, mental, or physical disability.

26.11.7. Whistleblower Acts/Retaliation

It is unlawful to discharge an employee who has opposed a discriminatory practice or who has filed a complaint alleging discrimination.⁴²⁸ It is also unlawful to retaliate against an employee for filing a worker's compensation claim.⁴²⁹

⁴²¹ *Davis*, 149 Wn.2d at 532.

⁴²² *Doe*, at 18-19.

⁴²³ *Riehl*, 152 Wn.2d at 149 n.5.

⁴²⁴ *Id.* at 149.

⁴²⁵ *Roerber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 135, 64 P.3d 691, *review denied*, 150 Wn.2d 1016, 79 P.3d 446 (2003).

⁴²⁶ *Robel v. Roundup Corp.*, 148 Wn.2d 35, 48, 59 P.3d 611 (2002).

⁴²⁷ RCW 49.60.172(5).

To establish a claim for retaliation, an employee must prove that he or she was engaged in a statutorily protected activity, that an adverse employment action was taken against the employee, and that the protected activity caused the adverse employment action.⁴³⁰

RCW Chapter 42.40 provides protection to state employees who report violations of state or federal law, and RCW Chapter 42.41 provides the same protection to local government employees. RCW 42.41.040 provides for disciplinary action or discharge of any local government official or employee who is found to have retaliated against an employee for a good faith report of an improper governmental action. The statute also authorizes a penalty of up to \$3,000 to be paid personally by an offending local government official.

Federal employees are protected from job discrimination under the Whistleblower Protection Act of 1989.⁴³¹ Whistleblowers can recover against companies that defraud the federal government under the federal False Claims Act.⁴³²

26.12. Worker Safety

Worker safety is regulated by both federal and state law.

The Occupational Safety and Health Act (OSHA)⁴³³ is the federal law that regulates all business engaged in interstate commerce “to assure so far as possible every working man and woman in the nation safe and healthful working conditions. . . .”⁴³⁴ OSHA authorizes the Department of Labor to set standards,⁴³⁵ to promulgate rules and regulations to implement the Act, to conduct inspections, and to issue citations and penalties for violations.⁴³⁶ By definition, federal and state employers are exempt from OSHA regulation.⁴³⁷

Washington’s corollary to OSHA is the Washington Industrial Safety and Health Act (WISHA),⁴³⁸ which covers all public and private employers in the state. Its purpose is to assure “safe and healthful working conditions for every man and woman working in the State of Washington.”⁴³⁹ The Director of the Department of Labor and Industries is

428 RCW 49.60.210(1); see also 42 U.S.C. 2000e-3.

429 RCW 51.48.025(1).

430 *Robel*, 148 Wn.2d at 50.; *Delahunty v. Calhoon*, 66 Wn. App. 829, 832 P.2d 1378 (1992).

431 5 U.S.C. 1201

432 31 U.S.C. 3730(d).

433 29 U.S.C. § 651 et seq.

434 29 U.S.C. § 651(b).

435 29 C.F.R. § 1910.

436 29 C.F.R. § 1903.

437 29 U.S.C. § 652(5).

438 Chapter 49.17 RCW.

439 RCW 49.17.010.

Volume 3: Financing and Engaging in the Business of Healthcare

authorized to adopt rules and regulations,⁴⁴⁰ to enter and inspect work places,⁴⁴¹ and to issue citations for violations of the Act.⁴⁴² General safety and health standards are found in Title 296 of the Washington Administrative Code.

26.12.1. Bloodborne Pathogen Standard

Special OSHA and WISHA regulations have been adopted relating to workers who may come into contact with blood and other body fluids.⁴⁴³ These regulations are known as the blood-borne pathogen standard. OSHA's rule applies to all persons who may be "occupationally exposed." Potential occupational exposure is defined as "reasonably anticipated skin, eye, mucous membrane, or parental contact with blood or other infectious materials that may result from the performance of the employee's duties."⁴⁴⁴

An employer that has at least one employee who might be exposed to blood, body fluids, or tissue is required to establish a written exposure-control plan that includes (1) a list of all jobs or tasks that have any risk of occupational exposure; (2) a schedule and methods for com with all provisions of the standard; and (3) a procedure for evaluation of exposure incidents.⁴⁴⁵

An employer must also provide any necessary protective equipment and clothing at no cost to the employee.

26.13. Workers' Compensation

Washington's Industrial Insurance Act⁴⁴⁶ provides insurance benefits for work-related injuries, deaths, and occupational illnesses. An employer is immune from lawsuits for unintentional injuries caused by that employer's employees.⁴⁴⁷ The injured worker's exclusive remedy is through the workers' compensation system.⁴⁴⁸

Every employer pays premiums set by the Department of Labor and Industries, unless the employer is self-insured. Every employer is obligated to obtain a certificate of coverage and to post notice of employees' tights under the state statute.⁴⁴⁹ The statute applies to all employers, regardless of size.⁴⁵⁰

Employers must maintain certain records and may be subject to penalties of \$250 for each offense.⁴⁵¹

An employer may not discriminate against any employee for filing or indicating the intent to file a workers' compensation claim.⁴⁵² Workers who feel they have been retaliated against may file a civil lawsuit or file a complaint with the Department of Labor and Industries.

440 RCW 49.17.040.

441 RCW 49.17.070.

442 RCW 49.17.120.

443 29 C.F.R. § 1910.1030; WAC 296-62-08001.

444 OSHA Bulletin 3127 (1992).

445 WAC 296-62-08001(3).

446 RCW Ch. 51.04.

447 *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 444, 932 P.2d 628 (1997), *cert. denied*, 523 U.S. 1102, 118 S. Ct. 1574, 140 L.Ed. 2d 807, (1998).

448 *Goodman v. Boeing*, 127 Wn.2d 401, 407, 899 P.2d 1265 (1995) (discrimination falls outside the scope of the Industrial Insurance Act).

449 RCW 51.04.120.

450 RCW 51.04.180.

451 RCW 51.48.030.

Chapter 26: Employment Issues

(prepared from reference materials available as of January 31, 2007)

Under RCW 51.48.025(3), an employee may institute an action against an employer who has discharged the employee in retaliation for pursuing workers' compensation benefits by showing that (1) he or she exercised the statutory right to pursue workers' benefits, communicated to the employer an intent to do so, or exercised any other right under RCW Ch. 51; (2) he or she was discharged; and (3) there is a causal connection between the exercise of the legal right and the discharge.⁴⁵³

In establishing a prima facie case, the employee need not prove that the employer's sole motivation was retaliation based on the employee's pursuit of benefits under the Industrial Insurance Act. The employee need only produce evidence that pursuit of a workers' compensation claim was a cause of the firing.⁴⁵⁴

An employer may discipline or discharge a worker for failing to observe safety standards or because of the nature or frequency of work-related accidents.⁴⁵⁵

⁴⁵² RCW 51.48.025.

⁴⁵³ *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991).

⁴⁵⁴ *Anica v. Wal-Mart Stores*, 120 Wn. App. 481, 84 P.3d 1231 (2004).

⁴⁵⁵ RCW 51.48.025(1).

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Creation Date: 2/14/2007 3:46 PM
Change Number: 57
Last Saved On: 2/15/2007 10:14 PM
Last Saved By: DanieW
Total Editing Time: 376 Minutes
Last Printed On: 2/15/2007 10:14 PM
As of Last Complete Printing
Number of Pages: 69
Number of Words: 27,007 (approx.)
Number of Characters: 153,944 (approx.)