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2023 Washington State Legislative Update What Employers Need to Know

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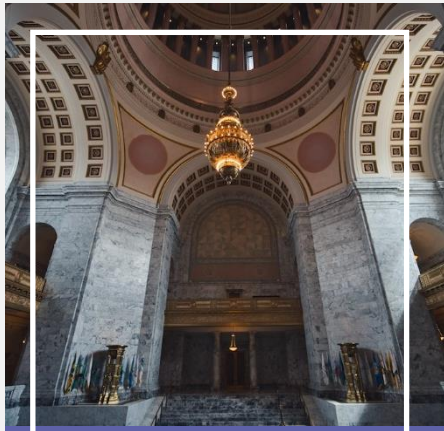


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Agenda



Brief Overview of
2023 Short
Session



Summaries of
Enacted Laws
and Bills on the
Governor's Desk



WA Long-Term
Care Act (LTCA)



Litigation Upticks



Reminders About
January 1, 2023
Effective Dates



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Brief Overview of 2023 Short Session



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Enacted Laws and Bills on the Governor's Desk

Privileged Communications Between Unions and Employees Unions Represent (ESHB 1187)

- Signed by Governor on May 1 – **effective date July 23, 2023**
- Prevents disclosure of any communication between an employee and union representative(s) or between union representatives
- Covers public-sector, NLRA, and RLA unions
- Akin to attorney-client privilege
- Carves out disclosure for preventing certain crimes or for legal claims against unions

Pre-Hire Drug Testing (SB 5123)

- Delivered to Governor on April 24
- Pertains to individuals that lawfully consume cannabis
- Adds new sections to RCW 49.44 (WA prohibited practices)
- Makes it unlawful for an employer to discriminate against a person in initial hiring for off-duty cannabis usage or for test results showing “nonpsychoactive cannabis metabolites”
 - Lawful to prohibit initial hiring based on tests that screen do not screen in this way
 - Lawful to maintain a drug and alcohol-free workplace policy
 - Lawful to test for controlled substances because of reasonable suspicion or post-accident
 - Lawful to test if results not reported to employer
- Excludes federally-required, various police/fire/first responder, airline and aerospace, and certain safety-sensitive position pre-hire testing

Employee Vehicle Searches (2SHB 1491)

- Delivered to Governor on April 18
- Prohibits searches of employees' private vehicles on employer property
- Also prohibits retaliation for employee exercising these rights
- Carve outs for:
 - Employer-owned vehicles
 - Searches by police
 - Vehicles used for work (limited)
 - Safety
 - Consent

My Health Data Act (ESHB 1155)

- Signed by Governor on April 27 – **effective date July 23, 2023**
- Expands HIPAA by reaching “any legal entity” in Washington that collects, processes, shares, or sells health data
- Health data specifically includes biometric data, genetic data, location data related to health care services, searches for health care services, reproductive health, and gender-affirming care information
- Requires extensive policy disclosure
- Prohibits collecting “extra” data, sharing of data, mishandling
- Customers have a right to information about data use, request deletion
- Violations are unfair trade practices for purposes of the CPA
- Sections take effect in 2024 (phased-in)

Unemployment Compensation Expansion (ESHB 1106)

- Delivered to Governor on April 18
- Expands unemployment benefits when leaving due to health or death of family
 - Currently benefits for claimant’s illness or disability and immediate family’s illness, disability, or death
 - Beginning September 3, 2023: illness, disability or death of a “family member”
 - Beginning July 7, 2024
 - Care for a child or vulnerable adult
 - Following minor child moving outside labor market
 - Permanent change in established schedule
- Can now request accommodations instead of leave

Workers' Compensation IMEs (SHB 1068)

- Signed by the Governor on April 25
- Provides new rights to workers during Independent Medical Exams:
 - Right to record audio and/or video of the examinations
 - Must provide seven days' notice
 - Worker pays the costs
 - Worker must provide unaltered copy
 - Worker may not post the recording “to social media”
 - Right to have one witness
 - Not worker's lawyer or lawyer's employee
 - Not attending provider or attending provider's employee

Workers' Compensation Duties of Self-Insureds/TPAs (SHB 1521)

- Delivered to Governor on April 23
- Originally affected **all** self-insured employers and their TPAs
- As of April 10, only affects “self-insured municipal employers” and “self-insured private sector firefighter employers”
- Imposes a duty of good faith and fair dealing
- Prohibits “wrongfully inducing” employees to take less compensation
- Department is empowered to define other violations
- Department is empowered to determine fines
- Department is empowered to investigate written complaints

Workers' Compensation – PTSD Coverage for RNs (2SSB5454)

- Delivered to Governor April 21, 2023
- Current Law: Claims based on mental conditions or disabilities caused by stress do not fall within the definition of occupational disease for industrial insurance.
- New Law:
 - (a) Does *not* apply to occupational disease claims resulting from post-traumatic stress disorder (PTSD) of direct care registered nurses
 - (b) PTSD must develop or manifest itself *after* individual has been employed on a fully compensated basis as a direct care registered nurse in WA for at least 90 consecutive days

Paid Family Medical Leave (SSB5586)

- Delivered to Governor April 21, 2023
- Current Law:
 - An *individual* has access to all records and info concerning that individual held by ESD, including PFML
 - An *employer* has access to records and info related to claims for paid family or medical leave; decisions to grant/deny benefits; and employer’s premium assessment.
- New Law:
 - Any *interested party* may have access to an employee’s paid family or medical leave claim including:
 - type of leave taken
 - duration of leave
 - an employee’s benefit approval
 - payment of benefits
 - “Interested Party” = current employer, current employer’s 3rd party administrator, employee, or specified by ESD

Staffing – RNs (E2SSB5236)

- Signed by the Governor on April 20, 2023 - **Effective Date – July 1, 2024**
- Must develop Nurse Staffing Committees – comprised of ½ registered nurses providing direct patient care and ½ determined by hospital administration
- Committee must develop and oversee an annual staffing plan
- Sets additional requirements for meal and rest breaks for nurses
- Makes overtime voluntary except in:
 - any unforeseeable emergent circumstance;
 - prescheduled on-call time, subject to certain limitations;
 - when the employer documents it has used reasonable efforts to obtain staffing.

An employer has not used reasonable efforts if overtime work is used to fill vacancies resulting from chronic staff shortages.
- Involves L&I in complaints with DOH and establishes penalties

Robo Calls (ESHB 1051)

- Signed by the Governor on April 20, 2023 – **Effective Date July 23, 2023**
- Aimed to prevent robocalls that are deceiving people
- Strengthens existing law (RCW 80.36.390 and 80.36.400 and 19.158.020)
- Adds language regarding “automatic” dialing and artificial language
- Also adds liability for those who “assist in the transmission” for solicitation

Musculoskeletal Injuries (ESSB 5217)

- 2003 initiative repealed existing regulations from 2000
- Prohibited L&I from adopting rules related to ergonomics or musculoskeletal injuries
- ESSB 5217 repeals RCW 49.17.360 & 49.17.370
- Does not *require* adoption of rules – simply permits rulemaking
- Sets limits on rulemaking
 - One set of rules per industry per 12 months
 - No emergency rulemaking
 - Rules only allowed for industries operating at 2x injury claim rate over 5 years
 - L&I must report out to legislature for each industry under review
 - L&I must publish list of industries and risk classifications subject to rulemaking each November

Warehouse Employee Productivity (2SHB1762)

- Delivered to Governor April 23 – has until May 13 to act (**Effective July 1, 2024**)
- Certain industry codes (a/k/a NAICS) must provide written notice to employees regarding required “work speed” or “quotas”:
 - Warehousing and storage – NAICS 493; Merchant wholesalers, durable goods – NAICS 423; Merchant wholesalers, nondurable goods – NAICS 424; Electronic shopping and mail-order houses – NAICS 454110 (no longer exists after 2022 amendments)
 - 100+ / 1,000+ Employees
- Notify employees of:
 - potential adverse actions and/or incentives associated with quotas
 - changes to quotas “as soon as possible” or within 2 business days
- Must maintain work speed data:
 - During employment
 - For 3 years after separation (limited to prior 6 months)
- Cannot retaliate against employees for not meeting a non-compliant quota or requesting work speed data



**Long-Term Care
Insurance**

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Washington Long-Term Care Act

Long Term Services and Supports Act

- Long term care insurance of up to \$36,500 – funded by payroll deductions
- Supposed to go into effect on January 1, 2022
- One time opt out window for privately funded insurance – October 1-December 31, 2022
- Class action lawsuit, Governor Inslee intervention, modifications by the Legislature
- Payroll withholdings are now to begin on July 1, 2023

Long Term Services and Supports Act

New exemptions – became available on January 1, 2023

- A veteran of the United States military with a service-connected disability of at least 70%;
- A spouse or registered domestic partner of an active duty service member of the US Armed Forces;
- Non-immigrant visa for temporary workers and employed by an employer in Washington; or
- Employed by a Washington employer, but has a permanent address and primary residence out of state.

Previous exemption – no longer available

- Anyone who received an exemption from the ESD based upon other Long Term Health care coverage (through private insurance or their employer plans)

Long Term Services and Supports Act

What should you do?

- Make sure you have approval letters from any prior exemptions
- Collect and maintain approval letters for new exemptions
- Approval letters will have an effective date
- Begin premium withholdings on July 1, 2023 = 0.0058 of gross wages
- Do not deduct premiums for employees with approval letters
- Submit to the ESD (like premiums for Washington Paid Family Leave)
- Prepare to submit quarterly reports (in October 2023)



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Litigation Upticks

Recent Cases and Claims

Silenced No More Act

- In effect since June 9, 2022
- Penalty: liable in a civil cause of action for actual or statutory damages of \$10,000, whichever is more, as well as reasonable attorneys' fees and costs
- Review Your Separation/Severance Agreements
- Review your instructions on confidentiality in internal investigations

Religious Accommodation

- Groff v. DeJoy – oral argument held on April 18, 2023
- Analysis of “undue hardship” = whether religious accommodation imposes an undue hardship on the conduct of the employer’s business based in part upon the burdens caused to other employees



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Reminders About January 1, 2023 Effective Dates

Increased Minimum Wages - Effective January 1, 2023

Washington State Minimum Wage **\$15.74**

Seattle Minimum Wage

- **\$18.69** for large employers (> 500 employees)
- \$16.50 for small employers (500 or fewer employees) – if the employer pays \$2.19 per hour toward medical benefits and/or \$2.19 per hour in tips
- \$18.69 for small employers (500 or fewer employees) – if the employer does not pay \$2.19 per hour toward medical benefits and/or \$2.19 per hour in tips

Agricultural Minimum Wage

- *Martinez-Cuevas v. DeRuyter Brothers Dairy* decision – dairy workers exemption to OT held unconstitutional
- **On January 1, 2023** – OT for weekly hours exceeding 48
- On January 1, 2024 – OT for hours exceeding 40

Increased Salary Thresholds - **Effective January 1, 2023**

Overtime Exempt

- For small employers (1-50 employees) = 1.75 x current state minimum wage
\$1,101.80 per week (\$57,293.60/year)
- For large employers (51 or more employees) = 2 x current state minimum wage
\$1,259.20 per week (\$65,478.40/year)

Computer Professionals

Exempt computer professionals may be paid on an hourly basis = 3.5 x state minimum wage

\$55.09 per hour

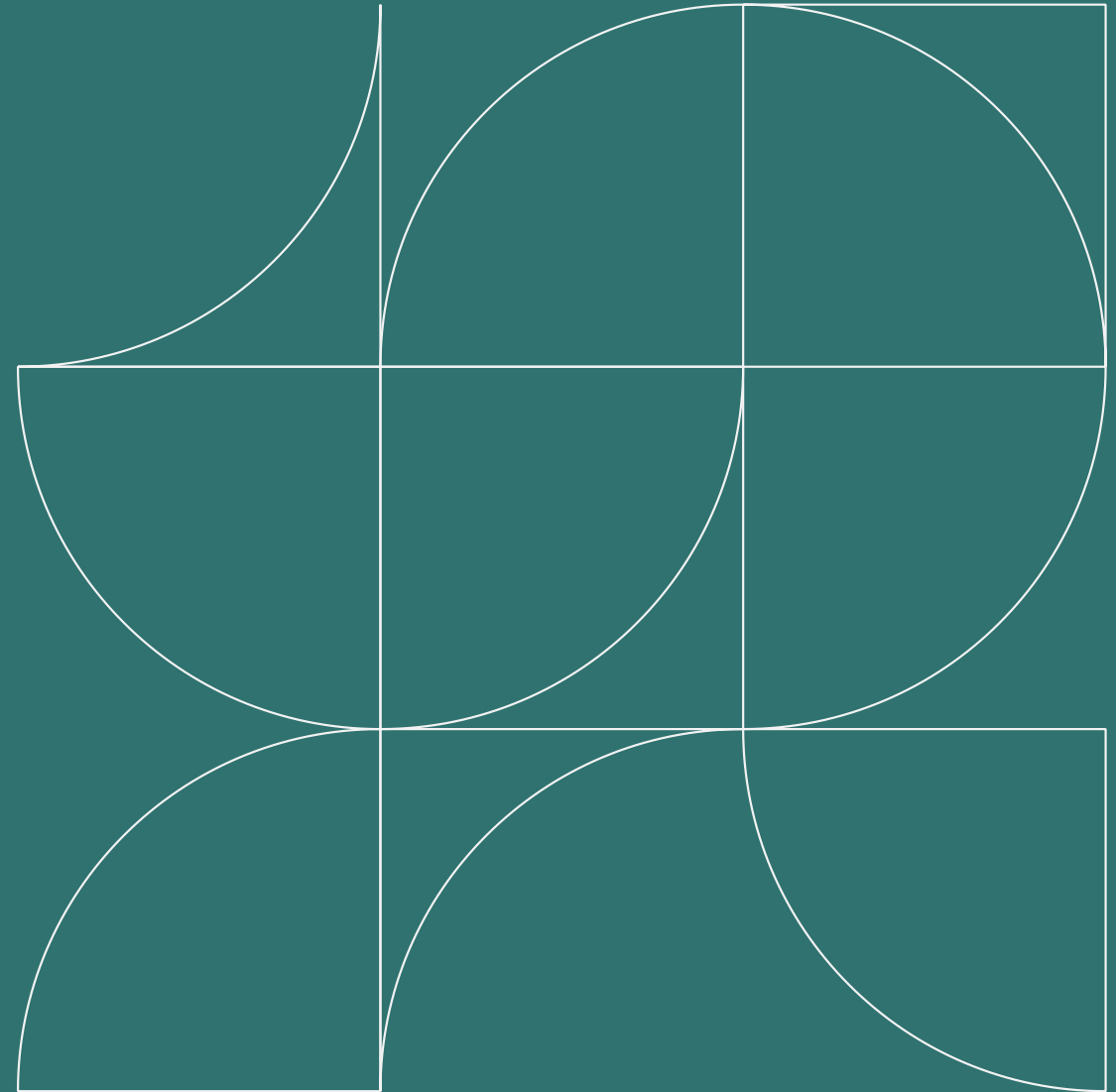
Noncompetition agreements void unless:

- Employees earning more than \$116,593.18; and
- Independent contractors earning more than \$291,482.95

Other Important Reminders

- Seattle Independent Contractor Protection Ordinance
 - In effect since September 1, 2022
- Wage Disclosure Requirements
 - In effect since January 1, 2023
 - Must disclose wage scale or salary range and general description of benefits for new jobs in WA
 - Includes remote workers
 - Statutory penalty = \$5000

Questions?



thank you

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