

## WASHINGTON

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### **I. AT-WILL EMPLOYMENT**

#### **A. Statute**

Washington does not have a statute regarding at-will employment, but the nature of employment as being at-will has been developed through case law.

#### **B. Case Law**

Common law at-will employment has been the default employment rule in Washington since at least 1928. *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 152, 43 P.3d 1223 (2002) (citing *Davidson v. Mackall–Paine Veneer Co.*, 149 Wash. 685, 688, 271 P. 878 (1928)). An employer may discharge an at-will employee for “no cause, good cause or even cause morally wrong without fear of liability.” *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 226, 685 P.2d 1081 (1984); *see also Roberts v. Atl. Richfield Co.*, 88 Wn.2d 887, 568 P.2d 764 (1977) (“In Washington, an employer has the right to discharge an employee, with or without cause, in the absence of a contract for a specified period of time,” unless such discharge is prohibited by law or is a violation of public policy).

### **II. EXCEPTIONS TO AT-WILL EMPLOYMENT**

#### **A. Implied Contracts**

##### **1. Employee Handbooks/Personnel Manuals**

Employee handbooks, policy manuals, or other company policy, conduct, or statements may create exceptions to the employment-at-will relationship. *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 959 P.2d 1104 (1998); *Quedado v. Boeing Co.*, 168 Wn. App. 363, 276 P.3d 365 (2012). Specifically, the employment-at-will relationship can be modified through (1) contractual modification, and (2) promises of specific treatment in specific situations, on which

an employee justifiably relies. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984).

Under the first exception, an employer's issuance of a manual or policy may modify an at-will employment relationship where "the requisites of contract formation, offer, acceptance and consideration" establish that the new manual or policy has become part of a modified employment contract. *Id.* at 228, 685 P.2d 1081. "To establish a modification, the party asserting the modification must show, through the [words] [or] [conduct] of the parties, that there was an agreement of the parties on all essential terms of the contract modification, and that the parties intended the new terms to alter the contract." See *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 523-24, 826 P.2d 664 (1992); *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991).

The second exception to the terminable at-will character of employment exists where "an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship." *Thompson*, 102 Wn.2d at 230, 685 P.2d 1081 (emphasis omitted). In recognizing this exception, the *Thompson* court observed that an employer can write policies using language that "may not amount to promises of specific treatment and merely be general statements of company policy and thus, not binding." *Id.* at 231, 685 P.2d 1081. "Moreover, the employer may . . . write them in a manner that retains discretion to the employer." *Id.* The elements of a justifiable reliance claim are (1) a promise contained in an employee manual or handbook or the like, (2) the employee's justifiable reliance, and (3) breach by the employer. *DePhillips*, 136 Wn.2d at 35, 959 P.2d 1104. "In particular, the justifiable reliance element takes the claim out of the traditional contract realm." *Id.*

Prior use of progressive discipline outlined in a manual or handbook does not obligate the employer to follow the procedure in the future. *McClintock v. Timber Products Mfrs., Inc.*, 105 Wn. App. 914, 21 P.3d 328 (2001).

An employment relationship will not be modified with the establishment of an implied employment contract based "solely [on the] employee's subjective understanding or expectations as to his or her employment." *Parker v. United Airlines, Inc.*, 32 Wn. App. 722, 649 P.2d 181 (1982) (citing *Lasser v. Grunbaum Bros. Furniture Co.*, 46 Wn.2d 408, 281 P.2d 832 (1955)).

## 2. Provisions Regarding Fair Treatment

In the absence of a written employee handbook, oral promises or representations of continued employment by a "supervisor are insufficient to [create] an enforceable promise." *Drobny v. Boeing Co.*, 80 Wn. App. 97, 907 P.2d 299 (1995). For an oral promise to be enforceable as an employment contract modification of the at-will doctrine, "the employee must have specifically bargained for job security requiring termination only for cause." *Hill v. J.C. Penney, Inc.*, 70 Wn. App. 225, 852 P.2d 1111 (1993) (citing *Siekawitch v. Wash. Beef Producers, Inc.*, 58 Wn. App. 454, 461-62, 793 P.2d 994 (1990)).

### 3. Disclaimers

A disclaimer that the handbook or policy does not create a contract or alter employment at-will must be effectively communicated to employees, though it is generally a question of fact whether the disclaimer is effective. *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 826 P.2d 664 (1992); *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 914 P.2d 102 (1996).

“[W]hether an employment policy manual issued by an employer contains a promise of specific treatment in specific situations, whether the employee justifiably relied on the promise, and whether the promise was breached are questions of fact.” *Burnside v. Simpson Paper Co.*, 123 Wash.2d 93, 104-05, 864 P.2d 937 (1994). See also *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516, 404 P.3d 464 (2017) (reversing grant of summary judgment in favor of employer, finding that there were genuine issues of material fact as to whether a corrective action policy with discretionary language modified employee’s at will status). In some cases, however, Washington courts have held, as a matter of law, that an employee handbook with discretionary language does not create an enforceable promise of specific treatment. E.g., *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 95, 993 P.2d 259 (2000) (nature of performance evaluation was discretionary); *Quedado v. Boeing Co.*, 168 Wn. App. 363, 372, 276 P.3d 365 (2012) (company policies did not promise that it would adhere to a matrix of recommended disciplinary sanctions); *Drobny v. Boeing Co.*, 80 Wn. App. 97, 105, 907 P.2d 299 (1995) (policy retained employer's discretion to discharge employees without progressive discipline); *McClintick v. Timber Prods. Mfg., Inc.*, 105 Wn. App. 914, 922, 21 P.3d 328 (2001) (employment guidebook contained “no terms such as ‘shall,’ ‘will,’ or ‘must’ that indicate the practice is mandatory”).

### 4. Implied Covenants of Good Faith and Fair Dealing

Washington courts have specifically rejected the concept that an implied covenant of good faith and fair dealing exists in every employment relationship, so as to limit the employer’s ability to terminate an employee at-will. *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 27 P.3d 1172 (2001).

#### B. Public Policy Exceptions

##### 1. General

“The tort for wrongful discharge in violation of public policy is a narrow exception to the at-will doctrine.” *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 258, 359 P.3d 746 (2015); *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991); *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232–33, 685 P.2d 1081 (1984). “To state a cause of action, the plaintiff must plead and prove that his or her termination was motivated by reasons that contravene an important mandate of public policy.” *Becker*, 118 Wn.2d 46, 821 P.2d 18. The tort is limited to cases involving “very clear violations of public policy,” i.e., where the policy is “judicially or legislatively recognized.” *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 276, 358 P.3d 1139 (2015). The reason the tort is limited is to “protect employers from having to defend against amorphous claims of public policy violations and address the employers’

legitimate concern that a broad common law tort would considerably abridge their ability to exercise discretion in managing and terminating employees.” *Id.*

Claims for termination in violation of public policy have generally been limited to four scenarios:

- (1) where employees are fired for refusing to commit an illegal act;
- (2) where employees are fired for performing a public duty or obligation, such as serving on jury duty;
- (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and
- (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistle blowing.

*Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996).

When a plaintiff alleges wrongful discharge in violation of public policy that does not fit neatly into one of the four recognized categories *supra*, Washington courts will apply a four-part framework to determine whether plaintiff is able to state a claim. *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 723, 425 P.3d 837, 843 (2018) (citing HENRY H. PERRITT JR., *WORKPLACE TORTS: RIGHTS AND LIABILITIES* (1991)). This framework, known as the “Perritt framework,” has four factors:

- (1) The plaintiffs must prove the existence of a clear public policy (the clarity element).
- (2) The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the jeopardy element).
- (3) The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the causation element).
- (4) The defendant must not be able to offer an overriding justification for the dismissal (the absence of justification element).”

*Id.* at 723, 425 P.3d at 843. “[T]he Peritt framework does not apply to a claim that falls within one of the four categories of wrongful discharge in violation of a public policy.” *Id.* at 723-24, 425 P.3d at 843.

## 2. Exercising a Legal Right

An exception to the at-will employment doctrine is created where an employer discharges an employee because of age, sex, marital status, sexual orientation, race, creed, color, national

origin, honorably discharged veteran or military status, 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 49.60.180(1).

Although Chapter 49.60 RCW applies only to employers with eight (8) or more employees, even if an employer has fewer than eight (8) employees, an employee may maintain a common law claim for wrongful discharge in violation of public policy. *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000); *Wahl v. Dash Point Family Dental Clinic, Inc.*, 144 Wn. App. 34, 181 P.2d 864 (2008).

A claim for wrongful termination in violation of public policy may also exist where an employee is discharged in retaliation for exercising his or her legal right, such as pursuing workers' compensation benefits under Title 51 RCW, filing a discrimination claim under the RCW 49.60, or engaging in union organizing activity. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991); *Allison v. Hous. Auth.*, 118 Wn.2d 79, 821 P.2d 34 (1991); *City of Fed. Way v. Pub. Employment Relations Comm'n*, 93 Wn. App. 509, 970 P.2d 752 (1998).

Washington courts have not found a public policy implicated when an employee was allegedly terminated for:

- (1) medical marijuana use, *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wn.2d 736, 759, 257 P.3d 586, 597 (2011);
- (2) pregnancy and pregnancy-related issues (as the public policy in favor of protecting pregnant employees from discrimination is adequately protected by statute), *Lee v. Rite Aid Corp.*, 917 F. Supp. 2d 1168, 1175 (E.D. Wash. 2013);
- (3) having a relative with a disability, *Sedlacek v. Hillis*, 145 Wn.2d 379, 393, 36 P.3d 1014, 1021 (2001).

### 3. Refusing to Violate the Law

A public policy exception to at-will employment exists when an employee is terminated for refusing to violate the law and/or reporting the employer's violation of the law. *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989). The court considers not only whether the employer violated the letter of the law but also whether the employee sought to further the public good as opposed to the employee's own private interest in reporting the wrongdoing. Id.

### 4. Exposing Illegal Activity (Whistleblowers)

As an exception to the employment-at-will doctrine, an employer may not discharge an employee in retaliation for whistleblowing activity. *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 259, 359 P.3d 746, 749 (2015) (holding that trial court properly denied motion to dismiss plaintiff's wrongful termination in violation of public policy claim because federal statutes, including Dodd-Frank and Sarbanes-Oxley, do not provide exclusive remedies to

whistleblowers); *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 724, 425 P.3d 837, 843 (2018) (affirming summary judgment dismissal of alleged whistleblower claim because former employee failed to show that his act of advocating for student safety at a university fitness center constituted a “clear mandate of public policy”).

### **III. CONSTRUCTIVE DISCHARGE**

“Washington law does not recognize a cause of action for constructive discharge; rather the law recognizes an action for wrongful discharge which may be either express or constructive.” *Snyder v. Med. Serv. Corp. of E. Washington*, 145 Wn.2d 233, 238, 35 P.3d 1158, 1161 (2001). Constructive discharge occurs where an employer forces an employee to quit by making working conditions intolerable. *Martini v. Boeing Co.*, 88 Wn. App. 442, 945 P.2d 248 (1997). The test for constructive discharge is:

- (1) employer deliberately made the working conditions intolerable for the employee (may be demonstrated through aggravating circumstances or a continuous pattern of discriminatory treatment);
- (2) a reasonable person in the employee's position would be forced to resign;
- (3) the employee resigned solely because of the intolerable conditions; and
- (4) the employee suffered damages.

*Wahl v. Dash Point Family Dental Clinic, Inc.*, 144 Wn. App. 34, 181 P.2d 864 (2008).

It is the act, not the result, which must be deliberate. *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 637, 700 P.2d 338 (1985). Whether conditions are intolerable is a question of fact. *Bulaich v. AT & T Info. Sys.*, 113 Wn.2d 254, 261–62, 778 P.2d 1031 (1989). The “intolerable” element can be shown by aggravated circumstances or a pattern of conduct. *Sneed v. Barna*, 80 Wn. App. 843, 850, 912 P.2d 1035 (1996). Additionally, the employee must show that she resigned because of the conditions and not for some other reason, like finding a better job. *Glasgow v. Georgia–Pacific Corp.*, 103 Wn.2d 401, 408, 693 P.2d 708 (1985).

Resignations are presumed voluntary, and the burden is on the employee to introduce evidence to rebut this presumption. *Sneed v. Barna*, 80 Wn. App. 843, 849, 912 P.2d 1035, 1039 (1996).

### **IV. WRITTEN AGREEMENTS**

#### **A. Standard “For Cause” Termination**

Written employment contracts may be formal documents, but even informal letters may be considered written agreements. Collective Bargaining Agreements are also written contracts of employment. Employment agreements may govern other terms of the employment

relationship but maintain that employment remains at-will. Conversely, employment agreements may require that termination be for cause only, in which case the employer has agreed to give up its right to terminate employees at-will.

## B. Status of Arbitration Clauses

“The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, applies to all employment contracts except for employment contracts of certain transportation workers.” *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301, 103 P.3d 753, 758 (2004) (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001)). Courts must indulge every presumption “in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.* at 301-02. Although federal and state courts presume arbitrability, “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.” *Id.* at 302.

The enactment of the FAA appears to have superseded Washington case law that held that an employment arbitration agreement was not enforceable when the employee sued for wrongful termination. *E.g., Young v. Ferrellgas, L.P.*, 106 Wn. App. 524, 21 P.3d 334 (2001); *Wilson v. City of Monroe*, 88 Wn. App. 113, 943 P.2d 1134 (1997).

The trend since the enactment of the FAA is to enforce employment arbitration agreements, but to strike any unconscionable, and severable, provisions. *See, e.g., Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301, 103 P.3d 753, 758 (2004); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004). For example, in *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 330, 211 P.3d 454, 462 (2009), the Court of Appeals held that the plaintiff’s wage and hour claims were properly subject to arbitration. But the Court of Appeals also found provisions of the arbitration agreement requiring arbitration take place in Colorado and that the plaintiff pay the employer’s attorney fees if he did not prevail to be unconscionable. *Id.* The Court of Appeals severed these provisions from the agreement and ordered the case to proceed to arbitration. *Id.*

## V. ORAL AGREEMENTS

### A. Promissory Estoppel

Parties may enter into oral employment agreements. Absent express oral agreements, however, plaintiff employees may claim that promissory estoppel nevertheless entitles them to certain promised terms of employment. The elements of promissory estoppel are:

- (1) A promise which
- (2) the promisor should reasonably expect to cause the promisee to change his position and
- (3) which does cause the promisee to change his position
- (4) justifiably relying upon the promise, in such a manner that
- (5) injustice can be avoided only by enforcement of the promise.

*Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 424 P.2d 290 (1967); *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 992 P.2d 511 (1999).

## B. Fraud

The nine elements of fraud in the employment context are the same as for any other tort claim for fraud, and they are:

- (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

*Stiley v. Block*, 130 Wn.2d 486, 925 P.2d 194 (1996). Each element must be proven with clear and convincing evidence. *Id.*

## C. Statutes of Frauds

Employment agreements for employment for a specified duration of more than one year must be in writing under the Washington statute of frauds. RCW 19.36.010; *Greaves v. Med. Imaging Sys.*, 124 Wn.2d 389, 879 P.2d 276 (1994).

# VI. DEFAMATION

## A. General Rule

To be successful in a defamation claim in the employment context, a plaintiff must show that the employer's conduct met the following elements:

- (1) Falsity of the statements made by employer;
- (2) An unprivileged publication to a third party;
- (3) Fault (negligence, if employee is a private figure); and
- (4) Damages.

*Klontz v. Puget Sound Power & Light Co.*, 90 Wn. App. 186, 951 P.2d 280 (1998) (citing *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981)).

### 1. Libel

The test for libel (defamation in a fixed form, such as writing) is the same as the standard test for defamation.

## 2. Slander

The test for slander (defamation in a transitory form, such as speech) is the same as the standard test for defamation.

### B. References

Employers have limited immunity from liability in disclosing employee information to prospective employers. RCW 4.24.730. An employer who discloses information about a former or current employee is immune from civil and criminal liability if the information relates to: (a) the employee's ability to perform the job; (b) the employee's diligence, skill, or reliability in performing the job; or (c) if the information relates to any illegal act committed in fulfillment of the duties of the job. RCW 4.24.730(1).

The employer is advised to keep a written record of the identity of persons or entities to whom the disclosure is made for a period of two years. If a written record is made, the record must be included in the employee's personnel file, and the employee has a right to inspect the record. RCW 4.24.730(2); *see also* RCW 49.12.250; *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 730-31, 425 P.3d 837, 846-47 (2018) (holding that employee must pursue an administrative request through the Department of Labor and Industry before seeking a judicial remedy (for requesting employment file) from the court).

The employer is presumed to be acting in good faith, a presumption that can be rebutted only by showing clear and convincing evidence that the information was knowingly false, deliberately misleading, or made with reckless disregard for the truth. RCW 4.24.730(3).

### C. Privileges

An absolute privilege or immunity is said to absolve the employer of all liability for defamatory statements. *Bender v. Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983). This is confined to cases in which the public service and administration of justice require complete immunity, such as when an employer is acting as a witness or party in a judicial proceeding. *Id.*

If a conditional— or qualified—privilege exists, there is no defamation. In *Lawson v. Boeing Co.*, 58 Wn. App. 261, 792 P.2d 545 (1990), the Washington Court of Appeals applied a conditional privilege to statements made during the course of a sexual harassment investigation because those statements were made in furtherance of a common interest to the employer and the individuals making the statements. Lawson, who was the subject of the sexual harassment investigation, brought a defamation action against the employer. Noting that conditional privilege is routinely applied to complaints of sexual harassment and that Lawson did not show actual malice or abuse in the conduct of the investigation, the court dismissed the defamation claim on summary judgment. *Id.*; *see also Klontz v. Puget Sound Power & Light Co.*, 90 Wn. App. 186, 951 P.2d 280 (1998). However, a conditional or qualified privilege may be lost if the employee can demonstrate the privilege was abused. *Bender v. Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983).

## D. Other Defenses

### 1. Truth & Consent

Truth is an absolute defense to defamation. *Maison de France, Ltd. v. Mais Oui!, Inc.*, 126 Wn. App. 34, 45, 108 P.3d 787, 794 (2005). The statements need not be literally true to defeat the claim of defamation - it is sufficient that the statements are “substantially true or that the gist of the story, the portion that carries the ‘sting,’ is true.” *Mark v. Seattle Times*, 96 Wn.2d 473, 494, 635 P.2d 1081 (1981).

### 2. No Publication

An element of defamation is publication to a third party. *Schmalenberg v. Tacoma News*, 87 Wn. App. 579, 943 P.2d 350 (1997). Therefore, no defamation exists if no publication was made.

### 3. Self-Publication

There is no publication, and therefore no defamation, where the defamatory statements were communicated to a third person by the plaintiff him/herself. *Lunz v. Neuman*, 48 Wn.2d 26, 290 P.2d 697 (1955); *Hill v. J.C. Penney, Inc.*, 70 Wn. App. 225, 852 P.2d 1111 (1993).

### 4. Invited Libel

Washington has not recognized an invited libel doctrine.

### 5. Opinion

“A threshold requirement of defamation is that the alleged defamatory statement be a statement of fact and not just opinion.” *Davis v. Fred's Appliance, Inc.*, 171 Wn. App. 348, 365, 287 P.3d 51, 60 (2012) (subsequent citation omitted). “But the line between fact and opinion is sometimes blurry.” *Id.* “So there is a three-part test to determine whether a statement is actionable.” *Id.* (subsequent citation omitted). The factfinder must consider: “(1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts.” *Id.*

Statements of opinion, which cannot form the basis of a defamation claim, are “more likely in certain contexts.” *Id.* For example, “[t]he workplace can be a place that invites exaggeration and personal opinion.” *Id.* (internal quotation marks and subsequent citation omitted). Statements are also generally opinion in the context of public debate or circumstances in which an “audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole.” *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 41, 723 P.2d 1195 (1986) (internal quotation marks and subsequent citation omitted).

## E. Job References and Blacklisting Statutes

It is a misdemeanor in Washington to “willfully and maliciously” publish a statement that has the purpose of preventing another individual from obtaining or maintaining employment. RCW 49.44.010. RCW 49.44.010 “allows a civil cause of action for blacklisting.” *Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn. App. 502, 515, 278 P.3d 197 (2012).

F. Non-Disparagement Clauses

Non-disparagement clauses are generally enforceable in Washington. *Moore v. Blue Frog Mobile, Inc.*, 153 Wn. App. 1, 4, 221 P.3d 913, 914 (2009). In *Moore*, the employer, Blue Frog, terminated the plaintiff, Moore, but agreed to pay Moore according to the terms of a severance agreement, which included a non-disparagement clause. *Id.* at 4-5. Blue Frog later concluded that Moore breached the non-disparagement clause by submitting a declaration in a third party’s litigation against Blue Frog and stopped paying Moore as required by the severance agreement. *Id.* Moore sued Blue Frog for wrongful withholding of wages. *Id.* at 5. The trial court granted summary judgment in favor of Moore. *Id.* at 5-6. The Court of Appeals, however, reversed, concluding that, in light of the language of the non-disparagement clause, there was a bona fide dispute over Moore’s entitlement to wages and genuine issues of material fact precluded summary judgment. *Id.* at 8-10.

**VII. EMOTIONAL DISTRESS CLAIMS**

Washington courts generally will not recognize emotional distress for pure breach of employment contract claims. *Gaglidari v. Denny’s Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991); *see also Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 154-55, 43 P.3d 1223 (2002) (“Unlike wrongful discharge, a breach of contract is neither immoral nor wrongful; it is simply a broken promise.”).

This is not to say, however, that an action for emotional distress will not lie in the instance of any wrongful discharge, such as discharge in violation of public policy. *Wahl v. Dash Point Family Dental Clinic, Inc.*, 144 Wn. App. 34, 181 P.2d 864 (2008).

A. Intentional Infliction of Emotional Distress

The tort of intentional infliction of emotional distress, or outrage, was thoroughly discussed in the employment context in *Snyder v. Med. Serv. Corp. of E. Wash.*, 98 Wn. App. 315, 988 P.2d 1023 (1999), *aff’d* 145 Wn.2d 233, 35 P.3d 1158 (2001).

Snyder was a social work case manager at Medical Service Corporation of Eastern Washington (MSC). After an altercation with her supervisor where the supervisor poked Snyder in the chest with her finger, Snyder took a doctor ordered medical leave for anxiety. She subsequently informed MSC that she suffered from depression and post-traumatic stress disorder, for which she had been under medical treatment for over ten years. Snyder agreed to return to work at MSC, so long as she could be transferred to another supervisor. MSC refused to accommodate her request. Snyder accepted a position with another company and sued MSC for intentional and negligent infliction of emotional distress.

For her intentional infliction of emotional distress claim, the court required Snyder to show:

- (1) extreme and outrageous conduct;
- (2) intentional or reckless infliction of emotional distress; and
- (3) actual result to the plaintiff of severe emotional distress.

*Id.* at 1027 (citing *Birkliid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995)); *see also Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 P.3d 611 (2002).

This tort is intended to discourage conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community” *Id.* (internal quotation marks and subsequent citation omitted); *see also Kloepfel v. Bokor*, 149 Wn.2d 192, 66 P.3d 630 (2003).

The *Snyder* Court considered the following factors in determining the outrageousness of the defendant’s conduct:

- (1) The position occupied by the defendant;
- (2) Whether the plaintiff was particularly susceptible to emotional distress, and if the defendant knew this fact;
- (3) Whether defendant’s conduct may have been privileged under the circumstances;
- (4) Whether the degree of emotional distress caused by a party was severe as opposed to mere annoyance, inconvenience, or normal embarrassment; and
- (5) Whether the actor was aware that there was a high probability that his or her conduct would cause severe emotional distress and proceeded in a conscious disregard of it.

*Snyder*, 98 Wn. App. at 322, 988 P.2d at 102.

Applying these factors to the above facts, the *Snyder* Court found that the conduct of Snyder’s supervisor did not reach the level of “outrageous conduct”, reasoning in part that no one at MSC was aware of Snyder’s particular emotional sensitivity. *Id.*

In *Mikkelsen v. Pub. Util. Dist. # 1 of Kittitas Cty.*, 195 Wn. App. 922, 949, 380 P.3d 1260, 1272 (2016), *rev’d on other grounds*, 189 Wn.2d 516, 404 P.3d 464 (2017), the Washington Court of Appeals affirmed summary judgment dismissal of a plaintiff’s intentional

infliction of emotion distress claim premised on her alleged wrongful termination. The Court of Appeals noted: “Losing a long-term job and being unfavorably described by a former employer could, of course, be upsetting, but that and the other conduct about which [plaintiff] complains amount, at most, to indignities, annoyances, rough language, unkindness, or lack of consideration. They are not beyond all possible bounds of decency.” *Id.*

#### B. Negligent Infliction of Emotional Distress

The traditional elements of negligence will govern negligent infliction of emotional distress claims. Those elements are the existence of a duty, breach, proximate cause, and damages. *Snyder*, 98 Wn. App. at 322, 988 P.2d at 102. In the employment context, a plaintiff must show:

- (1) that his/her employer’s negligent acts resulted in injury to him/her;
- (2) the acts were not a workplace dispute or employee discipline;
- (3) the injury is not preempted by the Industrial Insurance Act; and
- (4) the negligence claim is dominated by the emotional injury.

*Snyder*, 98 Wn. App. at 323, 988 P.2d at 1028 (subsequent citations omitted).

However, the plaintiff in a claim for negligent infliction of emotional distress must demonstrate that the emotional distress is manifested by objective physical symptoms such that the emotional distress must be susceptible to medical diagnosis and proved through medical evidence. *Hagel v. McMahon*, 136 Wn.2d 122, 960 P.2d 424 (1998). Thus, there must be objective evidence regarding the severity of the distress and the causal link between the actions of the employer and the subsequent emotional reaction of the employee. *Id.*

### **VIII. PRIVACY RIGHTS**

#### A. Generally

The Washington State Supreme Court recognizes a common law cause of action for invasion of privacy. *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998). There are two variations on the tort of invasion of privacy: (1) invasion of privacy by intrusion on seclusion, and (2) invasion of privacy by publication. *Fisher v. State ex rel. Dep't of Health*, 125 Wn. App. 869, 878-79, 106 P.3d 836 (2005). “Invasion of privacy by intrusion consists of a deliberate intrusion, physical or otherwise, into a person's solitude, seclusion, or private affairs.” *Id.* at 879. Invasion of privacy by publication “requires publicizing the private affairs of another if the matter publicized would be highly offensive to a reasonable person.” *Id.* (citing, inter alia, Restatement (Second) of Torts § 652D (1977)). Intent is an essential element of intrusion on seclusion, but not invasion of privacy by publication. *Id.* at 879-80.

In *White v. Town of Winthrop*, 128 Wn. App. 588, 166 P.3d 1034 (2005), an employee sued his employer for invasion of privacy by publication after a local newspaper, based on an interview with the employer, published a story about the employee suffering from epilepsy. The Court of Appeals reversed a grant of summary judgment in favor of the employer, finding that genuine issues of material fact precluded summary judgment.

When an employee's supervisor publicizes the private affairs of an employee, but the publication occurs outside of the scope of the supervisor's employment, the employee's invasion of privacy by publication against his employer fails as a matter of law. *Emeson v. Dep't of Corr.*, 194 Wn. App. 617, 641, 376 P.3d 430 (2016). In *Emeson*, the plaintiff-employee sued his employer after the employee's supervisor posted a Facebook comment that mentioned the employee had been transferred to her office because of a reasonable accommodation. *Id.* at 623. The trial court dismissed the employee's invasion of privacy by publication claim and the Court of Appeals affirmed. *Id.* at 624-25, 640-41. The Court of Appeals reasoned that the invasion of privacy claim could not be imputed on the employer because the supervisor's conduct was outside the scope of her employment, i.e., she was not fulfilling her job function when she was engaged in the injurious conduct. *Id.* at 641.

## B. New Hire Processing

### 1. Eligibility Verification and Reporting Procedures

Washington State law requires employers to report all new hires regardless of age, gender or number of hours worked. The requirement also applies to re-hires, if the employee has not worked with the company within the past 60 days. Employers are required to report within 20 days of hire. RCW 26.23.040. The reports must include the employees name, address, social security number, date of birth, date of hire, company name, company address and Federal Employer Identification Number.

### 2. Background Checks

Background checks are not required in Washington.

## C. Other Specific Issues

### 1. Workplace Searches

Private employers are not prohibited from searching on the employer's property, including employee's personal property that is brought to work, such as personal property in lunch boxes or lockers. A written policy, however, should explain to employees that the employer does have this right.

Public employers may be more restricted in searching, because public employees enjoy constitutional privacy protections to which private employees are not entitled.

### 2. Electronic Monitoring

There is no law in Washington prohibiting employers from monitoring employees via video cameras or other means. Additionally, computer, e-mail and telephone use may be monitored. Before any monitoring, employees should be notified, via employer policy, that they do not have privacy rights in any information contained on the employer's computer system or transmitted via the employer's telephone or computer system.

### 3. Social Media

Washington State law prohibits employers from demanding that employees or job candidates surrender their usernames or passwords to Facebook, Twitter, or other social networks, as well as from requiring employees to add managers as friends or contacts. RCW 49.44.200. Employers cannot punish employees for refusing to disclose this personal information. *Id.*

### 4. Taping of Employees

A Washington statute prohibits recording private communications without the participants' consent. RCW 9.73.030; *see also Smith v. Employment Security Department*, 155 Wn. App. 24, 39, 226 P.3d 263 (2010) (holding that conversations between public employees in an office were private as a matter of law). Therefore, while employers may monitor employees, they may not record such monitoring. A violation of RCW 9.73.030 "requires exclusion of 'all evidence' of the contents of the illegally recorded conversations." *Marin v. King Cty.*, 194 Wn. App. 795, 806, 378 P.3d 203, 211 (2016) (citing, *inter alia*, RCW 9.73.050) (excluding recordings secretly made by employee during conversations with supervisor).

### 5. Release of Personal Information on Employees

An employer that discloses information about a current or former employee to a prospective employer or an employment agency, at the employer or agency's specific request, is presumed to be acting in good faith and is immune from civil or criminal liability, but only if the disclosure is limited to one of the following: the employee's ability to perform the job, the employee's diligence, skill, or reliability in carrying out his or her duties, or any illegal or wrongful act committed by the employee that is related to the duties of his or her job. RCW 4.24.730.

### 6. Medical Information

Privacy protection for medical information in Washington is consistent with the federal HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA), and corresponding regulations.

### 7. Restrictions on Requesting Salary History

Under Washington's Equal Pay Opportunity Act, taking effect June 7, 2018, employers must ensure equal compensation between "similarly situated" employees. RCW 49.58.020(1).

An employee's previous wage or salary history is not a defense to a claim of unequal pay. RCW 49.58.020(3)(d).

## **IX. WORKPLACE SAFETY**

### **A. Negligent Hiring**

Negligent hiring or retention and negligent supervision or training are recognized causes of action in Washington. *Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 43–44, 747 P.2d 1124 (1987). An employer can be liable for negligent hiring or retention for failing to exercise ordinary care by hiring or retaining an employee known to be unfit. *Peoples v. Puget Sound's Best Chicken!, Inc.*, 185 Wn. App. 691, 701, 345 P.3d 811 (2015).

Liability arises when the employer knows or has reason to know that the employee presented a risk of danger to others. *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 48–49, 929 P.2d 420 (1997). The employer has a duty to “prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others.” *Id.* at 48, 929 P.2d 420.

The causes of action for negligent hiring, retention, supervision and training are analytically different from vicarious liability. *Id.* These claims arise when the employee is acting outside the scope of employment. *Id.* at 51, 929 P.2d 420. They are based on the concept that the employer's own negligence is a wrong to the injured party, independent from the employer's liability for its employee's negligence imputed by the doctrine of respondeat superior. *Id.* at 48, 929 P.2d 420. In fact, an injured party generally cannot assert claims for negligent hiring, retention, supervision or training of an employee when the employer is vicariously liable for the employee's conduct. *LaPlant v. Snohomish County*, 162 Wn. App. 476, 479–80, 271 P.3d 254 (2011).

An employer's duty relating to the hiring, retention, supervision and training of employees is owed to “foreseeable victims.” *Niece*, 131 Wn.2d at 48, 929 P.2d 420; *see also Smith v. Sacred Heart Med. Ctr.*, 144 Wn. App. 537, 544, 184 P.3d 646 (2008); *Betty Y. v. Al-Hellou*, 98 Wn. App. 146, 149, 988 P.2d 1031 (1999). “[F]oreseeability requires that the alleged harm fall within the general field of danger.” *Smith*, 144 Wn. App. at 544, 184 P.3d 646.

### **B. Negligent Supervision/Retention**

*See* Section IX(A), *supra*. The standards applicable to a claim of negligent supervision/retention are the same as a claim for negligent hiring. The only difference is the timing of the act giving rise to the claim. Negligent hiring occurs at the time of hiring, while negligent retention occurs in the course of employment. *Peck v. Siau*, 65 Wn. App. 285, 288, 827 P.2d 1108 (1992).

### **C. Interplay with Workers' Compensation Bar**

Employers are generally immune from claims arising from employees' workplace injuries. RCW 51.04.010; RCW 51.32.015. “An employee injured by a coworker's negligence is

limited to the remedies provided by Washington's worker's compensation system [(RCW 51.04.010; RCW 51.32.010; RCW 51.32.015)]; she may not sue the coworker for his negligence.” *Brown v. Labor Ready Nw., Inc.*, 113 Wn. App. 643, 647, 54 P.3d 166(2002). “She may, however, sue a third party ‘not in the same employ.’” *Id.*

D. Firearms in the Workplace

Both private and public employers may generally prohibit employees from carrying firearms or other weapons on the job. They may also prohibit the possession of firearms on employer-owned property, including employer-owned parking garages and lots.

E. Use of Mobile Devices

Restrictions on the use of mobile devices provided by employers to employees is individualized by company policies.

**X. TORT LIABILITY**

A. Respondeat Superior Liability

Vicarious liability, otherwise known as the doctrine of respondent superior, imposes liability on an employer for the torts of an employee who is acting on the employer's behalf – *i.e.*, within the scope of his or her employment and in furtherance of the employer's business. Where the employee steps aside from the employer's purposes in order to pursue a personal objective of the employee, the employer is not vicariously liable. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997); *Kuehn v. White*, 24 Wn. App. 274, 277, 600 P.2d 679 (1979).

Employers that are places of public accommodations are directly, and strictly, liable for acts of discrimination (including acts of sexual harassment against customers of public accommodation) committed by their employees. *Floeting v. Grp. Health Coop.*, 434 P.3d 39, 40 (Wash. 2019)

B. Tortious Interference with Business/Contractual Relations

The elements of the tort of interference with a contractual relationship are: (1) existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy by the alleged interfering party; (3) intentional interference that induces or causes breach or termination of the relationship or expectancy; and (4) resultant damage. *Plumbers & Steamfitters Union v. Wash. Public Power Supply Sys.*, 44 Wn. App. 906, 724 P.2d 1030 (1986).

Even if all four elements are present, however, interference is justified as a matter of law if the interferer has engaged in the exercise of an absolute right equal or superior to the right that has been invaded. *Id.*; *Joy v. Kaiser Aluminum & Chem. Corp.*, 62 Wn. App. 909, 816 P.2d 90 (1991). This exception was applied in *Plumbers & Steamfitters*, where discharged workers who were denied access to a work site sued their former employer for tortious interference with the

employment contract. The action was dismissed because the employer had both common law and statutory rights to protect its property by precluding access by unauthorized people. *Id.*

## **XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS**

### **A. General Rule**

Non-competition provisions are valid in employment agreements, if their terms are reasonable:

Whether a covenant is reasonable involves a consideration of three factors: (1) whether restraint is necessary for the protection of the business or goodwill of the employer, (2) whether it imposes upon the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill, and (3) whether the degree of injury to the public is such loss of the service and skill of the employee as to warrant nonenforcement of the covenant.

*Perry v. Moran*, 109 Wn.2d 691, 748 P.2d 224 (1987) (internal quotation omitted).

The general rule in Washington is that consideration exists for a non-competition agreement only if the employee enters into the non-competition agreement when he or she is first hired. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004). If a non-competition agreement for an employee is entered into subsequent to employment, independent consideration is required. *Id.* In most cases, continued employment and routine training will not supply the independent consideration needed. *Id.* However, supplemental consideration such as promised future employment, specialized training, increased wages or disclosure of confidential information of value to an employee in most cases will suffice. *Id.*; *see also McKasson v. Johnson*, 178 Wn. App. 422, 315 P.3d 1138 (2013).

### **B. Blue Penciling**

The “blue pencil test” is the rule in Washington. *SPEEA v. Boeing, Co.*, 139 Wn.2d 824, 991 P. 2d 1126 (2000). This means that one or more contract provisions that are contrary to law may be rescinded simply by crossing them out, while leaving the remainder of the contract in effect. In application, this allows an employment contract to remain substantially valid, even if one or more provisions are found to be contrary to law.

### **C. Confidentiality Agreements**

Confidentiality agreements are allowed, and often included, in Washington employment contracts. A promise of employment and job experience is sufficient consideration in exchange for a confidentiality agreement from an employee. *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 828 P.2d 73 (1992), *overruled on other grounds Waterjet Tech., Inc. v. Flow Intern. Corp.*, 140 Wn.2d 313, 996 P.2d 598 (2000).

### **D. Trade Secrets Statute**

The Washington Trade Secrets Act is contained in RCW Chapter 19.108. Employers may receive injunctions to prevent employees from using trade secrets, client lists, or other confidential information, to the employer's detriment. WASH. REV. CODE § 19.108.010 *et seq.* Employers may also receive monetary damages to compensate for loss caused by the misappropriation of a trade secret. WASH. REV. CODE § 19.108.030; *see also Petters v. Williamson & Assoc., Inc.*, 151 Wn. App. 154, 165, 210 P.3d 1048 (2009) (observing that damages are traditionally calculated by determining the profits on sales attributed to the use of the trade secrets).

E. Fiduciary Duty and Their Considerations

Washington case law has not addressed restrictive covenants/non-compete agreements in the context of fiduciary duties.

**XII. DRUG TESTING LAWS**

A. Public Employers

Public employers are very limited in drug testing because public employees are constitutionally protected from unreasonable searches. In *Robinson v. City of Seattle*, 102 Wn. App. 795, 10 P.3d 452 (2000), the court concluded that pre-employment drug testing of public employees may only be done with a warrant or under some common law exception to the warrant requirement. *Id.* at 813, 10 P.3d 462. After evaluating common law exceptions for warrantless searches, the court concluded that it would only be reasonable for the city to test applicants or employees whose duties implicate public safety, such as police and fire personnel. *Id.* at 828, 10 P.3d 470.

Various classes of employers and/or employees may be subject to federal drug testing laws that allow for testing that would not otherwise be allowed in Washington. Among these are federal contractors, nuclear workers, and transportation workers.

B. Private Employers

Private employers in Washington may conduct drug testing of employees. Although most employers conduct only for-cause drug testing, the Washington Court of Appeals has upheld a private employer's decision to terminate an at-will employee for her failure to submit to a random drug test. *Roe v. Quality Transp. Services*, 67 Wn. App. 604, 838 P.2d 128 (1992). Private employers may also conduct pre-employment drug testing, but only after a conditional offer of employment has been extended. The conditional offer may be withdrawn if the applicant tests positive or refuses to be tested.

### **XIII. STATE ANTI-DISCRIMINATION STATUTE(S)**

#### **A. Employers/Employees Covered**

Washington's Law Against Discrimination (WLAD) applies only to employers with eight (8) or more employees. RCW 49.60. Additionally, even if they employ eight (8) or more people, religious nonprofit organizations are exempt from the WLAD. *Id.*

#### **B. Types of Conduct Prohibited**

WLAD prohibits discrimination in hiring, discharge, or any other employment terms or conditions based on age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, disability, or use of a trained dog guide or service animal by a person with a disability. RCW 49.60.030 - .180.

Prior to 2007, the Washington State Supreme Court adopted the definition of "disability" used by the Americans with Disabilities Act and interpreting federal case law to evaluate claims of disability discrimination under the WLAD. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). To be disabled under this definition, the employee was required to have a physical or mental impairment that substantially limited one or more major life activity, a record of such an impairment, or be regarded as having such an impairment. *Id.* However, in 2007, the Washington legislature enacted amendments rejecting the *McClarty* decision, removing any requirement that employees filing WLAD claims had to show their disabilities impair performance of "major life activities" and making the definition of disability under Washington law very broad. RCW 49.60.040; *see also Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 498, 198 P.3d 1021, 1023 (2009).

#### **C. Administrative Requirements**

Employees who believe they have been discriminated against under the WLAD have several options. They may file a complaint with the Washington Human Rights Commission or the federal Equal Employment Opportunity Commission, or they may commence a civil lawsuit. There is no requirement that the employee pursue administrative remedies before filing a civil lawsuit in state court alleging violation of state law. *E.g., Washington State Comm'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 202, 293 P.3d 413 (2013).

#### **D. Remedies Available**

A successful plaintiff may recover actual damages, including back pay, front pay, mental anguish, and emotional distress, prejudgment interest, plus reasonable attorneys' fees and costs. RCW 19.52.010; 49.60.030(2); 49.46.090; 49.48.030; 49.52.070; *Martini v. Boeing Co.*, 137 Wn.2d 357, 971 P.2d 45 (1999); *Clype v. Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 785, 358 P.3d 464 (2015).

Damages for wrongfully withheld wages may be doubled if the wages were willfully withheld. RCW 49.52.050, 49.52.070. Nonpayment of wages is "willful" only when it is result

of knowing and intentional action, and not the result of bona fide dispute as to an obligation of payment. *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 684 (2014). The dispute must be “bona fide,” which courts have described as a “fairly debatable” dispute over whether all or a portion of wages must be paid. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 161 (1998) (no finding of willfulness when there is a bona fide dispute over the amount of wages actually due).

#### **XIV. STATE LEAVE LAWS**

##### **A. Jury/Witness Duty**

No employee may be discharged for responding to a summons or serving on jury duty. RCW 2.36.165. An employer who intentionally violates this provision is guilty of a misdemeanor. *Id.*

##### **B. Voting**

There is no requirement that employers provide employees time off to vote.

##### **C. Family/Medical Leave**

Washington has a parental leave law similar to the Federal Family and Medical Leave Act (FMLA). RCW 49.78. The FMLA, however, is generally more beneficial to employees than Washington’s Act, so it is the FMLA that will generally apply.

Washington also has a statute providing for Family Care Leave, which is different from the FMLA. Under the Washington statute, employers who provide paid sick leave to employees must allow employees to use their paid sick leave to care for sick family members, include children under the age of 18 with health conditions requiring supervision; children with disabilities; and spouses, parents, parents-in-law, and grandparents with serious or emergency health conditions. RCW 49.12.265 - .270.

In 2017, the Washington State Legislature passed the paid family and medical leave bill. S.B. 5975 (Oct. 19, 2017).<sup>1</sup> This new law establishes a statewide insurance program that will be administered by the Washington State Employment Security Department. Beginning in 2019, the program will be funded by premiums paid by employers and employees. In 2020, it will allow workers to apply for up to 12 weeks of paid leave for personal illness, pregnancy or illness of family members. If workers experience multiple events in a given year, they may be eligible to receive up to 16 weeks, or up to 18 weeks if the employee experiences a serious health condition with a pregnancy that results in incapacity. Washington will be the fifth state in the nation to offer paid family and medical leave benefits to workers.

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<sup>1</sup>Available at <http://lawfilesexst.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/5975-S.SL.pdf> (last visited Oct. 17, 2018). See also Final Bill Report available at <http://lawfilesexst.leg.wa.gov/biennium/2017-18/Pdf/Bill%20Reports/Senate/5975-S%20SBR%20FBR%2017%20E3.pdf> (discussing background of Act and rationale for legislation).

Under S.B. 5975, employers are responsible for premium payments of 0.4% of gross wages paid. Businesses with fewer than 50 employees are not required to pay the employer portion of the premium but are required to collect and remit the employee portion of the premium and abide by all reporting requirements. Small business assistance grants are available to businesses with 50-150 employees, and businesses with fewer than 50 employees who have opted-in to the employer share of the premium. Voluntary plans are available to employers who want to manage a plan internally that meets or exceeds the state plan's requirements.

Generally, all Washington employers, including out-of-state employers with Washington employees, are required to participate with few exceptions. These exceptions are: (1) self-employed individuals (may opt-in); (2) federal employees; (3) federally recognized tribes (may opt-in); and, (4) people who work temporarily in Washington, e.g., utility worker helping after a storm.

An employee qualifies for leave by working 820 hours in the qualifying period. These hours can be earned at more than one employer. (Employers must report hours to the Employment Security Department to create an accurate record of hours worked by each employee.) This means an employee could work 20 hours a week at two employers and earn 40 hours total per week towards eligibility.

The qualifying period is the first four of the last five completed calendar quarters from the date leave is set to begin. If leave is not established with this initial period, the last four completed calendar quarters immediately preceding the application for leave will be used.

Employees are paid in proportion to their average weekly wage (AWW), up to 90%. The maximum weekly benefit amount is \$1,000—adjusted annually. The minimum weekly benefit will not be less than \$100 per week except if the employee's AWW at the time of the leave is less than \$100 per week. In that case, the weekly benefit is the employee's full wage.

#### D. Pregnancy/Maternity/Paternity Leave

A parent can take up to 12 weeks of paid or unpaid leave (depending on the employer) to care for a newborn, adopted, or foster child if she/he: works for a business with 50 or more employees and has worked at least 12 months for that business for a total of at least 1,250 hours in the preceding year. Neither Washington State nor federal law require that parents get paid leave while taking time off to care for a new child. WASH. REV. CODE § 49.78.

#### E. Day of Rest Statutes

Washington does not have a day of rest statute. Washington law does, however, require employers to provide nonexempt employees with unpaid meal breaks of at least 30 minutes and paid rest breaks of at least 10 minutes. WASH. ADMIN. CODE § 296-126-092. The meal break must be taken between the second and fifth hours of the employee's shift, and no employee may work more than five consecutive hours without a meal break. *Id.* Employees are entitled to a rest

break for every four hours of working time and may not work more than three consecutive hours without a rest break. *Id.*

F. Military Leave

Public employees are granted paid military leave of up to 21 days per year. RCW 38.40.060.

G. Sick Leave

Pursuant to Initiative 1433, as of January 1, 2018, employers in Washington must provide nearly all of their employees with paid sick leave. RCW 49.46.020(4). Under the law, employees must accrue paid sick leave at a minimum rate of 1 hour for every 40 hours worked. RCW 49.46.210(1). This includes part-time and seasonal workers. Paid sick leave must be paid to employees at their normal hourly compensation. RCW 49.46.200; RCW 49.46.200(1)(i). Employees are entitled to use accrued paid sick leave beginning on the 90th calendar day after the start of their employment. RCW 49.46.200(1)(d). Unused paid sick leave of 40 hours or less must be carried over to the following year. RCW 49.46.200(1)(j). Employers are allowed to provide employees with more generous carry over and accrual policies.

Employees may use paid sick leave:

- To care for their health needs or the health needs of their family members.
- When the employees' workplace or their child's school or place of care has been closed by a public official for any health-related reason.
- For absences that qualify for leave under the state's Domestic Violence Leave Act.

RCW 49.46.210(1)(b) – (c).

Employers may allow employees to use paid sick leave for additional purposes. RCW 49.46.200(1)(e).

H. Domestic Violence Leave

Under Washington's Domestic Violence Leave Act, RCW 49.76.030, an employee may take reasonable leave from work, intermittent leave, or leave on a reduced leave schedule, with or without pay, to:

- (1) Seek legal or law enforcement assistance or remedies to ensure the health and safety of the employee or employee's family members including, but not limited to, preparing for, or participating in, any civil or criminal legal proceeding related to or derived from domestic violence, sexual assault, or stalking;

(2) Seek treatment by a health care provider for physical or mental injuries caused by domestic violence, sexual assault, or stalking, or to attend to health care treatment for a victim who is the employee's family member;

(3) Obtain, or assist a family member in obtaining, services from a domestic violence shelter, rape crisis center, or other social services program for relief from domestic violence, sexual assault, or stalking;

(4) Obtain, or assist a family member in obtaining, mental health counseling related to an incident of domestic violence, sexual assault, or stalking, in which the employee or the employee's family member was a victim of domestic violence, sexual assault, or stalking; or

(5) Participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members from future domestic violence, sexual assault, or stalking.

Employers may request verification of the domestic violence, but must keep information confidential. RCW 49.76.040.

Under RCW 49.46.210(1), employees are entitled to use paid sick leave for absences that qualify for leave under Washington's Domestic Violence Leave Act, Chapter 49.76 RCW.

#### I. Other Leave Laws

The Cities of Seattle, Sea-Tac, and Tacoma have local paid sick leave rules. *See* Seattle Municipal Code 14.16; Tacoma Municipal Code 18.10; SeaTac Municipal Code 7.45.020.

### **XV. STATE WAGE AND HOUR LAWS**

#### A. Current Minimum Wage in State

The Washington Minimum Wage Act (MWA) establishes a minimum wage and maximum hours for all nonexempt employees. The MWA provides for a higher minimum wage than the federal minimum wage. RCW 49.46.020. The Washington minimum wage for 2019 is \$12.00 per hour. In 2020, the minimum wage will increase to \$13.50 per hour. Beginning in 2021, and each year thereafter, the Department of Labor and Industries is required to make a cost-of-living adjustment to the minimum wage based on the CPI-W. *See* RCW 49.46.020(1). A number of Washington cities, including Seattle and Sea-Tac, have approved ordinances setting higher minimum wages. Seattle Municipal Code (SMC) 14.19 (\$15.00 per hour); SeaTac Municipal Code § 7.45.050 (\$15.64 per hour).

#### B. Deductions from Pay

The employer may make the following deductions from an employee's paycheck: required state and federal taxes (including worker's share of workers' compensation premiums),

court-ordered garnishments and when the worker agrees in advance, deductions for personal loans, personnel purchases of business's food, equipment, services, or purchase of items the business sells to the public, and worker health and dental insurance payments or co-payments, etc. RCW 49.48.010; RCW 49.52.060; WAC 296-126-025; WAC 296-126-028.

### C. Overtime Rules

The MWA requires employers to pay overtime wages of at least one and one-half an employee's regular rate of pay for hours worked in excess of 40 in a week. RCW 49.46.130; *see also* 29 U.S.C. § 207(a)(1) (FLSA setting forth same general rule). All employers, regardless of size, must pay overtime wages.

Most workers who are paid an hourly wage and work more than 40 hours in a 7-day work week must be paid overtime. Overtime is not typically calculated based on working over 8 hours on one day or the employer's pay period. Businesses may choose to pay overtime to workers who work on a holiday, but the law does not require them to do so.

When paying overtime, a business must pay at least one and one-half times the worker's regular hourly rate. Tips and gratuities are not part of the worker's wage and are not included in the overtime calculation.

Businesses may make overtime mandatory even if the workers do not want to do so, and even on a day that is normally a scheduled day off. Generally, there is not a limit on the number of hours an employer can require its workers to work.

A Washington employer is not liable for an employee's wages when the employer did not have actual or constructive knowledge that the employee worked. *See* L&I Administrative Policy ES.C.2 at 1 (defining "hours worked" as "all hours during which the employee is authorized or required, [and] known or reasonably believed by the employer to be on duty on the employer's premises or at a prescribed work place") (emphasis added); *United Food & Commercial Workers Union Local 1001 v. Mut. Ben. Life Ins. Co.*, 84 Wn. App. 47, 54, 925 P.2d 212 (1996), *abrogated on other grounds by Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 991 P.2d 1126 (2000) (implying that an employer is not liable for an employee's wages where the "employee chose to work unscheduled hours while taking steps to prevent the employer from acquiring knowledge of the extra work"); *Barnett v. Wal-Mart Stores, Inc.*, 133 Wn. App. 1036, 2006 WL 1846531 (2006) ("Under the relevant wage and hour statutes, 'to employ' includes 'to permit' to work. And an employer 'permits' its employee to work when it has either actual or constructive knowledge of the allegedly uncompensated work.") (emphasis added).

### D. Time for Payment Upon Termination

When an employee ceases to work for an employer, whether by discharge or voluntary withdrawal, that employees' wages are due at the end of the established pay period. WASH. REV. CODE § 49.48.010.

E. Breaks and Meal Periods

1. Rest Breaks

Employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period.

WAC 296-126-092(4).

The term “rest period” means “to stop work duties, exertions, or activities for personal rest and relaxation.” L&I Administrative Policy ES.C.6.1 at 4. “Employees need not be given an uninterrupted 10-minute rest period when the nature of the work allows intermittent rest periods equal to ten minutes during each four hours of work.” *Id.* at 5. An “intermittent rest period” is defined as an interval of short duration in which employees are allowed to rest, relax, and engage in brief personal activities while relieved of all work duties.” *Id.* at 4. When employees are allowed “to rest, eat a snack or drink a beverage, make personal telephone calls, attend to personal business, close their door to indicate they are taking a break, or make other personal choices as to how they spend their time during their rest break . . . no additional compensation for the 10-minute break is required.” *Id.* at 5.

Employers may require workers to stay on the work site during (1) their paid rest breaks, (2) their meal period if the business pays the worker during that meal period, (3) their meal period without paying them if the workers are completely relieved from duty for the entire meal period and will not be called back to work during the meal period. An employer is not required to provide a room or other area where workers can eat meals or take rest breaks.

2. Meal Periods

“Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift.” WAC 296-126-092(1). Further, “No employee shall be required to work more than five consecutive hours without a meal period.” WAC 296-126-092(2). “Hours worked,” means all hours during which the employee is authorized or required, known or reasonably believed by the employer to be on duty on the employer’s premises or at a prescribed work place. WAC 296-126-002(8); L&I Administrative Policy ES.C.1.

While an employer does not have an obligation to schedule meal periods or rest breaks under WAC 296–126–092, the employer must provide breaks that comply with the requirement of “relief from work or exertion.” *White v. Salvation Army*, 118 Wn. App. 272, 283, 75 P.3d 990 (2003); *see also Pellino v. Brink’s Inc.*, 164 Wn. App. 668, 693, 267 P.3d 383 (2011) (“In summary, neither paid rest breaks nor paid meal periods have to be scheduled (although the employer should make some effort to do so) . . . no active work can be performed, and the employees must be able to engage in personal activities and rest during these breaks.”).

## F. Employee Scheduling Laws

Washington does not have any regulations regarding when and how workers are scheduled. A business has the right to change a worker's schedule at any time, with or without notice. *See Schedules*, WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, <https://www.lni.wa.gov/WorkplaceRights/Wages/HoursBreaks/Hours/default.asp> (last visited Apr. 9, 2019). Additionally, businesses are not required to give weekends or holidays off. *Id.*

The City of Seattle does, however, impose employee scheduling requirements on certain businesses. *See* SMC §14.22.005, et seq. (Secure Scheduling Ordinance). The Secure Scheduling Ordinance was enacted “to establish predictable work schedules that advance race and social equity, promote greater economic security, further the health, safety and welfare of employees, create opportunity for employee input into scheduling practices, and create a mechanism for employees to obtain access to additional hours of work.” SMC § 14.22.012. The Secure Scheduling Ordinance applies only to retail or food service establishments with 500 or more employees worldwide. SMC § 14.22.020.

One section of the Secure Scheduling Ordinance requires employers to provide each new employee a written, good faith estimate of the employee’s work schedule at the time of hire. SMC § 14.22.025. These estimates include the median number of hours the employee can expect to work each week and whether the employee can expect to work on-call shifts. *Id.* Employers must provide a revised estimate every year following the initial estimate – or anytime the employer’s or employee’s needs change. *Id.* Additionally, the employer must provide employees with written work schedules at least 14 days prior to the first day of such work schedule. SMC § 14.22.040.

Furthermore, the Secure Scheduling Ordinance provides employees the right to identify any limitations or changes in work schedule availability. SMC § 14.22.030. The employee may request not to be scheduled for work shifts during certain times or at certain locations. *Id.* The employer’s ability to deny the employee’s request depends on whether the request is based on a major life event. If so, the employer can only deny the request if there is a bona fide business reason for the denial, followed by a written explanation. *Id.*

The Secure Scheduling Ordinance also requires employers to offer additional hours to existing employees before hiring new employees or sub-contractors. SMC § 14.22.055. If the employer needs additional work, it must post the description of the position, total hours offered, the proposed schedule, and other related information. *Id.* If an existing qualified employee responds to the posting, the employer must offer him/her the additional work. *Id.*

## **XV. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES**

### A. Smoking in Workplace

Washington State prohibits smoking in any place of employment. RCW 70.160.030. Moreover, smoking is prohibited in any area where employees are required to pass through or

within 25 feet of an entrance or exit. RCW 70.160.075. Washington does not require employers to create designated smoking areas or provide other accommodations for smokers in the workplace.

B. Health Benefit Mandates for Employers

The Washington State Office of Insurance Commissioner contains a list of mandatory health care benefits that all plans must cover.

C. Immigration Laws

Washington State currently has some of the laxer laws in the country regarding illegal immigration. Washington State does not require employers to e-verify immigration status of employees.

D. Right to Work Laws

There is no right to work law in Washington State.

E. Lawful Off-Duty Conduct (including lawful marijuana use)

In 2012, Washington State's Initiative I-502 went into effect, decriminalizing certain cultivation, sale, possession and use of marijuana. However, I-502 did not legalize marijuana use in the workplace and is silent on how the workplace may be impacted. In that regard, employers retain authority to enact drug policies prohibiting marijuana use both in and outside the workplace. Private sector employers may require that their employees consent to drug testing as a condition of employment. Public employers may also require drug testing subject to the same Constitutional requirements that impacted them prior to the enactment of I-502.

F. Gender/Transgender Expression

Washington law defines "sexual orientation" as "heterosexuality, homosexuality, bisexuality, and gender expression or identity." RCW 49.60.040(26). Gender expression or identity is further defined as "having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth." RCW 49.60.040(26).

Washington expressly forbids employers from discriminating based on sexual orientation or gender identity or expression in hiring, firing, or other employment decisions. RCW 49.60.180.

G. Other Key State Statutes

1. Washington Industrial Safety and Health Act, RCW 49.17.160 -- no employee may be discharged for filing a complaint or participating in proceedings under the act.
2. RCW 49.44.120 -- no employee may be required to take a lie detector examination as a condition of employment.
3. RCW 42.40.010-42.40.900 -- no state employee may be discharged for reporting improper governmental action.
4. RCW 49.70.110 -- no employee may be discharged for exercising rights under the state Worker and Community Right to Know Act which covers disclosure of information regarding hazardous substances.
5. Industrial Insurance Act, RCW51.04.010 – governs worker’s compensation claims, preempting common law where the Act provides substitute remedy.
6. RCW 49.12.200 - Equal Employment Opportunity for Women: “no person shall be disqualified from engaging in or pursuing any . . . employment . . . on account of sex.”
7. WASH. CONST. ART. XXXI, SEC. 1, EQUAL RIGHTS AMENDMENT: “Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.”