

December 10, 2020

# Looking to 2021: Top Labor & Employment Considerations for Washington Employers

# Agenda

- Welcome
- Post-Election Update
- Important Considerations as Employees Continue to Work at Home
- Top Labor Law Issues
- Immigration Implications of the Election
- Top Wage and Hour Concerns
- Expanding Concerns with Non-Compete Agreements
- Other Employment Law Updates and Developments



Welcome

# Panelists



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# Post-Election Update

# Post-election Update

## State Updates

- Washington – Governor Inslee’s Focus on Economic Recovery, Budget Deficit, COVID-19 Safety
- California Gig Industry Drivers Classified as Independent Contractors
- Florida Adopts \$15 Minimum Wage
- Colorado Approves State Program for Paid Family and Medical Leave

## Post-election Update

### What Changes Will We See With a Biden Presidency?

- Executive Orders
  - Rescind Executive Order on Reducing Regulation and Controlling Regulatory Costs
  - Rescind Executive Order on Combating Race and Sex Stereotyping
  - Reinstate Obama-Biden Administration's Fair Pay and Safe Workplaces Executive Order

## Post-election Update

### Federal Regulatory/Administrative Agency Changes

- Increase in Funding and Hiring of Investigators
- More Aggressive Enforcement
- Coordination of Efforts Regarding Independent Contractor Misclassification
- COVID-19 Guidance – OSHA, EEOC, CDC
- DOL Independent Contractor Rule
- DOL Joint Employer Rule



# Post-election Update

## Potential Federal Legislative Proposals and Changes

- FFCRA Extension/ COVID relief
- Other Paid Family Leave
- Equality Act - Title VII Sexual Orientation and Gender Identity
- Increase in Federal Minimum Wage (\$15)
- Eliminate Tip Credit
- ABC Independent Contractor Test
- Prohibit Employee Non-Competes
- Prohibit Employee Arbitration Agreements



# Important Considerations as Employees Continue to Work at Home

# Important Considerations as Employees Continue to Work at Home

## Five key considerations

- Written policies and communication
- Wage and hour
- Health and safety
- Relocation
- Performance management

# Important Considerations as Employees Continue to Work at Home

## Written policies and communication

- Remote work policy or agreement
- Reminders about continued policy application and policies updated for remote work
  - Safe workplace; injury reporting
  - Timekeeping; overtime; meal and rest breaks
  - Discrimination, harassment, accommodation
  - Confidentiality, data security

# Important Considerations as Employees Continue to Work at Home

## Wage and hour compliance

- Time recording:
  - Pay for all hours worked: reasonable diligence standard
  - Implement reasonable reporting procedures for unscheduled time
  - Must train managers
  - Remote access
- Meal and rest breaks: Consider Washington meal waiver
- Travel time: Remote workers reporting to other site
- Reimbursement:
  - State-specific laws: Some cover all incurred business expenses; others for equipment that cannot be otherwise used by employee
  - Bring below minimum wage or salary basis?

# Important Considerations as Employees Continue to Work at Home

## Health and safety

- OSHA/WISHA not inspecting home offices
- Injury at home is work-related if directly related to performance of work and the employee's job
- Communicate to employees about home workplace free of safety hazards. Provide written guidance, including to report injuries
- Be alert to accommodation requests disguised as requests for home equipment (faster computer, larger monitor, etc.)
- If not fully remote, including any in-person meetings, implement COVID screening tool

# Important Considerations as Employees Continue to Work at Home

## Relocation

- Where are employees working? Require approval for change
- Short-term work (e.g., two-week vacation) less of a concern
- Tax implications for employer and employee:
  - Employer: May be considered to be doing business in another state, requiring registration. May have additional withholding obligations
  - Employee: May be subject to withholding in multiple locations and need to pay income taxes
- Professional licenses
- Benefits and insurance: Both for employee and professional insurance held by company

# Important Considerations as Employees Continue to Work at Home

## Relocation (cont.)

- Varying employment laws:
  - State/local sick leave
  - Paid family medical leave
  - Additional leave types
  - Harassment training
  - Overtime, meal and rest breaks, paystubs, final pay, leave cash-out
  - Restrictive covenant agreements



# Important Considerations as Employees Continue to Work at Home

## Performance management

- Documentation still important
  - Assess management tools (e.g., work assignment status reports) to help with lack of in-person observation
  - Monitoring software: Give advance notice. Certain states have requirements (e.g., Connecticut and Delaware)
- Avoid disparate treatment
  - Consider individual circumstances, including child care responsibilities and potential disparate impact on women

# Top Labor Law Issues

## 2021 NLRB Update

### National Labor Relations Board composition

- 5 Members sit in appellate capacity
  - 3 from party in White House
  - But GOP majority until August 2021 at earliest, depending on Senate contests in Georgia
- General Counsel's term expires in November
  - Controls the Regions, sets the agenda
  - Arguably can be dismissed sooner -1983 memo
- Target rich environment for continuing substantial change in workplace rules
  - But lowest case backlog in 40 years

## 2021 NLRB Predictions – GOP Rule

Continuation of pro-business case reversals

- Elimination of “contract bar” to employee decertification efforts
- Precluding graduate teaching assistants and other student workers from organizing at private universities
  - Rulemaking process underway
- Restricting use of Scabby the Rat at pickets and other protests

## 2021 NLRB Predictions – Democrat Rule

Pro-union and worker cases and potential legislation

- Protecting Right to Organize (PRO) Act
  - Passed by House in 2020
  - Significant changes, including but not limited to:
    - Ban right-to-work laws in 28 states
    - Allow “stealth” card check (like WA’s cross check)
    - Reverse *Epic Systems* in favor of class actions
    - Require binding arbitration for first contracts
    - Civil penalties for employer unfair labor practices
    - Adopt CA’s “ABC Test” for independent contractor status

## 2021 NLRB Predictions – Democrat Rule

Big changes on many issues, including:

- New limits on workplace rules (reversal of *Boeing*)
- Use of employer email systems for organizing (return to *Purple Communications*)
- Expanding joint employer rule (return to *Browning-Ferris Industries*)
- Approval of micro- and other tailored bargaining units (return to *Specialty Healthcare*)
- Restrictions on unilateral changes – “contract coverage” vs. “clear and unmistakable” waiver (reversal of *MV Transportation*)

## 2021 Impacts on Public Employers

- Expansion of U.S. Supreme Court's 2018 *Janus* decision
  - *Janus* held that agency fees violate employees' First Amendment right not to support union activity
  - Plaintiff in *Janus* seeking refund of union dues and fees paid
  - Seventh Circuit (and every other court to consider issue) has rejected refunds; Supreme Court accepted review
  - Potential financial ruin for public sector unions nationwide

# Immigration Implications of the Election



## Immigration Update: White House

- Prompt Repeal of Trump Era Executive Orders and Presidential Proclamations, including:
  - “America First” Executive Order and related rules
    - DOL wage rules
    - New specialty occupation definition
    - Wage-based H-1B selection in lieu of lottery
  - “Labor Market Risk” ban on new L-1, H-1B, and J-1 visas and green cards
  - COVID related travel bans (EU, UK, Ireland, China, Brazil and Iran)

## Immigration Forecast: DHS and USCIS

- Department of Homeland Security to be led by Alejandro Majorkas
  - Former head of USCIS and DHS Undersecretary
    - Implemented DACA, improved USCIS response times and quadrupled I-9 enforcement
  - Expect gradual improvements at USCIS
    - Improved processing times
    - Expansion of Premium Processing for more case types
    - Withdrawal of “America First” regulations
    - Return to notice & comment rulemaking

## Immigration Forecast: Congress

- DREAM Act may be more likely to pass in 2021 or beyond
- No other significant immigration legislation yet on the table.
- No significant immigration legislation so far this century.

# Top Wage and Hour Concerns

## Top Wage and Hour Concerns in Washington

Five topics about which every employer should be aware:

- Increasing minimum wage rates
- Increasing pay standards for exempt workers
- Determining whether employees are Washington-based for application of Washington law
- Striking down the agricultural exemption
- Addressing the wage challenges of COVID screening if/when employees return to the workplace

## Increasing Minimum Wage Rates

The state and local minimum wage rates automatically increase every year:

- State rate: increases from \$13.50 to \$13.69/hour
- Seattle rate: increases from \$15.75 to \$16.69/hour
- SeaTac rate: increases from \$16.34 to \$16.57/hour

## Increasing Pay Standards for Exempt Workers

Washington adopted new exemption standards in 2020, and pay standards will increase each year:

- Duties requirements now parallel federal standards
- 2020 minimum salary was \$675/\$35,100 (less than the federal minimum of \$684/\$35,568)
- For small employers (1-50 employees), the 2021 minimum salary is \$821.40/\$42,712.80
- For large employers (50+ employees), the 2021 minimum salary is \$958.30/\$49,831.60
- For computer professionals, the minimum hourly rate is \$37.6475 (if 1-50 employees) and \$49.915 (if 50+)

## Whether Employees Are Washington-Based

Employers must comply with Washington law for all Washington-based employees:

- Department of Labor & Industries Admin. Policy ES.A.13 addresses what Washington-based means
- DLI identifies a range of relevant factors, including:
  - Where the employer is based and operates
  - Where the employee was hired, lives, and is based
  - How much work is performed in Washington
  - Whether work is assigned/supervised from Washington
- Employees who perform no work in Washington may still be Washington-based and subject to our laws



## Striking Down the Agricultural Exemption

In a 5-4 decision on November 5, 2020, in *Martinez-Cuevas v. DeRuyter Brothers Dairy*, the Washington Supreme Court held that the agricultural exemption is unconstitutional as applied to dairy farmers

- RCW 49.46.130(2)(g) broadly exempted agricultural workers from overtime requirements
- The exemption had been in place for many decades
- The Court held it violated the state constitution's mandate to protect workers in hazardous occupations
- Four justices also found it violated equal protection
- Key issues: retroactivity and broader application

## COVID Screening in the Workplace

If/when employees return to the workplace, employers will face wage challenges with COVID screening

- This could involve temperature checks, brief responses to CDC questions, or other screening
- Important questions employers must address include:
  - Does this screening count as compensable work?
  - If so, how can it be tracked and compensated?
  - Is the amount of work time *de minimis*?
  - What impact does this have on operations and other start-of-work activities?
- Employers need to plan for wage compliance



# Expanding Concerns with Non-Compete Agreements

## 2020 WA Law Regarding Noncompetition Covenants, Chapter 49.62 RCW

Effective January 1, 2020, a new Washington law tightened restrictions on noncompetition covenants.

- “Noncompetition covenant” is defined broadly:
  - every written or oral covenant, agreement, or contract by which an employee or independent contractor is prohibited or restrained from engaging in a lawful profession, trade, or business of any kind
- Exceptions for nonsolicitation agreements (narrowly defined), confidentiality agreements, and covenants regarding trade secrets and inventions

## 2020 WA Law Regarding Noncompetition Covenants, Chapter 49.62 RCW

Key points for employer/employee covenants include:

- Employee noncompetition covenants are void and unenforceable unless the employee's annualized earnings exceed \$100,000
  - increasing to **\$101,390** effective 1/1/21
- Durations exceeding 18 months after termination are presumptively unreasonable and unenforceable

## 2020 WA Law Regarding Noncompetition Covenants, Chapter 49.62 RCW

Key points (continued):

- Following layoff (undefined), employee must receive continued base compensation during enforcement period, less any subsequent employment earnings
- Terms must be disclosed in writing at or before employment offer acceptance
- May not require adjudication outside Washington
- May not deprive employee of the law's benefits and protections (e.g., through choice of law clauses)

## 2020 WA Law Regarding Noncompetition Covenants, Chapter 49.62 RCW

Significant consequences for non-compliance:

- If a noncompetition covenant violates the law, or if a court or arbitrator reforms, rewrites, modifies, or only partially enforces a noncompetition covenant, then the employee is entitled to recover:
  - \$5000 or actual damages, whichever is greater; and
  - reasonable attorneys' fees and costs
- BUT, no cause of action for covenants signed prior to January 1, 2020, if covenant is not being enforced

## Accelerating Trend Toward Increased Restrictions Across Several States

Three states impose general bans:

- California; North Dakota; and Oklahoma

Three have long-standing statutory limitations:

- Colorado; Idaho; and Oregon (expanded 2016, 2020)

Eight recently added lower-wage (or non-exempt) employee protections:

- Illinois (2017), Massachusetts (2018), Maine (2019), Maryland (2019), New Hampshire (2019), Rhode Island (2020), Virginia (2020), and Washington (2020)

Many other state-specific nuances



## Other Increased Scrutiny and Policy Debate

Noncompetition covenants being attacked from several other angles:

- state AGs aggressively pursuing restaurant chains for imposing noncompetes on rank-and-file workers
- coalition of 19 states urged the FTC to restrict noncompetes through rulemaking in November 2019
- ongoing Congressional efforts to enact federal legislation restricting noncompetes
  - multiple bills introduced 2015, 2018, and 2019

Pressure expected to continue in 2021, including due to economic downturn and rising unemployment

## Recommended Actions for Employers

- Review restrictive covenant forms on a regular basis to ensure compliance with statutory restrictions and developing case law
- Determine whether current employees should be required to sign updated agreements
  - independent consideration requirements
- Multi-state employers using a single form of agreement may need to reconsider that approach
- Exercise caution before sending automatic “reminders” to departing employees who signed earlier forms of restrictive covenant agreements

# Other Employment Law Updates and Developments

# Other Employment Law Updates and Developments

## COVID-19 - Examples of Temporary Measures

- Protections for “high risk” employees (i.e., underlying medical conditions; and/or 65 or older)
  - must offer accommodations (e.g., telework, alternative locations, reassignment, and social distancing)
  - if alternative work arrangement not available, allow use of accrued leave or unemployment insurance (in any sequence) without risk of adverse action
  - During absence, must maintain health benefits
  - Cannot permanently replace high-risk employees
- In effect for duration of state of emergency, or until otherwise rescinded or amended

# Other Employment Law Updates and Developments

## COVID-19 - Examples of Temporary Measures

- Seattle Paid Sick and Safe Time for “Gig Workers”
  - Covers transportation and food delivery network companies who hire 250+ gig workers worldwide
  - Requires accrual and worker use of paid leave
  - In effect through 2023, or 3 years after termination of COVID-19 emergency declarations, but workers can only accrue and use PSST through 180 days after emergency orders covering Seattle have been lifted

# Other Employment Law Updates and Developments

## Potential Legislation in 2021

- Health Emergency Labor Standards Act (HELSEA)
  - L&I to establish safety standards in workplaces where workers are exposed to contagious/infectious diseases
  - During public health emergency, as declared by Gov/Pres:
    - Presumption of worker's comp coverage for "frontline" workers
    - Allow voluntary use of PPE; employer pays for masks/gloves if required
    - Whistleblower protections for raising infection control concerns
    - Lowers eligibility standards for paid family/medical leave when qualifying period includes a public health emergency

"Frontline" employees include first responders, hospital/nursing home/assisted living, food-related industries, transit, daycare/childcare, pharmacy/grocery, restaurants, hotels, home health, in-person/on-site education, others

# Other Employment Law Updates and Developments

## Potential Legislation in 2021

- HELSA (cont'd) –
  - All employers provide additional paid sick leave for employees exposed or infected and unable to work or telework
  - All employers with 50 or more employees to provide employer-paid childcare leave when schools and childcare centers are closed
  - Both leaves have dollar-to-dollar credit towards state B&O tax if there is no federal assistance for similar leave
  - Employers of “frontline employees” who are paid \$1 or less above minimum wage must receive additional 25% of minimum wage for each hour worked

# Other Employment Law Updates and Developments

## Potential Legislation in 2021

- Unemployment Insurance Bill
  - Reform social tax to prevent spikes in employer-paid UI premiums following a public health emergency
  - Reduces increases to employer's experience tax rate by temporarily extending window for determining rate.
  - Modification of certain eligibility requirements, benefits, and UI assessments in certain circumstances
    - Waives waiting week; modifies work search requirement; allows employers to request relief of charges for benefits paid to higher risk individuals and related business closures; makes Shared Work benefits paid or reimbursed by federal government non-chargeable



# Other Employment Law Updates and Developments

## Court Decisions on Employee Arbitration Agreements

### *Burnett v. Pagliacci Pizza, Inc*

- WA Supreme Court ruled arbitration agreement with pizza delivery driver was procedurally unconscionable and unenforceable
- Agreement was contained on page 18 of 23-page handbook provided at new employee orientation
- Court determined driver did not have a “reasonable opportunity” to comprehend the information before agreeing to it and “lacked meaningful choice”
- Motion to compel arbitration of alleged wage and hour violations denied

# Other Employment Law Updates and Developments

## Court Decisions on Employee Arbitration Agreements

### *Burgess and Lithia Motors*

- Former employee and employer arbitrating dispute; employee files motion in court to terminate arbitration and rescind agreement, alleging employer breached arbitration agreement by failing to comply with discovery deadlines and arbitrator did so by failing to enforce applicable procedural rules
- WA Supreme Court affirms superior court order denying motion, concluding judicial review under the Federal Arbitration Act limited to disputes over “gateway” issues (i.e., enforceability of the arbitration clause in the first instance), and review of final awards

# Questions & Answers

K&L GATES