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Washington State Legislature Passes Pay Equity and “Me Too” Legislation

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The 2017–2018 Washington State legislature passed, and the governor signed, numerous bills that affect employers. Foremost among them is new legislation addressing “Me Too” concerns and gender pay equity, which is the focus of this update.

State lawmakers were particularly concerned with addressing a pay gap purportedly based on gender considerations [1] and curbing sexual and other forms of harassment — both foreseeable developments in response to the “Me Too” movement. The new “Me Too” laws prohibit certain forms of nondisclosure agreements and agreements requiring employees to arbitrate discrimination, harassment, or assault claims arising under federal law or the Washington Law Against Discrimination.

This alert summarizes these new laws, which take effect on June 7, 2018.

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Equal Pay Act

Washington lawmakers amended the Equal Pay Act [2] for the first time since it became law in 1943. The amendment was adopted as states and municipalities across the country are attempting to close a reported gender wage gap.

The Equal Pay Act’s original language has been updated from “sex” to “gender” in an attempt to create greater flexibility and compensation equity for women and LGBTQ (lesbian, gay, bisexual, transgender, queer/questioning) employees.

The Equal Pay Act generally attempts to achieve equal career advancement opportunity without regard to gender. This is only the second law in the nation to address gender equity throughout an employee’s entire career development. That is, an employer must not only provide equal compensation and benefits but must also provide equal access to promotions, training, or other job opportunities. An employer may be liable for violation of the Equal Pay Act if it provides “less favorable employment opportunities” by directing an employee into a less favorable career track, failing to provide an employee with information about promotions or advancement, or otherwise limiting or depriving an employee of employment opportunities that would be available to the employee but for the employee’s gender. Nevertheless, in making employment decisions, employers may take into account regional differences and other bona fide job-related factors, including an employee’s education, training, or experience. However, employers may not consider an employee’s wage or salary history.

The Equal Pay Act also generally bans “pay secrecy” policies by prohibiting employers from requiring employees to sign nondisclosure agreements that prevent discussion of wages. However, employers can prohibit certain employees (e.g., human resources) from disclosing compensation information about *other* employees, except when complying with legal obligations. The Equal Pay Act does not require employees to disclose their wages.

The Equal Pay Act also prohibits employers from retaliating against employees for exercising their rights under the act.

Employees who believe their rights under the Equal Pay Act have been violated may file a complaint with the

Department of Labor and Industries (L&I) or bring a civil action within three years of the alleged violation. An employee may recover wages and interest for up to four years from the last violation before the complaint was made, plus statutory damages equal to the actual damages or $5,000, whichever is greater.

Despite compelling arguments from the business community about the need for uniform statewide legislation to preempt local laws on topics that are otherwise addressed by state law (as was provided in Washington's recent paid family leave law), lawmakers refused to add preemption language in the Equal Pay Act to prevent local governments from passing additional pay equity requirements. Consequently, the amended act further complicates an already complex compliance landscape for Washington businesses in which paid leave, sick leave, and minimum wage laws vary by jurisdiction.

Legislation in Response to the "Me Too" Movement

Although lawmakers failed to agree on a joint resolution that would have created a taskforce to tackle sexual harassment, they passed a number of laws aimed at curbing sexual harassment, sexual assault, and other forms of workplace discrimination.

Workplace Sexual Harassment and Sexual Assault — Nondisclosure Agreements. With the exception of certain settlement agreement provisions (see below), a new law makes any nondisclosure agreement, waiver, or other document signed by an employee as a condition of employment against public policy and void and unenforceable if it has the purpose or effect of preventing the employee from disclosing or discussing sexual harassment or sexual assault: (1) occurring in the workplace, (2) at work-related events coordinated by or through the employer or between employees, or (3) between an employer and an employee, off the employment premises. The law also prohibits employers from retaliating against an employee for disclosing or discussing work-related sexual harassment or sexual assault.

The law does not prohibit an employer from entering into a settlement agreement with an employee or former employee who alleges sexual harassment or sexual assault, even if the settlement agreement contains confidentiality provisions. However, a separate new law that was passed provides that in any civil judicial or administrative action relating to sexual harassment or sexual assault (whether in an employment context or otherwise), a nondisclosure policy or agreement that purports to limit the ability of any person to produce evidence regarding past instances of sexual harassment or sexual assault by a party to the civil action does not affect discovery or the availability of witness testimony relating to that civil action. Any such provision of a nondisclosure policy or agreement, including any arbitration agreement or decision that would limit, prevent, or punish such disclosure, is contrary to public policy and unenforceable. *(Sexual Harassment and Sexual Assault — Nondisclosure Agreements — Discovery).*

Domestic Violence Leave Act. The Domestic Violence Leave Act has been amended to prohibit employers from discriminating against an employee, or from refusing to hire an applicant, who is an actual or perceived victim of domestic violence, sexual assault, or stalking.

Additionally, upon a victim's request, an employer is required to make reasonable safety accommodations unless the employer can demonstrate that an accommodation would impose an undue hardship on the employer's business operations. Accommodations may include an employee's transfer, reassignment, modified schedule, changed work telephone number or email address, changed work station, installed lock, implemented safety procedure, or any other adjustment to a job structure, workplace facility, or work requirement in response to actual or threatened domestic violence, sexual assault, or stalking. An employer may require verification that a requested safety accommodation is for the purpose of protecting the employee from domestic violence, sexual assault, or stalking.

The Domestic Violence Leave Act also allows employees to file a complaint with L&I or bring a private right of action (without defining the statute of limitations) and prohibits employers from retaliating against employees for exercising their rights under the law.

Workplace Sexual Harassment — Model Policies. The Washington Law Against Discrimination (WLAD) has been amended to require the Human Rights Commission, which is charged with administering and enforcing WLAD, to convene a stakeholder work group to develop model policies on preventing sexual harassment in the workplace by January 1, 2019. Employers are not required to take any action under this law.

Legislation Banning Alternative Dispute Resolution to Resolve Employee Discrimination Claims Without Employee Consent

Discrimination Complaints and Causes of Action — Employment Agreements. A new law prohibits an employer from utilizing alternative dispute resolution forums to resolve an employee's discrimination claim without the employee's consent. Under this law, a provision of an employment contract or agreement is void and

unenforceable as against public policy if it requires an employee to waive the right to publicly file an administrative complaint or publicly pursue a cause of action arising under WLAD or federal anti-discrimination laws or if it requires an employee to resolve discrimination claims in a dispute resolution process that is confidential.

As originally drafted, the law would have preserved an employee's right to file a complaint arising from only sexual harassment or sexual assault. However, during public testimony on the original law, certain employee advocates expressed concern that the law did not protect employees who endured other types of harassment. Accordingly, the final law applies to all discrimination claims arising under WLAD and federal anti-discrimination laws. Although it passed unanimously, it is possible that this law is preempted by the Federal Arbitration Act.

Notes

[1] Other reasons for this "gap" could include the length of time a worker may have been in or out of the workforce, the types of positions being compared versus the demographics of applicants for such positions ("availability pool"), and many other factors. The recitals to the new legislation do not reference any such potential variables.