

# EMPLOYMENT LAW UPDATE

## NOVEMBER 18, 2021

# Agenda

- COVID-19 Employer Update
- Overtime Exemption Refresher
- Audience Questions

## CLE Credit

Approved for 1.5 WA MCLE credits.

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# COVID-19 UPDATE

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# Topics:

- Where are we now?
  - Overview of current orders and rules
  - OSHA/Biden mandate summary
- Reasonable accommodations
  - Vaccinations
  - High-risk employees
  - Permanent work from home

# WHERE ARE WE NOW?

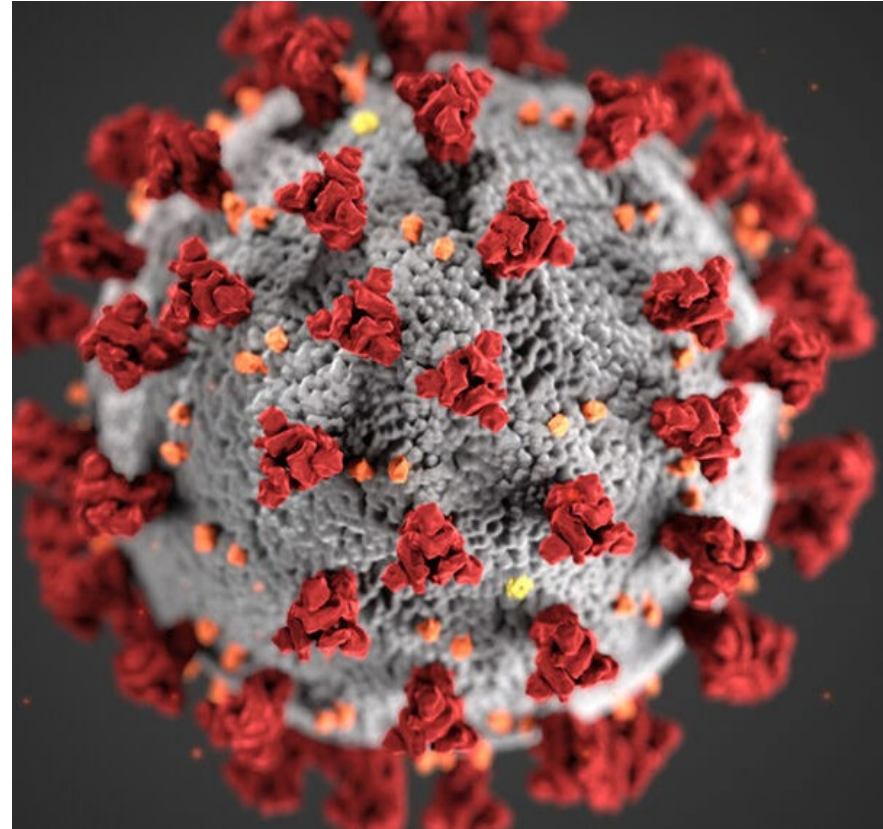
# Masks at work

- Masks at workplaces are required under Inslee's proclamation and the State Secretary of Health's order.
- Allows for an exception if employees are fully vaccinated and work in an environment not generally accessible to the public, so long as no customers, volunteers, visitors, or non-employees are present.
- Specific verification requirements.



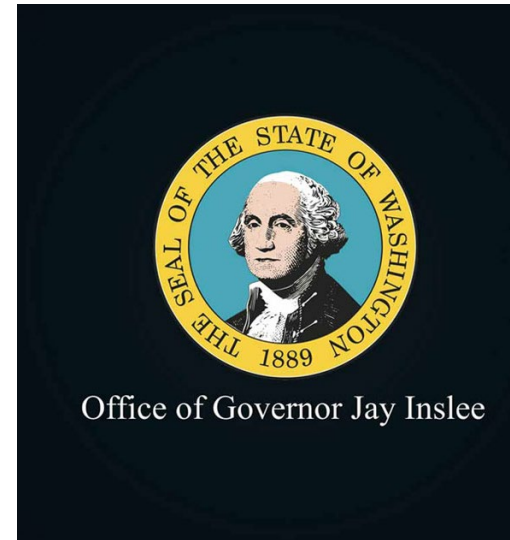
# Positive case notification/reporting

- Provide written notice of potential exposure within one business day to all employees who were at the same worksite as the person who tested positive.
- Report outbreaks of 10 or more employees at a worksite with more than 50 employees to L&I within one business day.
- Notify local health jurisdiction within 24 hours if suspect COVID is spreading or aware of two or more employees with confirmed or suspected COVID in a 14-day period.



# Inslee's Mandatory Vaccination Order

- Applies to state employees and employees of educational and healthcare settings.
- Requires vaccination by October 18 unless a medical or religious accommodation was granted.
- Requires specific forms of verification—signed attestations are insufficient.





Employers can still choose to mandate vaccines if they want, even if they are not subject to a government-ordered mandate.

# OSHA vaccine or testing rule (ETS)

- Not just testing! 9 requirements:
  - Weekly\* testing for unvaccinated employees who come onsite
  - Implement and enforce a written policy
  - Determine vaccination status, maintain a roster and preserve proof of vaccination
  - Recordkeeping and availability of records on vaccination and testing
  - Paid leave for vaccination and vaccine side effects
  - Exclusion of positive COVID cases
  - Face coverings for unvaccinated employees
  - Notices to employees
  - Report fatalities and hospitalizations
- **Testing deadline 1/4/2022; All others 12/5/2021\***

# OSHA vaccine or testing rule (ETS)

## Resources:

- Stokes Lawrence compliance checklist (download from your seminar invitation)
- OSHA sample policy (download from DOL website or your seminar invitation)
- OSHA FAQs: [www.osha.gov/coronavirus/ets2/faqs](https://www.osha.gov/coronavirus/ets2/faqs)
- OSHA summary sheet:  
[www.osha.gov/sites/default/files/publications/OSHA4162.pdf](https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf)
- Accommodation request forms (contact an SL lawyer for assistance)

# OSHA vaccine or testing rule (ETS)

Coverage and exemptions:

- 100+ employees, at all locations, including FT and PT employees and seasonal employees, but not including independent contractors or temp/staffing agency employees.
- Workers working exclusively from home.
- Workers working exclusively outdoors.

# OSHA vaccine or testing rule (ETS)

| Vaccine                   | Last day to get first shot to avoid testing requirement on 1/4/2022 |
|---------------------------|---|
| Pfizer                    | December 14, 2021   |
| Moderna                   | December 7, 2021  |
| Johnson & Johnson/Janssen | January 4, 2022   |

# OSHA vaccine or testing rule (ETS)

## Cost of testing

- Cost of testing may be on employee
- Employer not required to pay for testing time
- \*Unless testing is required as part of a religious or medical accommodation

## Testing protocols

- OTC test, supervised and read by employer or telehealth provider
- LAB/PCR test every seven days, or within seven days before return to the workplace
- No testing required for 90 days after a positive COVID case

# OSHA vaccine or testing rule (ETS)

## Paid leave obligations:

- Each vaccine dose after 12/5/2021:
  - “reasonable amount of time,” up to 4 hours paid time including travel time
  - “reasonable” paid sick leave for side effects; up to 2 days per dose
  - Okay to require use of accrued sick leave; may not require use of vacation; may not require employee to “go negative” on balance
- Booster shots
  - Paid leave not required under the ETS

# OSHA vaccine or testing rule (ETS)

Notices – in employee’s language and literacy level:

1. ETS requirements and company policy implementing the rule
2. CDC’s “[Key Things to Know About COVID-19 Vaccines.](#)”
3. OSHA rules against retaliation for reporting workplace injuries or illness (fact sheet available in [English](#) and [Spanish](#)).
4. OSHA prohibitions on providing false information to OSHA (fact sheet available in [English](#) and [Spanish](#)).



# OSHA vaccine or testing rule (ETS)

## Recordkeeping and responding to inquiries

- Vaccination records and roster must be stored as medical records
- Release personal records to employee\* by end of business day after request
- Release aggregate number of full vaccinations and total headcount by end of business day after request
- Release policy and aggregate numbers to OSHA within 4 hours of request; all other documents by end of business day after request.
- **Practical tip:** store vaccination and test results in separate file, not dispersed through individual employee files

# REASONABLE ACCOMMODATIONS

# Reasonable Accommodations

## Overview

- Both state and federal law generally require employers to provide reasonable accommodations to qualified individuals with disabilities.
- State and federal law also generally require employers to accommodate religious beliefs, preferences, and observances if they are “sincerely held.”

# What is “sincerely held?”

- Employers should generally assume that a request is based on a sincerely held religious belief.
- If an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, the employer is justified in making a limited factual inquiry and seeking additional supporting information.

# Undue hardship

- Employers don't have to grant a religious or disability accommodation if it would present an undue hardship.
- Undue hardship = significant difficulty or expense.
- Only “de minimus” for requests for religious accommodation.

# Direct threat

- Employers don't need to grant accommodations if it would present a direct threat to the health and safety of the employee or other employees.

# Interactive process

- Remember, the interactive process is key!

# Vaccines: Case by case analysis

- Direct threat/undue burden analysis must be on a case-by-case basis\*
- May shift over time
  - Local infection and hospitalization rates
  - Vaccination rate of workforce
  - Volume of accommodation requests
- Accommodation is not simply an exemption:
  - Testing\*
  - Antibodies\*
  - Remote work
  - Change of assignment or work location



# High risk employees

- Utilize “all available options for alternative work assignments”
- Employee use any available accrued leave or unemployment benefits, in any sequence
- Okay to hire temporary replacement, but must reinstate worker on 5 days’ notice, without loss of rights such as seniority
- Employer may require medical verification of HRE status, including consideration of vaccination status
- Since April 9, 2021, employers no longer need to maintain medical benefits for HRE who is not working

# Work from home

Before COVID ...and after COVID

*Working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer.*

*Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001), citing EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (March 1, 1999)

# Work from home – case-by-case considerations

- Physical/on-location tasks
- Availability, effectiveness, cost, and security of technology to facilitate remote work
- History of performance during previous WFH
- Location and size of team
- Tax, legal compliance, administrative cost of out-of-state operations

# Managing remote employees— clear expectations

- Schedule modifications
- When employees are expected to be available
- Responsiveness
- Good communication
- Software familiarity and use

# FAIR LABOR STANDARDS ACT AND MINIMUM WAGE ACT EXEMPTION REFRESHER

Maricarmen Perez-Vargas

# Baseline: Overtime

Under state and federal law, employees are entitled to overtime pay at 1.5x their regular rate for hours within a workweek exceeding 40 hours, unless they are exempt from this requirement.

# What is an Exempt employee?

Employees who meet certain **minimum salary** thresholds **and** satisfy certain **duties tests** are exempt from state and federal minimum wage and overtime requirements.

# Salary Basis: Federal Law

Exempt employees must be paid on a **salary basis** at not less than \$684 per week.

Salary basis = employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis.



# Salary Basis: Washington Law

Employee must be paid on a salary basis equal to or greater than 2.5 times the state minimum wage for a 40-hour workweek. This basis is being phased in.

2022 WA Minimum Wage = \$14.49/hour

2022 WA Multiplier = 1.75

2022 Salary Basis = \$1,014.30/week

# What is part of “salary?”

- Regular rate of pay
- Nondiscretionary bonuses and incentive payments (including commissions) (**only federal**)
- “Catch-up” payments

# Impermissible Deductions

- Variations in quality or quantity of work
- Variations in number of days or hours worked

# Permissible Deductions

- Employee is absent from work for one or more full days for personal reasons **other than sickness or disability**;
- Absences of one or more full days due to sickness or disability if the deduction is made in accordance with a **bona fide plan, policy or practice** of providing compensation for salary lost due to illness;
- To offset amounts employee received as jury or witness fee, or for military pay;
- Penalties for infractions of safety rules of major significance;
- Unpaid disciplinary suspension of one or more full days (**differ between state and federal law**);
- Unpaid leave under FMLA

# Duties Tests: Who is Exempt?

- Executive
- Administrative
- Professional
- Computer Professional
- Outside Sales

# Executive Exemption

- Employee's **primary duty** must be management;
- Employee must direct the work of at least **two or more FTEs**; and
- Employee must have **hiring and firing authority**

# Administrative Exemption

- Employee's primary duty must be the performance of **office** or **non-manual** work **directly related** to management or general business operations; and
- Employee's **primary duty** includes **exercise of discretion** and **independent judgment**

# Professional Exemption: Learned

## Professional

- Employee's **primary duty** must be performance of work requiring **advanced knowledge** (predominately intellectual and includes work requiring consistent exercise of **discretion** and **judgment**);
- **Advanced knowledge** must be in a field of science or learning; and
- Advanced knowledge must be customarily acquired by a **prolonged course of specialized intellectual instruction**



# Professional Exemption: Creative Professional

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

# Computer Employee Exemption

- Employee must be employed as a **computer systems analyst, computer programmer, software engineer**, or other similarly skilled worker.
- Primary duties:
  - Application of systems analysis;
  - Design, development, documentation, analysis, creation, testing, or modification of computer systems or programs;
  - Design, documentation, testing, creation, or modification of computer programs related to machine operating systems; OR
  - A combination of the above

# Outside Sales Exemption

- Employee's **primary duty** must be making sales; and
- Employee must be customarily and regularly engaged away from the employer's place of business.

# Highly Compensated Employees

Federal regulations provide that executive, administrative, or professional workers can also be exempt from overtime pay if they earn more than \$107,432 per year and they perform at least one executive, administrative, or professional duty. **This exemption does not exist under Washington state law.**

# COMMON EXAMPLES AND QUESTIONS

**Question:** Can Administrative Assistants be exempt?

**Answer:** Sometimes!

**Question:** Can employers deduct from exempt employees' salaries if they exceed their allotted vacation pay?

**Answer:** Sometimes!

# Resources

- <https://lni.wa.gov/workers-rights/wages/overtime/jobs-not-paid-overtime>
- <https://lni.wa.gov/workers-rights/wages/overtime/changes-to-overtime-rules-q-a>
- <https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime#footnoteOvertime>



# SPOTLIGHT ON 2022: AGRICULTURAL OVERTIME PAY PHASE-IN

# Overtime Pay for Agricultural Workers

- The Washington State Supreme Court recently held the MWA's agricultural exemption was unconstitutional as applied to dairies.
- **Senate Bill 5172:** Prevents lawsuits for overtime pay against agricultural employers who had relied on the agricultural exemption in the past. Phases the agricultural exemption out until **January 1, 2024**, when it will be eliminated.

# Timeline

| Effective Date  | Overtime pay required for weekly hours exceeding this number |
|-----------------|--|
| January 1, 2022 | 55 hours   |
| January 1, 2023 | 48 hours   |
| January 1, 2024 | 40 hours   |

\*Dairies in WA should begin paying overtime wages immediately due to the Supreme Court's decision. Other agricultural employers should follow the schedule above.

# Your Questions Answered