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EMPLOYMENT LAW ISSUES FOR NON-EMPLOYMENT LAWYERS

Kelby Fletcher
Stokes Lawrence, PS
1420 Fifth Avenue
Suite 2900, Seattle, WA 98101
(206) 626-6000
kelby.fletcher@stokeslaw.com

KELBY FLETCHER is a shareholder at Stokes Lawrence, P.S. a Seattle and Yakima law firm. He received a B.A. from the School of International Service, The American University in 1971 and a J.D. from Northwestern University School of Law in 1974. His practice consists almost exclusively of employment related matters where he represents individuals in advice, negotiations and litigation. He has served on various bar association committees and served as chair of the Executive Committee of the Labor and Employment Law Section of WSBA. Kelby was, for many years, chair of the Amicus Committee of the Washington State Association of Justice Foundation and a hearing officer in the WSBA discipline process. In 2012 Kelby was elected as a Fellow of the College of Labor and Employment Lawyers. He is an avid urban hiker and is also known to be found on various trails in the Olympic National Park and Forest as well as the stairs at E. Blaine St. between 10th Avenue E. and Lakeview Ave. E. in Seattle. He retired as a notary with no regrets.

Introduction.

Legal matters concerning the employment relationship once concerned only a small set of lawyers mostly practicing in larger cities who dealt with union and management issues arising under the National Labor Relations Act (NLRA), 29 U.S.C. § § 151-169. These attorneys were called 'labor lawyers.'

Now, due to state and federal (and even municipal) legislation and the development of the common law which goes far beyond the NLRA, we have a practice area known as 'employment law.'

Employers, and their past and potential employees, increasingly seek legal advice about rights, duties and remedies. The answers may not be what you think they are. And they are likely different from what they were five and ten years ago.

There can be no doubt that Washington's statutory and common law jurisprudence each evidence this state's "long and proud history of being a pioneer in the protection of employee rights." ***Drinkwitz v. Alliant Techsystems, Inc.***, 1240 Wn.2d 291, 300 (2000). Advice and counsel of employees and employers should keep that in mind. Indeed, the Washington Constitution at Art. II sec. 35 states that "[t]he legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health . . . ."

1. The Reach of the NLRA.

It is a profound mistake to believe that the NLRA applies only in the context of unionization and collective bargaining. A very significant portion of the Act, Section 7, applies to most private sector employment. And where Section 7 does not apply, a similar state statute, RCW 49.32.020, likely applies.

NLRA Section 7, 29 U.S.C. § 157, states:

> **Employees shall have the right** to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and **to engage in other concerted activities for the purpose of** collective bargaining or other **mutual aid or protection,** and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Enforcement of Section 7 rights is through the National Labor Relations Board (NLRB) by way of complaints of an Unfair Labor Practice (ULP) made under Section 8 of the

Act, 29 U.S.C. § 158. *See, e.g*., ***Kilb v First Student Transportation, LLC***, 157 Wn.App. 280 (2010).

Generally, the NLRA does not apply to government workers, supervisors and independent contractors. Certain agricultural and domestic workers are also exempt from coverage. The jurisdiction of the NLRA and the NLRB covers most other private sector employers affecting commerce.

ULP complaints typically have to be made within six months of their occurrence.

For those employers not covered by the NLRA, RCW 49.32.020 provides very much the same protections as does Section 7. The state statute reads:

> WHEREAS, Under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the **individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his or her freedom of labor,** and thereby to obtain acceptable terms and conditions of employment, wherefore, though he or she should be free to decline to associate with his or her fellows, it is necessary that he or she have full freedom of association, self-organization, and designation of representatives of his or her own choosing, to negotiate the terms and conditions of his or her employment, and **that he or she shall be free from interference, restraint, or coercion of employers of labor, or their agents**, in the designation of such representatives or in self-organization **or in other concerted activities for the purpose of** collective bargaining or **other mutual aid or protections;** therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the state of Washington are hereby enacted.

The state statute likely provides an independent cause of action for employees who engage in concerted activities and who suffer retaliation as a result. ***Krystad v. Lau***, 65 Wn.2d 827 (1965); ***Bravo v. The Dolsen Cos.*** 125 Wn.2d 745 (1995) but see ***Briggs v. Nova Services,*** 166 Wn.2d 794 (2009).

Plainly, these two statutes apply when no union is involved either in organizing or with regard to collective bargaining.

A. Employee Discussion of Wages and Hours

An attempt by an employer to prevent employees from discussing or comparing their wages, benefits and hours will run afoul of NLRA Section 7 and RCW 49.32.020. The statute "encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital term and condition of employment." ***Triana Industries,*** 245 NLRB 1258 (1979). Wage discussions are likely "the most critical element in

employment." ***Aroostook County Regional Opthalmology Center***, 317 NLRB 218, 220, enforced in part at 81 F.3d 209 (D.C. Cir. 1996). Employer policies or practices prohibiting discussion or comparison of wages are unlawful, therefore. ***DaNite Sign Co***, 356 NLRB No. 124, n.1 (2011).

An employer taking adverse action against an employee for discussion of wages and benefits is likely acting unlawfully. ***Taylor Made Transportation Services, Inc.***, 358 NLRB No. 58 (June 7, 2012).

This year, Laws 2018 ch. 116 was enacted. This requires equal pay, discussed *infra*, and also deals to some extent with concerted activity. Employers may not: "[r]equire nondisclosure by an employee of . . . wages as a condition of employment; or [r]equire an employee to sign a waiver or other document that prevents the employee from disclosing the amount of the employee's wages." Id. at § 5, now codified at RCW 49.58.040. the statute creates a remedy through the Department of Labor and Industries or through a civil action.

Employers therefore could be subject to claims brought before federal and state administrative agencies as well as civil actions if they impair employee rights to discuss compensation.

B. What is Concerted Activity?

Both the NLRA and RCW 49.32.020 provide protections for employees engaging in 'concerted activities.' According to the NLRB, the test for whether concerted activity exists is whether it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." ***Meyers Industries***, 281 NLRB No. 118 at 887 (1986) *affirmed* as ***Prill v. NLRB,*** 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988). However an individual can be acting "in concert" with others where s/he "seek[s] to initiate or to induce or to prepare for group action." Id. "Individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are [a] logical outgrowth of the concerns expressed by the group." ***Mike Yurosek & Sons, Inc.***, 306 NLRB 1037, 1038 (1992).

C. Employers/Employees and Social Media

Postings by employees on social media sites may be considered as concerted activity. Social media has, in many ways, replaced the public square or sidewalk as a means to protest or to vent.

The NLRB concluded that an employer policy against employees making disparaging comments about the employer, its managers, coworkers and competitors was unlawful. *See, e.g.*, ***University Medical Center***, 335 NLRB 1318, 1320-1322, *enforcement denied in part,* 335 F.3d 1079 (D.C. Cir. 2003).

The employer should tread lightly even where an employee posts uncivil language about the employer or its executives or managers. The threat of litigation against an employee for defamation may have the effect of chilling Section 7 rights and therefore violate Section 8 of NLRA. *See* ***Lutheran Heritage Village-Livonia,*** 343 NLRB 646, 647 (2004). Thus, a rule prohibiting "inappropriate discussions" about the employer could reasonably be believed to restrain Section 7 conduct because the employee could believe that s/he could not discuss with others the terms and conditions of employment.

Salon/Spa at Boro, Inc., 356 NLRB No. 69 (2010) dealt with a staff meeting where a manager made comments about social media. Employees took the comments to be threats. The manager noted that "negativity is complaining. It is not being happy or grateful for the situation that you have." This violated a company policy that required all employees to avoid statements and behaviors that would contribute either to an atmosphere or perception of negativity by customers of the employer. At the staff meeting, the manager discussed social media and noted that the employees "needed to be kind and positive" in their postings. The Administrative Law Judge hearing the case determined that these were not threats. But the ALJ did state that the anti-negativity policy chilled Section 7 rights. By prohibiting 'negativity' the policy could be construed by employees to prevent them from discussing with each other complaints about managers that affected working conditions.

In advising employers about social media and internet usage, counsel should consider that the NLRB is very active in this area and will remain so because of the prevalence of social media. If nothing else, the specter of an investigation by the Board into a non-union employer's conduct should, itself, merit caution.

Employers can seek advice - advisory opinions - for the Board's Office of General Counsel, Division of Advice. Sears did so with respect to its social media policy and whether it had an adverse effect on Section 7 rights. Its policy generally barred discussion in social media of the company's proprietary or trade secret information, confidential information, disparagement of the company's services or products (or those of competitors) and executive leadership, employees and business prospects. Use of the company name with reference to disparagement of people due to membership in a protected classification was also prohibited as was use of profanity, explicit sexual references and reference to illegal drugs.

The NLRB's Division of Advice noted that the ban on disparagement of the employer's executive leadership "could chill the exercise of Section 7 rights if read in isolation . . . .." However "the policy as a whole provides sufficient context to preclude a reasonable employee from construing the rules as a limit on Section 7 conduct."

In order to be certain that a third party is not able to claim that a posting is endorsed, ratified or sponsored by the employer, the company could require a disclaimer. Thus, if an employee identifies him or herself as an employee of the company, s/he could be required by company policy to state that the views are not of the employer and do not state the views or policies of the employer or its management.

In Washington, an employer is prohibited by statute from: requesting or requiring an employee or job applicant from disclosing social media log-in information for a personal social networking account; coercing an employee to observe the contents of the account or to take adverse action against an employee or applicant if she refuses to divulge such information. RCW 49.44.200(1). Exceptions are allowed to assure compliance with laws, regulations or prohibitions against misconduct or where there is an investigation about misappropriation of confidential or financial information. RCW 49.44.200(2).

2. Discrimination.

A. The protected classes

State law, RCW 49.60.030 and RCW 49.44.090 protects persons because of their:

- race,
- creed,
- color,
- national origin,
- sex,
- honorably discharged veteran or military status,
- sexual orientation,
- the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability,
- age.

Note that 'sexual orientation' is specifically defined to mean:

> [H]eterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived 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).

"Disability" is defined at RCW 49.60.040(7) and includes temporary and permanent impairments; those that can be mitigated and learning disabilities. However, the impairment "must have a substantially limiting effect upon the individual's ability to perform his or her job."

Federal law provides protections due to:

- race,
- color,

- religion,
- sex,
- pregnancy,
- national origin,
- age,
- disability,
- genetic information,
- veterans' status.

B. The covered workers

Generally, the state anti-discrimination statutes apply to employers with eight or more service providers. That a service provider is not an employee and is, instead, a contractor, is of no consequence. *See, e.g*., ***Marquis v. City of Spokane***, 130 Wn.2d 97 (1996).

State common law may also provide a remedy for individuals working for employers with fewer than eight employees. This is due to the broad declaration of civil rights found at RCW 49.60.030 which forms the basis for a public policy-based tort for constructive wrongful discharge. *See, e.g.,* ***Wahl v. Dash Point Family Dental Clinic, Inc***., 144 Wn.App. 34 (2008).

Municipal ordinances likely cover all employers. For example, Seattle's SMC 14.04.030.K defines 'Employer' to be "any person who has one or more employees . . . ."

The major federal law against employment discrimination is Title VII of the Civil Rights Act of 1964. It requires that an employer have fifteen or more employees and that the employer affects interstate commerce. In order to maintain a civil action in federal court it is first necessary to file a charge with the Equal Employment Opportunity Commission.

Entire CLE seminars are, of course, devoted to what constitutes unlawful discrimination and what does not. Many commentators on TV discuss discrimination as the equivalent of hatred or dislike [animus] and that those who discriminate are racists or misogynists or supremacists or worse.

Unlawful discrimination is none of this. Rather, it is simply to treat a person adversely due to membership in a protected class. Our Supreme Court addressed this in ***State v. Arlene's Flowers, Inc.,*** 187 Wn.2d 804, 389 P.3d 543, cert. petition filed, July 21, 2017, cert. granted and judgment vacated and remanded, __U.S. __ (2018). A business owner in a public accommodation case asserted that she did not have any animus toward gay people but that her religious beliefs prevented her from providing certain services to them.

In footnote 4, the unanimous opinion by Justice Gordon McCloud stated, "[w]e have already addressed this question of an animus requirement with regards to the WLAD [RCW 49.60] and have held that it contains no such requirement." Footnote 5 stated, "***See also Blackburn v. Dep't of Social & Health Servs.*** 186 Wn.2d 250, 258-59, 375 P.3d 1076 (2016) (discrimination on basis of race occurs even where racially motivated staffing decision might have been based on benign reason.)"

3. Trade Secrets.

It seems every employer now has trade secrets it desires to protect. The use of electronic devices and media allows migration of information with the click of a button.

The Washington statute which most directly deals with this is the Uniform Trade Secrets Act, RCW 19.108 (UTSA). It provides a working definition of trade secrets and displaces common law dealing with these secrets. It also provides for fee shifting at RCW 19.108.040. But read that provision carefully as it may allow a defendant an opportunity to obtain fees on a more generous basis than for a plaintiff.

Because so much employer work is done on various electronic devices (smart phones, lap tops and tablets) there are some 'best practices' to consider when advising either an employer or an actual, potential or former employee:

- The employer should have a policy regarding use of electronic devices at work - especially those devices it owns.

- Both the employer and the employee have an interest in preventing employer electronic media and data from migrating to an employee's personal electronic devices.

- The employee should want, and the employer should provide, necessary electronic devices for the employee to do his or her work.

- The employer should prohibit or discourage use of its electronic devices for employees' personal use - and vice versa.

- If the employee is going to use employer media on a personal device, it should be through a Virtual Private Network (VPN) or remote desk-top access.

- Advise the employee that memorized information may be a trade secret under UTSA.

- If the employer requires travel to foreign countries, consider issuing a 'clean' electronic device to the employee. There are some borders where the authorities tend to seize first and discuss later. Likewise, employees should consider renting a phone overseas and taking a minimum amount of personal electronic media with them.

- A new hire should be required to warrant, in writing, that she is not to bring on to the company premises any trade secret, proprietary or confidential information of any third party.

If you are advising an employee who is considering leaving his or her job, remind that person that any migrations of media from the employer to a third party are traceable. You might advise the employee in turn to advise the employer that work-related electronic media may be on a personal device.

The employee should learn from the employer how it wishes to deal with this: By simple 'deletion' by the employee or by having the employer 'scrub' the employee's electronic device of the employer's media. Segregation of work and personal devices eliminates this problem.

If you are advising an employer, be mindful of that part of the definition of 'trade secret' at RCW 19.108.010(4)(b): that the information or data "[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Just saying that something is a trade secret is not enough!

On the employee side, resist any agreements which purports to place the burden of proving that information is not a trade secret on the employee.

4. Non-Compete Agreements

There is an urban legend that non-compete and non-solicitation agreements [each a species of Post-Employment Restraints - PERs] are unlawful or unenforceable. This seems to originate from clients who have relatives who live or work in California where non-competition agreements are, by statute, unenforceable in most circumstances.

There can be little doubt that, in the abstract, PERs may be lawful in Washington state if they are 'reasonable.' The basis for determining reasonableness rests on the United States and Washington Constitutions.

"[O]ne of the most fundamental of those privileges protected by the [privileges and immunities] Clause" is "the pursuit of a common calling." ***Supreme Court of New Hampshire v. Piper,*** 470 U.S. 274, 280, n.9, (1985) (citation omitted). Under the Washington Constitution, art. I, section 12, a "fundamental right" is to "carry on business" in the state. ***State v. Vance***, 29 Wash. 435, 458, 70 P. 34 (1902) (cited with approval in G***rant County Fire Prot. Dist. No. 5 v. City of Moses Lake,*** 150 Wn.2d 791, 813, 83 P.3d 419 (2004).

The right to seek and obtain employment in this state is so fundamental that a non-competition provision is analyzed for violation of Wash. Const. art. XII, section 22 which prohibits monopolies and limiting any product or commodity. ***Sheppard v. Blackstock Lumber Co***., 85 Wn.2d 929, 931, 540 R.3d 1373 (1975).

The burden is on the employer to establish the reasonableness of its post-employment restraint (PER) with its employee. **Sheppard**, at 85 Wn.2d 933.

A Washington court is allowed to insert its notion of what is 'reasonable' and reform the terms of the PER if an element of the PER is unreasonable. Id. at 934. Reasonableness is determined by examining what is required for protection of some legitimate interest of the employer; whether it imposes an undue hardship on the employee and whether it is injurious to the public. Id.

If the employer requires a non-competition agreement as a condition of employment but only makes that condition known after a job offer is made, the agreement likely is voidable. This would be especially so where the employee changed position in reliance upon the job offer e.g., by quitting his or her previous employment. ***Labriola v. Pollard Group, Inc.***, 152 Wn.2d 828, 835, 100 P.3d 791 (2004).

A species of PER is a non-solicitation provision with respect to customers or clients or employees. In order to be truly effective, it should also provide that the burdened party (the former employee) will not hire or do business with the persons or entities involved.

Solicitation can best be described as "To appeal to (for something); to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving.... By contrast, [m]erely informing customers of one's former employer of a change in employment, without more, is not solicitation." ***Nowogroski Ins., Inc. v. Rucker***, 137 Wn.2d 427 at fn.4 (citations to out of state authorities and internal quotes omitted).

The non-solicitation provision is far less onerous than a true non-competition form of PER and is likely to pass muster more readily. It concedes that the employer does not have an interest in preventing competition, *per se* and thereby reduces the likelihood that the burdened party can claim its application harms him or her.

But beyond the effect on the burdened employee is the effect on persons who are not party to the non-solicitation agreement. In effect, the employer is preventing those employees from being able to remove an economic opportunity from them. How does that square with at-will employment?

Undoubtedly, you will have clients who wish to enforce a PER, and clients who are concerned about whether a PER is enforceable. As with most things we deal with in our profession prevention is preferable to cure.

Some best practices regarding PERs include these:

- If you have a client with a PER and that client is thinking of changing employers, read the PER and the agreement in which it is located carefully: What, precisely, is going to be prohibited under the terms of the contract?

- Learn what your client has actually done for the employer in the last several years: Does the PER really apply to anything the employee actually did? (Many PERs are taken off the internet and some are boilerplate one-size-fits-all creatures. It may not

apply to your client at all.) Many of the Washington appellate cases involve professional service firms such as accountants. They have exclusive relationships with their clients. Most other businesses do not have exclusive relationships. See, e.g., ***Nowogroski Insurance, Inc. v Rucker***, 137 Wn.2d 427 (1999) (insurance broker); ***Perry v. Moran***, 109 Wn.2d 691 (1987) (accounting firm), ***Knight, Vale & Gregory v. McDaniel,*** 37 Wn.App. 366 (1984) (accounting firm).

- Learn when the PER was formed: Before or after employment began. It can make a difference, as ***Labriola*** teaches. If formed after the employment began, was there consideration for the PER

- Have the terms and conditions of employment substantially changed since the PER was initially formed? if so, the PER may not be enforceable. See, e.g., ***Wells Fargo Ins. Services USA, Inc., v Tyndell,*** 2016 WL 7191692 at *6 (E.D.WA 2016); ***Chemstation of Seattle v Donahoe***, 2018 WL 3625781 (Div. I, 7/30/2018)

- Learn whether there was there an opportunity to negotiate the PER.

- If this client is considering a job offer, have the client disclose to the potential employer the PER.

- If your client is the potential employer, consider having the potential employee sign a warranty that s/he is under no contractual disability to be employed by your client in a specified job. This could tend to immunize the potential employer if the employment relationship is formed and the former employer is considering a tortious interference claim against your client.

- The potential employer should absolutely prohibit the potential employee from bringing into the work place or using any past information obtained from the former employer regardless whether it is hard copy or electronic media.

- "Merely informing customers of one's former employer of a change in employment, without more, is not solicitation." ***Nowogroski,*** *supra*, at 137 Wn.2d 440, n.4 (internal quotes omitted).

- When an employee arguably subject to a PER leaves employment, the former employer should remind the former employee in writing of the existence of the PER.

- Consider a declaratory judgment action with respect either to enforceability or scope of a PER. However, be mindful of any contractual fee shifting provision in the PER and its consequences.

5. Employee Manuals.

There is the belief that a generalized disclaimer in an employee handbook or manual will insulate the employer from any sort of common law claim of wrong termination based upon an estoppel-like and implied contract theories approved in ***Thompson v. St. Regis Paper Co.,*** 102 Wn.2d 219, 685 P.2d 1081 (1984).

The problem some employers have is that they don't manage the employee manual. Revisions are made but may not be distributed to all employees. Conditions may change which make some of the employer policies or practices obsolete. Oral representations may be made which negate some or all of what is in the manual and that may form the basis of an enforceable right. *See, e.g.*, ***Swanson v. Liquid Air Corp.,*** 118 Wn.2d 512, 533, 826 P.2d 664 (1992), ***Payne v. Sunnyside Community Hospital***, 78 Wn.App. 34, 894 P.2d 1379 (1995).

Most recently, the Washington Supreme Court dealt with expansive terms in an employment manual in ***Mikkelsen v. Pub. Util. Dist. No.1 Kittitas Cty***., 189 Wn.2d 516 (2017). There, the employer was given broad discretion in determining employee discipline. However, there were other provisions which discussed 'employee rights' and that corrective actions should be 'fair'. The ambiguities in these policies created a material issue of fact which survived a motion for summary judgment as to whether the employee was truly 'at-will.'

Bulman v. Safeway, Inc., 144 Wn.2d 335, 27 P.3d 1172 (2001), is another Washington Supreme Court decision dealing with employee manuals. That decision required that the former employee must rely upon a promise of "specific treatment in specific circumstances" while employed in order to make out an estoppel-like claim. 144 Wn.2d at 341. However, the implied contract theory of termination for 'cause' does not require reliance. Id. at 350.

Another problem for some employers is that they include so much information that the manual becomes useless. This may be particularly pernicious if the work force does not have the general aptitude to deal with the extent of information conveyed or the manner in which it is conveyed. You can read ***Bulman*** and understand better the result in ***Mikkelsen.***

6. Unpaid Wages.

Washington has two statutes which provide for payment of wages. RCW 49.48.010 requires wages to be paid upon termination of employment. RCW 49.52.050 and .070 provide a remedy when the employer 'willfully withholds' wages - double damages, attorney fees in favor of the employee only and potential personal liability for those involved in determining not to pay the wage.

The element of scienter in RCW 49.52 actions is in a confusing state because of two recent state Supreme Court decisions which seem to contradict each other.

Up until February, the element of 'willfulness' could be defeated by the affirmative defense of clerical error or *bona fide* dispute as to the amount or whether wages are owed at all. ***Schilling v. Radio Holdings, Inc.,*** 136 Wn.2d 152, 961 P.2d 371(1998). A *bona fide* dispute is one where the state of mind of the actor is in question or where it is 'fairly debatable' whether the wage is owed because the amount may be in question or the fact of employment is disputed. ***Schilling***, *supra*, at 136 Wn.2d 161; ***Moore v. Blue Frog Mobile***, ***Inc.,*** 153 Wn.App. 1 at ¶ ¶ 12-13 (2009), rvw denied, 168 Wn.2d 1020 (2010).

But in ***Allen v. Dameron,*** 187 Wn.2d 692 (2017) a concurring opinion by Justice Gordon McCloud stated,

> I write separately to clarify that "may" means "may [be liable]." The other prerequisites to WRA [RCW 49.52] liability must still be met before such liability can attach. Specifically, plaintiffs must still prove the statute's mental element: that the deprivation of wages was done "[w]illfully and with intent to deprive." RCW 49.52.050(2) . . . .
>
> The majority is generally correct that the WRA must be liberally construed to advance the legislative purpose " 'to protect employee wages and assure payment.' " Majority at 493 (quoting ***Schilling v. Radio Holdings, Inc.***, 136 Wash.2d 152, 159, 961 P.2d 371 (1998)). But this mental element of the statute we are construing today—RCW 49.52.050(2)—is not subject to a liberal construction . . .

Under the teaching of ***Allen***, it seemed not only was there an affirmative defense available for clerical error or *bona fide* dispute, but also an affirmative obligation of a plaintiff to prove willfulness.

Then, ***Hill v. Garda CL Northwest, Inc.,*** ____Wn.2d____, 2018 WL 4025322 (8/23/2018) was decided. This is another case involving RCW 49.52. Yet, it contains no mention of ***Allen*** and the majority opinion is by Justice Gordon McCloud and it states:

> The standard for proving willfulness is low-our cases hold that an employer's failure to pay will be deemed willful unless it was a result of 'carelessness or error . . . But an employer defeats a showing of willful deprivation of wages if it shows there was a 'bona fide' dispute about whether all or part of the wages were really due.

Hill seems to revert to ***Schilling*** in terms of providing an affirmative defense as a way to defeat willfulness which is otherwise presumed. But in light of the recency of ***Allen***, where is the Court on the issue of proof of scienter: Is that something which must be established by a plaintiff or is it something presumed, and defeated only by an affirmative defense? Tread carefully here.

The personal liability of corporate officers and managers under RCW 49.52 can be a very coercive tool. *See* ***Morgan v. Kingen***, 166 Wn.2d 526, 210 P.3d 995 (2009) where a majority of six determined that bankruptcy of an employing entity does not

excuse the CEO and the COO of that entity from personal liability for unpaid wages under RCW 49.52.050 and .070. Both of these corporate officers controlled payment of wages and, between them, owned about forty percent of the stock of the entity.

In ***Zimmerman v. W8LESS Products***, 160 Wn.App. 678, 248 P.3d 601 (Div.II 2011) individual members of a limited liability company (LLC) successfully appealed a summary judgment against them for unpaid wages allegedly due an employee of the LLC in an action brought under RCW 49.52. The fact issue was whether the plaintiff was actually employed by the defendant employing entity and, if so, under what terms.

7. Some Useful Washington Statutes/Regulations

• Employer references: RCW 4.24.730: Presumption of good faith applies to an employer who discloses information about a former or current employee to a prospective employer or employment agency if the information pertains to the ability of the employee to perform the job, any illegal or wrongful act committed by the employee and the diligence, skill or reliability exercised by the employee in carrying out the job.

• RCW 49.44.010 prohibits blacklisting - causing any statement to be published in any form for the purpose of preventing an individual from obtaining employment. This is a criminal statute but it has a civil remedy. *See,* ***Moore v. Commercial Aircraft Interiors,*** 168 Wn.App. 502, rvw denied, 175 Wn.2d 1027 (2012).

• Assignment of employee rights to inventions, RCW 49.44.140-.150. This statute declares public policy regarding the extent to which an employer can claim ownership of employees' inventions.

• Prohibition against any form of genetic screening as a condition of employment, RCW 49.44.180.

• Washington equal pay law: RCW 49.58. This requires equal pay between men and women doing 'similar' (not equal) work. It was amended most recently in 2018. This requires equal pay for individuals "worki[ing] for the same employer, the performance of the job requires similar skill, effort and responsibility, and the jobs are performed under similar working conditions . . . ."RCW 49.52.020(1). There are exceptions, of course. Examples are: Educational training or experience, seniority, merit, measuring earnings by quantity or quality of work. RCW 49.58.020 (2)(b). Note that "[a]n individual's previous wage or salary history is not a defense under this section." RCW 49.58.020 (3)(d).

• RCW 49.12.200: "every avenue of employment shall be open to women . . . ."

• Employee inspection of personnel files: RCW 49.12.250-.260: Employee may annually inspect locally "file(s)" and employee may request removal of "any irrelevant or erroneous information." If the employer does not remove such information, the

employee may have placed in the "file(s)" a "statement containing the employee's rebuttal or correction."

- RCW 49.12.350-.370: Employers must offer the same parental leave for adoption of a child under six years of age as offered to biological parents.

- RCW 49.12.265-.285: An employer which has sick leave for employees must allow employees to use that leave time for assistance or caring for children, parents, parents-in-law and grandparents.

- Sales representatives' payment of commissions: RCW 49.48.150-.190. The statute requires written commission agreements between a principal and its sales representative who solicits wholesale orders in Washington.

- An employer must provide a written reason for its termination of an employee. WAC 296-126-050(3).