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Employment Law Update
November 18, 2021

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Agenda

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

CLE Credit

Approved for 1.5 WA MCLE credits.

To apply for credit, email your WSBA # to nataniel.vigil@stokeslaw.com

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COVID-19 Update

Aviva Kamm and Krista Slosburg

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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

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WHERE ARE WE NOW?

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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.

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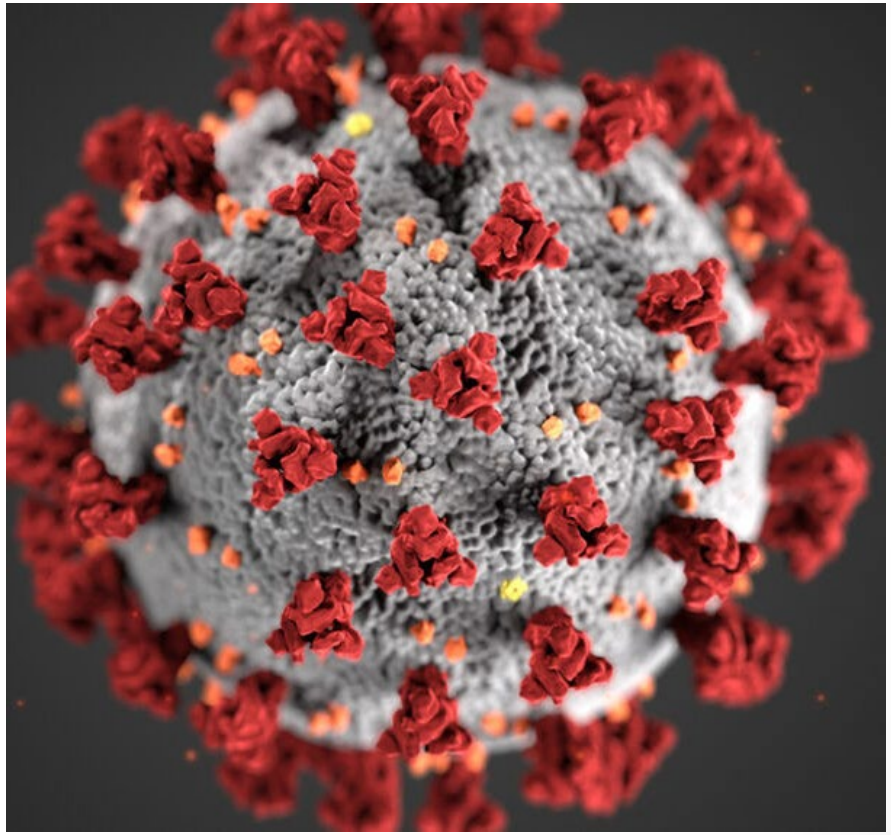
Positive case notification/reporting

- 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.



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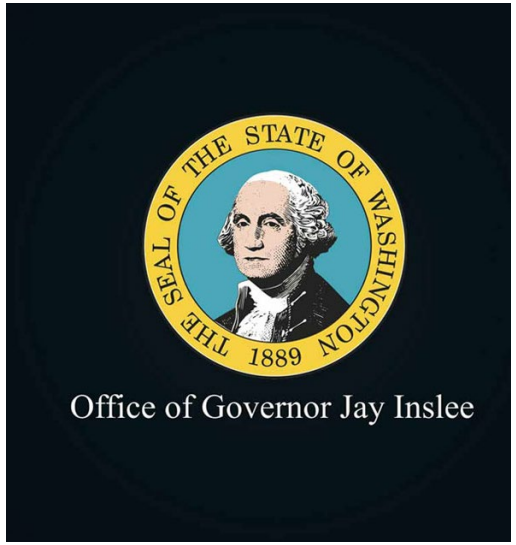
Inslee's Mandatory Vaccination Order

- 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.



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

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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*

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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
- OSHA summary sheet: www.osha.gov/sites/default/files/publications/OSHA4162.pdf
- Accommodation request forms (contact an SL lawyer for assistance)

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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.

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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

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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

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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

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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).

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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

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Reasonable Accommodations

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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."

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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.

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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.

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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.

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Interactive process

- Remember, the interactive process is key!

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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

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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

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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)

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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

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Managing remote employees—clear expectations

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

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Fair Labor Standards Act and Minimum Wage Act Exemption Refresher

Maricarmen Perez-Vargas

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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.

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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.

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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.

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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

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What is part of "salary?"

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

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Impermissible Deductions

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

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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

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Duties Tests: Who is Exempt?

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

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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**

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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**

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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**

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Professional Exemption: Creative Professional

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

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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

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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.

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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.**

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Common Examples and Questions

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Question: Can Administrative Assistants be exempt?

Answer: Sometimes!

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

Answer: Sometimes!

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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

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Spotlight on 2022: Agricultural Overtime Pay Phase-In

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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.

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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.

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Your Questions Answered

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