

2024 Employment Law Update

Thank you for joining us!
The presentation will begin shortly.

Say What?! Employee Speech and Discipline

Presented by Chrystina Solum

Presenter



Chrystina Solum
Attorney

Discussing Compensation

- Acme Industry, Inc.'s Employee Handbook has a Confidentiality Policy that states:
 - As a condition of employment, all employees agree to keep confidential all Company information, including, without limitation, information relating to prospective, current, and/or former customers, as well as the Company's confidential or proprietary information, including, without limitation, **compensation information, employee data**, business development plans, marketing strategies, economic, financial, or legal information, and management policies.

Discussing Compensation

- Acme Industry, Inc.'s Employee Handbook has a Confidentiality Policy that states:

- As a condition of employment, the Company informs prospective, current and former employees that all confidential or proprietary information, including but not limited to **compensation information**, marketing strategies, and other confidential information, is the property of the Company and must be kept confidential.



employees must agree to keep confidential all confidential information, information relating to the Company's business, as well as the Company's confidential information, without limitation, including but not limited to business development plans, financial information, and management information.

Discussing Compensation

- Under Washington's Equal Pay and Opportunities Act (EPOA), employers may not prohibit employees from inquiring about, disclosing, comparing, or discussing their wages, including pay and benefits, with others, or require employees to sign agreements that prevent them from discussing their wages.
- Washington's Silenced No More Act bars employers from entering into agreements with employees that prohibit employees from disclosing conduct they reasonably believe under state, federal, or common law to be illegal discrimination, harassment, retaliation, a wage and hour violation, sexual assault, or a violation of clear public policy.

Discussing Compensation

- The EPOA protects employees who:
 - Engage in wage discussions;
 - Inquire about, disclose, compare, or otherwise discuss their own wages or the wages of any other employee, unless the employee has access to others' compensation data as part of the essential functions of their job;
 - Communicating with any person, including coworkers, about a violation of the law;
 - File an EPOA complaint with LNI;
 - Testify or otherwise participate in an administrative, judicial, or other investigation or proceeding regarding an alleged violation of the law;
 - Inform another person about their rights under the law.

Discussing Compensation

- Tran Sparency, **the manager of Acme Industry's sales department** sent a Teams message **to their team** saying, “I want to remove the stigma and secrecy about compensation. I currently make \$100,000.00 per year in base salary and 2% commission on all sales our department makes. When I was hired, **my salary was \$10,000 higher** than we now pay employees in that position.” Is that protected?

Discussing Compensation

- Tran Sparency, the manager of Acme Industry's sales department sent a Teams message **to their team** saying – “I want to remove the stigma and secrecy about compensation. I currently receive 1% commission on all sales our company makes. When I was hired, **my salary** was \$10,000 higher than what was protected.” Is that



Discussing Compensation

- You are the Vice President of Human Resources for a large corporation in Yakima. You receive a complaint from employees in the analytics department that their coworker, Diz Ruptive, is continually asking them about their compensation. They report that they have **repeatedly refused** to provide that information and **asked Diz to stop. Diz persists** in asking. Can you instruct Diz to stop asking the analytics team about their compensation?

Discussing Compensation

- You are the Vice President of Human Resources for a large corporation in Yakima. You receive a call from a manager in the analytics department that their coworker, Diz, is repeatedly asking them about their compensation. They request that you stop asking them about their compensation. They **repeatedly refused** to provide that information and **asked** you to stop asking them about their compensation. Can you instruct Diz to stop asking the analytics department about their compensation?



Discussing Compensation

- Your **payroll administrator**, Gus Toe, sends **company-wide email** with a spreadsheet of **all employee compensation** because he thinks the company pays women less than men. Is this protected activity under the EPOA?

Discussing Compensation

- Your **payroll administrator**, Gus Toe, sends **company-wide email** with a spreadsheet of **all employees** because he thinks the company pays women less than men. Is this a protected activity under the EPOA?



Social Media Posts

- The sales department did not meet its Q3 goals, and because of that, the sales team did not receive their quarterly bonus. Morale in the department is low, and finger-pointing and recrimination is rampant. Missy Guided, who is usually the top performing salesperson, posted a video on TikTok complaining that, “Acme Industries is self-sabotaging faster than a coyote with a stick of dynamite. **Corporate cost cutting** has made our **products so unsafe** they are **blowing up before our customers can get them out of the box**. As sales dwindle because our products suck, the **C suite keeps jacking up prices** to try to cover the loss. They can blame the sales team all they want, but **this is going to blow up in their faces** faster than Acme's A2C4 dynamite.”
- **Four members of the sales team liked** the video. So did 10,000 others, **including your competitor's social media manager** who featured the video on their company Instagram page.
- Can you instruct Missy to take down the post?
- Can you discipline Missy for making the post?

Social Media Posts

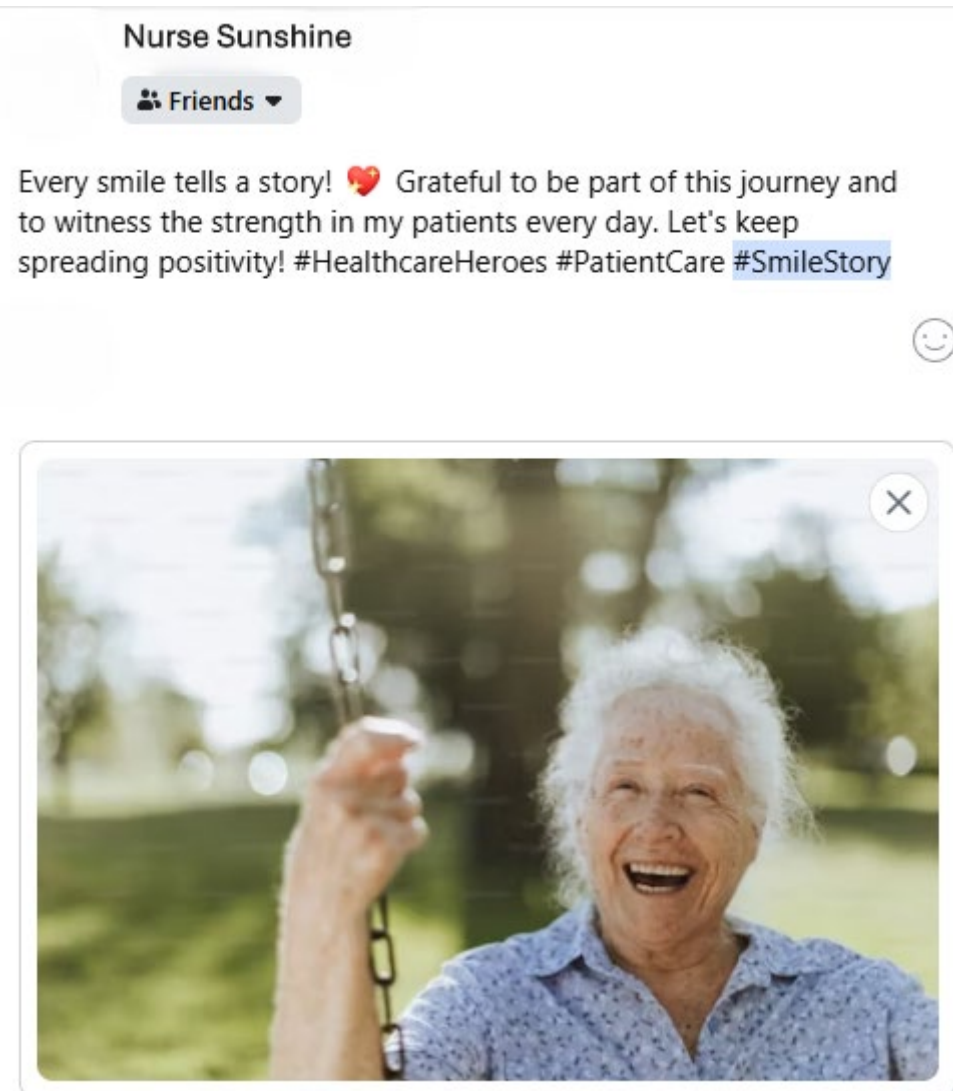
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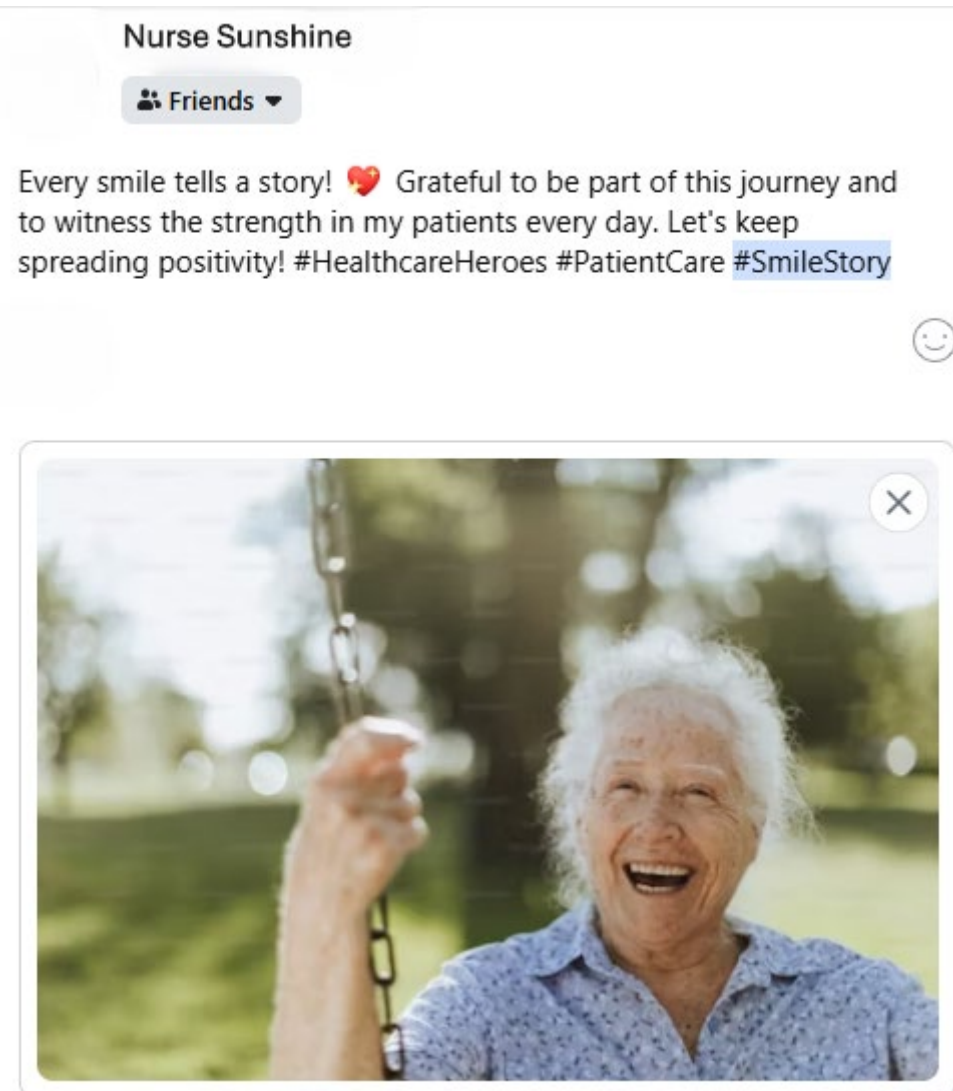
- The National Labor Relations Act protects nonsupervisory employees who engage in conduct for the purpose of improving the terms and conditions of the workplace for themselves and their coworkers, even if they are not unionized.
- The forum in which the activity is undertaken is irrelevant in determining whether the activity was for the “mutual aid or protection” of other employees. The analysis considers only whether there is a link between the activity and matters concerning the workplace or employees’ interests as employees.

Social Media Posts



- Nurse Sunshine, an RN at a memory care facility, posted on her **personal Facebook page, using her personal device, from home**, “Every smile tells a story! Grateful to be part of this journey and to witness the strength in my patients every day. Let's keep spreading positivity!”
- Included with the post is a **picture of Gladys, one of the residents** at the facility.
- You receive a call from Gladys’s daughter, furious her mom's picture and name are on Nurse Sunshine's post.
- Can you instruct Nurse Sunshine to remove the post? Can you discipline her?

Social Media Posts



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- personal device, from home, “Every t of this journey and to witness the t's keep spreading positivity!”
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Political Speech

- The CEO of your company is **watching the evening local news program** before the election and noticed a brief shot of one of **your direct reports**, Ag I. Tater, sitting at a table **gathering signatures in support of an initiative** to increase paid sick leave benefits. Ag is not interviewed, not identified by name, is not wearing any clothing that would identify his employer. You get a call from the CEO filling you in and instructing you to put Ag on a PIP for violating Company's policy prohibiting off-duty conduct that negatively impacts the Company's business, reputation, or interests.
- Do you do it?

Political Speech

- The CEO of your company is **watching the evening local news program** before the election and noticed a brief shot of one of **your direct reports**, Ag I. Tater, sitting at a table **gathering** sick leave benefits. Ag is not wearing any clothing that would identify you in and instructing you to prohibit off-duty conduct, reputation, or interests.
- Do you do it?



Political Speech

- It is a gross misdemeanor in Washington to interfere with or attempt to interfere with the right of any voter to sign or not sign an initiative or referendum petition, or with the right to vote for or against an initiative or referendum measure by threats, intimidation, or any other corrupt means or practice.
- The City of Seattle prohibits employers from discriminating based on political ideology.
- State and local government employees have a protected right to vote and express their opinions on all political subjects and candidates, to hold political office, or participate in the management of a partisan, political campaign.

Political Speech

- Kevin, a tenured professor at the University of Purple Huskeys, used his **university computer to email other faculty members** and encourage them to **contact their legislators in support of proposed legislation** that would provide tenure-like protections to part-time college professors. UPH's technology policy allows **some incidental, personal use** of university technology. Is this use lawful?

Political Speech

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Confidentiality Agreements

- You are a newly hired Director of HR for Acme Sidekick, LLC, a growing subsidiary of Acme Industries. ASLLC's COO asked you to review the company's employment documents for compliance issues as part of your new duties. In reviewing the **employment agreement**, the company asks all new employees to sign, you notice the following:
Nondisparagement. As a condition of employment, Employee agrees not to **defame, disparage, criticize, or speak negatively** about the Company or its **officers, directors, employees, agents, parent, or subsidiaries**, or its **services, products, customers, competitors, or vendors**. You also agree not to keep confidential **all facts related to the Company**, including **any and all conversations or interactions you have with any employee, customer, or vendor**.
- Is this provision lawful?

Confidentiality Agreements

- You are a newly hired Director of HR for Acme Sidekick, LLC, a growing subsidiary of Acme Industries. ASLLC's COO asked you to review the company's employment documents for compliance issues as part of your job. The company asks all new employees to sign a **Confidentiality Agreement**. As a condition of employment, the agreement requires the employee to agree not to **defame, disparage, criticize, or speak negatively about** the company, its **officers, directors, employees, agents, parent, or subsidiaries**, its **products, customers, competitors, or vendors**. You also agree not to **disclose any confidential information** to any third party. Is this provision lawful?



Confidentiality Agreements

- Washington's Silenced No More Act prohibits employers from requesting or requiring an employee to enter into an agreement that prohibits them from disclosing conduct, discussing conduct, or the existence of a settlement involving conduct that the employee reasonably believed under state, federal, or common law constituted illegal harassment, discrimination, or retaliation; a wage and hour violation; sexual assault; or a violation of clear public policy.
- The SNMA prohibits nondisclosure and nondisparagement provisions in employment agreements, independent contractor agreements, settlement or severance agreements, or any other agreement between an employer and employee.
- Employee means a current, former, or prospective employee or independent contractor.
- Violations of the SNMA may be enforced by private lawsuit for actual damages or statutory damages of \$10,000, whichever is more, and reasonable attorney fees and costs.

Confidentiality Agreements

- As you continue reviewing the form agreements, you see the following provision in the company's standard severance agreement:
 - **Confidentiality.** As a condition of receiving the Severance Payment identified in Section 2 above, you agree to keep confidential the facts leading up to this Agreement, the existence of this Agreement, all negotiations regarding the Agreement, and the amount of Severance Payment.
- Is this provision lawful?

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- Is this provision lawful?



AI in the Workplace

- **While at home, using home computer, employee Fel Oneous uses generative AI to create nude pictures of female coworkers, and disseminates them to three coworkers in private text string, including Al Eye. Al immediately forwards the pictures to the women, who complain to you.**
- Can you fire Fel for creating and disseminating the pictures on his own time?



AI in the Workplace

- While at home using home computer, employee Fel Oneous us female co coworkers immediate complain t
- Can you fir pictures on his own time?



AI in the Workplace

- It is illegal in Washington to knowingly disclose fabricated intimate images of another without their consent. Fabricated images are defined as any photo, videotape, digital image, or other recording that was created or altered by digitization or computer generated.
- Conduct that occurs outside of the workplace can still create a hostile work environment if it is sufficiently severe so as to alter the terms and conditions of employment.

Mandatory Meetings

- Prince Able refuses to attend a **mandatory work meeting** where the **main item** on the agenda is to discuss the **owner's belief** that **unionizing would be harmful**. Can you discipline him for refusing to attend?

Mandatory Meetings

- Prince Able refuses to attend a **mandatory work meeting** where the **main item** on the agenda is to discuss the **owner's belief** that **unionizing would be harmful**. Can you discipline him for not attending?



Mandatory Meetings

- Washington's Employee Free Choice Act prohibits employers from requiring employees to:
 - Attend or participate in employer-sponsored meetings where the primary purpose is to communicate the employer's opinions concerning religious or political matters; or
 - Listen to speech or view communications, including electronic communications, in which the primary purpose is to communicate the employer's opinion on religious or political matters.
- NLRB has recently ruled that captive audience meetings are unlawful – for now.

Mandatory Meetings

- Washington's Employee Free Choice Act does not prohibit employers from:
 - Communicating to employees any **information the employer is legally required to communicate**, but only to the extent of the legal requirement;
 - Offering **voluntary meetings**, forums, or other communications about religious or political matters;
 - Communicating to employees any information, or requiring employee attendance at a meeting or other event, that is **necessary for employees to perform their lawfully required job duties**; or
 - Requiring employees to attend training intended to **reduce and prevent workplace harassment or discrimination**.

Mandatory Meetings

- Perry Emptive sends email to entire company that they deleted the latest email from CEO without reading it because the email explained potential changes to regulations affecting company's operations. The email did not express an opinion for or against the regulations.
- Hallie Rassment refuses to attend mandatory annual training on reducing harassment, discrimination, and retaliation in the workplace.
- Noel Go refuses to read the updated Employee Handbook HR circulated, asserting that they cannot be forced to read the employer's opinion concerning legal and regulatory changes.

Mandatory Meetings

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Thank You

Contact Chrystina



chrystina.solum@stokeslaw.com



Seattle Office



206.892.2096



stokeslaw.com

Pregnancy Accommodations in the Workplace

Presented by Valerie Walker

Presenter



Valerie Walker
Attorney

What We'll Cover

- Background re: disability accommodations
- *State:* Healthy Starts Act
- *Federal:* Pregnant Workers Fairness Act (PWFA)

Background: Accommodating Disability

- WLAD and ADA: Require an employer to reasonably accommodate employee with a disability
- Employee must be “qualified”
 - Can perform the essential functions of the position with or without reasonable accommodation
- Employer may request reasonable documentation
- Undue hardship defense available



State: Healthy Starts Act

- Covers employers with 15 or more employees
- Requires providing reasonable accommodations for an employee's pregnancy or pregnancy-related health conditions

State: Healthy Starts Act

- Prohibited conduct:
 - Fail or refuse to make reasonable accommodation (absent applicable undue hardship defense)
 - Take adverse action against employee for requesting, declining, or using accommodation
 - Deny employment opportunities based on need to make reasonable accommodation
 - Require an employee to take leave if another reasonable accommodation can be provided

State: Healthy Starts Act

- Significant differences from laws re: disability
 - Certain accommodations are per se reasonable, no individualized assessment is required
 - For some accommodations:
 - No undue hardship defense
 - Cannot request written certification from healthcare professional

State: Healthy Starts Act

- Per se reasonable accommodations
 1. **Providing more frequent, longer, or flexible restroom breaks;**
 2. **Modifying a no food or drink policy;**
 3. **Providing seating or allowing the employee to sit more frequently if her job requires her to stand;**
 4. **Providing reasonable break time to express breast milk for two years after birth.**
 5. Job restructuring, part-time or modified work schedules, reassignment to a vacant position, or acquiring or modifying equipment, devices, or an employee's workstation;
 6. Providing for a temporary transfer to a less strenuous or less hazardous position;
 7. Providing assistance with manual labor and limits on lifting;*
 8. Scheduling flexibility for prenatal visits.

***Limiting lifting over seventeen pounds.**

State: Healthy Starts Act

- Employer not required to:
 - “Create additional employment that the employer would not otherwise have created”
 - “Discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job”

...unless the employer does so—or would do so—for other classes of employees who need accommodation

Federal: Pregnant Workers Fairness Act (PWFA)

- Covers: employers with 15 or more employees
- Requires: providing reasonable accommodations for a qualified employee's “known limitations” related to pregnancy, childbirth, or related medical conditions



Federal: PWFA

- Prohibited conduct:
 - Healthy Starts Act conduct, **plus:**
 - Requiring an employee to accept an accommodation without utilizing the interactive process
 - Retaliating against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding
 - Interfering with any individual's rights under the PWFA

Federal: PWFA

- Significant differences from laws re: disability
 - Certain accommodations are (almost always) reasonable and do not impose an undue hardship = “predictable assessments”
 - “Qualified” employee definition
 - Restrictions re: documentation requests

Federal: PWFA

“Predictable assessments”: in “virtually all cases,” these are reasonable accommodations where undue hardship defense does not apply:

1. Take additional restroom breaks, as needed;
2. Take breaks to eat and drink, as needed;
3. Carry or keep water near and drink, as needed;
4. Sit and stand, as needed.

Federal: PWFA

- “Qualified” employee definition
- Pregnant employees do not need to be able to perform the essential functions of the job . . .
 - If that inability is for a temporary period
 - If the function can be performed “in the near future”
 - E.g., for a current pregnancy, 40 weeks

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Federal: PWFA

- Employers may only seek supporting documentation when it is reasonable under the circumstances
- Examples when employer cannot seek supporting documentation:
 - Obvious condition or limitation and obvious need
 - Employee is pregnant and requests one of the “predictable assessments”
 - Employee request re: pumping at work
- Employee self-confirmation for the above is sufficient

Federal: PWFA

- Employer may only seek “reasonable documentation”
 - Confirm physical or mental condition
 - Confirm related to applicable condition
 - Describe the change needed



Tips for Employers Navigating Pregnancy Accommodations

DO NOT

- Default to standard processes re: disability accommodations
- Require supporting documentation for every type of accommodation
- Require employees to submit supporting documentation on a specific form

Tips for Employers Navigating Pregnancy Accommodations

DO

- Identify whether the accommodation requested is specifically called out by HSA or PWFA
- Consider whether employee could perform the essential functions “in the near future”
- Limit documentation requests consistent with the legal restrictions re: accommodation-type

Thank You

Contact Valerie



valerie.walker@stokeslaw.com



Seattle Office



206.892.2132



stokeslaw.com



Washington and Federal Law Update

Presented by

Maricarmen Perez-Vargas & Sean Worley

Presenters



Maricarmen Perez-Vargas
Attorney



Sean Worley
Attorney

Topics

- Non-Competes
- Pay Transparency
- Employee Reimbursements
- Wage and Hour Updates

Non-Competes

The burning question... are they even enforceable?

Answer: kind of!



Rise and Fall of the FTC Ban

- Bans non-competes nationwide moving forward and only retroactive preservation for “senior executives”
- Bans non-competes in disguise (where such agreements “prohibit,” “penalize” or “function to” prevent a worker from seeking or accepting work):
 - Non-solicitation agreements
 - No-handling agreements
 - No-hire provisions
 - Training/education repayment obligations

Limited Exceptions

- Owner of a franchise in a franchisee-franchisor relationship
- Restrictions pursuant to a bona fide sale of a business entity or an individual's interest in a business entity
- Industries not regulated by the FTC

So Non-Competes Are Illegal?

Nope!

Federal Status



Washington State

Unenforceable if:

- Too broad
- Too long
- Too little money

Lesser Known Pitfalls

- Timing of agreement
- Layoffs
- Choice of law and venue
- Moonlighting

Consequences of Violations

- Actual damages or \$5,000, whichever is greater
- Attorneys' fees
- Expenses and costs

Updates on Pay Transparency

Refresher:

- Equal Pay Opportunities Act
 - Amended effective 1/1/23
- Employers with 15 or more employees
- Requires certain disclosures in job posting
 - Wage Scale or Salary Range
 - Benefits and “other compensation”

Updates on Pay Transparency

Refresher:

- Damages
 - “Actual Damages” or \$5,000 (whichever is greater)
 - Interest at 1% per month
 - Costs
 - Reasonable Attorneys’ Fees
 - Reinstatement
 - Injunctive relief
 - Recovery of wages calculated from 4 years from the last violation prior to filing lawsuit

Updates on Pay Transparency

New Amendment – Effective July 1, 2025

- Extends EPOA act claims to discrimination based on membership in a “protected class”
- “Protected classes” are defined under WLAD
- Note:
 - Discrimination based on a protected class was already illegal
 - Now – it’s also a basis for a EPOA claim

Updates on Pay Transparency

Complaints to LNI

- Investigate complaints by applicants “who have applied to jobs in good faith with the intent of gaining employment”
- Assess damages when applicant can establish actual harm
- May still apply civil penalties
 - 1st violation: \$500
 - Repeat: \$1000 or 10% of damages, whichever is greater

Updates on Pay Transparency

New Draft Rules – WAC 296-123-010 et. seq.

- November 22, 2024 - Time for Public Comment on Preliminary Rules
 - Submit Comments: https://lni.us.engagementhq.com/equal-pay-and-opportunities-act-epoa-updated-draft-rule?utm_medium=email&utm_source=govdelivery
- Effective Date – July 1, 2025

Updates on Pay Transparency

New Draft Rules – WAC 296-123-010 et. seq.

- Highlights
 - Does not define “applicant” (e.g., “bona fide” requirement?)
 - Does not say employers must create a wage scale (if they don’t have one)
 - BUT – LNI Admin Policies indicate it is required
 - Creates
 - LNI investigation and resolution procedures
 - Citation and Notice of Assessment
 - Appeal procedures – “from director’s determination”
 - Reasonable attorneys’ fees *from employer* for prevailing employee

Updates on Pay Transparency

Greater Risk

- Class action litigation

Recent waive of class actions

- Many filed with the same named Plaintiff

Updates on Pay Transparency

To file a lawsuit under the EPOA, must the applicant actually intend to accept employment?

i.e., - is there a “bona fide” or “good faith” requirement?

Updates on Pay Transparency

To file a lawsuit under the EPOA, must the applicant actually intend to accept employment?

Answer: Maybe

Updates on Pay Transparency

Must the applicant be “bona fide”?

Federal Court: Yes (for now)

- Procedural harms are not sufficient for Article III Standing
- Must demonstrate some actual harm
- Applicants likely have to allege and produce evidence of actual harm

Updates on Pay Transparency

Must the applicant be “bona fide”?

State Court: TBD

- Question has been certified from federal court to Washington Supreme Court:
- “What must a Plaintiff prove to be deemed a ‘job applicant’ within the meaning of RCW 49.58.110(4)? For example, must they prove that they are a ‘bona fide’ applicant?”

Updates on Pay Transparency

What should employers do?

- Assure that job postings include wage/salary scales and summary of benefits and “other compensation.”
- Comment on LNI’s Proposed Rules by 11/22/24
 - Definition of “applicant”
 - Clarify requirement to *create* a wage/salary scale
 - Attorneys’ Fees – e.g., what if employer didn’t appeal?
 - Etc.

Seattle Reimbursement Requirements

- Remote workers entitled to reimbursement for “necessary expenditures or losses incurred by the employee in direct consequence of the discharge of the employee’s duties.”
- Remote work by employee’s choice sometimes requires reimbursements
- Can include reimbursement for personal internet or cell phone plans used for work

Wage & Hour Updates

- **2025 Minimum Wage:**
 - \$16.66/hour (increase from \$16.28/hour)
 - Seattle: \$20.76/hour (increase from \$19.97/hour)
- **Exempt Salary Basis**
 - 50 employees or less: \$69,305.60/year
 - 51 employees or more: \$77,968.80/year
- **Noncompete Threshold**
 - Employees: \$123,394.17/year
 - Independent Contractors: \$308,485.43/year

Wage & Hour Updates

Recent Case:

- *Androckitis v. Virginia Mason Medical Center*, Wash. Ct. of Appeals (Sep. 30, 2024)
 - Damages for Missed Meal Period:
 - Additional 30 min. of wages (even if already paid for the 30 min. of work)
 - Meal Period Waivers:
 - Need to prove specific instances that plaintiffs voluntarily waived lunches
 - Takeaways:
 - Pay employees for missed meal periods
 - Document waivers

Thank You

Contact Maricarmen

 maricarmen.perez-vargas@stokeslaw.com

 Seattle Office

 206.892.2125

Contact Sean

 sean.worley@stokeslaw.com

 Yakima Office

 509.895.0082

2024 Employment Law Update

Thank you for joining us!
Recordings will be made available
via email later this week.