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Washington Lawmakers Aim to Stop Workplace Sexual Harassment and Close Gender Pay Gaps

Labor, Employment & Benefits Legal Update

In the wake of the #MeToo movement, Washington state's legislature has adopted sweeping reforms to state laws against discrimination and created a work group to develop model sexual harassment policies and best practices. Washington's new laws will require employers to:

- Ensure that men and women are paid the same for the same job;
- Refrain from imposing nondisclosure agreements that restrict employees from discussing sexual harassment or sexual assault occurring in the workplace;
- Avoid requiring employees to waive or release harassment or discrimination claims except in certain settlement agreements; and
- Change their background checking process so that applicants are screened for qualifications before using arrest or conviction records during the recruitment process.

Lane Powell's Labor and Employment Team has prepared this summary highlighting key takeaways from the new employment laws, along with a Lawyers for Employers™ Compliance Checklist.

Act Encouraging Disclosure of Workplace-Related Sexual Harassment or Assault. This law places new restrictions on an employer's ability to

require employees to sign nondisclosure agreements or waivers relating to workplace-related sexual harassment or assault.

- **Prohibits nondisclosure agreements.** Employers may not require an employee to sign, as a condition of employment, a nondisclosure agreement, waiver or other document that prevents an employee from disclosing sexual harassment or sexual assault involving employees occurring in the workplace, at employer-sponsored work-related events, or at another on- or off-site event related to work. Any agreement containing the prohibited provisions is void and unenforceable.
- **Excludes certain settlement agreements.** Settlement agreements between an employer and its current or former employees may contain confidentiality provisions to resolve allegations of sexual harassment (but not sexual assault).
- **No retaliation.** The law prohibits retaliation against an employee who discusses or discloses sexual harassment or sexual assault occurring at a work-related event.
- **HR investigations generally excluded from nondisclosure restriction.** Human resources professionals and other employees who are expected to maintain confidentiality as part of their assigned job duties or were asked to maintain confidentiality during an ongoing human resources investigation are excluded from the definition of employees subject to the nondisclosure requirements. This is important because the law might otherwise allow HR professionals and other employees to violate confidentiality requirements and might interfere with work-related harassment investigations where confidentiality is needed to maintain the integrity of the investigation.

Prohibition on Waivers of Discrimination Claims and Confidential Dispute Resolution Processes. This new law renders any provision in an employment contract or agreement against public policy and void and unenforceable if it requires an employee to waive or release: (1) their right to publicly pursue a cause of action arising under the Washington Law Against Discrimination and the Washington State Civil Rights Act or federal antidiscrimination laws; (2) their right to publicly file a complaint with state or federal agencies; or (3) if it requires an employee to resolve claims of discrimination in a dispute resolution process that is confidential.

Gender Pay Equity Act. The gender pay equity legislation will update Washington's current pay equity law, which has remained unchanged since it was enacted in 1943. The new law will apply to all employers with one or more employees in the State of Washington. Key provisions include the following:

- **Equal wages and advancement opportunities are required for similarly-employed employees.** The new law prohibits Washington employers from discriminating among "similarly employed" employees by providing less "compensation" (wages and benefits) or limiting career advancement opportunities because of gender.
- **Job titles are not determinative.** Employees are "similarly employed" if their jobs require similar skill, effort and responsibility, and are performed under similar working conditions, regardless of whether their job titles differ.
- **Wage disparities between genders must be based on one or more bona-fide job-related factors.** Bona fide factors include education, training, experience, seniority or merit systems, regional market differences in compensation, or differences in quantity or quality of work.
- **Employers may not prohibit most employees from discussing their compensation with each other.** This prohibition is not new; federal law (the National Labor Relations Act) gives non-supervisory employees the right to discuss and/or complain about their wages. However, Washington's new law will provide broader coverage, will permit enforcement on the state level, and will dictate different penalties for violations.
- **New penalties for violations.** Employers who violate this new law may be guilty of a misdemeanor; civil penalties; as well as actual and statutory damages. Employees may also file a civil lawsuit against employers and, if successful, may recover their lost wages (going back four years), penalty wages, their attorney's fees and costs, as well as injunctive relief (e.g., a court order to increase wages) and, if applicable, reinstatement.

Washington Fair Chance Act. This new law restricts employers from considering arrests and convictions in employment decisions until after the employer determines the applicant is otherwise qualified for the

position, subject to several exemptions. Key provisions of the new law include:

- **No consideration of criminal history early in hiring process.** Employers may not inquire into an applicant's criminal history on any employment application; may not run a criminal background check; or otherwise inquire into an applicant's criminal history until after the employer has determined that the applicant is "otherwise qualified" for the position as set out in the job description or advertisement.
- **New requirements for job advertisements.** Job postings or advertisements may not include statements to the effect of "no felons," "no criminal background," and the like.
- **No categorical bans allowed; exemptions.** The new law prohibits employer policies or practices that exclude individuals with a criminal record from consideration before determining that they are otherwise qualified. The law exempts employers hiring for a position with unsupervised access to children or vulnerable persons; employers, including financial institutions, that are expressly permitted or required by law to consider criminal records; and law enforcement or criminal justice agencies.
- **Seattle employers beware.** This new state law does not supersede the existing Seattle Fair Chance Ordinance. Seattle employers must continue to comply with those local requirements, in addition to the new state law.
- **No private lawsuits.** Applicants and employees are not authorized to file a civil lawsuit to enforce this new law. Instead, the Washington Attorney General's (AG) office will enforce the law by conducting investigations, and pursuing administrative sanctions or a lawsuit. The AG must utilize a "stepped-enforcement" approach, first by educating violators, then by warning them, and finally, if violations are not remedied, by taking legal action.

What Should Employers Do Now?

Employers must act promptly because these five new laws are expected to become effective in mid-June. For employers doing business in Washington, Lane Powell offers this Lawyers for Employers™ checklist for complying with the new Washington laws:

- ✓ **Review job advertisements and postings.** Ensure that ads or postings do not contain categorical exclusions for felons or individuals with a criminal record.
- ✓ **Review employment applications.** Applications should not ask applicants to disclose whether they have been arrested, have been convicted of a felony, or otherwise solicit any information about an applicant's criminal history.
- ✓ **Review employment contracts.** These new laws impact virtually all employment-related contracts that require confidentiality relating to workplace matters and all agreements that waive or release discrimination claims. Review employment agreements, confidentiality agreements, severance plans, separation agreements and settlement agreements for compliance with the new laws. Agreements should also contain severability provisions so that if some provision is void or unenforceable, the remainder is still enforceable.
- ✓ **Review employee handbooks and policies.** These new laws collectively address how employers handle discrimination, harassment and retaliation claims, serving as added incentive for addressing inappropriate conduct *before* it occurs. Employers should review handbooks to ensure that they have robust and clear policies prohibiting discrimination, harassment and retaliation, and a complaint reporting process.
- ✓ **Keep an open door.** Managers should ensure that their door is open and any complaints are promptly elevated to HR professionals so that they can be properly investigated.
- ✓ **Train and empower employees to eradicate harassment.** To underscore commitment to fostering diversity and eradicating improper conduct, provide interactive and practical training to all employees so that they recognize and report concerns. Managers should be trained on what to do upon receiving complaints.
- ✓ **Review compensation practices.** Ensure that existing policies and practices do not violate the pay equity law by prohibiting employees from discussing their wages and benefits with each other, or otherwise

discriminate because of gender with respect to wages, benefits or advancement opportunities.

✓ **Consider a pay-equity analysis.** Consider conducting a pay-equity analysis to identify disparities, working closely with legal counsel to shield audit results on privilege grounds, if possible. If compensation disparities between similarly-employed employees are found, consider whether they are based upon the law’s enumerated bona fide job-related factors. Disparities that are not based on such factors should be promptly corrected.

✓ **Review recruiting practices and train managers.** Policies and practices around the use of criminal background information should be reviewed to ensure that criminal history is not inquired into, and is not considered, until after an applicant has been screened and deemed “otherwise qualified” for the position. Hiring managers and HR personnel should be trained on the new restrictions.

✓ **Stay tuned.** The Legislature found that 25-85 percent of working women have experienced sexual harassment on the job, and therefore employers must be encouraged to adopt and actively implement policies to ensure sexual harassment is reported. The Legislature required the Washington State Human Rights Commission to convene a stakeholder work group who must develop and adopt model policies and best practices no later than January 1, 2019.