# EYE ON WASHINGTON

Timely, topical insights on a variety of payroll and reporting issues.

# Detailed Look at State, Local and Federal Updates

## Topics covered in this issue:



## State/Territory/District

### California Updates Guidance and Resources for New Pay Data Reporting Rules

California's Civil Rights Division (CRD) has released updated guidance and resources to reflect recent changes to the pay data reporting requirements for employers with 100 or more employees. The changes were a result of the enactment of Senate Bill 1162.

**The Details:**

Background:

The following chart summarizes the changes to pay data reporting rules made by Senate Bill 1162, which took effect January 1, 2023.

| Pay Data Reporting | |
|---|---|
| **Prior to January 1, 2023** | **Beginning January 1, 2023** |
| A private employer that has 100 or more employees and is required to file an annual Employer Information Report (EEO-1) under federal law must submit a pay data report to the state on or before March 31 each year. | A private employer that has 100 or more employees must submit a pay data report covering the prior calendar year to the state on or before the second Wednesday of May each year, **beginning May 10, 2023**, regardless of whether they are required to submit an EEO-1. |
| | A private employer that has 100 or more employees hired through labor contractors within the prior calendar year must submit a separate pay data report to the state covering those employees. The private employer must also disclose on the pay data report the ownership names of all labor contractors used to supply employees. A labor contractor must supply all necessary pay data to the private employer. |

| Pay Data Reporting | |
|---|---|
| **Prior to January 1, 2023** | **Beginning January 1, 2023** |
| The pay data report must include the following information:<br>• The number of employees by race, ethnicity and sex in each of the following job categories:<br>o Executive senior level officials and managers<br>o First or mid-level officials and managers<br>o Professionals<br>o Technicians<br>o Sales workers<br>o Administrative support workers<br>o Craft workers<br>o Operatives<br>o Laborers and helpers<br>o Service workers | In the addition to what was required before January 1, 2023, the pay data report must include the median and mean hourly rate for each combination of race, ethnicity and sex within each job category. |
| For employers with multiple establishments, the employer must submit a report for each establishment. | A multiple-establishment employer does not submit separate reports for each establishment. Based on the recent guidance (**see below**), this change means a multiple-establishment employer submits a single report that contains all establishments. |
| An employer can comply with the requirement if they submit a copy of their EEO-1 report, containing the same or substantially similar pay data information required. | Employers can no longer comply by submitting a copy of their EEO-1 report in lieu of a CA pay data report. |
| Employers may be responsible for the costs associated with the state's efforts to enforce compliance. | Employers that fail to file the required report may be fined up to $100 per employee, and up to $200 per employee for a subsequent failure to file. Employers may also be responsible for the costs incurred with the state's efforts to enforce compliance. |

Updated Guidance and Resources:

The state has now updated answers to **frequently asked questions** (FAQs), its **user guide** and **templates** to reflect the changes. For example, in the updated FAQs, the state addresses how employers should calculate individual, mean and median hourly rates, providing the following information.

**How do I calculate an employee's hourly rate?**

Employers must calculate each employee's individual hourly rate before calculating the mean and median hourly rates. The hourly rate is derived from an employee's total annual earnings for the entire reporting year, as shown on the Internal Revenue Service (IRS) Form W-2 Box 5. To calculate the hourly rate, divide the employee's W-2 Box 5 income by the number of hours the employee worked.

> **Example:** An employee's W-2 Box 5 income is $100,000 and they worked 2,080 hours.
>
> To calculate the employee's hourly rate:
>
> Divide $100,000 by 2,080 to get: **$48.08.**

If an employee has wages not reported in IRS Form W-2 Box 5, as may be the case for an H-2A visa holder, for example, use W-2 Box 1 for that employee's total annual earnings and divide that amount by the number of hours the employee worked.

**How do I calculate the mean hourly rate?**

Employers report the mean hourly rate for each grouping of employees with the same establishment, job category, race/ethnicity and sex combination. The mean hourly rate is calculated by adding the individual hourly rates for each employee in the group, then dividing that sum by the number of employees in the group.

> **Example:** Employee A and Employee B are the only two employees grouped in the same establishment, job category, race/ethnicity and sex combination.
>
> Employee A's hourly rate: $20.00
> Employee B's hourly rate: $21.00
>
> To calculate the mean hourly rate for the group:
>
> Add Employee A and Employee B's hourly rates ($41.00) and divide by the number of employees (2) to get: **$20.50**.

If there is only one employee grouped in the same establishment, job category, race/ethnicity and sex combination, that employee's hourly rate is reported as the mean hourly rate.

> **Example:** Employee A is the only employee in their same establishment, job category, race/ethnicity and sex combination. Their employer would report Employee A's hourly rate (**$20.00**) as the mean hourly rate.

**How do I calculate the median hourly rate?**

Employers are required to report the median hourly rate for each grouping of employees with the same establishment, job category, race/ethnicity and sex combination. The median hourly rate is calculated by ordering the hourly wages of each employee in the group from smallest-to-largest and selecting the middle number.

> **Example:** Employees A, B and C are the only three employees grouped in the same establishment, job category, race/ethnicity and sex combination:
>
> Employee A's hourly rate: $20.00
> Employee B's hourly rate: $21.00
> Employee C's hourly rate: $22.00
>
> To calculate the median hourly rate for the group:
>
> Arrange all three employees' hourly rates in order from smallest-to-largest ($20.00, $21.00, $22.00) and take the middle number to get: **$21.00**.

If there is only one employee grouped in the same establishment, job category, race/ethnicity and sex combination, that employee's hourly rate is reported as the median hourly rate.

> **Example:** Employee A is the only employee in their same establishment, job category, race/ethnicity and sex combination. Their employer would report Employee A's hourly rate (**$20.00**) as the median hourly rate.

If the number of employees in the same establishment, job category, race/ethnicity and sex combination is an even number, the median hourly rate is calculated by arranging the hourly wages of each employee in the group from smallest-to-largest and taking the mean of the

two middle numbers. If there are only two employees in the same category, the median hourly rate would be the same as the mean of their two hourly rates.

> **Example:** Employees A thru D are all in the same establishment, job category, race/ethnicity and sex combination.
>
> Employee A's hourly rate: $20.00
> Employee B's hourly rate: $21.00
> Employee C's hourly rate: $22.00
> Employee D's hourly rate: $23.00
>
> To calculate the median hourly rate:
>
> Find the mean (the average) of the two middle numbers. In this case, you would add $21.00 and $22.00 ($43.00) and divide by two to get: **$21.50**.

The guidance also clarifies that employers with multiple establishments must submit a single report that includes each establishment.

**Does Senate Bill 1162 mean that multiple-establishment employers have to submit a separate report for each establishment?**

No. The California pay data reports are purposefully designed to consolidate all of an employer's relevant data. For that reason, Senate Bill 1162 conformed Government Code Section 12999 to the system built by the CRD. A multiple-establishment employer submits a single Payroll Employee Report and/or a single Labor Contractor Employee Report, depending on which of these reports the employer is required to file.

The guidance also makes clear that when reporting to the CRD, employers must include their employees assigned to California establishments and/or working within California. Unlike in years past, employers may not report employees who are working outside of California and are assigned to an establishment outside of California.

**Next Steps:**

If you are a covered employer:

- Read the updated **FAQs** and **user guide**.
- Review the templates (**Excel** and **CSV**).
- Determine your "Snapshot Period" to identify the employees who will be included in your report. Employees assigned to California establishments and/or who work from California must be included.

The "Snapshot Period" is a single pay period between October 1 and December 31 of the reporting year. You are free to choose the single pay period between those dates that will serve as your Snapshot Period.

- Determine which establishments you have and gather information about each establishment.
- For all employees in the Snapshot Period, identify each employee's establishment, job category, race/ethnicity, sex, pay, pay band and hours worked.
- Within each establishment, group employees who have the same job category, pay band and race/ethnicity/sex combination. Some groups may be a group of one, if no other employee in the establishment shares that employee's job category, pay band, race/ethnicity and sex.
- Within each employee group in each establishment, calculate the total hours worked by the group.
- Within each employee group in each establishment, calculate the group's mean hourly rate and median hourly rate.
- Gather additional information about the employer and its establishments, such as:
  - Address on file with California's Employment Development Department (EDD);
  - Total number of employees in the United States;
  - Total number of employees in California;
  - Federal Employer Identification Number (FEIN);
  - California Employer Identification Number (SEIN);
  - North American Industry Classification System (NAICS) code(s);
  - Data Universal Number System (DUNS) Number; and
  - Whether you are a state contractor.

- Register **in the portal** and build the report.
  - First, in the portal, provide information about your organization and, if relevant, its parent company, as well as information on all affiliated entities included in the report (Employer Info and Submission Info).
  - Next, provide establishment-level and employee-level information (Establishment and Employee Details) by uploading an Excel file by using CRD's template, uploading a .CSV file or using the portal's fillable forms.
- Provide any clarifying remarks in the relevant field(s) and correct any errors identified by the portal.
- Certify the final report and submit it by **May 10, 2023**.

If you are required to file a pay data report for labor contractors, you must also follow a similar process for them.

## Illinois to Require that Employers Provide Paid Leave

Illinois has enacted legislation (Senate Bill 208) that will require employers to provide employees with up to 40 hours of paid leave that they may use for any reason. Senate Bill 208 takes effect **January 1, 2024**.

**The Details:**

Coverage:

The law covers most employers and employees. However, it doesn't cover:

- Any employer that is covered by a municipal or county ordinance that is in effect on January 1, 2024 that requires employers to give any form of paid leave to their employees, including paid sick leave.
- Any employee working in the construction industry who is covered by a bona fide collective bargaining agreement.
- Any employee who is covered by a bona fide collective bargaining agreement with an employer that provides services nationally and internationally of delivery, pickup and transportation of parcels, documents and freight.
- Any school district or park district.

**Note:** An employer that provides any type of paid leave policy that offers at least 40 hours of paid leave isn't required to modify the policy if the policy offers an employee the option, at the employee's discretion, to take paid leave for any reason.

Accrual, Frontloading and Carryover:

Under the law, employees are entitled to begin accruing paid leave on January 1, 2024, or their date of hire, whichever is later. Employees are entitled to accrue one hour of paid leave for every 40 hours worked, up to 40 hours (employers may provide more generous leave).

Employees who are exempt from the overtime requirements of the federal Fair Labor Standards Act are deemed to work 40 hours in each workweek for purposes of paid leave accrual, unless their regular workweek is less than 40 hours, in which case paid leave accrues based on that regular workweek.

Employers that use the accrual method must carry over any unused paid leave to the next benefit year. However, employers aren't required to provide more than 40 hours of paid leave for an employee in a benefit year unless the employer agrees to do so.

Instead of using the accrual method, an employer may make available the minimum number of hours of paid leave to an employee on the first day of employment or the first day of the benefit year. This is commonly known as frontloading. The Act suggests that an employer may be able to provide a pro rata frontload amount to both new hires and part-time employees.

Employers that frontload the paid leave aren't required to carryover unused leave to the next year. However, under no circumstances can an employee be credited with paid leave that is less than what the employee would have accrued under the accrual method.

Use:

Employees are entitled to begin using the paid leave under the law 90 days following commencement of their employment, or on March 31, 2024, whichever is later.

Employees are entitled to use accrued paid leave for any reason, upon written or oral request. They aren't required to provide a reason for the leave, and employers are prohibited from requiring them to provide documentation or certification in support of the leave. Employees may choose whether to use paid leave provided under the law prior to using any other leave provided by the employer or state law.

Employees are also entitled to use the leave in increments as small as two hours.

Pay During Leave:

During the leave, the employee must be paid their hourly rate of pay. Employees paid by gratuities or commissions must be paid at least the full minimum wage in the jurisdiction in which they are employed when paid leave is taken.

Employee Notice:

Paid leave under the law must be provided upon the oral or written request of an employee in accordance with the employer's reasonable paid leave policy notification requirements, which may include the following:

- If use of paid leave is foreseeable, the employer may require the employee to provide seven calendar days' notice before the date the leave is to begin.
- If the use of paid leave isn't foreseeable, the employee must provide notice as soon as it is practical.
- An employer that requires notice of paid leave when the leave isn't foreseeable must provide a written policy that contains procedures for the employee to provide notice.

Payout of Leave:

With an important exception (see below), the law doesn't require employers to pay employees for any unused paid leave at the end of the benefit year, or at the time of separation from employment.

***Exception***

Paid leave under the law must not be charged to an employee's Paid Time Off (PTO) bank or employee vacation account, unless the employer's policy permits such a credit. If the paid leave under the law is charged to an employee's PTO bank or employee vacation account, then any unused paid leave must be paid to the employee upon the employee's termination, resignation, retirement or other separation to the same extent as vacation time under existing Illinois law or rule.

**Note:** Employers must provide employees with written notice of changes to the employer's vacation time, paid time off or other paid leave policies that affect an employee's right to final compensation for such leave.

Recordkeeping:

An employer subject to the law must make and preserve records documenting hours worked, paid leave accrued and taken, and remaining paid leave balance for each employee for at least three years. An employer that provides paid leave on an accrual basis must provide notice of the amount of paid leave accrued or used by an employee upon request by the employee in accordance with the employer's reasonable paid leave policy notification provisions.

Employer Notice:

Employers must post a notice — and include it in an employee handbook, if the employer has one — to be prepared by the Illinois Department of Labor, summarizing the requirements of the law and information pertaining to the filing of a complaint. Employers that have workforces comprised of a significant portion of workers who aren't literate in English must request a notice in the appropriate language from the Illinois Department of Labor.

Retaliation Prohibited:

Employers are prohibited from taking adverse action against employees for exercising their rights under the law.

**Next Steps:**

- Review policies, forms and practices to ensure compliance with Senate Bill 208 by January 1, 2024.
- Train supervisors on the new law and how to handle leave requests.
- We anticipate that the Illinois Department of Labor will release additional guidance clarifying a number of issues including for example, pro-rata frontloading and rate of pay requirements. We will continue to keep you informed.

## New Jersey Enacts Bill of Rights for Temporary Workers

New Jersey has enacted legislation (Assembly Bill 1474), the "New Jersey Temp Worker Bill of Rights," (the "Bill") which increases the rights of certain temporary workers. The law is set to take effect on August 5, 2023, with a few provisions that begin on May 7, 2023.

**The Details:**

Assembly Bill 1474 provides significant additional rights to certain workers who are placed in temporary roles at third-party client employers by temporary help service firms.

Under the Bill, staffing firms must pay temporary laborers assigned to work for a third-party client the same average rate of pay and equivalent benefits as a permanent employee that performs the same or similar work of the third-party client.

The Bill also prohibits staffing firms or a contract or agent of such, from charging a fee to a temporary laborer to transport them to or from the designated work site.

**Note:** Temporary employment is a duration that is clearly stated to all parties at the time of referral and is either fixed as some definite agreed period of time or by the occurrence of some specified event.

Covered Workers:

The Bill provides additional rights to a temporary worker of a New Jersey-based firm that contracts with a temporary help services firm to be assigned to perform work in the following occupations:

- Certain Protective Service Workers
- Food Preparation and Serving
- Building and Grounds Cleaning and Maintenance;
- Personal Care and Service;
- Construction Laborers
- Helpers, Construction Trades
- Installation, Maintenance, and Repair
- Production
- Transportation and Material Moving; or
- Any successor categories the Bureau of Labor Statistics (BLS) may designate.

See the **text of the law** for exceptions.

**Note:** Staffing firms located, operating or transacting business within New Jersey may not make any designated classification placements unless they are certified by the Director of the Division of Consumer Affairs.

Employer Requirements:

When a firm agrees to send a worker on an assignment, they must provide the worker, at the time of dispatch, a written statement approved by the commissioner that includes, among other things:

- The name of the worker;
- The name and address of the temporary services firm and the worksite;
- The workers' compensation carrier;
- The name and nature of the work to be performed;
- The wages offered;
- The terms of transportation offered to the temporary worker (if applicable);
- A description of the position; and
- Whether a meal or equipment (or both) are provided by the firm or the third-party client, and associated costs (if any).

See the **text of the law** for details.

Multi-day Assignments:

For multi-day assignments, a firm must provide a worker with the schedule, length of the assignment (if known), and the amount of sick leave to which temporary workers are entitled under the law. The firm must also provide the terms of use for sick leave.

In the event of a change in a schedule, shift or location of a multi-day assignment, the firm must provide written notice of the change not less than 48 hours in advance to the worker (when possible).

When a worker is assigned to the same assignment for more than one day, the firm must provide the employment notice on the first day of the assignment, and on each day that a term found on the employment notice changes.

**Note:** If notice is not provided, the firm should be prepared to demonstrate that it was not possible to provide the required notice.

Additional Protections:

If the worker is not placed with a third-party client or contracted to work for that day, the firm must, upon request, provide a worker with a confirmation that:

- Is signed by an employee of the firm;
- States the temporary worker sought work; and
- Includes the firm's name, the worker's name and address, and the date and the time the worker receives the confirmation.

Under the law, firms:

- Are prohibited from sending a worker to a placement where a strike, lockout, or other labor dispute exists without providing, at the time of dispatch, a written statement that informs the worker of the labor dispute and the worker's right to refuse the assignment.
- Must make translation services from their company or a vendor available to temporary workers. The translators must be able to effectively communicate information in Spanish (or any other language that is generally understood in the locale of the firm), as required **under the law**.

Recordkeeping:

The law includes extensive recordkeeping requirements for employers, such as when firms send one or more individuals as temporary workers. The firm must maintain all records for a period of six years.

See the **text of the law** for detailed recordkeeping requirements.

Non-retaliation:

Firms are prohibited from retaliating against workers that exercise their rights under the law.

**Note:** Firing or disciplining a worker within 90 days of a worker exercising their rights under the law will increase the assumption that retaliation has occurred.

**Next Steps:**

New Jersey staffing firms should:

- Stay apprised of the new protections granted under Assembly Bill 1474.
- Be on the lookout for a multilingual outreach program from the state to inform workers of their rights.
- Consult legal counsel with inquiries on the applications of the law.

## New Mexico Provides Paid Sick Guidance

The New Mexico Department of Workforce Solutions has released guidance to clarify an employer's paid sick leave requirements under the Healthy Workplaces Act.

**The Details:**

New Mexico enacted legislation (House Bill 20), the Healthy Workplaces Act ("the Act"), which requires employers to provide paid sick and safe leave to employees effective July 1, 2022. The state has released guidance that clarifies the following under the Act:

Covered Workers:

The guidance helps clarify worker coverage under the Act.

| Covered Workers |
| --- |
| Employees who perform services in New Mexico, even if the employer is based in another state, such as telecommuters and remote workers, are covered. This includes those who perform services in the geographic bounds of New Mexico and whose employers are:<br>• Incorporated, registered, based, physically in, or do business in New Mexico; or<br>• Remote and based or incorporated out-of-state, but provide significant services in New Mexico or conduct significant business activities in the state. |
| **Partially Covered Employees** |
| Telecommuters and remote workers who perform some services in New Mexico and other services outside of New Mexico are most likely partially covered by the Act for the services performed in New Mexico, if the employer is also:<br>• A New Mexico employer; or<br>• An out-of-state employer with minimum contacts in New Mexico. |
| **Employees Likely Not Covered** |
| Remote workers in the geographic bounds of New Mexico, whose employers are based out-of-state and who do not provide significant services in New Mexico or conduct significant business activities in the state. |
| **Employees Not Covered** |
| • Independent contractors;<br>• Employees of the United States, New Mexico, or its cities, counties and agencies;<br>• Remote workers physically outside of the geographic bounds of New Mexico, regardless of whether their employers are based in New Mexico or are out-of-state employers with minimum contacts; or<br>• Employees that perform services in New Mexico on tribal land. |

See the **reference guide** for further details.

Accrual:

The guidance clarifies the following for accruing paid sick leave under the Act:

- Employers can never cap an employee's paid sick leave accrual;
- Non-exempt employees accrue sick leave at the same rate as regular hours for hours worked that exceed 40 hours per seven-day workweek; and
- Employees must accrue paid sick leave for hours actually worked (paid sick leave is not accrued during any type of leave).

See the **reference guide** for more information.

Frontloading:

The guidance clarifies the following for frontloading paid sick leave use under the Act:

- If frontloading, an employer must grant employees at least 64 hours of earned sick leave for the upcoming year, at the start of each year. Employers may not frontload fewer than 64 hours, including for part-time employees. In cases where an employee begins work mid-year, employers can frontload a pro rata portion of the 64 hours for use in the remainder of that year.
- Employers who frontload must still monitor employee hours worked. If an employee works more than 1,920 hours in a year, that employee must receive the appropriate number of accrued sick leave hours, which would be more than the 64 hours they were frontloaded.
- Employers may frontload paid sick leave for one category of employees and use accruals for other employees.
- An employer may not recoup any unused frontloaded leave through payroll deductions, even if an employee signs a written agreement authorizing the employer to do so or is separated before accruing the frontloaded leave.

Use:

The **reference guide** clarifies the following for paid sick leave use under the Act:

- Per diem employees may use earned sick leave for the hours they were scheduled to work or for hours they would have worked, absent a need to use earned sick leave.
- To determine the amount of time of paid sick leave used for per diem employees or employees with indeterminate shift lengths, use the number of hours the employer had a replacement employee for the same shift. If this method is not possible, use the number of hours that the employee most recently worked during the same shift.

Carryover Limit:

Employers must permit employees to carry over up to 64 hours of unused sick leave from year-to-year. However, an employer is not required to permit an employee to use more than 64 hours in a 12-month period.

Rehires:

If a former employee is rehired by the same employer within 12 months of the separation, the employer must reinstate any paid sick leave that the employee had accrued, but didn't use prior to the separation, even if it is more than 64 hours.

Rehired employees must be allowed to use accrued earned sick leave and accrue additional earned sick leave upon their rehire, unless they were paid for those days upon separation.

Pay Requirements:

Under the Act, employers must pay employees for earned sick leave on the same scheduled payday as regular wages. And employers are not required to pay out accrued or earned sick leave that was not used upon termination, resignation, retirement or other separation from employment.

When an employee's number of hours worked fluctuates from week-to-week, an employer must use the average number of hours the employee worked the preceding two weeks when paying earned sick leave.

Employers must ensure they correctly pay tipped, salaried, task, piece or commission employees who use earned sick leave:

- Tipped employees that are ordinarily paid less than the full minimum wage due to a "tip credit" must receive the greater of the full state or local minimum wage.
- Salaried employees must receive their regular salary converted to an hourly rate based on the employee's regular workweek and weekly salary amount.

  **Example:** A worker that normally works 40 hours per week and earns $1,000 must be paid at least $25 per hour for any earned sick leave used. ($1,000 divided by 40).

  **Note:** For a salaried employee whose work hours fluctuate by week, divide the weekly salary by 40 to determine the hourly rate.

  Task, piece or commission employees must receive the greater of their hourly or salary rate or the state or local minimum wage.

See the **reference guide** for more examples.

Notice Requirements:

Fully remote businesses may comply with the notice requirements using a website, email or some other form of electronic communication or publishing that employees can easily access.

Pay Statement Requirements:

The Act does not include pay statement requirements. However, employers must provide employees with an accurate year-to-date summary, in writing, of hours worked, sick leave accrued, and sick leave used at least once every calendar quarter. This may be electronically, including by email, website, mobile application or other reasonable method. Employers will be in compliance with this requirement if this information is provided on regularly issued pay statements.

Recordkeeping:

Employers must keep records documenting hours worked by employees, sick leave earned and sick leave taken by employees for four years. Employers must provide this information to the state upon request.

**Next Steps:**

Employers in New Mexico should review the **reference guide** and their paid sick leave policies and procedures to ensure compliance with the Act.

## State of New York Requires Veteran Benefits and Services Poster

The New York Department of Labor has enacted legislation (Senate Bill 1961B), which requires employers to display a poster on veterans' benefits and services. Senate Bill 1961B is effective immediately.

**The Details:**

Under the law, New York employers with more than 50 full-time equivalent employees must display the required poster on benefits and services available to military veterans in a conspicuous place that is accessible to employees in the workplace.

**Next Steps:**

New York employers should display the **required poster** to help ensure compliance with Senate Bill 1961B.

## State of Washington Updates Cares Act

The State of Washington has released information to assist employers in meeting their requirements under the Washington Cares Act.

**Background:**

Washington's long-term care benefits program, "WA Cares," was set to begin on January 1, 2022. Under the program, employers were to deduct a .58 percent premium from employee wages and remit that premium to Washington's Employment Security Department ("ESD"). WA Cares covers nearly all employees employed in Washington State.

In November 2021, a lawsuit (*Pacific Bells, et al. v. Inslee*) was filed, arguing that WA Cares violated federal laws. The case was dismissed, but to address concerns, Washington passed House Bill 1732 and House Bill 1733, which:

- Delayed premium collections to **July 1, 2023**;
- Delayed benefits to **July 1, 2026**;
- Provides limited relief for employees within 10 years of retirement; and
- Expands exemptions for certain employees.

**The Details:**

Washington has released an **employer toolkit**, **a FAQs sheet** and more employer resources on its **website** to assist employers in preparing for WA Cares requirements.

| Employer Requirements |
| --- |
| Starting July 1, 2023, employers must withhold a "premium" of .58 percent of an employee's wages, unless the employee provided (or provides in the future) a state-issued exemption letter.<br>An employer must stop withholding from the employee by the effective date of the letter (or immediately if provided after the effective date) once it is received. Otherwise, the employer is liable to the employee. Washington will not return funds that are improperly withheld.<br>**Note:** The law caps the tax rate at .58 percent of wages, which cannot be increased without legislative action. |
| **Eligible Wages** |
| Wages that are subject to the tax are uncapped. All wages and remuneration (stock-based compensation, bonuses, paid time off, severance pay, etc.) are subject to the tax. |
| **Employees Subject to the Tax** |
| All employees who are "employed" in Washington State are required to pay the WA Cares tax. There are exceptions for federal employees, employees of tribal businesses, self-employed individuals and employees who qualify for an exemption (see below).<br>An employee is treated as "employed" in Washington if the work they perform is localized in Washington or they perform some work in Washington that is directed or controlled from Washington (if the work is not localized in any state).<br>WA Cares uses the same localization definitions as the state's Paid Family and Medical Leave program (found in RCW 50A.05.010). If an employee is subject to the Paid Family and Medical Leave program, then they are also subject to WA Cares, absent an approved exemption.<br>WA Cares is also delayed for employees who are a party to a collective bargaining agreement in existence on October 19, 2017. These employees are not subject to WA Cares unless and until that agreement is reopened, renegotiated or expires. Parties must notify ESD when the collective bargaining agreement becomes open. As a practical matter, most agreements will have already reopened since October 19, 2017. |
| **Federal Employees, Employees of Tribal Businesses and Self-Employed Individuals** |
| Federal employees who work in Washington do not contribute to the program.<br>Employees of **tribal businesses** only contribute if the tribe has chosen to opt in.<br>**Self-employed individuals** can choose to opt in. |

### Employees Exempt from the Tax

There are several types of exemptions:

- Employees who had private long-term care insurance before Nov. 1, 2021 were eligible to apply for a permanent exemption until Dec. 31, 2022. The timeframe for applying for this type of exemption has closed. If an employee has an approved private insurance exemption, they will continue to be exempt permanently and (under current law) are not able to enroll in WA Cares.
- Veterans with a 70% or higher service-connected disability can apply for a permanent exemption. **Applications** for this type of exemption became available Jan. 1, 2022 and are available on an ongoing basis.
- Some employees can apply for a conditional exemption. If an employee lives out-of-state, are a temporary worker with a non-immigrant visa, or are a spouse/registered domestic partner of an active-duty service member of the U.S. Armed Forces, then they can apply for an exemption.

  **Applications** for these exemptions became available Jan. 1, 2022, and are available on an ongoing basis. Employees will qualify for these exemptions only as long as these circumstances apply.

  If an employee's situation changes and they no longer qualify for a conditional exemption, they must notify both the ESD and their employer(s) within 90 days. Employees will begin paying premiums and earning coverage for WA Cares Fund benefits the first day of the next quarter after their exemption is discontinued.

  If employees fail to notify ESD and their employer(s) within 90 days, then they will be assessed the balance of their unpaid premiums with interest at the rate of one percent per month.

### Benefits

Benefits will be payable on July 1, 2026. An eligible individual deemed by the Department of Social and Health Services to require assistance with at least three activities of daily living will receive up to $100 per day (up to a maximum lifetime limit of $36,500).

### WA Cares Benefit Qualification Requirements

Washington residents will receive full benefits if they have paid the tax for:

- Ten years without interruption of five or more consecutive years; or
- Three of the last six years before applying for the benefits.

Employees born before January 1, 1968, who have not satisfied these requirements will receive a pro-rated 10 percent of the benefit amount for each year the tax is paid if they contributed to WA Cares for at least one year and worked at least 500 hours in that year.

**Next Steps:**

With WA Cares contributions scheduled to take effect on July 1, 2023, Washington employers should prepare to withhold wages and remit the WA Cares tax to ESD following the same means used for Paid Family and Medical Leave contributions.

## State of Washington Minimum Wage and Workers' Rights Reminder

The Washington Department of Labor and Industries (L&I) provided resources on changes to the minimum wage and workers' rights for 2023.

**The Details:**

The **Washington Department of Labor and Industries** has provided resources on the following:

### Wage Updates

State Minimum Wage (Effective January 1, 2023)

- Workers aged 16 and up: $15.74 per hour.
- Workers 14 to 15 years old: $13.38 per hour (85 percent of the **minimum wage**).

**Note:** Cities, such as Seattle and SeaTac, may have higher hourly minimum wages.

| 2023 Overtime Exempt Salary Threshold (Effective January 1, 2023) |
|---|
| To be exempt from **the state Minimum Wage Act**, executive, administrative, professional or computer professional, and outside salespeople must earn at least the following minimum salary depending on their employer size:<br>• 50 or fewer employees: 1.75 times the minimum wage: $1,101.80/week ($57,293.60/year).<br>• 51 or more employees: Double the minimum wage: $1,259.20/week ($65,478.40/year). |
| Agricultural Overtime |
| • January 1, 2023: An agricultural worker must work at least 48 hours, in a workweek before they are eligible for overtime pay.<br>• January 1, 2024: Overtime eligibility will start after 40 hours in a workweek. |
| **Workers' Rights Updates** |
| Job Posting Requirements (January 1, 2023) |
| Businesses with 15 or more employees must include in each **job posting or advertisement**:<br>• A salary range or pay scale;<br>• A general description of all benefits offered (and identify any other compensation).<br>Employers must also provide an employee who is promoted, or transferred to a new position, with the pay scale for the new position, if requested. |
| Rideshare Driver Rights (January 1, 2023) |
| Rideshare drivers will have more **rights**, such as minimum trip pay, paid sick time, workers' compensation coverage and protection from retaliation for exercising these rights. |

**Next Steps:**

Visit the Department of Labor and Industry's **website** or call **360-902-5316** or **1-866-219-7321** to learn more about minimum wage, overtime, rest breaks and meal periods.

## State of Washington Provides Salary Transparency Guidance

The State of Washington has released **a policy** to help employers comply with the state's Equal Pay and Opportunities Act and the salary transparency requirements that took effect on January 1, 2023.

**The Details:**

Washington has released an administrative policy that clarifies the Equal Pay and Opportunities Act and provides guidance to employers on the state's salary transparency requirements.

Covered Employers:

The law covers all employers with 15 or more employees that engage in any business, industry, profession or activity in Washington for any job postings that recruit Washington-based employees.

This includes employers that do not have a physical presence in Washington, if they have one or more Washington-based employees, engage in business in Washington or recruit for jobs that could be filled by a Washington-based employee, such as remote jobs.

Covered Applicants:

The law protects applicants, including existing employees who apply to a posting that recruits Washington-based employees for a covered employer.

**Note:** If a person is offered a different role than the one they applied for, an employer should disclose wage and salary information by providing a copy of the compliant posting for the position offered.

Job Posting:

The policy clarifies that posting includes recruitment done directly by an employer or indirectly through a third party. See **the policy** for further details.

**Employee and Job Applicant Rights under the Act:**

Equal Pay:

Employers must provide equal compensation to "similarly-employed" workers (those that have the same employer, and the performance of their job requires similar skills, efforts, responsibilities and working conditions). Job titles alone do not determine if employees are similarly employed.

Equal Career Advancement Opportunities:

Employers must not limit or provide career advancement opportunities to their employees on the basis of gender.

Open Wage Discussions:

Employers cannot prohibit employees from inquiring about, disclosing, comparing or discussing their wages, including pay and benefits, or require employees to sign agreements that prevent them from discussing their wages.

Non-discrimination and Protections against Retaliation:

Under the Act, employers are prohibited from taking adverse action against an employee for discussing wages, filing a complaint or exercising other protected rights.

Applicant Wage and Salary History Protections:

Under the law, employers are prohibited from:

- Seeking the wage or salary history of an applicant;
- Asking (even an optional question) about an applicant's salary history in a job application; or
- Requiring an applicant's prior wage or salary history to meet certain criteria, such as requiring an employee to have made a minimum previous salary to be considered for a new position.

Applicants can choose to disclose their wage or salary history to prospective employers, but only if the disclosure is voluntary. An employer may confirm an applicant's wage or salary history if the applicant voluntarily discloses their history or after the employer negotiates and makes an offer of employment that includes compensation to the applicant.

See **the policy** for further details and exceptions to the above requirements.

**Pay Transparency Requirements:**

Information required to be disclosed in a Job Posting Overview:

Employers must disclose in each posting, for each job opening, the wage scale or salary range and a general description of all benefits and other compensation for a specific available position to be offered to the hired applicant.

**Note:** Employers must provide an employee who is offered an internal transfer or promotion with the wage scale or salary range of their new position, if the employee requests that information.

Employers must disclose such information on postings for remote work that could be performed by a Washington-based employee, and an employer cannot avoid disclosing wage and salary information requirements by indicating within a posting that they will not accept Washington applicants.

However, employers do not need to disclose wage and salary information in printed hard-copy postings made and distributed entirely outside of Washington.

See **the policy** for further details and consult legal counsel on exceptions under the law.

Wage Scale or Salary Range:

A wage scale or salary range should:

- Provide an applicant with the employer's most reasonable and genuinely expected range of compensation for the job;
- Extend from the lowest to the highest pay established by the employer prior to publishing the job posting. If the employer does not already have an existing wage scale or salary range for a position, a scale or range should be created prior to publishing the posting; and
- Have a clear minimum and maximum without open-ended phrases.

**Example:** "$60,000/per year and up" and "up to $29.00/hour" do not work because they do not provide a top or a bottom scale.

See **the policy** for guidance on how to handle the below scenarios:

- The wage scale or salary range changes after a posting is published.
- A different position than what the applicant applied for is offered.
- An employer intends to implement a "starting range" or "starting rate" for an initial timeframe of employment or a probationary period.
- A job posting for an opening that can be filled with varying job titles, depending on experience, is published.
- A job paid by commission, piece rate, or the greater of commission or piece rate is posted.

General Description of All Benefits:

A "general description of all benefits:"

- Includes, but is not limited to, health care benefits, retirement benefits, any benefits permitting paid days off (including more generous paid sick leave accruals, parental leave, and paid time off or vacation benefits), and any other benefits that must be reported for federal tax purposes, such as fringe benefits; and
- Provides the applicant with the employer's most reasonable and genuinely expected benefits offered for the specific available position. See **the policy** for more examples.

**Note:** If the general description of benefits changes after a posting has been published, an employer should update the posting to reflect the updated benefit information.

Employers are also required to list the following in their job posting for each category that is part of their benefits offerings:

- **The types of insurance:** Medical insurance, vision insurance, dental insurance, life insurance and disability insurance, etc.
- **Retirement plans:** 401K, employer-funded retirement plans, deferred compensation, and other defined benefit or defined contribution plans, etc.
- **Paid time off or vacation:** The number of days or hours the hired applicant would expect to receive, such as eight hours per month or 12 days per year.
- **Paid holidays:** The number of paid holidays a hired applicant would expect to receive, such as 10 paid holidays per year. The employer does not have to list each paid holiday.
- **More generous paid sick leave than required by Washington State or an applicable local ordinance:** The number of hours per month or days per year the hired applicant would expect to receive, such as three hours of paid sick leave for every 40 hours worked or eight hours of paid sick leave per month.

General Description of Other Compensation:

"Other Compensation" includes, but is not limited to, bonuses, commissions, profit-sharing, stock options or other forms of compensation that would be offered to the hired applicant in addition to their established salary range or wage scale. See **the policy** for further examples.

Electronic Postings May Link Benefits and Other Compensation Information:

On electronic job postings, employers must include a general description of benefits and other compensation, but may use a link or hyperlink to lead the applicant to a more-detailed description. If the benefits and other compensation information are available on the original or subsequent web pages, the information only needs to be listed once.

Employers must ensure continuous compliance with link functionality, up-to-date information, and information that applies to a specific job posting, regardless of the use of third-party administrators.

Job Posting Example:

Job postings must include wage and salary information when the posting includes qualifications for desired applicants for a specific position. Qualifications include, but are not limited to, specific knowledge, skills or abilities requested of the applicant for suitability for the position.

| Sample Job Posting |
| --- |
| "Help Wanted - Server. Food Handler's Certification Needed. Offering: $24.00–$26.00 per hour, medical benefits, 70 vacation hours per year, and a $500 sign-on bonus" on an electronic reader board outside of a business.<br><br>**Note:** An employer that advertises for a specific available position that includes qualifications on an online job board, social media post or web-based application should treat the advertisement as an electronic job posting. |

See **the policy** for more examples and clarifications on job posting requirements.

**Next Steps:**

- Review **the policy** in full.
- Review and update pay range, compensation and other benefits information for jobs that can be performed in the State of Washington.
- Include the required specifications in job postings to help ensure compliance with the policy. This includes any postings made at an employer's direction by a third-party.
- Consult with legal counsel with questions on the new policy requirements.

# Local

## Berkeley, California, Adopts Scheduling Ordinance for Certain Industries

Berkeley, California, has enacted an ordinance that will require employers in certain industries to follow specific scheduling practices beginning **January 1, 2024**.

**The Details:**

Covered Employers:

To be covered by the ordinance, an employer must have 10 or more employees in the City of Berkeley and be:

- Primarily engaged in the building services, healthcare, hotel, manufacturing, retail, or warehouse services industries, and employ 56 or more employees globally; or
- Primarily engaged in the restaurant industry, and employ 100 or more employees globally; or
- A franchisee primarily engaged in the retail or restaurant industries and associated with a network of franchises with franchisees employing in the aggregate 100 or more employees globally; or
- A not-for-profit corporation organized under **Section 501 of the United States Internal Revenue Code** in the industries specified under subsection (a)(1), (2), and (3) and employ 100 or more employees globally.

Covered Employees:

To be covered by the ordinance, an employee must:

- Be entitled to the minimum wage under state law.
- Perform at least two hours of work within the geographic boundaries of the city for an employer.
- Not be exempt from payment of an overtime rate under Labor Code Section 510, and not be paid a monthly salary equivalent to at least forty hours per week at a rate of pay of twice the minimum wage required by Berkeley Municipal Code Section 13.99.040.

Good Faith Estimate:

An employer must provide each employee with a good faith estimate in writing of the employee's work schedule. The employee may submit a written request to modify the estimated work schedule, and the covered employer in its sole discretion may accept or reject the request, and must notify the employee of the covered employer's determination in writing prior to or on commencement of employment.

A covered employer must provide its employees with at least two weeks' notice of their work schedules by doing one of the following:

- Posting the work schedule in a conspicuous place at the workplace that is readily accessible and visible to all employees; or
- Transmitting the work schedule by electronic means, so long as all employees are given access to the electronic schedule at the workplace.

For new employees, a covered employer must provide the new employee prior to or on their first day of employment with an initial work schedule. Thereafter, the covered employer must include the new employee in an existing schedule with other employees.

**Note:** An employee who is a victim of domestic violence or sexual violence may request that the employee's work schedule not be posted or transmitted to other employees.

Schedule Changes:

A covered employer must provide an employee written notice of any change to the employee's posted or transmitted work schedule within 24 hours of a schedule change. This notice requirement doesn't apply to any employee-initiated schedule changes.

Right to Decline:

With limited exceptions, an employee has the right to decline any previously unscheduled hours that the covered employer adds to the employee's schedule, and for which the employee has been provided advance notice of less than 14 days before the first day of any new schedule.

Right to Additional Hours:

Before hiring a new employee, the employer must first offer additional hours of work to existing part-time employee(s) who have worked for more than two weeks, if the part-time employee(s) are qualified to do the additional work, as reasonably and in good faith determined by the covered employer, and if the additional hours needed are not the same hours the part-time employee is scheduled to work. This provision shouldn't be construed to require any employer to offer employees work hours paid at a premium rate under **Labor Code Section 510**, nor to prohibit any employer from offering such work hours.

A part-time employee has 24 hours to accept an offer of additional hours, after which time the covered employer may hire new employees to work the additional hours.

A part-time employee who wishes to accept the additional hours must do so in writing.

When a covered employer is required to offer additional hours to existing part-time employees, the covered employer must make the offer either in writing or by posting the offer in a conspicuous location in the workplace or electronically where notices to employees are customarily posted.

Predictability Pay:

With limited exceptions, covered employers must provide an employee with the following compensation per shift for each previously scheduled shift that the covered employer adds or subtracts hours, moves to another date or time, cancels, or for each previously unscheduled shift that the covered employer adds to the employee's schedule.

- When less than 14 days of notice, but 24 hours or more of notice is given to the employee: one hour of predictability pay;
- When less than 24 hours of notice is given to the employee:
  - When hours are cancelled or reduced: four hours or the number of cancelled or reduced hours in the employee's scheduled shift, whichever is less.
  - For additions and all other changes: one hour of predictability pay. The compensation required by this subsection shall be in addition to the employee's regular pay for working such shift.

Under the ordinance, predictability pay is paid at the employee's "regular rate of pay." Predictability pay isn't required in the following situations.

- Mutually agreed-upon work shift swaps or coverage arrangements among employees;
- Employee-initiated voluntary shift modifications, such as voluntary requests to leave a scheduled shift prior to the end of the shift or to use sick leave, vacation leave, or other policies offered by the employer; or
- To accommodate the following transitions in shifts:
  - If an employee works no more than thirty minutes past the end of a scheduled shift to complete service to a customer, provided the employee is compensated at their regular rate of pay for the additional work performed by the employee.
  - An employee begins or ends their scheduled shift no more than ten minutes prior to or after the scheduled shift, provided the employee is compensated at their regular rate of pay for the additional work performed by the employee.
- When operations cannot begin or continue due to extreme acts of nature and certain other situations. See the **text of the ordinance** for details.

Rest between Shifts:

An employee has the right to decline work hours that occur less than 11 hours after the end of the previous shift. An employee who agrees in writing to work hours despite this right must be compensated at one and one-half times the employee's regular rate of pay for any hours worked less than 11 hours following the end of a previous shift.

Right to Request a Flexible Working Arrangement:

An employee has the right to request a modified work schedule, including but not limited to: additional shifts or hours; changes in days of work or start and/or end times for the shift; permission to exchange shifts with other employees; limitations on availability; part-time employment; job sharing arrangements; reduction or change in work duties; or part-year employment. An employer may accept, modify or decline the employee's request. A covered employer must not retaliate against an employee for exercising their rights under this provision.

Notice:

The city is required to publish and make available to covered employers, in English and in other languages as provided in any implementing regulations, a notice suitable for posting by covered employers in the workplace informing employees of their rights under the ordinance.

Each covered employer must give written notification to each current employee, and to each new employee at time of hire, of their rights under the ordinance. Every covered employer must also provide each employee at the time of hire with the covered employer's name, address and telephone number in writing. The written notification must be in English and other languages as provided in any implementing regulations, and must also be posted prominently in areas at the worksite where it will be seen by all employees.

Retaliation Prohibited:

Employers are prohibited from taking adverse action against any employee in retaliation for exercising rights protected under the ordinance.

**Next Steps:**

If you are a covered employer:

- Ensure compliance with the requirements of the ordinance by January 1, 2024.
- Train supervisors on the ordinance.

## Los Angeles Adopts Scheduling Ordinance for Retail Sector

The City of Los Angeles has enacted an ordinance that will require large employers in the retail sector to follow certain scheduling practices. The ordinance takes effect **April 1, 2023**.

**The Details:**

Covered Employers:

To be covered by the ordinance, an employer must be identified as a retail business in the North American Industry Classification System (NAICS) within the retail trade categories and subcategories 44 through 45, and employ at least 300 employees globally.

Covered Employees:

To be covered by the ordinance, an employee must be entitled to the minimum wage under state law and perform at least two hours of work within the geographic boundaries of Los Angeles for a covered employer.

Good Faith Estimate:

Before hiring an employee, a covered employer must provide the employee with a written good faith estimate of the employee's work schedule.

The estimate must notify a new employee of their rights under the ordinance. In the alternative, the employer may provide the new employee with a copy of the poster required by the ordinance (see the Notice and Recordkeeping section below).

Employers must also provide a written good faith estimate of an employee's work schedule within ten days of an employee's request.

If an employee's actual work hours substantially deviate from the good faith estimate, an employer must have a documented, legitimate business reason, unknown at the time the estimate was provided, to substantiate the deviation.

Right to Request Schedule Changes:

Covered employees have the right to request a preference for certain hours, times or locations of work. An employer may accept or decline the request, provided that the employer notifies the employee in writing of the reason for any denial.

Advance Notice of Schedule:

Covered employers must provide written notice of the employees' work schedule at least 14 calendar days before the start of the work period by any one of the following:

- Post the work schedule in a conspicuous and accessible location where employee notices are customarily posted and visible to all employees; or
- Transmit the work schedule by electronic means or another manner reasonably determined to provide actual notice to each employee.

Changes to the Work Schedule:

Covered employers must provide written notice of any employer-initiated changes to the work schedule that occur after the advance notice required. An employee has a right to decline any hours, shifts or work location changes not included in the work schedule. If an employee voluntarily consents to work hours or shift changes not included in the work schedule, the consent must be in writing.

Right to Additional Hours:

Before hiring a new employee or using a contractor, temporary service or staffing agency to perform work, the employer must first offer the work to current employees if:

- One or more of the current employees is qualified to do the work as reasonably determined by the employer; and
- The additional work hours would not result in the payment of a premium rate under state law.

An employer must make the offer to each current employee either in writing or by posting the offer in a conspicuous location in the workplace where notices to employees are customarily posted. The offer must be made at least 72 hours prior to hiring any new employee, using a contractor, temporary service or staffing agency. Upon receipt of the offer, an employee has 48 hours to accept the offer of additional hours in writing.

An employee who accepts additional hours pursuant to this section isn't entitled to predictability pay (see below) for those additional hours, if it results in a schedule change from the work schedule.

Predictability Pay:

When an employee has agreed to a change in their work schedule after the advance notice period, the employer must compensate the employee with one additional hour of pay at their regular rate for each change to a scheduled date, time or location that:

- Doesn't result in a loss of time to the employee; or
- Does result in additional work time that exceeds 15 minutes.

An employer must compensate an employee at one-half of their regular rate of pay for the time the employee doesn't work, if the employer reduces work time listed in the work schedule by at least 15 minutes.

Predictability pay isn't required if:

- An employee initiates the requested work schedule change.
- An employee accepts a schedule change initiated by an employer due to an absence of another scheduled employee.
- An employee accepts an offer of additional hours as stated above.
- An employee's hours are reduced due to the employee's violation of any existing law or of the employer's lawful policies and procedures.
- The employer's operations are compromised pursuant to law or force majeure.
- Extra hours worked require the payment of an overtime premium under California Labor Code Section 510.

Rest between Shifts:

Employers are prohibited from scheduling an employee to work a shift that starts less than ten hours from the employee's last shift without the employee's written consent. An employer must pay a premium of time and a half for each shift not separated by at least ten hours.

Notice and Recordkeeping:

Covered employers must post a notice published each year by the city, informing employees of their rights under the ordinance. Covered employers must post the notice in English, Spanish, Chinese (Cantonese and Mandarin), Hindi, Vietnamese, Tagalog, Korean, Japanese, Thai, Armenian, Russian and Farsi, and any other language spoken by at least five percent of the employees at the workplace or job site.

Covered employers must also retain all records required by the ordinance, for both current and former employees, for a period of three years. These records include:

- Work schedules for all employees;
- Copies of written offers to employees for additional work hours and written responses from employees;
- Written correspondence between the employer and employee regarding work schedule changes including, but not limited to, requests, approvals and denials;
- Good faith estimates of hours provided to new and existing employees; and
- Any other records the city may require to demonstrate compliance with the ordinance.

Retaliation Prohibited:

Employers are prohibited from taking adverse action against any employee in retaliation for exercising rights protected under the ordinance. These rights include, but are not limited to, the right to file a complaint or inform any person about any alleged noncompliance with the ordinance; and the right to inform any person of their potential rights under the ordinance and to assist them in asserting such rights.

**Next Steps:**

If you are a covered employer:

- Ensure compliance with the requirements of the ordinance by April 1, 2023.
- Train supervisors on the ordinance.

## Seattle Prohibits Caste Discrimination

Seattle, Washington, has passed legislation (Council Bill 120511), which adds caste as a protected characteristic under Seattle law. Council Bill 120511 takes effect on March 23, 2023.

**The Details:**

The **Seattle Fair Employment Practices Ordinance** protects employees from being discriminated against on the basis of protected characteristics, such as age, race, religion, creed, color, national origin, citizenship or immigration status, sex, and marital status, among others. The law covers all employers, a designee of the employer, or a person acting in the interest of an employer.

Council Bill 120511 adds caste as a protected characteristic under the Seattle Fair Employment Practices Ordinance and provides the following definitions:

**Caste:** A system of rigid social stratification characterized by hereditary status, endogamy and social barriers sanctioned by custom, law or religion (a division of people on the basis of their birth or descent).

**Discrimination:** Any act, by itself or as part of a practice, that is intended to or results in different treatment or differentiates between or among individuals or groups of individuals by a protected characteristic under the law. It includes racial and sexual harassment, and harassment based on other protected characteristics.

**Non-discrimination Protections:**

Council Bill 120511 prohibits covered employers from taking actions that indicate a preference, limitation, specification or discrimination based on a protected characteristic. This includes printing, circulating, or causing to be printed, published, or circulated, a statement, advertisement or publication related to employment or membership.

However, the law allows employers to collect data on protected characteristics to:

- Make reports specifically required by agencies of federal, state, or local to eliminate and prevent discrimination or overcome its effects; or
- Help comply with the law or the rules and regulations of:
  - Washington State Human Rights Commission;
  - The Equal Employment Opportunities Commission; or
  - The Department of Civil Rights.

Employers that are found in violation of the law may be required to:

- Reinstate an employee to their full position and benefits (such as a promotion);
- Provide back pay; or
- Pay fines.

**Next Steps:**

Seattle employers should help ensure compliance with Council Bill 120511 by:

- Updating their non-discrimination policies and procedures.
- Training their managers and employees on the new protections.

# Upcoming Minimum Wage Increases

## Minimum Wage Announcements – 2/16/23 – 3/15/23

The following states or localities have announced new minimum wage increases

| State or Locality | Minimum Wage Rate | Minimum Tipped Cash Wage | Effective Date(s) | New or Updated Poster Requirement? | Notes |
|---|---|---|---|---|---|
| Malibu, CA | $16.90 | N/A* | 7/1/23 | Yes | Once available, the poster will be posted **here**. |
| San Francisco, CA | $18.07 | N/A* | 7/1/23 | **Yes** | |
| West Hollywood, CA | $18.86 | N/A* | 7/1/23 | Yes | Once available, the poster will be posted **here**. |
| District of Columbia | $17.00 | $6.00<br>$8.00 | 5/1/23<br>7/1/23 | **Yes** | |
| Santa Fe County, NM | $14.03 | $4.21 | 3/1/23 | **Yes** | |
| City of Santa Fe, NM | $14.03 | $3.00 | 3/1/23 | Yes | Once available, the poster will be posted **here**. |
| San Mateo County, CA (Unincorporated) | $16.50 | N/A* | 4/1/23 | | Once available the poster will be posted **here**. |
| Montgomery County, MD (51 or more employees) | $15.65 | $4.00 | 7/1/22 | **Yes** | |
| Montgomery County, MD (11 to 50 employees) | $15.00 | $4.00 | 7/1/23 | | |
| Montgomery County, MD (10 or fewer employees) | $14.50<br>$15.00 | $4.00<br>$4.00 | 7/1/23<br>7/1/24 | | |

*CA does not allow the use of a tip credit.

# Federal

## U.S. Supreme Court Rules Daily Paid Employees Eligible for Overtime Pay

The United States Supreme Court has ruled in ***Helix Energy Solutions Group v. Hewitt*** that an employee who made in excess of $200,000 annually was eligible for overtime pay, due to the fact that the employee was paid on a daily basis.

**The Details:**

The plaintiff, Michael Hewitt, from 2015-2017 worked on an offshore oil rig for 28 days straight, working 12 hours daily. He was paid $963 to $1341 per day and earned $248,053 in 2015 and $218,863 in 2016.

The employer (Helix) asserted that because Hewitt (1) was a highly paid executive earning over $200,000 annually and (2) received the required weekly amount of pay at the time to be an exempt employee ($455 per week), that he was not eligible for overtime pay.

Hewitt argued that since he was paid on a daily basis and not on a salaried basis, he should be eligible for overtime.

In its 6-3 decision, the Court ruled against Helix's assertion that Hewitt was not eligible for overtime based on the "Executive Exemption." One of the criteria necessary to be considered a bona fide executive is outlined in 29 CFR §541.100(a)(1) as follows:

"(a) The term 'employee employed in a bona fide executive capacity' in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a **salary basis** [emphasis added] pursuant to § 541.600 at a rate of not less than $684* per week..."

*The rate at the time of the plaintiff's employment with Helix was $455 per week.

**Salary basis** is defined under 29 CFR § 541.602(a) in part as follows:

***"General rule.*** An employee will be considered to be paid on a 'salary basis' within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed."

The Court in its majority opinion stated in part as follows:

"Helix did not pay Hewitt on a salary basis as defined in §602(a). That section applies solely to employees paid by the week (or longer); it is not met when an employer pays an employee by the day, as Helix paid Hewitt. Daily-rate workers, of whatever income level, are paid on a salary basis only through the test set out in §604(b) (which, again, Helix's payment scheme did not satisfy). Those conclusions follow from both the text and the structure of the regulations. And Helix's various policy claims cannot justify departing from what the rules say."

**Next Steps:**

Employers who pay their employees via daily rate (regardless of amount) should review this case with their legal advisor to ensure they are following the rules of Fair Labor Standards Act, in relation to overtime pay eligibility as decided by the Court.

## IRS Dramatically Expands Electronic Filing Mandate in 2024

Click **here** for the article.

## Federal Court Voids 2022 Labor Law Changes in Puerto Rico

A Puerto Rico federal judge has nullified a Puerto Rico law (**House Bill 1244**/Act No.41-2022) that made major revisions last year to rules governing probationary periods, vacation and sick leave, meal periods, annual Christmas bonuses and other requirements under the island's labor laws. House Bill 1244 went into effect in 2022. On March 3, 2023, a federal judge nullified the law. The Puerto Rico government can appeal the ruling.

**The Details:**

Here is a summary of many of the changes that will occur if the federal court's ruling is left standing.

Probationary Periods:

The automatic probationary period reverts back to nine months for non-exempt employees and 12 months for exempt employees.

Vacation and Sick Leave:

The threshold for employees to be eligible to accrue paid vacation and sick leave reverts back to working at least 130 hours in a month.

For employees hired after January 26, 2017, and who work for an employer with 13 or more employees, vacation leave accrual reverts to:

- Half-day per month during the first year of service;
- Three-quarters of a day per month after the first year and until the fifth year;
- One day per month after five years until 15 years; and
- One-and-a-quarter days per month after 15 years.

For employees hired after January 26, 2017, and who work for an employer with 12 or fewer employees, vacation accrues at a half-day per month.

Sick leave accrual is one day for each month the covered employee works at least 130 hours.

**Note:** Employees hired before January 26, 2017 are entitled to accrue vacation at a rate of one-and-a-quarter days per month, provided that the employee works at least 130 hours during the month in which the accrual takes place.

Annual (Christmas) Bonus:

To be eligible for the annual Christmas bonus, employees hired after January 26, 2017 must work 1,350 hours within the applicable 12-month period. The bonus will be two percent of the total salary earned, up to $600 for employers with more than 20 employees, and up to $300 for smaller employers.

**Note:** Employees hired before January 26, 2017 must work 700 hours to be eligible for the annual Christmas bonus. The formula for calculating the bonus also differs.

Unjust Dismissal Law:

The island's unjust dismissal law will have several provisions that will revert back to the way they were before the 2022 changes, including:

- The calculation of the remedy for an unjust dismissal.
- The definition of constructive discharge.
- The concept of "just cause" in performance-related terminations.

Meal Periods:

Meal periods must begin no earlier than the second hour of work, but before the start of the sixth hour of consecutive work. Employers may omit a meal period if the total work hours are no more than 6 hours in a working day. A second meal period is no longer required, provided total work hours are no more than 12 hours, and the employee has taken the first meal period.

Day of Rest:

A premium rate will no longer apply to non-exempt "student" employees who work on the day of rest required after six consecutive workdays.

**Next Steps:**

If you have employees in Puerto Rico and made changes based on the **2022 law**:

- Determine whether you wish to revert to the pre-2022 law considering the employee relations impact of your decision and the possibility of a future appeal by the government. Consult with counsel as needed before deciding.
- If you do decide to revert to the pre-2022 law:
  - o Update policies and practices to reflect the changes.
  - o Notify employees of the changes and the reason(s) they are being made.
  - o Train supervisors on the changes.

## IRS Releases 2022 Version of Publication 502

The Internal Revenue Service (IRS) has released the latest version of Publication 502, which describes what medical expenses are deductible by taxpayers on their 2022 federal income tax returns. This publication provides guidance on what qualifies as a medical expense under Code § 213(d) and helps identify the expenses that may be reimbursed or paid by health flexible spending accounts (health FSAs), health savings accounts (HSAs), or health reimbursement arrangements (HRAs), or covered on a tax-favored basis under other group health plans (e.g., an employer-sponsored medical plan).

**The Details:**

Publication 502 explains the itemized deduction for medical and dental expenses that a taxpayer can claim on Schedule A (Form 1040) and discusses what expenses, and whose expenses, a taxpayer can and cannot include in figuring the deduction. It also explains how to treat reimbursements, how to figure the deduction, and informs taxpayers on how to report the deduction on their tax return and what to do if taxpayers sell medical property or receive damages for a personal injury.

Under the "What's New" Section, the 2022 Publication 502 states as follows:

**Standard mileage rate.** The standard mileage rate allowed for operating expenses for a car when you use it for medical reasons is 18 cents a mile from January 1, 2022, through June 30, 2022, and 22 cents a mile from July 1, 2022, through December 31, 2022.

**Health coverage tax credit (HCTC).** The HCTC was not extended. The credit is not available after 2021. If you are an eligible trade adjustment assistance (TAA) recipient, an alternative TAA recipient, a reemployment TAA recipient or a Pension Benefit Guaranty Corporation payee, then you will no longer use Form 8885 before completing Schedule A, line 1.

For a copy of Publication 502 (Medical and Dental Expenses (for preparing 2022 Returns)), click on the link provided below:

**https://www.irs.gov/pub/irs-pdf/p502.pdf**

## IRS Releases 2022 Version of Publication 503

The Internal Revenue Service (IRS) published Publication 503 for use in preparing 2022 tax returns, which describes the tests a taxpayer must meet in order to claim the credit for child and dependent care expenses and explains how to calculate and claim the credit.

**The Details:**

Under the "What's New" Section, the 2022 Publication 503 states as follows:

**The 2021 enhancements to the credit for child and dependent care expenses have expired.** The changes to the credit for child and dependent care expenses for 2021 under the American Rescue Plan Act of 2021 have expired. For 2022, the credit for child and dependent care expenses is nonrefundable and you may claim the credit on qualifying employment-related expenses of up to $3,000 if you had one qualifying person, or $6,000 if you had two or more qualifying persons. The maximum credit is 35% of your employment-related expenses. The more you earn, the lower the percentage of employment-related expenses that are considered in determining the credit. Once your adjusted gross income is over $43,000, the maximum credit is 20% of your employment-related expenses.

**The 2021 enhancements to dependent care benefits have expired.** The changes to dependent care benefits under the American Rescue Plan Act of 2021 have expired. For 2022, the maximum amount that can be excluded from an employee's income through a dependent care assistance program is $5,000 ($2,500 if married filing separately). Dependent care benefits are reported on Form 2441, line 12.

**Temporary special rules for dependent care flexible spending arrangements (FSAs).** Section 214 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 provides temporary COVID-19 relief for dependent care FSAs. This legislation allows employers to amend their dependent care plan to allow unused amounts to be used in a subsequent year. Unused amounts from 2020 and/or 2021 are added to the maximum amount of dependent care benefits that are allowed for 2022.

For a copy of Publication 503 (Child and Dependent Care Expenses (for 2022 Returns)), click on the link provided below:

https://www.irs.gov/pub/irs-pdf/p503.pdf

## NLRB Rules Broad Confidentiality and Non-Disparagement Provisions in Severance Agreements Are Unlawful

The National Labor Relations Board (NLRB) has ruled that employers are barred from drafting severance agreements that contain overly broad non-disparagement and confidentiality prohibitions.

**The Details:**

The case before the NLRB (**McLaren Macomb**) involved an employer that permanently furloughed 11 employees and presented each of them with an agreement that offered severance pay if they signed it. All 11 employees signed the severance agreement.

The agreement required the furloughed employee to release the employer from any claims arising out of their employment or termination of employment. The agreement also contained the following provisions regarding confidentiality and disparagement:

> "The employee acknowledges that the terms of this agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
>
> [...] At all times hereafter, the Employee agrees not to make statements to employer's employees or to the general public that could disparage or harm the image of employer, its parent and affiliated entities and their officers, directors, employees, agents, and representatives."

If the furloughed workers violated these provisions, they could have faced significant sanctions.

The NLRB found that the plain language of those provisions violated employees' rights under Section 7 of the National Labor Relations Act (NLRA). Under **Section 7 of the NLRA**, employees have the right to act together to improve wages and working conditions, and to discuss wages, benefits, and other terms and conditions of employment, with or without a union.

"The non-disparagement provision on its face substantially interferes with employees' Section 7 rights," the NLRB found. "Public statements by employees about the workplace are central to the exercise of employee rights under the NLRA. Yet the broad provision at issue here prohibits the employee from making any 'statements to employees or to the general public that could disparage or harm the image of the employer' — including, it would seem, any statement asserting that the employer had violated the NLRA (as by, for example, offering a settlement agreement with unlawful provisions)."

The NLRB also found that the confidentiality provision unlawfully impacted Section 7 rights.

"The provision broadly prohibits the subject employee from disclosing the terms of the agreement 'to any third person,'" the NLRB said. "The employee is thus precluded from disclosing even the existence of an unlawful provision contained in the agreement. This proscription would reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting a NLRB investigation into the employer's use of the severance agreement, including the non-disparagement provision. Such a broad surrender of Section 7 rights contravenes established public policy that all persons with knowledge of unfair labor practices should be free from coercion in cooperating with the NLRB. The confidentiality provision has an impermissible chilling tendency on the Section 7 rights of all employees because it bars the subject employee from providing information to the NLRB concerning the employer's unlawful interference with other employees' statutory rights."

Importantly, the NLRB found that simply offering employees a severance agreement that includes unlawful provisions violates the NLRA, even if the employer doesn't take any additional adverse action against individuals (such as by imposing sanctions against a furloughed worker because they spoke with the NLRB about the severance agreement).

"A severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and that employers' proffer of such agreements to employees is unlawful," the NLRB wrote. "In making that determination we will examine the language of the agreement, including whether any relinquishment of Section 7 rights is narrowly tailored."

**Next Steps:**

Review severance agreements with legal counsel to ensure compliance with this ruling.

# ADP Compliance Resources

ADP maintains a staff of dedicated professionals who carefully monitor federal and state legislative and regulatory measures affecting employment-related human resource, payroll, tax and benefits administration, and help ensure that ADP systems are updated as relevant laws evolve. For the latest on how federal and state tax law changes may impact your business, visit the ADP ***Eye on Washington*** Web page located at **www.adp.com/regulatorynews.**



ADP, Inc.
One ADP Boulevard, Roseland, NJ 07068
adp.com


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