

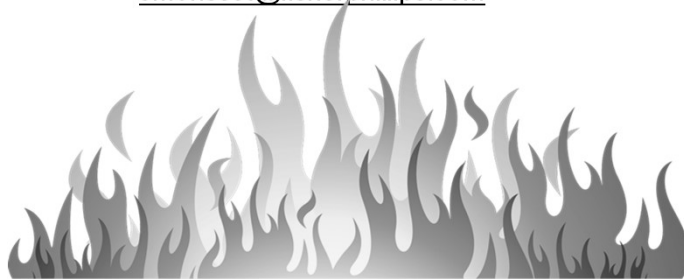
Hot Topics in Employment Law

June 8, 2021

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Phillips



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Today's Topics

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- What you might have missed during the pandemic
- What is going on with masks, vaccines, and reopening



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What you missed during the pandemic

- Overtime salary increase
- Duties test changes
- PFML benefits
- Non-competes
- Some cases
 - Pay equity
 - Arbitration agreements



Overtime Salary Increases

| When the rule takes effect | | July 1, 2020 | Jan. 1, 2021 | Jan. 1, 2022 | Jan. 1, 2023 | Jan. 1, 2024 | Jan. 1, 2025 | Jan. 1, 2026 | Jan. 1, 2027 | Jan. 1, 2028 |
|---|--|-----------------|------------------|------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|
| For employers with 1-50 employees | Multiply minimum wage by ... | 1.25x | 1.5x | 1.75x | 1.75x | 2x | 2x | 2.25x | 2.25x | 2.5x |
| | Projected salary threshold Weekly (Annual) | \$675 (\$9,100) | \$827 (\$43,004) | \$986 (\$51,272) | \$1,008 (\$52,416) | \$1,177 (\$61,204) | \$1,202 (\$62,504) | \$1,382 (\$71,864) | \$1,412 (\$73,424) | \$1,603 (\$83,356) |
| For employers with 51 or more employees | Multiply minimum wage by ... | 1.2x | 1.75x | 1.75x | 2x | 2x | 2.25x | 2.25x | 2.5x | 2.5x |
| | Projected salary threshold Weekly (Annual) | \$675 (\$9,100) | \$965 (\$50,180) | \$986 (\$51,272) | \$1,152 (\$59,904) | \$1,177 (\$61,204) | \$1,353 (\$70,356) | \$1,382 (\$71,864) | \$1,569 (\$81,588) | \$1,603 (\$83,356) |
| Total employees affected | Cumulative estimate | 40,000 | 90,000 | 107,000 | 136,000 | 155,000 | 185,000 | 205,000 | 238,000 | 259,000 |

Note 1: Salary projections after 2020 are based on an estimated Consumer Price Index for Urban Wage Earners and Clerical Workers.

Note 2: This table does not apply to computer professionals paid by the hour who have higher minimum wage multipliers.

<https://lni.wa.gov/forms-publications/F700-207-000.pdf>

Overtime: Duties Tests

- ✓ Now updated, but not all follow the FLSA
- ✓ “Executive” is most commonly misapplied; there is no “managerial” exemption
- ✓ **Did you “lose” the duties test because of pandemic-related adjustments?**
 - Are “managers” still “managing”?

<https://lni.wa.gov/workers-rights/wages/overtime/changes-to-overtime-rules>



Changes Ahead under Biden Administration?

- DOL pull back on IC rule
- Expect to hear more from OSHA
- Agency wage & hour investigations likely to continue strong
- EEOC (and state) – retaliation claims!
 - <https://www.eeoc.gov/employers/small-business/small-business-tip-sheets>



A CASE

Agricultural Workers + Overtime

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➤ ***Martinez-Cuevas v. DeRuyter Brothers Dairy, Inc. et al.***

- ✓ <https://www.fisherphillips.com/resources-alerts-washington-supreme-court-grants-dairy-workers>
- ✓ Overtime exemption for agricultural workers unconstitutional as applied to dairy workers
- ✓ Based on finding that dairy work is hazardous and dangerous to workers
- ✓ Likely to apply to any agricultural work, especially if hazardous





Federal Equal Pay Act



- Rizo v. Yovino (9th Cir. 2/27/20) (on remand), en banc
- Again it held: Prior salary does not justify gender pay disparity
- This decision controls in AK, AZ, CA, Guam, HI, ID, MT, NV, N. Mariana Islands, OR, WA
 - WA's state law directly bans prior salary use
- Leaves an unresolved split among the federal circuit courts as to meaning of the four statutory exceptions, which permit a wage disparity based on (i) seniority, (ii) merit, (iii) the quantity or quality of the employee's work, or, (iv) the catchall of "any other factor other than sex."

WA Paid Family Medical Leave

PFML Regulatory Updates



WAC 192-700-020. When does an employer need to provide a continuation of health benefits to an employee who is on paid family or medical leave?

- When there is at least **one day of concurrent use** with leave taken under the federal **Family and Medical Leave Act** as it existed on October 19, 2017.
 - If required, then the employee's health benefits must be maintained as if the employee had continued to work from the date PFML commenced until the earlier of (a) PFML ends; or (b) employee returns from leave to any employment.
 - Employee still remains responsible for employee's share as per FMLA



Non-Competes

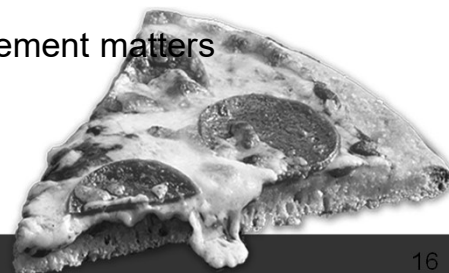
- “*Shall not work for any competing business . . .*”
- As of 1/1/2021, employers cannot put in place or enforce non-compete agreements unless:
 - Employees earn more than \$101,390/ year
 - Independent contractors earn more than \$253,415/year.
 - Non-competes agreements longer than 18 months after the termination of employment are presumed unreasonable.
- Penalty = \$5000 or actual damages
- Don't forget about “park bench” leave if layoff
- More at:
 - <https://lni.wa.gov/workers-rights/workplace-policies/Non-Compete-Agreements>

ANOTHER CASE

Arbitration Agreements

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- Burnett v. Pagliacci Pizza, Inc., 196 Wn.2d 38 (8/2020)
- Pizza delivery driver sought to bring wage-hour class action
- Employer moved to compel arbitration
- Procedurally unconscionable: adhesion contract, clause buried in the 23-page employee guide, **no meaningful choice** but to sign
- Substantively unconscionable: required all to report their concerns to a supervisor before bringing a claim.
- When and how you present the arbitration agreement matters
- *Don't forget about consideration!



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Masks: Workers



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This content can and will change!

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Key Links

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L&I Workplace Requirements, <https://www.lni.wa.gov/forms-publications/F414-179-000.pdf>

Updated COVID-19 Facial Covering Guidance for Employers and Businesses
<https://www.governor.wa.gov/sites/default/files/COVID19%20Facial%20Coverings%20Guidance%20for%20Businesses.pdf>

DOH Vaccine FAQ's <https://www.doh.wa.gov/Emergencies/COVID19/vaccine>

Thurston County DOH. <https://www.thurstoncountywa.gov/phss/Coronavirus>

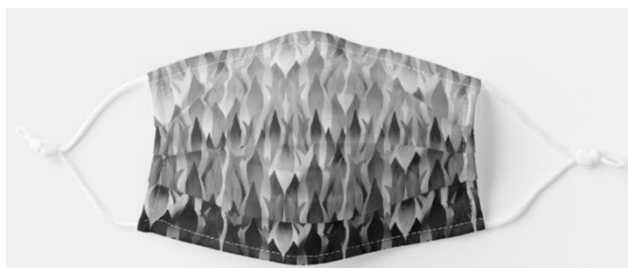
Fisher Phillips Vaccine Resource Center.
<https://www.fisherphillips.com/services/emerging-issues/vaccine-resource-center/index.html?tab=overview>

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Workplace Mask Mandate

What hasn't changed: Masks still required at work.



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Workplace Mask Mandate

What has changed: Employers may allow vaccinated employees to go without masks in most workplaces.

“Employers may still require mask use if they choose, and with some exceptions . . . employers must allow employees to wear a mask or other protective equipment if they choose to, regardless of vaccination status.”

DOH, LNI, as of 5/21/21 [No Fed OSHA]



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Workplace Mask Mandate



What has changed: Employers may allow vaccinated employees to go without masks. Except for

- Healthcare (including long-term care, doctor's offices, hospitals)
- Public transportation (aircraft, train, road vehicles)
- K-12 Schools, childcare facilities, and day camps in locations where students are present
- Correctional facilities
- Homeless shelters

<https://www.lni.wa.gov/safety-health/safety-rules/enforcement-policies/DD1180.pdf>

Workplace Mask Mandate



- **Where optional, employers must verify vaccination status if workers do not wear masks** (updated 5/21/21)
- <https://www.doh.wa.gov/Portals/1/Documents/1600/coronaviruss/ClothFacemasks.pdf>

The workplace order: Washington employers are required to check vaccination status of their workers before relaxing mask or physical distancing requirements. Unvaccinated workers are still required to wear face coverings at work in almost all situations. Employers may choose to continue to require masks for all workers regardless of vaccination status. Employers must provide face coverings if workers do not have them; and employers must allow employees to wear a mask or other protective equipment if they choose to. Employers are responsible to comply with this order and the Department of Labor & Industries enforces it.

Workplace Mask Mandate




- **What has changed** (updated 5/21/21)
- <https://lni.wa.gov/forms-publications/F414-179-000.pdf>
- To verify vaccine status, acceptable documentation includes:
 - A copy or photo of the CDC vaccination card
 - Health care provider letter
 - Signed attestation
 - Documentation from state immunization system

Remember: Maintain in file separate from personnel file

Workplace Mask Mandate




- **What has changed** (updated 5/21/21)
 - <https://lni.wa.gov/agency/outreach/coronavirus-covid-19-worker-face-covering-and-mask-requirements-questions>
 - <https://lni.wa.gov/forms-publications/F414-179-000.pdf>
 - **Employers** must have valid proof. This means:
 - A log of workers who have vaccination and date verified
 - Check each day as workers enter a jobsite,
 - Marking a worker's badge or credential to show that they are vaccinated* or
 - "Other methods"
- *Consider potential discrimination, harassment, or morale issues*



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Vaccine Policies: Workers

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What hasn't changed:

Most employers can choose between a voluntary or mandatory vaccination policy

Both – or neither - are allowed

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Key Laws that Apply to Workplace Vaccine Policies

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- Workplace Health & Safety Regulations, e.g.,— Federal OSHA or WA L&I
- WA Department of Health mandates or rules
- Governor's Proclamations
- HIPAA?
- Americans with Disabilities Act/Washington's Law Against Discrimination
- Wage & Hour, e.g., FLSA and Washington's Minimum Wage Act
- Taxes: FICA, state payroll taxes

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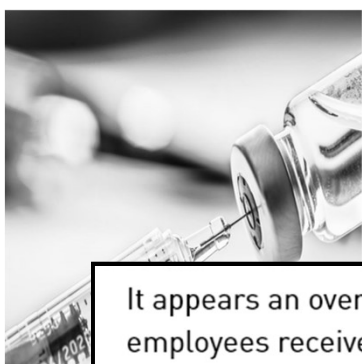
- Decision point: Mandatory or Voluntary?
- EEOC: Employers *may* mandate that all employees vaccinate (at your cost). <https://www.fisherphillips.com/resources-alerts-top-7-things-you-need-to-know>
 - Not all states have adopted this EEOC guidance

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- What are others doing?
- <https://www.fisherphillips.com/news-insights/fp-flash-survey-reveals-mandating-covid-19-vaccine.html>

It appears an overwhelming number of employers are not mandating their employees receive the COVID-19 vaccine – more than four in five – but are instead encouraging their workforce to get inoculated from the virus. That's according to a survey conducted by Fisher Phillips, with over 600 respondents providing their thoughts between May 14-19.

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If mandatory, you must:

1. Articulate how the policy is job-related and consistent with business necessity.
2. Have a policy
3. Consider how to communicate to your team
4. Allow for reasonable accommodations for disabilities*
5. Allow for reasonable accommodations for religion*

*Document the interactive process

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**Can I ask if the employee is vaccinated?
What about the ADA/WLAD? HIPAA?**

- Neither administering a vaccine nor asking an employee for proof of vaccination constitutes a disability-related inquiry or medical exam.
- But:
 1. Cannot require more info than vaccine (e.g., copy of CDC Vaccine Card)
 2. Must maintain confidentiality of this info

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- If employee requests an accommodation or refuses, be ready.
- Duty to provide reasonable accommodations unless undue hardship for:
 1. Medical/Disability
 2. Bona fide religious belief, practice, or observance

<https://www.fisherphillips.com/news-insights/religious-objections-to-mandated-covid-19-vaccines-considerations-for-employers.html>

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Undue Hardship:

- Nature and cost of the accommodation;
- Employer's overall financial resources, number of employees, and effect on expenses and resources of the facility;
- Type of operation/function
- Alternate accommodations?
- Employee or customer fears don't count

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Reasonable accommodations:

1. Have employee complete request form.
2. Ask for medical support or signed statement of bona fide religious objection.
3. Forms at Vaccine Resource Center
<https://www.fisherphillips.com/services/emerging-issues/vaccine-resource-center/index.html?tab=overview>

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Can we prevent employees from working if they will not get vaccinated?

- Probably, but should not support a termination if based on disability or religion unless direct threat or undue hardship.
 - Direct threat = hard to prove
 - Assessment is individualized; no one size fits all
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (to be updated?)

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Can we terminate employees if they will not get vaccinated?

- Yes, but be careful.
- Disability or religion? Must explore accommodations, or prove direct threat or undue hardship.
 - Direct threat = hard to prove
 - Assessment is individualized; no one size fits all
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (to be updated?)

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As of 5/21/2021, Proclamation No. 21-08, "**Safe Workers**":

- No vaccine requirement, but protects from workplace **retaliation** for:
 - Getting vaccine
 - Taking reasonable time off to get vaccine or to recover from it
 - Seeking medical treatment/quarantine for COVID-19



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“Adverse Action” means, for example:

- 1) Terminating, suspending, demoting, or denying a promotion;
- 2) Denying the worker the worker’s choice of any available paid leave provided by existing laws, a CBA, or employer policy;
- 3) Denying unpaid leave to the worker if the worker does not have any paid leave available to cover the qualifying event;
- 4) Denying use of, or delaying payment for, paid leave, wages, or other amounts owed to the worker;
- 5) Reducing the number of work hours for which the employee is scheduled;
- 6) Altering the employee’s preexisting work schedule;
- 7) Reducing the employee’s rate of pay; and
- 8) Threatening to take, or taking action, based upon the immigration status of an employee or an employee’s family member



COVID-19 — Employee Vaccines

What hasn’t changed:

Don’t forget about “high risk workers”

<https://www.fisherphillips.com/news-insights/washington-changes-key-employer-obligations-high-risk.html>



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What hasn't changed:

If mandatory, must pay.

- Employers must pay employees for **all** hours worked in a workweek.
 - “Hours worked” includes all time an employee must be on duty, on the employer's premises, or at any other prescribed place of work.”
- Overtime = 1.5 times “regular rate of pay”
- “Regular rate of pay” = Divide the total compensation for an employee in any workweek by the total number of hours worked in the workweek.
- “Vaccine bonus” must be included

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If voluntary, can you offer a cash incentive? PTO day? HSA bonus? Prize drawing?

- Wellness rules
 - If the incentive offered is too high, it can violate EEOC wellness rules
- Get tax advice
- Still may create a regular rate of pay issue.

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Can my employees sue me if I don't require masks and they get COVID-19?

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- Workers compensation statutes generally protect employers from personal injury lawsuits by employees injured on the job.
- Exception for Intentional Acts:** An employee suffers an injury because of the employer's "deliberate intention . . . to produce such injury." RCW 51.24.02.
 - More than gross negligence
 - Must have actual knowledge the injury is certain to occur and willfully disregard that knowledge
- Note. Employee may have proof problems : "When the contraction of COVID-19 is incidental to the workplace or common to all employment (such as an office worker who contracts the condition from a fellow employee), a claim for exposure to and contraction of the disease will be denied."

<https://lni.wa.gov/agency/outreach/workers-compensation-coverageand-coronavirus-covid-19-common-questions>

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Litigation?


<https://www.fisherphillips.com/innovations-center/covid-19-employment-litigation-tracker-and-insights.html>

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Thank You!

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