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The recently concluded 2008 legislative session resulted in the enactment of several new laws that affect Washington employers. These changes include providing family military leave and leave for victims of domestic violence, sexual assault or stalking, clarifying the requirements for disclosure of automatic service charges, and establishing a single unified test for determining independent contractor status in the construction industry.

2008 Washington Legislative Update

By Douglas Edward Smith and Jennifer L. Mora

The recently concluded 2008 legislative session resulted in the enactment of several new laws that affect employers and employees in the state of Washington. Following are summaries of the most significant new laws.

Leave for Victims of Domestic Violence, Sexual Assault or Stalking

Effective April 1, 2008, all employers in Washington (regardless of size) must allow employees who are victims of domestic violence, sexual assault or stalking (or who have a family member who is such a victim) to take unpaid or paid leave (which may be drawn from the employee's sick leave or other paid time off or compensatory leave and can be taken intermittently or on a reduced leave schedule) in order to:

- Seek legal or law enforcement assistance or remedies to ensure the health and safety of the employee or the employee's family members;
- Seek treatment by a health care provider for physical or mental injuries caused by domestic violence, sexual assault, or stalking, or to attend to health care treatment for family members who are victims;
- Obtain, or assist a family member in obtaining, assistance from social services programs, such as a domestic violence shelter or a rape crisis center;
- Obtain, or assist a family member in obtaining, mental health counseling; or

- Participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members from future domestic violence, sexual assault, or stalking.¹

Qualifying family members include children, spouses, parents, parents-in-law, grandparents, or any person with whom the employee has a dating relationship.

Employees requesting this leave must provide the employer with advance notice of his or her intention to take leave. If the employer has a policy regarding this type of leave, the employee's timing of the request for leave must be consistent with that policy. However, if advance notice of the leave is not possible due to an emergency or unforeseen circumstances resulting from domestic violence, sexual assault or stalking, the employee (or a designee) must notify the employer of the leave no later than the end of the day that the employee takes the leave.

The employer may require that the employee provide verification that: (1) the employee or a family member is a victim of domestic violence, sexual assault or stalking; and (2) the leave is being requested for one of the five reasons allowed by the statute. Beyond this, the employer is not permitted to require the employee to produce or discuss any other information with the employer regarding the need and circumstances of the leave. Moreover, the employee is not required to provide any information that would compromise the safety of the employee or the employee's family in any

way, nor may an employer require the disclosure of such information. Such verification, if requested, must be provided in a timely manner, or within a reasonable period of time if circumstances prevent the employee from requesting the leave in advance. To the extent an employer requests verification, the request will be satisfied if the employee provides, for example, a police report, a court order, or a written statement from the employee. The employee may also verify the existence of a familial relationship with a victim needing support from the employee by providing, among other things, a statement from the employee confirming the relationship, a birth certificate, or court records.

Employers are required to maintain the confidentiality of all information provided by the employee unless the employee requests or consents to disclosure, the employer is ordered to do so by a court or administrative agency, or such disclosure is otherwise required by federal or state law. It is unlawful for any employer to discriminate or retaliate against an employee who has exercised or has assisted other employees in exercising their rights under the statute.

Employees who take leave for themselves or for their family members may not lose any pay or benefits that had already accrued before the leave starts. When an employee returns from leave, the employee must be restored to either the same position or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment. Employers also must maintain health insurance coverage of employees who take leave in the same manner as if the employee had not taken the leave.

Although this new law applies to all employees and employers (regardless of size), it specifically excludes individuals employed by a staffing company who are on a temporary assignment or individuals who were hired for a discrete project that has been completed and for which the employer would not have continued to employ the individual.

Additional information concerning the new

law can be found on the Washington State Department of Labor & Industries' website at <http://lni.wa.gov/WorkplaceRights/LeaveBenefits/FamilyCare/DomViolence/default.asp>.

Authorizing Leave Sharing for State Employees for Victims of Domestic Violence, Sexual Assault, or Stalking

The State of Washington maintains a leave-sharing program for state government employees that contains detailed requirements governing the extent to which a state employee may donate his or her accrued leave to other state employees who need to take leave because the employee or a relative or household member suffers from an extraordinary illness, injury, impairment, or physical or mental condition or has been called to service in the military. Substitute Senate Bill 6500, which becomes effective on October 1, 2008, will allow state employees to share their accrued leave with other state employees who are victims of domestic violence, sexual assault, or stalking.

Family Military Leave

On March 19, 2008, Governor Gregoire signed a new military leave law, Senate Bill 6447. This new law, effective June 12, 2008, allows employees who work an average of 20 hours or more per week (excluding independent contractors) to take up to 15 days of unpaid leave when the employee's spouse is a member of the military and is deployed during a period of military conflict. Such military leave, which is limited to a maximum total of 15 days per deployment, must be taken either before the employee's spouse is deployed or while the spouse is on leave from deployment. In addition to providing unpaid leave to employees who have spouses in the military, the bill also increases the total number of military leave days (from 15 to 21 days per year) that may be taken by state, county and local government employees who are members of the Washington national guard or the reserves.

Employees must provide the employer with advance notice of the leave within

five business days of receiving official notice of an impending call or order to active duty or of a leave from deployment. Although the leave is unpaid, employees may elect to substitute any of the accrued leave to which the employee may be entitled for any part of the leave provided under the new law. Employees returning from leave are entitled to the same job restoration rights and the same benefits that they would have received had the leave been taken under the federal Family Medical Leave Act and/or the Washington Family Leave Act. Employers may not discriminate or retaliate in any way against employees who take leave under the new law.

Additional information concerning the new military family leave law can be found on the Washington State Department of Labor & Industries' website at <http://lni.wa.gov/WorkplaceRights/LeaveBenefits/FamilyCare/Military/default.asp>.

Disclosures for Automatic Service Charges

Washington Revenue Code section 19.48.130 requires employers, such as restaurants, convention centers and hotels, that impose automatic service charges related to food, beverages, entertainment or portage to disclose in an itemized receipt and in any menu provided to the customer the percentage of the automatic service charge that is paid or is payable directly to the employee or employees serving the customer. Such service charges are in addition to hourly wages paid or payable to the employee or employees serving the customer.

House Bill 2699, which becomes effective on June 12, 2008, recodifies section 19.48.130 as a new section in Washington's Minimum Wage Act. According to the Final Bill Report on House Bill 2699, the law was moved because the prior code chapter that contained the law – the chapter relating to hotels, lodging houses and restaurants – does not include enforcement provisions or civil or criminal penalties. By contrast, the Washington Minimum Wage Act includes provisions authorizing the Director of the Department of Labor and

Industries to conduct investigations necessary to determine whether the Act has been violated. In addition, an employer that violates the Minimum Wage Act or retaliates against an employee for filing a complaint of a violation may be found guilty of a gross misdemeanor. Whether other remedies and enforcement mechanisms provided under the Minimum Wage Act are now available for a violation of the disclosure requirements of this new law remains to be determined.

Consolidating, Aligning, and Clarifying the Tests for Determining Independent Contractor Status for Construction and Electrical Contractors Under Washington's Unemployment and Workers' Compensation Laws

In 2007, the Washington Legislature created a Joint Legislative Task Force on the Underground Economy in the Construction Industry to study and formulate recommendations concerning the underground construction economy. One of the issues addressed by the Task Force was the determination of independent contractor status for construction and electrical contractors. After studying the issue, the Task Force recommended that the different tests used to determine independent contractor status (i.e., the definition of "worker" in the industrial insurance law, and the definition of "employment" under the unemployment insurance law) be combined into a single consistent definition.

Following the Task Force's recommendation, the Legislature enacted Engrossed Substitute House Bill 3122. Under this new law, a single new test is established to determine when work in the construction industry is being done by an independent contractor (rather than an employee) for purposes of industrial (workers' compensation) and unemployment insurance. The prior construction-specific tests have been eliminated. Under the new law, each of the following requirements must be

met for a construction or electrical contractor to qualify for independent contractor status:

- The individual has been and will continue to be free from control or direction over the performance of the service, both under contract and in fact;
- The service is either outside the usual course of business for which the service is performed, or outside of all the places of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the place of business;
- The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature, or the individual has a principal place of business that is eligible for a business deduction for federal income tax purposes, other than that furnished by the employer;
- On the effective date of the contract, the individual is responsible for filing, under the contract and in fact, a schedule of expenses with the Internal Revenue Service;
- On the effective date of the contract or within a reasonable period after the effective date, the individual has an active and valid certificate of registration with the state Department of Revenue and an active and valid account with any other applicable state agencies, and has a Unified Business Identifier (UBI) number;
- On the effective date of the contract, the individual is maintaining a separate set of books or records; and
- On the effective date of the contract, the individual has a valid contractor registration or electrical contractor license if the work requires the registration or license.

This new law becomes effective on June 12, 2008.

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¹ Wash. Subst. H.B. 2602.