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Best Practices for Best Employers™

How to Become a Best Workplace Starting Today!

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Lawyers for Employers®

D. Michael Reilly, Lane Powell PC

Brent Schlosstein, LWHRA

Dear Colleagues:

Being a "Best Workplace" can be hard work. *Lane Powell* and the *Lake Washington Human Resources Association* have joined forces to help your business become a "Best Workplace."

We invite you to join us for our 30th Annual Labor and Employment "Best Practices For Best Employers™" Seminar at the beautiful Four Seasons Hotel in Seattle. Small and large business owners, senior corporate executives, corporate counsel and human resources professionals will receive cutting-edge guidance on quick-changing employment laws.

Being caught unaware of big changes in employment laws can hurt your business. We are here to help.

You will receive thoughtful insights from experienced speakers on **Seattle's new Paid Safe and Sick Leave Ordinance**, which took effect on September 1, 2012.

You will learn about **key legislative and court developments affecting employers, and receive easy to use checklists** to help keep your company's employment policies and procedures up-to-date.

You will hear about **new IRS and Washington state initiatives regarding independent contractor status**, and you will learn "best practices" to avoid the wrath of the IRS and the Department of Labor.

We will discuss changes to **The Affordable Health Care Act** and provide guidance on what employers need to do now in light of the recent United States Supreme Court decision.

For more than 135 years, Lane Powell has helped emerging and established businesses navigate the legal landscape in the Pacific Northwest. The Lake Washington Human Resources Association is the "Super-Mega Chapter" of the Society for Human Resource Management, and has a long history of providing thoughtful insights to current employment issues facing businesses.

D. Michael Reilly
Director of Labor and Employment and Employee Benefits Practice Group, Lane Powell PC

Brent Schlosstein
President Elect, Lake Washington Human Resources Association ("LWHRA")

For more information and to register for our upcoming Annual Labor and Employment Seminar on September 20, please visit our website at www.lanepowell.com.

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LWHRA

Best Practices For Best Employers™ Seminar

How to Become a Best Workplace Starting Today!

September 20, 2012

*This annual seminar, geared toward Employers, Managers, Human Resource Professionals and Corporate Counsel, is part of our ongoing **Employment Law School For Managers®** Series.*

Cost: $100 prepay online; $125 at the door. Register online at www.lanepowell.com.

7:45 a.m. to 2:15 p.m.
(7:15 a.m. Breakfast and Registration)
Please see full agenda on last page.

Location:
Four Seasons Seattle
99 Union Street, Suite 1101
Seattle, Wash.

Questions? Contact:
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The Seattle Sick and Safe Leave Ordinance is Here: Are You In Compliance?

By Laura T. Morse

Laura Morse is a shareholder at Lane Powell, where she is a member of the Firm's Labor and Employment Practice Group. She concentrates her practice on employment litigation involving wrongful discharge, race, sex, religion and disability claims, as well as litigating employee benefits claims. Laura can be reached at 206.223.7063 or morsel@lanepowell.com.

Probably the most vexing issue for employers is how to handle employees who work only occasionally in Seattle. For these employees, the rules for notice, tracking time and use are sometimes confusing, and even the final rules do not provide bright-line guidance.

On September 1, 2012, nearly a year after Mayor Mike McGinn signed the City of Seattle Paid Sick and Safe Leave Ordinance (the "Ordinance"), it finally went into effect. The Ordinance has caused significant anxiety for many employers, both in terms of its potential economic impact and its administrative requirements. On June 29, 2012, after many months of community discussion and numerous iterations, the City issued its final rules for implementation. Although the new rules have clarified some uncertainties, many employers were left with questions about how to comply with the Ordinance to avoid stiff penalties. The following are just a few of the important issues employers need to be aware of:

If my company already has a sick leave plan, we're in compliance, right? Not necessarily. Simply giving your employees the same amount of leave required by the Ordinance may not be enough. Employers need to make sure they are also complying with the carry-over minimums. Some employers may need to revise their "use it or lose it" policies, as such policies likely violate the Ordinance. Finally, an employer with a sick leave plan must also permit employees to use that leave for safe leave, as provided in the Ordinance.

The "occasional" employee is causing the most frequent headaches. Probably the most vexing issue for employers is how to handle employees who work only occasionally in Seattle. For these employees, the rules for notice, tracking time and use are sometimes confusing, and even the final rules do not provide bright-line guidance. Employers who have brick and mortar locations in Seattle, where they can post the requisite notices in employee areas, may have an easier time providing notice of the Ordinance. It might not be so easy for other employers. For example, employers who have employees who do sales or deliveries in Seattle may not have such an easy avenue for providing the requisite notice.

Tracking time has caused similar uncertainties. The final rules clarify that the employer can put the burden on its employees to track their own time. The final rules do not, however, explain how or when this must be done. Nor do the final rules deal with the issue of employees who may not accurately track their hours worked in Seattle.

Finally, the question of when an occasional employee may use sick and safe leave continues to cause confusion. The final rules confirm that an occasional employee may only use sick and safe leave "when they are scheduled to perform work in Seattle." This does not address the situation where the employee does not have a regular "schedule" and can come in and out of Seattle (or telecommute from a residence in Seattle) at his or her discretion.

An employee's obligations are not 100 percent clear either. As discussed above, the Ordinance and final rules do place some responsibilities on employees, like tracking occasional time in the City limits. The Ordinance and final rules also have a requirement that employees give their employer notice when they are taking sick or safe leave. There is, however, no specific timing requirement for unforeseeable leave, which could likely leave employers — especially in the food service and retail industries — scrambling to cover shifts. Employers should make sure they have a written call-in policy, even though employees can deviate from that policy in certain circumstances.

Protect your company and your employees by familiarizing yourself with the Ordinance and final rules, as well as updating any relevant policies.

Interesting Facts...

One-third of the projected fastest growing occupations are related to health care.

Fifteen percent to 43 percent of gay and transgender workers have experienced some form of discrimination on the job.

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If the Shoe Fits

Avoiding Tax Liability From Employee Misclassifications

By D. Michael Reilly

D. Michael Reilly, a shareholder at Lane Powell and director of the Firm's Labor and Employment and Employee Benefits Practice Group, represents small and large employers in all facets of employment-related issues and litigation. He can be reached at reillym@lanepowell.com or 206.223.7051.

Last year, the Department of Labor's Wage and Hour Division hired an additional 90 investigators and upped its budget by $244 million, with the goal of uncovering overtime and other FLSA violations.

"Congratulations: Your business has been selected for an IRS audit on the issue of independent contractor versus employee." An increasing number of employers are hearing this message. What is the big deal? What will happen?

Most people think they understand the differences between independent contractors and employees. Yet, with most of the focus on how you determine which is which, we spend little time talking about why it matters.

The Independent Contractor/ Employee Issue. If you have an employee, the employer must withhold income tax and the employee's portion of Social Security and Medicare taxes. The employer also pays Social Security, Medicare and unemployment taxes.

If the worker is an independent contractor, the employer provides a Form 1099 to report amounts paid to the IRS. With no withholding, the employee is responsible for paying income and self-employment taxes.

Failure to withhold past taxes may result in substantial liabilities, plus penalties and interest. Taxes that must be withheld include income and employment taxes. If the employer cannot prove the workers paid their own income taxes, the employer can be required to pay the taxes it should have withheld.

IRS Amnesty? Think Twice. The Internal Revenue Service recently announced its Voluntary Classification Settlement Program, which would give businesses that had been misclassifying workers a chance to come clean and avoid back taxes. But, the IRS also stated its plans to share information it receives with other federal and state agencies, and those state agencies could impose their own penalties and rules.

The Audit. Last year the Department of Labor and Industries ("DLI") conducted 5,100 audits; 69 percent of those employers had problems including misclassifications. Now more than ever, the IRS and the DLI are bearing down on the misclassification of workers. IRS agents are told to focus on this issue because it could generate additional revenue from payroll taxes, penalties and interest by reclassifying independent contracts to employees. In Washington alone, total underreported taxes and worker compensation payments exceeded $30 million. Now is the time to review and address any misclassified employees, then check with legal counsel on how to respond to an IRS or DLI audit.

Interesting Facts...

In December 2011, 30 percent of employers using independent contractors misclassified them.

For every dollar the Wage and Hour Division spends on investigating employers for misclassification, it gets $7 back in fines and penalties.

The U.S. Equal Employment Opportunity Commission received a record 99,947 charges of employment discrimination in 2011.

For more information and to register for our upcoming Annual Labor and Employment Seminar on September 20, please visit our website at www.lanepowell.com.

Trends in Labor and Employment Law:
Four Steps Employers Can Take to Minimize Claims

By Katheryn Bradley

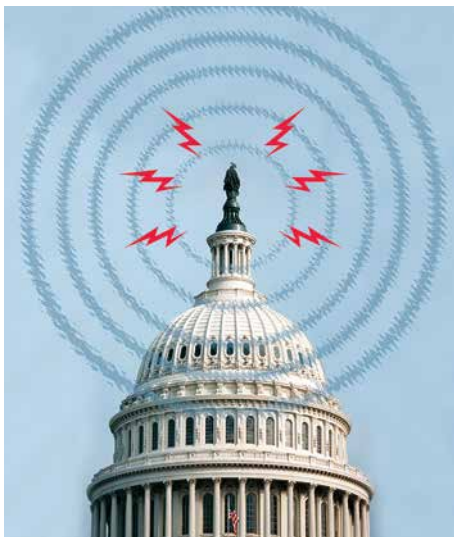
Katheryn Bradley is a shareholder at Lane Powell, where she is a member of the Firm's Labor and Employment Practice Group. She represents private and public employers in workplace disputes, and has successfully litigated and resolved claims for wrongful discharge, discrimination, and violations of leave and wage and hour laws. She can be reached at 206.223.7399 or bradleyk@lanepowell.com.

1 **Understand Legal Obligations for Returning Veterans and Their Families**

With large numbers of veterans now returning from war, employers should be prepared to comply with employment laws protecting veterans and their families. As one example, the Uniformed Services Employment and Reemployment Rights Act requires returning service-members to be reinstated with accrued seniority and related rights and benefits as if they were continuously employed while on military leave. The federal Family and Medical Leave Act ("FMLA") grants up to twenty-six weeks of leave to military family members seeking to care for injured service-members. The FMLA and Washington law permit military family members to take time off when service-members are home on leave and for other military purposes. In November 2011, Congress passed the VOW to Hire Heroes Act, which authorized veterans to sue for a hostile work environment. Employers should update policies and conduct anti-harassment training to ensure military veterans are treated with respect and dignity.

2 **Train Managers to Accommodate Disabled Employees**

Disability discrimination is alleged in more than one-quarter of all charges filed with the Equal Employment Opportunity Commission ("EEOC") and with returning veterans, that number will likely increase. Most medically cognizable or diagnosable medical conditions are considered disabilities under Washington law. To avoid claims, employers should train supervisors about the interactive process for accommodating employees' disabilities. Requests for medical information should also comply with recent EEOC regulations implementing the Genetic Information Nondiscrimination Act.



3 **Review Social Media Policies for Compliance With the National Labor Relations Act**

Regulating how employees use workplace technology, including social media, has become increasingly challenging. Employers must provide a workplace free from unlawful discrimination, whether harassment takes place at the water cooler or on Facebook. Nor does an employer want to lose its ability to protect its trademarks and proprietary information when employees recklessly blog and tweet. Many employers have therefore adopted broad technology policies limiting what employees may post on social media, and when those policies are violated, terminate employment. But such policies may violate the National Labor Relations Act, which protects the rights of non-supervisory employees, whether unionized or not, to engage in "concerted activities for the purpose of ... mutual aid or protection." Employers should review handbook policies to ensure that they comply with the National Labor Relations Board's recent guidance, and proceed cautiously before terminating employees for social media activities.

4 **Conduct a Self-Audit to Identify Misclassified Workers**

With the economic downturn, many employers limited labor costs by asking employees to perform more work for the same salary, regardless of hours worked. This practice is legally permissible if an employee is exempt from overtime compensation under federal and state wage and hour laws. But if such employees were misclassified as exempt, employers face claims for unpaid overtime compensation, unpaid meal and rest breaks, and liquidated double damages. Likewise, employers who outsourced jobs to independent contractors may be audited and assessed penalties for unpaid unemployment taxes, workers' compensation premiums and taxes owed to the Internal Revenue Service. With improvement in the job market, employees and contractors may be more motivated to pursue misclassification claims. Employers should consider self-audits, consulting with legal counsel to protect privilege.

Interesting Facts...

Employment trended up in health care (+13,000) and wholesale trade (+9,000) in June 2012.

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Jacob Downs is an attorney at Lane Powell, where he is a member of the Firm's Labor and Employment Practice Group. He focuses his practice on employment and business litigation, and represents many national and northwest companies in both state and federal court, as well as in private arbitration. Jacob can be reached at 206.223.7397 or downsj@lanepowell.com.

What to Do When Employees Go Wild

By Jacob M. Downs

We all saw the implosion of Charlie Sheen. No employer wants to make the nightly news because one of its employees had that monumental meltdown at work. YouTube and other websites are filled with videos and recounts of employee antics that span the spectrum of conceivable misbehavior. From over-indulging at the company holiday party to trashing the office during a profanity-laced tirade, an employee's bad acts can have disastrous consequences for the employer. In addition to embarrassment and property damage, an employee's meltdown may also subject an employer to significant legal exposure from claims by other employees or third parties.

Obviously, proper hiring and training procedures are the best way to prevent such an incident from ever happening. But what can you do to prevent harm to the company and others when one of your employees goes off the deep end?

Damage Control. Protecting the bad employee may link the employer to the employee's bad conduct, which could result in third parties asserting claims such as negligent hiring and retention, assault and battery, defamation and conversion (theft). In addition to protecting itself from third-party claims, the employer should also take steps to protect its own personal, real and intellectual property interests from the employee. Therefore, immediate action may be required at the first sign of trouble.

Take Steps To Address Issues of Physical Safety. In situations where the employee is an ongoing threat, certain legal action may be warranted to prevent harm to the company and others. Depending on the circumstances, consider the following emergency legal options:

1. **Anti-Harassment Protection Orders to Protect Other Employees.** An employer may assist an individual in obtaining a protection order that restricts the employee's interaction with that person. While this type of order exists to protect persons and not property, it can have the incidental benefit of protecting a place of business while the protected individual is present. If prompt action is taken, this type of order can often be obtained within hours of an incident.

2. **No Trespass Notice.** An employer has the right to exclude the employee from its private property. Providing notice to the employee that he or she is no longer welcome on the employer's property may preempt any further disruptions at the workplace. This is particularly effective when the notice is provided by the employer's attorneys or the police.

3. **Restraining Order.** An employer may seek a temporary restraining order to restrain the employee from certain action or inaction. This form of injunctive relief may restrain the employee from entering the employer's premises, disclosing information belonging to the employer, posting information about the employer online, using the employer's property, contacting certain persons, or otherwise acting in a manner harmful to the employer.

4. **Prosecutor Cooperation.** In the event the employee is charged with a criminal act, the prosecuting attorney can obtain a no-contact order, which is similar to an anti-harassment protection order. In the event the employee's criminal act implicates the employer in any way, the best practice is to establish immediate and continued communication with the prosecuting attorney so that the employer has all the information necessary when making decisions on how to proceed regarding its interests.

Determine the Appropriate Disciplinary Response and Whether the Employment Relationship Can (or Should) Be Saved. Take prompt, but fair, action to remove the employee's visibility and access, consistent with company policy and applicable employment laws. Remember, even "bad" employees are still afforded many legal protections. Consider a paid administrative leave with clear rules about acceptable behavior, setting out clear consequences for violation of the rules, while you investigate. In cases of more egregious conduct, immediate termination may be warranted. Either way, your decisions should be documented and supported by an internal investigation. This will help reduce the chance of any future claims by the employee. After you have investigated, assess the chances for "rehabilitating" the employment relationship and weigh the value of the employee with the effort required to rehabilitate him or her. Corrective action and retraining may be appropriate in certain situations. In the end, if you are working harder at the employee's success than at the success of the company (or harder than the employee him or herself is working), it might be time to terminate the relationship.

Interesting Facts...

The health care and social assistance sector is projected to gain the most jobs (5.6 million), followed by professional and business services (3.8 million), and construction (1.8 million).

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Craig Day is Counsel to the Firm at Lane Powell, where he is a member of the Employee Benefits Practice Group. He focuses his practice on ERISA-related matters, employee benefits issues and executive compensation. Craig can be reached at 206.654.7819 or dayc@lanepowell.com

Health Care Reform: What the Decision Means to Companies

By Craig A. Day

On June 28 the Supreme Court issued its much-anticipated decision, which held that the comprehensive federal health care reform legislation, the Patient Protection and Affordable Care Act ("PPACA"), is constitutional. Predictions about what the Supreme Court might do varied widely, and although some may have predicted the outcome, few predicted the underlying legal rationale or the coalition of justices that would uphold the law. In a 5-4 decision, the Court's four liberal justices joined the conservative Chief Justice in upholding the controversial "individual mandate" that requires individuals to maintain a minimum level of health insurance coverage beginning in 2014 or pay a penalty. The Court held that Congress did not have the power to enact the individual mandate under the Commerce Clause (which authorizes Congress to regulate interstate commerce), but that it did have the power to do so under Congress' taxing authority.
The Court narrowed the law's expansion of Medicaid programs, striking down the provisions of the law that authorized the federal government to withhold all federal Medicaid funding (including existing funding) to states, unless they agreed to expand their Medicaid programs under the law.

For employers, the decision means that all of PPACA's provisions that apply to employers and their health benefit programs are still in force. The law is comprised of a series of provisions that have different effective dates and apply differently to employers and health plans, depending on the number of employees and whether or not the plans are "grandfathered" under the law.

Strategies May Need to Change

What employers should do now depends mostly on the strategy they adopted when the law was first enacted. Employers that have been working with their service providers, advisors and consultants to comply with the law since it was first enacted should continue doing what they have been doing. Employers who were waiting for the issue to be settled by the Supreme Court must now begin working to comply with the law, starting with the provisions that are currently effective and then working on provisions with later effective dates.

A Few Important Provisions

Here is a brief summary of some of the law's provisions:

- Currently effective provisions include: dependent coverage for adult children up to age 26; lifetime dollar limits on certain health benefits prohibited; and preexisting condition exclusions prohibited for children under age 19.
- Other important aspects of the law will become effective in later years. For 2012 and 2013, examples include:
  - Employers must provide a uniform summary of benefits and coverage to participants (for open enrollments after September 23, 2012);
  - FICA Medicare tax rate increases by 0.9 percent for high earners (employee only);
  - Cap on annual health flexible spending arrangement deferrals ($2,500); and
  - Employers must provide notice to employees regarding state insurance exchanges.
- Important changes that will become effective in 2014 include:
  - Employers with 50 or more full-time employees are required to offer minimum essential coverage to employees or face penalties;
  - Preexisting condition exclusions are no longer allowed in group health plans; and
  - Individuals are required to obtain minimum essential health care coverage or pay a penalty.

Where to Start

Employers that have been waiting for the Supreme Court's decision to begin working on compliance should, at a minimum:

- Become familiar with the applicable provisions of the law;
- Adjust budgets to reflect compliance activities;
- Plan to communicate important health benefit changes to employees;
- Review current health plan for compliance with the law and make any necessary changes; and
- Consider alternatives to current health plan, including coverage under the state health insurance exchanges.

Interesting Facts...

By 2020, the number of Hispanics in the labor force is projected to grow by 7.7 million or 34 percent, and their share of the labor force is expected to increase from 14.8 percent in 2010 to 18.6 percent in 2020.

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Best Practices For Best Employers™ Seminar Agenda

7:15 – 7:45 a.m. – Registration and Breakfast

7:45 – 8 a.m. – Welcome and Introduction


Bradley

8 – 9 a.m. – Annual Labor and Employment Law Update: Lessons for Best Employers
Katheryn Bradley, Lane Powell PC
We will cover what employers need to know about legal trends affecting employers over the past year, including new federal, state and local laws, regulatory changes and initiatives, and decisions from courts. Highlights include EEOC trends and guidance, wage and hour developments, NLRB regulation of social media, and developments in managing leave and disabilities in the workplace.


Day


Schlosstein

9 – 9:45 a.m. – Healthcare Reform Breaking News: What the Supreme Court Decision Means for Employers
Craig Day, Lane Powell PC, and Brent Schlosstein, TRUEbenefits and LWHRA
The Supreme Court's landmark decision on the constitutionality of healthcare reform left most employers with more questions than answers. We will summarize the decision and subsequent events, and help you understand how the decision may impact your company and its employees. We will include practical steps you may want to take in response to the decision, and help you anticipate any further legislative action on healthcare.

9:45 – 10 a.m. – Break


Reilly


Carlson

10 – 11 a.m. – Are They Really Independent Contractors? Enforcement Trends and "Best Practices" to Avoid the Wrath of the IRS and DLI
Mike Reilly, Lane Powell PC, and Ted Carlson, Liberty Bay Consultants, LLC
More than ever, erroneous, independent contractor status can be a costly hotbed for employers, given renewed scrutiny by federal and state regulators. Learn how changing definitions and compliance expectations can get you into trouble, and leave with a plan on how to avoid mistaken independent contractor classifications.


Morse

11 – 11:45 a.m. – What You Need to Know *NOW* About Seattle's Paid Safe and Sick Leave Ordinance
Laura Morse, Lane Powell PC
The Seattle Paid Safe and Sick Leave Ordinance is in effect as of September 1. The Ordinance imposes complex accrual, use and recordkeeping requirements that employers — even those with employees that only work in Seattle occasionally — will need to understand to remain in compliance and avoid liability. We will highlight the changes to the final administrative rules, identify areas in your current policies that, although otherwise lawful, might violate the Ordinance. We will provide insight into best practices for navigating the recordkeeping requirements, including how to navigate records for exempt and occasional employees. We will also decipher the rules for the food and beverage industries, as well as industries with non-traditional work schedules.

11:45 a.m. – 1 p.m. – Lunch


Downs

12:15 – 1 p.m. – Handling Charlie Sheen: What to Do When Employees Go Wild
Jacob Downs, Lane Powell PC, Panelists: Carol Brickner, Trident Seafoods; Jane Lyda Mounsey, SPHR, GLY Construction; Ruth Alstadt, Data I/O Corporation (Lunch-time Presentation)
Bizarre, unpredictable, embarrassing and criminal conduct by employees and officers may require personnel actions. Often these decisions need to be made quickly to protect not only the employer but also other employees. A panel reviews real-life examples with practical advice on how to prevent such situations and what to do after it's too late. Learn from those who have been there.

1 – 1:15 p.m. – Break


Swale


Grant Bluechel

1:15 – 2:15 p.m. – Hindsight is 20-20: What I Wish I Had Asked My Employment Attorney
Sarah Swale, Lane Powell PC, and Renee Grant Bluechel, Lane Powell PC
We are not unionized, so do we need to consider changing our policies to protect our employees' rights under the NLRA? Even though we are not federal contractors, do we need to create an Affirmative Action Plan? Do we have an obligation to pay employees for things like state-mandated training or travel time? If we cannot accommodate an employee's disability, can we simply terminate their employment? These are just some of the questions that you never thought to ask your employment attorneys, but should have.