

# **Employment Law Update: Legal and Legislative Developments**

**Especially for  
The 14<sup>th</sup> Annual Washington State Nonprofit Conference**

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## I. EMPLOYMENT DISCRIMINATION

### A. Washington adopts new, broader statutory definition of “disability.”

#### S.B. 5340, effective July 22, 2007.

Several years ago, the Washington Supreme Court, citing a confusing and circular definition of “disability” under the Washington Law against Discrimination, RCW 49.60 (WLAD), adopted the definition of disability found in the Americans with Disabilities Act for purposes of WLAD enforcement. Apparently offended by the court’s decision, the Washington legislature passed, and the Governor has signed, SSB 5340 which rewrites the definition of disability so much so that all physical and mental impairments are now protected from employer discrimination.

The legislature reinstated the former definition of “disability” that our Supreme Court found so confusing: “Disability” means the presence of a sensory, mental, or physical impairment that (i) is medically cognizable or diagnosable; or (ii) exists as a record or history; or (iii) is perceived to exist whether or not it exists in fact.

The legislature added a new provision:

“A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.”

For purposes of this definition, “impairment” includes, but is not limited to:

“(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or (ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”

In order to qualify for a reasonable accommodation, an impairment must be known or shown through an interactive process to exist in fact and: (i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or (ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

The new law becomes effective for causes of actions filed on or after July 22, 2007. The effective date will not limit a plaintiff’s right to sue after July 22, 2007 based on discrimination occurring before that date.

*Impact and Recommendations:*

1. Employers must be aware of three different definitions of “disability:” (1) the ADA definition, (2) the WLAD definition of disability to establish disability discrimination, and (3) the WLAD definition of disability triggering the reasonable accommodation requirement.

2. An employer will need to treat any medical condition (i.e., any medically cognizable physical or mental impairment) as a disability.

3. Conditions that are correctable or which can be mitigated to the point that the individual can function normally are still considered disabilities (unlike the ADA).

4. An employer must accommodate the medical condition if the condition substantially limits the individual’s ability to perform his or her job (or the individual’s ability to apply or be considered for a job, or the individual’s ability to have equal access to employee benefits or working conditions) or the employer is on notice of an impairment and there is doctor’s certification stating there is a reasonable likelihood that failing to provide an accommodation will aggravate the condition to the extent it would eventually substantially limit the employee’s ability to perform the job. Undue hardship and direct threat defenses are still available. Employer notes to doctor’s asking for medical information should ask whether the impairment now has or may lead to these limitations.

5. You must engage in an interactive process with the disabled employee to determine job limitations and reasonable accommodation options. This mirrors the Ninth Circuit’s requirement for ADA purposes.

6. The expanded definition of “disability” will, presumably, broaden employee medical leave entitlements. For example, an employee with a minor, temporary medical condition will be entitled to leave for rest, treatment, doctor’s appointments, therapy, etc. if the failure to provide leave will eventually result in an aggravated, “substantially limiting” condition sometime in the future. Furthermore, an employee may be protected if a relatively minor physical or mental impairment causes the employee to run afoul of employer attendance or disciplinary policies. Employers should consult outside counsel should such a situation occur.

**B. Refusal to hire pregnant employee constitutes sex and pregnancy discrimination, not disability discrimination.**

**Hegwine v. Longview Fibre Co., \_\_\_Wn.3d. \_\_\_, No. 78728-0, November 29, 2007.**

Longview Fibre offered Stacy Hegwine a job as a customer service clerk, subject to successfully completing a medical exam. The newspaper ad did not mention any lifting requirements, nor did any written job description exist. During her job interview, the interviewer told her the job required the ability to lift twenty-five pounds. Her medical examination revealed her pregnancy, and the employer suspended her job orientation until it received medical clearance for Hegwine to work. Initially, Hegwine’s doctor cleared her to work subject to a twenty pound lifting restriction. Eventually, her doctor increased the restriction to forty pounds, but the company rescinded the job offer based on Hegwine’s unavailability. Later, it claimed that Hegwine could not lift the occasional sixty pounds the job required.

Hegwine sued for sex and pregnancy discrimination. Longview Fibre defended by asserting that it was unable to accommodate Hegwine’s forty pounds lifting restriction. The trial

court accepted Longview Fibre's argument, but the Court of Appeals disagreed, which the State Supreme Court affirmed.

The failure to hire because of pregnancy and pregnancy-related conditions is a form of gender and pregnancy discrimination. Hegwine's lifting restriction was a "pregnancy-related condition," and she never asked for an accommodation. Thus, her claim is to be reviewed under sex/pregnancy discrimination, not a "failure to accommodate" standard. Under sex discrimination laws and analysis, Longview Fibre needed to articulate a legitimate business justification for its failure to hire, or proffer a bona fide occupational qualification. An accommodation analysis under disability discrimination-type claims is not applicable nor appropriate.

Although Longview Fibre maintained that Hegwine could not do the job at the time of hire, the evidence failed to support this defense. The evidence showed that Longview Fibre arrived at its occasional sixty pound lifting requirement only after Hegwine submitted a lifting restriction that exceeded the twenty-five pound requirement conveyed to Hegwine during her job interview.

**C. Misconduct may be part of a disability.**

**Gambini v. Total Renal Care, Inc., \_\_\_F.3d.\_\_\_, No. 05-35209 (9<sup>th</sup> Cir., 2007).**

Stephanie Gambini suffered from bipolar disorder, which she disclosed to her employer. Her condition caused anxiety and mood swings, which made her irritable and easily distracted. During a meeting in which Gambini's supervisors placed her on a plan of improvement, Gambini threw the improvement plan document across the desk, uttered profanities, and left the room, slamming the door on the way out. Later, her supervisors observed Gambini kicking and throwing things at her cubicle. The company terminated Gambini based on her behavior during and after the improvement plan meeting.

Gambini sued the company for disability discrimination and a failure to provide reasonable accommodation under the Americans with Disabilities Act and the Washington Law against Discrimination (RCW 49.60). A jury returned a verdict in favor of the company, but Gambini appealed that verdict on the basis that the judge refused to give an instruction to the jury stating "[c]onduct resulting from a disability is part of the disability and not a separate basis for termination."

The Ninth Circuit Court of Appeals reversed the jury's verdict, and remanded the case to the lower court on the basis that the jury should have been instructed that it may be disability discrimination to terminate an employee for misconduct caused by a disability. The court interpreted prior Ninth Circuit and Washington case law to hold that misconduct caused by a disability "is considered a part of the disability, rather than a separate basis for termination." "As a practical result of that rule, where an employee demonstrates a causal link between the disability-produced conduct and the termination, a jury must be instructed that it may find that the employee was terminated on the impermissible basis of her disability... [A] decision motivated even in part by the disability is tainted and entitles a jury to find that an employer violated antidiscrimination laws."

The court added that this does not amount to an absolute protection for disabled employees regardless of their misconduct. An individual still needs to show that he or she is able to perform the essential functions of the job. In addition, the employer may still raise "business

necessity,” “direct threat” (in the case of an ADA claim) or “undue burden” defenses against the discrimination claim.

*Recommendations:* Before disciplining an employee with a known disability for misconduct, first consider whether the misconduct is “part of” the disability. If the misconduct is arguably caused by or a part of a disability, determine whether the employer could have offered accommodations that would have prevented the misconduct or reduced it to an acceptable level. Consider other accommodation that may eliminate the misconduct prospectively. There is still case law to support discipline for past misconduct caused by an unknown disability.

**D. Employee “regarded as” impaired is not necessarily “regard as” disabled.**

**Walton v. U.S. Marshals Service, 476 F.3d 723 (9<sup>th</sup> Cir. 2007).**

Walton failed a hearing test administered as part of her annual physical examination as an employee of a company providing security personnel to federal courthouses. Her test revealed she could no locate the direction from which sound came, and the employer terminated her employment on that basis. She sued under the federal Rehabilitation Act, alleging that the employer regarded her as disabled, and therefore engaged in disability discrimination.

The Court of Appeals held that Walton only established that her employer regarded her as impaired, and had not shown that it had regarded her as disabled.

Like the ADA, the Rehabilitation Act defines a “disability” as a “physical or mental impairment that substantially limits a major life activity,” or is “regarded as” having a disability. The court held:

[I]n order to state a “regarded as” claim a plaintiff must establish that the employer believes that the plaintiff has some impairment, and provide evidence that *the employer subjectively believes that the plaintiff is substantially limited in a major life activity*. If the plaintiff does not have direct evidence of the employer’s subjective belief that the plaintiff is substantially limited in a major life activity, the plaintiff must further provide evidence that the impairment imputed to the plaintiff is, objectively, a substantially limiting impairment.”

Walton could only show that her employer believed she could not ascertain the direction of sound based on her impairment. She could not establish by direct or indirect evidence that the employer believed her impairment substantially limited in a major life activity or that her impairment was, objectively, substantially limiting.

*Recommendations:* Do not describe your employees’ physical or mental conditions as “disabilities.” Rather, describe them as “impairments.” Managers and supervisors should understand this distinction, as should base fitness for duty decisions on the ability to perform job related functions and not on subjective beliefs regarding an individual’s ability to perform “major life activities.”

**E. Claimant must file EEOC charge within 180 days of each allegedly discriminatory employment decision.**

**Ledbetter v. Goodyear Tire & Rubber Co., \_\_\_ U.S. \_\_\_, No. 05-1074, May 29, 2007.**

Ledbetter worked for Goodyear from 1979 until 1998. For most of that time, salaried employees received pay raises based on performance evaluations. During the course of her employment, Ledbetter alleged that several supervisors had given her poor performance evaluations because of her sex, and that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly. She filed an EEOC charge in March 1998 alleging sex discrimination in her pay rate in violation of Title VII. Ledbetter did not claim any discriminatory act occurred after she filed her EEOC charge other than her lower rate of pay, which, she contended, was based on discriminatory acts occurring prior to 180 days before the filing of her charge. Goodyear argued that Ledbetter's pay discrimination claim was time barred with respect to all pay decisions made prior to September 26, 1997, i.e., 180 days before the filing of her EEOC questionnaire.

The Supreme Court rejected Ledbetter's argument that the paychecks that she received each violated Title VII and triggered a new EEOC charging period. According to the court, a new violation does not occur, and a new charging period does not begin, upon the occurrence of subsequent *nondiscriminatory* acts that perpetuate adverse effects resulting from the past discrimination. If, however, an employer engages in a series of separately actionable intentionally discriminatory acts, then a fresh violation takes place when each act is committed. Current effects alone cannot breathe life into prior, uncharged discrimination.

**F. Sexual Orientation a new protected class under Washington law.**

**ESHB 2661, effective June 9, 2006.**

A new law has added sexual orientation to the list of protected classes under the Washington Law against Discrimination, RCW 49.60.

Under the law, "sexual orientation" is defined as "heterosexuality, homosexuality, bisexuality, and gender expression or identity." As used in this definition, "gender expression or identity" means "having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth."

**G. New protected class in Washington: "Honorably discharged veteran or military status."**

**S.B. 5123, effective July 22, 2007.**

The Washington legislature has added "honorably discharged veteran or military status" to the list of protected classes under the WLAD. Those within this protected class are veterans, or "an active or reserve member of any branch of the armed forces, including the national guard, coast guard, and armed forces reserves."

**H. EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, May 2007.**

The Equal Employment Opportunity Commission has issued guidance on issues relating to unfair treatment of caregivers that may violate federal antidiscrimination laws. According to the EEOC, the guidance "is not intended to create a new protected category but rather to illustrate circumstances in which stereotyping or other forms of disparate treatment may violate Title VII

or the prohibition under the ADA against discrimination based on a worker's association with an individual with a disability.”

The enforcement guidance addresses matters relating to unlawful disparate treatment of female caregivers compared to male caregivers, gender-based assumptions about future caregiving responsibilities, assumptions about the work performance of female caregivers, “benevolent” stereotyping, subjective stereotyping of work performance , pregnancy and disability discrimination. A copy of the guidance may found be viewed or downloaded at [www.eeoc.gov/policy/docs/caregiving.html](http://www.eeoc.gov/policy/docs/caregiving.html).

**I. Discriminatory meaning of words depends on circumstances; comparative qualifications may prove pretext.**

**Ash v. Tyson Foods, Inc., 546 U.S. \_\_ , No. 05-379, per curiam, February 21, 2006.**

Two African-American employees of Tyson Foods were passed over for promotions in favor of lesser-qualified white applicants. They sued, alleging race discrimination under Title VII. In support of their claim, they provided evidence that the plant manager (who made the hiring decisions) had referred on some occasions to each of the plaintiffs as “boy.” They asserted also that they were better qualified than the white applicants.

The Court of Appeals found that “boy,” standing alone, does not necessarily connote racial animus. The Supreme Court, however, found this standard too limiting. Discriminatory meaning can depend on “context, inflection, tone of voice, local custom, and historical usage.”

The Supreme Court also found fault with the Court of Appeals’ test of pretext. According to the lower court, the difference in qualifications must be “so apparent as to virtually jump off the page and slap you in the face.” The Supreme Court found this test “unhelpful and imprecise,” noting past decisions with a much lower standard. The High Court sent the case back down to the Court of Appeals for reconsideration in light of these past cases.

**J. Any action by employer that would discourage a reasonable person from filing a discrimination charge constitutes unlawful retaliation.**

**Burlington Northern & Santa Fe Ry. Co. v. White, \_\_ U.S. \_\_, No. 05-259, June 22, 2006.**

In this case, an employee sued her employer when it had transferred her to a less desirable job after she filed a sexual harassment claim. The employer had transferred the employee, and had placed her on an unpaid (but later reimbursed) suspension. The Supreme Court resolved a conflict among federal circuit courts and held that any action by an employer that would discourage a reasonable applicant or employee from filing or participating in a discrimination charge constitutes retaliation in violation of Title VII of the Civil Rights Act of 1964.

The Court stated that the purpose of the anti-retaliation provision is to prevent an employer from interfering with an employee’s efforts to enforce Title VII’s basic guarantees of equality. It reasoned that an employer could effectively retaliate against an employee by taking actions not directly related to his employment or by causing the employee harm outside the workplace.

The Court also explained that the “reasonable employee” standard is an objective one, designed to avoid an analysis of an employee’s unusual subjective feelings that an action was materially adverse. Nevertheless, whether a particular action is materially adverse will depend on the particular circumstances. The Court gave the example that changing a work schedule may make little difference to many employees, but could be materially adverse to a mother with young children. In that circumstance, such an action could constitute retaliation if taken in response to the employee’s opposition to discrimination.

Applying its new formulation, the Court found that both actions alleged by White constituted retaliation. The reassignment to another, “dirtier” job constituted retaliation because her current job as a forklift operator task was objectively considered to be a better task. Similarly, despite the fact that White was reinstated with backpay following her suspension, the act constituted retaliation because White suffered the hardship of several weeks without pay. The Court reasoned that a reasonable employee faced with the choice between making a discrimination complaint or avoiding either the reassignment of duties or a suspension might well decide not to file the complaint.

**K. Waiver for release of age claims is not enforceable since it was not “written in a manner calculated to be understood” by the average employee, and therefore was not “knowingly and voluntarily” entered into by the participants.**

**Syverson v. IBM Corp., \_\_\_ F.3d. \_\_\_, No. 04-16449 (9<sup>th</sup> Cir., 2006).**

Under the Older Workers Benefit Protection Act, employees may not waive rights or claims arising under the Age Discrimination in Employment Act (ADEA) unless the waiver is “knowing and voluntary.” To qualify as “knowing and voluntary,” any waiver included in an agreement between an employer and its employees must, among other things, be “written in a manner calculated to be understood” by the average employee eligible to participate in the agreement.

In January 2001, IBM began a reduction in its workforce. As part of its workforce reduction plan, IBM offered each terminated employee a severance package of pay and certain benefits in exchange for signing a document entitled “Microelectronics Resource Action General Release and Covenant Not To Sue” (Agreement). Along with the Agreement, IBM issued to each employee a lengthy information package document detailing the job titles, ages, and numbers of those employees selected and those not selected for termination from various IBM divisions.

Based on the data contained in the information package, certain employees who signed and entered into the severance agreement filed charges of age discrimination with various discrimination agencies, including the Equal Employment Opportunity Commission (EEOC). The EEOC dismissed all charges on the grounds that the Agreement satisfied the minimum requirements for a “knowing and voluntary” waiver of ADEA rights and claims. The Commission found the Agreement to be enforceable, thus depriving the employees of their right to pursue their age discrimination claims.

In response to this decision, the employees filed an action in federal court challenging the validity of the Agreement. Specifically, the employees identified language in the Agreement which appeared to allow them the ability to specifically file age discrimination claims. While the Agreement expressly required the employees to release any and all claims against the employer, it included language stating:

“... you agree that you will pay all costs and expenses of defending against the suit incurred by IBM . . . , including reasonable attorneys’ fees, and all further costs and fees, including attorneys’ fees, incurred in connection with collection. This covenant not to sue does not apply to actions based solely under the [ADEA], as amended. That means that if you were to sue IBM . . . only under the [ADEA], as amended, you would not be liable under the terms of this Release for their attorneys’ fees and other costs and expenses of defending against the suit. This Release does not preclude filing a charge with the U.S. Equal Employment Opportunity Commission.”

(emphasis added)

IBM indicated that the intent of such language was to recognize only specific situations where an employee wished to challenge the validity of the Agreement under the ADEA. Generally, if an employee did file suit based upon a waived claim, IBM would be entitled to request from the employee reimbursement of its attorneys’ fees and cost associated with defending itself. However, if the action is to specifically contest the validity of the Agreement under the ADEA—that is the one exception to the reimbursement of such fees and costs. IBM asserted that the language was not meant to sweepingly except age claims from the full release and waiver of actions by the employee against the employer.

Despite the employer’s argument, the Ninth Circuit determined that the Agreement language was confusing, and thus, was not written in a manner to be understood by employees. IBM had the burden to prove the validity of the Agreement and failed. The Agreement appeared to grant employees the right to retain age claims and pursue independent ADEA actions generally in court.

## II. WAGE AND HOUR

- A. Employers must pay for drive time in company vehicles to and from home and the jobsite if the employer controls employees’ activities during the commute, as to make them “on duty”.**

**Stevens v. Brink’s Home Security, \_\_\_ Wn.3d \_\_\_, No. 79815-0, October 18, 2007.**

Stevens and other installation and service technicians spent their workdays installing and servicing home security systems in customers’ homes. To get to the jobsites, they drove company-owned pick-up trucks bearing the Brink's logo, which were also stocked with the necessary tools and equipment to perform the jobs.

As an option, many technicians kept the company trucks at home, and drove them directly to and from jobsites without first stopping at the Brink's Kent office. These employees received their daily assignments through voice mail or handheld computer. While the employer paid technicians for the time they spent driving between jobsites during the work day, Brink’s did not pay for the travel time from the technician’s home to the first jobsite, nor back home after the day's last job.

The employees later filed a class action lawsuit under the Minimum Wage Act (MWA) challenging the employer's practice to identify the travel to and from home and jobsite in company-owned vehicles as being "non-compensable commute".

According to the Washington Supreme Court, the technicians' driving time at issue adequately fell within the interpretation of Washington Administrative Code Section 296-126-002(8), which defines hours worked as "all hours during which the employee is authorized or required to be on duty on the employer's premises or at a prescribed work place." (*emphasis added*)

To support its decision, the Court reasoned that company policy required the technicians to use their trucks for company business only. Employees were not permitted to transport non-employee passengers in their vehicles. Further, the technicians received assignments and performed most of their paperwork inside their trucks. In addition, Brink's required its technicians to keep their trucks clean, organized, and serviced, as well as to follow all traffic laws, i.e., wear seatbelts, refrain from inappropriate parking, no alcohol in vehicles.

As such, the Court determined that the technicians were "on duty" during their drive time. Also, the Court stated that the trucks themselves constituted "a prescribed workplace" for Brink's employment for the purposes of the MWA.

*Comments:* Employers who allow employees to take home company vehicles should carefully review such policies, and the uses and restrictions placed upon the driving of such vehicles. If workplace policies and rules mimic the criteria used by Brink's, the employees' travel time to and from home and the jobsite may be considered as "hours worked" for which the employer will need to pay employees.

**B. The employer's failure to pay wages was "willful" where the employer's officers continued to operate the company before and after bankruptcy proceedings, despite its financial difficulties, and made decisions about payroll, permitting unpaid wages for two pay periods.**

**Morgan v. Kingen, \_\_ Wn. App. \_\_, No. 57938-0, October 1, 2007.**

In 2001, Kingen and Switzer established Funsters Grand Casino, Inc., a mini-casino in SeaTac, Washington. As CFO, Switzer administered the casino's finances and acted as general manager. As CEO and president, Kingen set compensation for senior employees and had authority to hire and fire employees. Both Kingen and Switzer controlled the payment of employees. They also had authority to prioritize the payment of wages and the other obligations of the company.

Funsters opened for business in poor financial condition, and soon after experienced further losses. More specifically, payroll checks were being returned by the company's bank to employees due to insufficient funds. At the time, Kingen, Switzer, and other owners of Funsters made capital contributions to the company in order to allow it to meet its obligations.

In August 2002, Funsters filed for protection under the federal Bankruptcy Code. While the company operated under Chapter 11, Kingen and Switzer hoped that the casino would turn a profit, but this change did not happen and business continued to decline. Thereafter, the owners were unwilling to make additional capital contributions to the company, and the casino owed

employees earned unpaid wages for two pay periods, estimated to be over \$179,000 total. Bankruptcy funds were insufficient to cover the wages due.

As such, the employees filed a class action to recover their unpaid wages. Based on RCW 49.52.050 and RCW 49.52.070, the employees sought personal liability for exemplary (double) damages against Kingen and Switzer, the officers of Funsters. The trial court granted summary judgment to the employees, and also allowed prejudgment interest, fees, and costs. The Court of Appeals affirms.

Here, it is undisputed that Kingen and Switzer were both officers of the Funsters Grand Casino, and neither the company nor owners paid the employees' earned wages. The critical test in an action for unpaid wages is whether the employer's failure to pay is "willful"; willfulness turns on whether the employer's refusal to pay is volitional, i.e., "whether the employer knows what he is doing, intends to do what he is doing, and is a free agent". Further, financial inability of the corporate entity to pay wages is not a defense to personal liability of its officers, i.e., basis to show a lack of willfulness under state wage and hour statutes.

**C. Federal minimum wage increase.**

Congress passed a supplemental spending bill for the war in Iraq that contains a \$2.10 increase to the federal minimum wage that will occur in stages over the current and next two years.

The federal minimum wage increased from \$5.15 to \$5.85 on July 24, 2007. It will continue to increase another 70 cents in July 24, 2008 to \$6.55, and then to \$7.25 per hour effective July 24, 2009. The change likely will not affect most Washington employers, who are subject to a CPI-indexed state minimum wage, currently set at \$7.93 per hour.

**D. Effective January 1, 2008, the Washington State minimum wage rises to \$8.07 per hour; the minimum hourly wage for 14- and 15-year-old minors adjusts to \$6.83 (85% of the adult minimum wage).**

Because of a voter-approved initiative in 1998, the Department of Labor and Industries makes a cost-of-living adjustment to the Washington State minimum wage each year based on the federal Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W). The Department recalculates the State's minimum wage in September, which takes effect the following year on January 1<sup>st</sup>.

Because the CPI-W increased 1.8 percent during the designated 12-month period ending August 31 (compared to a 3.9 percent increase in a similar period in 2006), the Department increased the State's minimum wage by 14 cents.

**E. Walking time that occurs after the start of an employee's first principal activity, such as the donning of protective gear, and before the end of the employee's last principal activity is compensable under the Fair Labor Standards Act (FLSA); however, the time employees spend waiting to don the first piece of protective gear that marks the beginning of the continuous workday is excluded from FLSA coverage.**

**IBP, Inc. v. Alvarez, \_\_\_ U.S. \_\_\_, No. 03-1238, November 8, 2005 (consolidated with Tum, et al. v. Barber Foods, Inc., No. 04-66).**

The U.S. Supreme Court consolidated two cases, from the Ninth and First Circuits respectively, which questioned the coverage and applicability of the FLSA in situations where employees must don protective clothing on the employer's premises before engaging in their production duties. The principle question is whether the time employees spend walking between the changing and production areas is compensable under the FLSA. Secondly, whether the time spent by employees waiting to initially put on such protective gear also may be compensable under the federal wage and hour statute.

*FACTS:* In the Ninth Circuit case, IBP, Inc. is a producer of fresh beef, pork, and related products. Its Pasco, Washington plant employs approximately 178 workers in the slaughter division and 800 line workers in the processing division. All production workers must wear outer garments, hardhats, hairnets, earplugs, gloves, sleeves, aprons, leggings, and boots. Many of those who use knives in their jobs also must wear a variety of protective equipment for their hands, arms, torsos, and legs; this gear includes chain link metal aprons, vests, Plexiglas armguards, and special gloves. IBP requires its employees to store their equipment and tools in company locker rooms, where most of them don their protective gear.

Production pay is based upon the time spent cutting and bagging, which begins with the first piece of meat and ends with the last piece of meat. Although IBP pays for four minutes of clothes-changing time, in 1999 employees filed a class action to recover compensation for preproduction and postproduction work, including the time spent donning and doffing protective gear and walking between the locker rooms and the production floor before and after their assigned shifts.

In the First Circuit case, Barber Foods, Inc. operates a poultry processing plant in Portland, Maine, employing about 300 production workers. These employees operate six production lines and perform various tasks that require different combinations of protective clothing. Employees are paid by the hour from the time they punch into computerized time clocks located at the entrances to the production floor. Current and former employees eventually sought to recover compensation for alleged unrecorded work under the FLSA, claiming specifically that Barber failed to compensate them for: (a) donning and doffing required protective gear; and (b) the walking and waiting time attendant to wearing such gear.

*ANALYSIS:* In reviewing both cases, the U.S. Supreme Court looked to the Portal-to-Portal Act, an amendment to the FLSA, which specifically excludes certain work-related activities from the scope of the FLSA. Specifically here, the Court focused on language recognizing that employers need not pay for (1) "walking, riding, or traveling to and from the actual place of performance of the principal [work] activity or activities", *i.e., e.g.*, commuting to and from work, or (2) "activities which are preliminary or postliminary to said principal [work] activity or activities, which occur either prior to the [start of work] or subsequent to the time [work stops]."

With this rule in mind, however, the Court did acknowledge and distinguish that "the term 'principal activity or activities' [as used above] embraces all activities which are an 'integral and indispensable part of the principal activities.'" Thus, any task or function that is deemed to be "integral and indispensable" to a "principal activity" (*i.e.*, duties which the individual is employed to perform), will itself be deemed a "principal activity", and thus covered under the FLSA, *i.e.*, compensable.

Here, the time spent donning and doffing particular gear that was specialized and unique to the production jobs at issue were found to be integral and indispensable to the employees who wore the equipment; as such the activities qualified as being compensable time under the FLSA. Accordingly, during a continuous workday, any walking time that occurred between the locker rooms and the production floor after donning the protective gear, *i.e.*, the start of an employee's first principal activity, and before taking off (doffing) the equipment, *i.e.*, the end of the employee's last principal activity, is paid time.

To distinguish, the Court declined to similarly recognize the "predonning waiting" time as a "principal activity". Thus, the time that employees may spend waiting to put on their first piece of equipment at the start of their shift is not required to be paid under the FLSA. Such time falls within the statutory exception as a preliminary activity occurring prior to the start of the workday.

**F. Effective January 1, 2006, the Department of Labor and Industries adopts and implements new rules relating to wage deductions. The rules differentiate between deductions during employment, and deductions from the employee's final paycheck upon separation of work. Of note, the Department also addresses deductions for overpayment of wages.**

**AMENDED SECTION: WAC 296-126-025, Deductions from final wages.**

(1) An employer may deduct any portion of an employee's final wages and reduce such final gross wages below the state minimum wage (in effect at the time the work is performed) if:

- (a) Required by state or federal law;
- (b) For medical, surgical or hospital care or service; or
- (c) To satisfy a court order, judgment, etc.

(2) The following deductions may be made only if specifically agreed in advance orally or in writing by the employee and employer (such deductions may reduce the employee's gross wages below the applicable state minimum wage):

- (a) For pension, medical, dental or other benefit plans; or
- (b) For payment to a creditor or third party (creditor can be the employer).

(3) The following deductions can be made only when such incidents occur in the final pay period, *i.e.*, not in previous pay periods, and may not reduce compensation below the state minimum wage:

- (a) Acceptance of a bad check or credit card in violation of a known policy;
- (b) For any cash shortage from a cash register, drawer or portable depository, and only if shown that the employee has sole access to the cash and has participated in an accounting at the beginning and end of the shift;
- (c) For any cash shortage, non-payment by customer, breakage or loss of equipment caused by the dishonest or willful act of the employee; or
- (d) Alleged theft, only if shown that the employee's intent was "to deprive", and the employer filed a police report.

(4) The employer has the burden to prove the existence of any agreement.

(5) The employer must identify and record all wage deductions openly and clearly in employee payroll records.

**NEW SECTION: WAC 296-126-028, Wage deductions during on-going employment.**

(1) During an on-going employment relationship, an employer may deduct any portion of an employee's wages and reduce such final gross wages below the state minimum wage (in effect at the time the work is performed) if:

- (a) Required by state or federal law;
- (b) For medical, surgical or hospital care or service; or
- (c) To satisfy a court order, judgment, etc.

(2) Deductions may be made during the on-going employment relationship only when the employee expressly authorizes the deduction in writing and in advance for a lawful purpose for the benefit of the employee (such deductions may reduce the employee's gross wages below state minimum wage). Examples: Employee purchases; employee loans; employee benefits, payments to creditors or third parties.

(3) Neither the employer nor agent can derive any financial profit or benefit from any deductions under the regulation.

(4) "Reasonable interest" charged by the employer for a loan or credit extended to the employee is not considered to be "of financial benefit to the employer".

(5) The employer must identify and record all wage deductions openly and clearly in employee payroll records.

**NEW SECTION: WAC 296-126-0030, Adjustments for overpayments.**

(1) Definition of "overpayment". When the employer pays:

- (a) More than the agreed-upon wage rate; or
- (b) More than the hours actually worked.

(2) Recouping overpayment may reduce the employee's gross wages below the state minimum wage.

(3) An employer cannot recover an overpayment when the disputed amount concerns the quality of work.

(4) Recovery is permitted only when overpayment "was infrequent and inadvertent". "Infrequent" means rarely, and not occurring regularly or as a pattern. "Inadvertent" means an error that was accidental, unintentional or not deliberate.

- (a) The employer has the burden to prove the error was inadvertent.
- (b) The employer has a 90-day window to detect and implement a plan to collect the overpayment from the employee. If the overpayment is not detected within the

90-day period, the employer cannot adjust the employee's current or future wages to recoup the overpayment.

(5) In situations involving an unexpired collective bargaining agreement that expires on or after January 1, 2006, where overpayments are included in the terms of the agreements, the effective date of this rule shall be the later of:

- (a) The first day following expiration of the agreement; or
- (b) The effective date of the revised collective bargaining agreement.

**G. Washington creates limited paid family leave insurance program.**

**E.S.S.B. 5659, effective July 22, 2007.**

The new law establishes a limited paid family leave insurance program providing benefits of up to \$250 per week for five weeks each year to eligible employees beginning October 1, 2009. "Family leave" means leave (1) because of the birth of a child and in order to care for the child, or (2) because of the placement of a child with the employee for adoption.

Employees must have worked 680 hours in the previous year to be eligible. To receive the full \$250 payment, employees must work at least thirty five hours per week. For part-time employees working fewer than thirty five hours but more than eight hours per week, the benefit amount is .025 times the maximum weekly benefit (currently \$250) times the number of hours of family leave taken during the week. For employers with more than twenty-five employees, employees taking paid family leave are job protected.

The law establishes a task force that will recommend, by the end of 2007, ways to administer and fund this program. See the Appendix for a copy of the new law.

**H. Department of Labor and Industries establishes new payment interval regulations.**

**WAC 296-126-023 and 296-128-035.**

Effective March 1, 2007, new payment interval regulations went into effect in Washington. The regulations set forth the following revised rules:

- Employers must pay all wages at no longer than monthly intervals on regular paydays.
- Employers must establish a regular payroll system. If paying at monthly intervals, the employer may withhold wages from up to seven days before payday for payment the next month.
- Employees must be paid on established paydays by hand-delivery of checks, mailing paychecks, or direct deposit or electronic transfer of funds.
- Employers must pay wages no later than ten days after the end of the pay period (except for monthly payroll systems, see above).

Employers may establish separate pay days for overtime pay that is not capable of being calculated by the end of the pay period in which the overtime was earned.

**I. Route sales drivers are not exempt under the Washington Minimum Wage Act (MWA).**

**Miller v. Farmer Bros. Co., \_\_ Wn.App. \_\_, No. 56816-7-I, January 16, 2007.**

The MWA requires employers to pay most employees an hourly wage with overtime for all hours worked over forty in a workweek. Outside sales employees are exempt from this requirement. Among the requirements for this exemption, an “outside salesman” is any employee who is primarily engaged in making sales and who is paid a guaranteed salary, commission or fee.

Farmer Brothers produces and sells coffee and related products. Farmer Brothers uses route sales representatives (RSRs) to deliver its products to its customers. Most of the RSRs’ work involves delivering products to established customers. They are paid a salary plus a percentage commission on everything they deliver, even when delivering regular orders to established customers. Some RSRs sued under the MWA, alleging Farmer Brothers owed them unpaid overtime. The company, for its part, defended the claim on the belief the RSRs were exempt outside sales employees.

Farmer Brothers claimed the RSRs were making sales when they visited regular customers, even if only to restock preordered products. Spot purchases and order changes required the RSRs to act as sales employees. The evidences showed, however, that most customers received their orders without changes, and that the RSRs had little time to engage in actual sales activities. Consequently, the Court of Appeals affirmed the lower court’s ruling in favor of the drivers, holding that the RSRs were not “primarily engaged” in the making of sales and were, therefore, nonexempt employees entitled to overtime.

**J. Interstate truck drivers are entitled to overtime pay under the MWA for all hours worked, both inside and outside of Washington.**

**Bostain v. Food Express, Inc., \_\_ Wn.2d \_\_, No. 77201-1, March 1, 2007**

In reversing a Court of Appeals decision holding that only those hours worked within the State of Washington could count for overtime calculation purposes, the Washington Supreme Court affirmed a lower court ruling in favor of an interstate truck driver employed by Food Express.

Food Express paid the driver, Bostain, an hourly wage, but if he drove over 200 miles, it paid him by the mile. In his final year of work for Food Express, Bostain averaged forty eight hours of work per week, but he never worked more than forty hours in Washington. Consequently, the company never paid Bostain overtime.

The MWA requires employers to pay their employees overtime for hours worked over forty in a workweek. According to the Supreme Court, the state law is unambiguous and did not limit the requirement for overtime pay for interstate truck drivers to hours worked in Washington only. The Court rejected the interpretation given by the lower appellate court and two Department of Labor and Industries administrative rules that “hours worked” meant hours worked within Washington.

*Recommendation:* The decision is not limited to truck drivers. All non-exempt employees are entitled to overtime pay if they work more than forty hours in a workweek, without regard to whether they work those hours in, or outside of, Washington. You should determine whether your policy or practice is consistent with this decision.

**K. Administrative enforcement of state law wage complaints. SHB 3185, effective June 7, 2006.**

The legislature has given teeth to the Department of Labor and Industries' enforcement of wage complaints under RCW 49.48.

Under prior law, the department could investigate complaints of unpaid wages or overtime, but did not have the authority to assess an employer or collect unpaid wages on behalf of a complaining party. Under the new law, the Department can issue a citation and notice of assessment, and collect a penalty in the event the Department finds an employer willfully withheld wages from an employee. Employers can appeal the citation and notice, which appeal will be heard by an administrative law judge. A final order by the Department, following the ALJ's decision, is appealable to superior court.

**III. FAMILY AND MEDICAL LEAVE ACT (FMLA)**

**A. Washington State adopts FMLA Regulations.**

Effective June 7, 2006, the Washington Family Leave Law generally adopts the provisions of the federal Family and Medical Leave Act (FMLA).

The primary change resulting from the State's adoption of the FMLA will be the increased leave for women for disability due to pregnancy or childbirth in addition to the leave granted under the federal FMLA. This provision has applied to employers of 100 or more employees since 1997 and will now apply to employers of 50 or more employees in a 75-mile radius, the same criteria as the federal FMLA. The United States Department of Labor will continue to enforce those elements under the FMLA that are identical under RCW 49.78; Washington State will address the additional leave benefit for disability due to pregnancy and childbirth.

In January 2007, the Department of Labor & Industries issued a memo addressing the State Family Leave Rules:

“The existing rules for the Family Leave Act under chapter 296-134 WAC are no longer relevant to the updated statute, chapter 49.78 RCW, and should be repealed in their present form. In 1997, the Family Leave Act was amended and the Family Leave Rules were not updated to reflect the changes. In 2006, the Family Leave Act was again completely revised making the rules further outdated. We are going to file to repeal the existing contents of chapter 296-134 WAC, Family Leave Rules, since they are outdated and in their current form creates confusion among users. We will file for an expedited repeal on January 23, 2007 which will then become effective on June 1, 2007.

The department will keep chapter 296-134 WAC since we will eventually develop rules in response to the 2006 amendments to the Family Leave Act. In the interim, we

are proceeding with a Frequently Asked Questions guide for employers and employees to better understand how to implement the law.”

Although some have touted Washington’s adoption of the FMLA as a way to preempt any federal DOL regulations that may “water down” the FMLA, the Washington law requires L&I and courts to consider the federal FMLA, regulations and case law to assist interpretations of the Washington law.

In a related note, the U. S. Department of Labor, Wage and Hour Division, reiterated its intention to issue new FMLA regulations in the wake of a Supreme Court decision invalidating DOL regulations pertaining to an employer’s failure to provide notice of FMLA coverage to an eligible employee. There has been speculation that the DOL will issue comprehensive new regulations on other aspects of the FMLA as well. The DOL presently is in the process of accepting commentary on the FMLA regulations from employers and other interested parties.

**B. Proposed amendments to the definitions under the Washington State Family Care Act, RCW 49.12.265-.295; WAC 296-130.**

The Department of Labor and Industries announced that proposed amendments to certain definitions under the Family Care Act, to become effective June 1, 2006.

Proposed language changes include:

- (1) Specifically naming “adoptive parents” as covered family members.
- (2) Amending the definition of “sick leave or other paid time off” to include the use of leave under certain disability plans (plans governed by ERISA or administered through an insurance company are exempt).

The added language states in part: “If paid time is not allowed to an employee for illness with a sick leave or pay benefit, “sick leave or other paid time off” also means time allowed under the terms of an appropriate state law, collective bargaining agreement, or employer policy, as applicable, to an employee for disability.”

**IV. WORKPLACE PRIVACY**

**A. New Washington law restricting the use of credit checks.**

**S.B. 5827, effective July 22, 2007.**

The Washington legislature amended the Washington Fair Credit Reporting Act to prohibit employers from obtaining credit reports from job applicants and current employees unless the employer follow’s the Act’s notice provisions and the information is “substantially job related.”

The amendment, S.B. 5827, states that an employer may not obtain a credit report for employment purposes unless the information is either (a) substantially job related or the

employer's reasons for the use of such information are disclosed to the consumer in writing; or (b) required by law.

The law does not define the term "substantially related." Positions that involve handling money, valuables or sensitive information are likely "substantially related" and a credit check is appropriate. For example: tellers, cashiers, employees in a jewelry store or retail clerks would fall into a category of jobs for which a credit check is permissible under the law. It is also likely that an employer can conduct a credit check if an employee holds a position of "trust," such as a security guard who has keys and access to the business, or an employee charged with financial accountability, i.e., having check signing ability, offering credit counseling to customers or bookkeepers. It is unlikely that the new law would permit a credit check on administrative, janitorial, clerical or labor intensive positions with no money handling or trust-based responsibilities.

Employers who use a credit checks inappropriately are subject to damages under the Fair Credit Reporting Act. Penalties include fines of \$5,000 and imprisonment and/or civil damages under the Consumer Protection Act (attorney fees, costs and actual damages).

**B. Employees have only a very limited expectation of privacy in their workplace computers.**

**U.S. v. Ziegler, \_\_F.3d \_\_, No. 05-30177 (9<sup>th</sup> Cir. 2007).**

The FBI received a tip that Jeffrey Ziegler, an employee at Frontline Processing, a company that processes online electronic payments, had accessed child pornography websites from a workplace computer. The FBI requested the company to copy Ziegler's hard drive and to provide that to the Bureau for its investigation. The company had a firewall in place that permitted constant monitoring of the employees' Internet activities. In addition, the company owned and routinely monitored all workplace computers, and employees were aware of these monitoring capabilities. IT personnel searched Ziegler's computer and confirmed that he had accessed child pornography from the workplace computer.

A federal grand jury indicted Ziegler, who in turn filed a motion to suppress the evidence obtained from the search of his workplace computer. He argued that the FBI, lacking a warrant, violated the Fourth Amendment by directing the Frontline employees to search his computer. The government countered that the search was conducted by Frontline Processing and was voluntary and private in nature. The district court found that while the FBI had directed the IT personnel to make a back-up of Ziegler's computer files and it was therefore not wholly voluntary, Ziegler had no reasonable expectation of privacy in the files he accessed on the Internet.

On appeal, the Ninth Circuit held that the threshold question was whether Ziegler had a legitimate expectation of privacy in his workplace computer. The U.S. Supreme Court has consistently held that application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," "reasonable" or "legitimate expectation of privacy" that has been invaded by government action. Thus, if Ziegler did not have a legitimate expectation of privacy, the court need not consider whether the IT employees acted as agents of the FBI so as to implicate Fourth Amendment considerations.

The Ninth Circuit stated that a criminal defendant may invoke the protections of the Fourth Amendment only if he can show that he had a legitimate expectation of privacy in the

place searched or the item seized. "This expectation is established where the claimant can show: (1) a subjective expectation of privacy; and (2) an objectively reasonable expectation of privacy." The Ninth Circuit acknowledged that since Ziegler could use his own password for his computer and could lock his office door, he had a subjective expectation of privacy and a reasonable expectation of privacy. The court proceeded to analyze, however, whether there was common authority over the computer such that the company could consent to a search of the computer on behalf of the FBI. The court found common authority over the computer because (a) Frontline's IT personnel had complete administrative access to any employee's workplace computer; (b) monitoring of employees' computer use was routine; and (c) employees were apprised of the company's monitoring efforts when hired (through training and an employee manual) and were also informed that workplace computers were restricted to company-related business use. Based on the foregoing, the court concluded that the search of his workplace computer was permissible because the employer had common authority over the computer.

*Recommendations:* Employers should (a) have a policy in place to limit personal use of work computers (including laptops); (b) communicate the policy to employees both upon hiring and periodically; (c) require employees to consent, in writing, to the policy; and (d) monitor work computers for legitimate business reasons.

## V. INDUSTRIAL INSURANCE

### A. **Employer is immune from third-party breach of contract claim to pay costs and expenses from the third-party to employee because the employer had not expressly waived its workers' compensation immunity in a properly worded contract.**

#### **Hatch v. City of Algona, \_\_ Wn.App.\_\_, No. 57713-1, October 1, 2007.**

In order to obtain a building permit for construction of a welded-duct facility, Boeing submitted detailed building plans to the City of Algona. In reviewing the plans, the City raised concerns about Boeing's plan to plant trees in Algona's right of way adjacent to a city sidewalk. Algona eventually agreed to allow Boeing to plant the trees farther away from the sidewalk, in addition to installing a root-barrier system to protect the sidewalk from damage from the trees' roots.

Boeing, however, planted the trees near the sidewalk and inconsistent with the City's authorization. After Algona expressed its displeasure, Boeing agreed to repair, at its own expense, any future damage to "the adjacent sidewalk, curb, gutter, water main and street" caused by growth of the trees. This agreement is formalized in a letter.

The roots of the trees eventually caused a portion of the sidewalk to buckle, and a Boeing employee tripped on the raised portion of the sidewalk, fell, and sustained injuries. Workers' compensation benefits were provided to the employee, who later initiated a civil lawsuit against the City of Algona, seeking to recover damages to compensate her for the injuries she sustained in the fall.

In the suit, the City asserted that the letter created an "implied in fact contractual indemnity obligation" requiring Boeing to reimburse Algona for any money it paid to the employee to satisfy her tort claim. Algona alleged that the fall and injuries were consequences of Boeing's breach of its promise to maintain and repair the sidewalk and Boeing's violations of the building permit conditions.

The trial court issued a summary judgment in favor of Boeing. On review, the Appeals Court affirmed: An employer participating in Washington's industrial insurance system may voluntarily undertake a contractual obligation to reimburse a third party for sums of money that the third party paid to the employer's employee, arising from a tort claim by the employee against the third party. However, for such a contractual obligation to be enforceable, the employer must have explicitly waived its Industrial Insurance Act (IIA) immunity in writing.

Because the document claimed by the City to be such a contract does not, in fact, contain such an explicit waiver of IIA immunity, the trial court decided correctly to dismiss the City's indemnity claim against Boeing.

**B. A sole proprietor, acting as an independent contractor, may fall under the workers' compensation scheme of the contracting party when injured in the course of duty.**

**Malang v. Department of Labor and Industries, \_\_ Wn.App.\_\_, No. 34504-8, July 17, 2007.**

Malang is a real estate agent associated with Crescent Realty, Inc. as an independent contractor. By agreement, she and Crescent split commissions she earns from real estate sales and listings after Crescent deducts brokerage expenses and transaction fees. Malang operates as a sole proprietorship and incurs business expenses that she reports to the IRS as deductions.

Malang suffered a work-related injury and filed a claim for benefits under her optional Washington State industrial insurance. To calculate her wages, the Department of Labor & Industries deducted the business expenses she declared in her federal tax return and the brokerage fees from total commissions. Malang appealed the order arguing that the Department should have calculated her wages from total commissions without deductions of brokerage fees or business expenses.

The Superior Court later granted Malang's motion that the Department lacked statutory authority to deduct costs and expenses to determine Malang's time loss wages. The Department then appealed, and the Appeals Court affirmed and reversed in part, along with remanding the case for recalculation of Malang's wages.

The issue presented is one of first impression for the Court of Appeals. The Department contends that Malang's wages equal her net income—categorizing her commissions as gross receipts and deducting her necessary business expenses to arrive at her take-home pay. Malang responds that “wages” means gross earnings under the statute's language, and deducting business expenses from her total commissions exceeds the Department's statutory interpretive and enforcement authority.

When drafting the Industrial Insurance Act (IIA), the State legislature adopted a broad definition of “worker” to eliminate the technical distinction between employees and independent contractors. By collapsing the distinction, the legislature intended to extend IIA coverage to independent contractors “whose *personal efforts* constitute the main essential in accomplishing the objects of the employment.” (emphasis in text)

The Department has developed tests to determine whether the essence of an independent contract is personal labor, examining the contract itself, the work to be performed, the parties'

situation, and any other relevant circumstances. A contract is not for personal labor if the independent contractor:

- (a) ... must of necessity own or supply machinery or equipment (as distinguished from the usual hand tools) to perform the contract..., or (b) ...obviously could not perform the contract without assistance..., or (c) ...of necessity or choice employs others to do all or part of the work he has contracted to perform....

Accordingly, in calculating the “wages” of an independent contractor, the Department must first apply these tests to determine whether the essence of the contract is personal labor. If it is not, the inquiry ends; the independent contractor is not a worker as defined under workers’ compensation laws.

But if the essence of the contract is personal labor, the next step is to analyze the business arrangement to determine whether it constitutes “employment.” RCW 51.08.195 creates an exception to the rule that independent contractors for personal labor are “workers”:

[S]ervices performed by an individual for remuneration shall not constitute employment subject to this title if it is shown that:

- (1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact; and
- (2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business 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 principal place of business from which the service is performed; and
- (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; and
- (4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and
- (5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and
- (6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

**C. Employee who was injured on the premises but before clocking in was not injured in the “course of employment.”**

**Johnson v. Safeway, Inc., \_\_ Wn.App. \_\_, No. 57468-0-I, February 20, 2007**

A worker who is “acting in the course of employment” at the time of an injury is entitled to worker’s compensation benefits. Johnson was sitting at a lunch table in Safeway’s break room before the start of his shift. He fell, injuring himself, when he got up from the table to get a glass of water. Johnson filed a claim for benefits under the Industrial Insurance Act, which the Department of Labor and Industries denied on the basis that Johnson was not acting in the course of employment when injured. Both the Board of Industrial Insurance Appeals and Superior Court upheld the Department’s order. On appeal, the Washington Court of Appeals affirmed the denial of benefits on the grounds that Johnson was not acting in the course of employment when he was injured.

“Course of employment” requires a claimant to establish all of the following:

(a) When the workman is acting at the employer’s direction or in the furtherance of the employer’s business, (b) while the employee is going to or coming from work on premises occupied, used or contracted for by the employer for its business, (c) immediate to the time the employee is to engage in the work process in areas controlled by the employer, (d) outside the fixed and compensated work time of the injured employee, and (e) regardless of whether the injury occurred within the time limits on which industrial insurance premiums or assessments are payable.”

Here, the court found that Johnson failed the first prong of the test because, at the time of his injury, Johnson was relaxing before the start of his shift and fell while going to get a glass of water. There was no relationship between this activity and the first prong of the test. Consequently, he was not entitled to benefits.

**D. Amount of time loss payments does not include employer-paid contributions to retirement or pension funds, apprenticeship training trust funds, labor-management funds, and life or disability insurance; those amounts are not considered as “wages” or “critical to the basic health and survival of the injured worker at the time of injury”.**

**Gallo v. State of Washington, Department of Labor and Industries, \_\_\_ Wn.3d \_\_\_, No. 74849-7, September 29, 2005 (consolidated with four other cases: Barber, Jones, Renshaw and Dumont).**

*FACTS:* In each of the five cases, the workers suffered an industrial injury in the course of their employment under a collective bargaining agreement (CBA). Basically, each CBA required the respective employer to make certain contributions into various benefits funds based upon compensable hours worked by the employee. These funds included: pension or retirement, apprenticeship training, labor-management relations, life insurance, and disability insurance.

When time-loss compensation and loss of earning power for the workers was calculated and issued, the payment orders essentially excluded contributions for the above amounts. Each of the employees filed an action seeking to compel the Department of Labor and Industries to include such added contribution amounts to their industrial insurance calculations.

In all cases, the Washington State Supreme Court affirmed the lower courts’ decisions to exclude the amounts. See also Bakovic v. Dep’t of Lab. & Indus., \_\_\_ Wn.App. \_\_\_, No. 55524-3-II, May 8, 2006 (Employer payments for social security, Medicare and industrial insurance are not “wages”).

*ANALYSIS:* Under the Industrial Insurance Act, time loss and loss of earning power compensation rates are determined by a worker's wage at the time of injury. "The purpose of time-loss compensation is to reflect a worker's lost earning capacity . . . [and] 'wages' are the basis from which time-loss compensation is computed."

RCW 51.08.178(1) in relevant part defines "wages" to be: "[T]he monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute . . . The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, but shall not include overtime pay . . . However, tips shall also be considered wages only to the extent such tips are reported to the employer for federal income tax purposes. . . ." (emphasis added)

In a 2001 opinion, the Washington State Supreme Court acknowledged that the value of employer-provided health care coverage needs to be included in industrial insurance calculations. *See Cockle v. Department of Labor & Industries*, 142 Wn.2d. 801 (2001). In reaching that decision, the Court adopted a narrower view to interpret the phrase "board, housing, fuel, or other consideration of like nature" to mean "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival."

In the *Cockle* opinion, the Court also patently rejected the contention that "all consideration" paid by an employer should be added within the wage calculation. "[T]he legislature intended to include in wages only those items of in-kind consideration that a worker must replace while disabled and that are critical to the worker's health or survival."

Applying the interpretative test in *Cockle* to the various employer-sponsored contributions above, the Court confirmed that such amounts do not meet the standard for inclusion. For example, retirement and pension payments "are not critical to the 'basic health and survival' of the injured worker at the time of injury because they are not intended to be, nor are they generally immediately available to the worker at the time of injury. [R]etirement benefits are not the sort of benefits that a worker must replace during the period of disability to preserve health or in order to survive during the period of disability and do not constitute wages for purposes of RCW 51.08.178."

Further, the "[r]eceipt of training payments or [labor-management relations] payments are not going to help rehabilitate an injured worker in the same way as health care coverage because they are not critical to basic needs when the worker is injured." Likewise, the Court declined to accept life or disability insurance payments into calculations because Plaintiffs failed to show how such sums were vital to their basic needs and survival at the time of injury.

"Looking beyond labels, the workers have not shown how all payments made by their employers into trust funds pursuant to the negotiated terms of the CBAs are a cash 'wage' to the employees within the meaning of [the industrial insurance statute]. Although the workers claim that all compensation paid pursuant to the CBAs constitute a cash wage that the workers then direct to various trust funds, the negotiated terms of the CBAs do not state that the employer is to pay an aggregate amount to the employee who will then determine the amount to be deposited into trust funds. Instead, the terms of the CBAs state that the employers will make payments into trust funds for the benefit of the employees and lists the trust fund payments as fringe benefits paid in addition to listed wage rates."

*COMMENTARY:* Employer must take care to expressly and distinctly distinguish between “wages” and “benefits” in a written collective bargaining agreement since courts will look to an employment contract to determine the nature and form of the payments. Here, the Court noted that “[t]he distinction between wages and benefits is significant because it makes clear that the parties did not intend that all sums paid be considered as wages and that those sums intended to fund benefits would not be paid directly to the employee as wages.”

Commingling such amounts under one generic term of “wages” or “compensation” in a written agreement opens argument that all sums are meant to be considered fully as “wages” for industrial insurance calculation purposes, rather than separating “benefits” or “fringe benefits” apart.

## **VI. EMPLOYMENT AT-WILL/WRONGFUL DISCHARGE**

### **A. Employee discharged after cooperating in a police investigation can claim a discharge in violation of public policy.**

**Gaspar v. Peshastin Hi-Up Growers, \_\_ Wn.App. \_\_, No. 24225-1-III, February 14, 2006.**

An employee who is fired for cooperating with law enforcement personnel may have a legal claim for wrongful discharge in violation of public policy, according to the Washington Court of Appeals.

One of the exceptions to Washington’s general rule of at-will employment is that employers may not terminate an employee in violation of public policy. To establish a claim, an employee must prove (1) the existence of a clearly mandated public policy (the “clarity” element); (2) that discouraging the employee’s conduct would jeopardize that public policy; and (3) the employee’s public policy-linked conduct was the reason for the dismissal. If these three elements are satisfied, the burden shifts to the employer to prove an overriding justification for the dismissal.

Gaspar was the general manager of Peshastin Hi-Up Growers, a Washington cooperative. A Chelan County Sheriff detective contacted Gaspar about Jean Dennis, a co-op employee who was suspected of having taken postage stamps from a malfunctioning post office machine without paying the full price. When Mr. Gaspar confronted her, she admitted taking the stamps, and although she later repaid the post office, she did so with a check she had altered. Gaspar met with the detective and a county prosecutor about the matter six times in the following weeks. Gaspar brought the matter to the co-op’s board of directors, which voted to place Ms. Dennis on administrative leave. Two days later, without any warning, the co-op fired Gaspar.

Gaspar filed suit against the co-op for wrongful termination in violation of public policy, claiming he was fired because of his meetings with police and prosecutors. The trial court dismissed his suit on grounds that he had failed to satisfy the clarity element: He had not established that there is a clearly- mandated public policy for helping law enforcement officers. On appeal, the only issue was whether Gaspar had satisfied the clarity element. The Washington Court of Appeals reversed.

In support of his case Gaspar cited RCW 7.69.010, which states that witnesses and victims of crimes have a civic and moral duty to cooperate fully with law enforcement. The court accepted Gaspar's argument, and held that the statute clearly reflects a public policy to encourage citizens to help law enforcement officers when they request it.

**B. Wrongful termination claims are properly dismissed against former employees who presented an ultimatum to their not-for-profit employer demanding that the Board of Directors rehire certain managers and fire the executive director.**

**Briggs v. Nova Services, et al., \_\_ Wn. App. \_\_, November 14, 2006.**

Nova Services is a non-profit organization that provides services to the disabled. Certain managers and staff employees were dissatisfied with the executive director's management of operations, and wrote to the Board of Directors about their concerns, despite the employer's policy prohibiting employees from contacting the Board directly.

The Board hired an employment law attorney to conduct an investigation into the employees' concerns, and also obtained a human resources consultant to mediate the situation between the executive director and employees.

When the executive director later discharged two managers for insubordination, and also released another manager thereafter, the remaining members of the management team along with other lay staff, wrote the Board a letter demanding specific action. The letter insisted upon both the "immediate removal" of the executive director and the "immediate reinstatement" of the terminated employees by a particular date, or the employees would "walk out of Nova Services".

The Board did not respond to this letter. When the employees failed to return to work on the following Monday, the executive director treated their letter and absence as a group resignation.

The employees then filed a lawsuit claiming wrongful termination, retaliation, negligent infliction of emotional distress, outrage, and negligent supervision. The trial court granted summary judgment on all claims against the employees. Upon appeal, the Court of Appeals affirms the dismissal.

Generally, an at-will employee may be terminated without cause. However, an exception exists if the termination contravenes public policy, *i.e.*, "matters that strike at the heart of a citizen's social rights, duties, and responsibilities." The public policy exception applies where an employee is terminated based on the exercise of a legal right or privilege. Notwithstanding, such an exception is not recognized where matters are "purely personal" to the individual(s).

The employees contend Nova wrongfully terminated them for joining together to complain to the Board, violating a public policy that permits employees to join together and engage in "concerted activities". Washington State recognizes that an employee has a legal right or privilege to engage in "concerted activity" under State labor regulations without employer interference. "Concerted activities" are those undertaken by employees in unison for the purpose of improving "working conditions", *i.e.*, areas that relate to the terms and conditions of employment (collective bargaining). "Concerted activities" also may include collective activities performed for "other mutual aid or

protections”. However, personal preferences and professional differences are not protected by applicable statutes.

Here, the Court found that the “ultimatum” letter sent to the Board was not “concerted activity” as meant by State statute. Rather, the letter merely expressed dissatisfaction and disapproval of the executive director’s management style and work ethics. The Court emphasized that the letter simply raised personal managerial style differences between the managers/employees and the executive director, and did not focus upon or attempt to collectively bargain for terms and conditions of employment. Further, the Court recognized that the “demands exceeded” those typically noted in collective bargaining situations.

## **VII. WISHA (SAFETY AND HEALTH)**

### **A. Washington Industrial Safety and Health Act (WISHA) revised to authorize courts to issue search (inspection) warrants and to further define the right of entry.**

**SHB 2538, effective June 7, 2006.**

Under the new law, the Director of the Department may apply to a court of competent jurisdiction for a warrant authorizing access. The court is authorized to issue a search warrant. This clarifies an ambiguity arising from a 2005 decision in which a Washington court held that courts may issue warrants only if the underlying statute specifically authorizes warrants.

The law also clarified permissible entry points for L&I inspectors, and to whom the inspector must seek entry. The inspector must obtain consent from the owner, manager, operator, or onsite person in charge of the worksite when entering a worksite located on private property. Entry must be at an entry point designated by the employer or, if there is no designated entry point, at a reasonably recognizable entry point. In both cases, the entry must be done in a safe manner and must be solely for the purpose of requesting consent. Advance notice of the inspection is not required.

The Department need not obtain consent to take action under a recognized exception to the search warrant requirements of the state and federal constitutions. Examples of recognized exceptions to the search warrant requirements include searches necessary to protect the safety of the public, searches necessary to prevent the imminent destruction of evidence, and most commonly, searches conducted in plain view where there is no expectation of privacy.

### **B. “Repeat” violations must only involve the same type of conduct, not the same conduct.**

**Cobra Roofing Services, Inc. v. Dep’t of Lab. & Indus., \_\_ Wn.2d. \_\_, No. 76064-1, June 1, 2006.**

The Department of Labor and Industries cited Cobra Roofing for a repeat Washington Industrial Safety & Health Act (WISHA) violation resulting from three employees working on a new school roof without proper fall protection. The Department cited Cobra in 1999 for a similar violation during another construction project. Cobra appealed the citation, claiming that there was no evidence that the citation resulted from the same hazard as existed in 1999. The Department contended that the regulations unambiguously focus on the nature of the hazard that

could result in injury, not the specific conduct. Additionally, by using the language "same type of hazard," rather than "same hazard," the applicable regulation eliminates the fact-specific inquiry Cobra sought to impose.

On appeal, the Industrial Insurance Judge and the Superior Court agreed with Cobra; the Board of Industrial Insurance Appeals and Court of Appeals agreed with the Department.

The Washington Supreme Court agreed with the Department and rejected Cobra's contention that the Department must prove the similarity of the specific equipment or practice to establish a repeat violation under Washington's regulatory scheme.

WISHA unambiguously defines "repeat" with respect to the nature of the hazard and requires the government to prove only that the violations involve the same type of hazard, not the same underlying conduct. The record showed that the Department cited Cobra in 1999 for violating the fall protection regulation. When the Department cited Cobra again in 2000, the record showed three Cobra employees worked on a roof without adequate guardrail systems, fall protection equipment, or fall restraint systems. Regardless of whether Cobra's 1999 violation involved the broad fall protection regulation requiring at least one of the three mechanisms or a specific subsection of the same standard, Cobra employees were exposed to the hazard of falling from a height of 10 feet or more because they lacked adequate fall protection. Accordingly, in both instances, Cobra employees were exposed to the same type of hazard. In short, Cobra did not present evidence to show that the violations involved different types of hazards. Under Washington's definition of repeat violations, which focuses on the type of hazard, the Department properly determined that Cobra employees were repeatedly exposed to the same type of hazard and thus subject to enhanced penalties.

**C. L&I pilot program to allow a limited number of employers to assist employees in initiating worker's compensation claims. SHB 2537, effective June 7, 2006.**

By January 1, 2007 Labor and Industries will begin a pilot program to allow employers to assist workers in completing an application for worker's compensation benefits. Currently, a worker's compensation claim begins when a treating physician fills out a claim form on behalf of the employee. There will be a limit of 500 participating employers during the first year of the program, and 750 employers during the second year of the program. The purpose of the pilot program is to determine whether employer-assisted claims filing will result in quicker claims filing and benefit payments. The pilot program expires July 1, 2009.

**D. Employer violated Washington State safety standards by failing to protect employees who had access to a potential hazard from the danger.**

**Mid Mountain Contractors v. Department of Labor and Industries, \_\_ Wn. App. \_\_, October 16, 2006.**

In November 2002, a safety inspector for the Department of Labor and Industries (Department) conducted an inspection at a site where Mid Mountain was performing work. A trench at the site contained a southern vertical wall (south wall), which was four feet six inches deep. Other portions of the trench had sloping, but the south wall was not sloped. Significantly, the trench did not have any protective systems to protect the workers at the site from a possible cave-in.

The Department noted that the excavation was situated within Type B soil. Such soil characteristics require an excavation that is four feet six inches deep to have at least four feet six inches of horizontal distance away from a potential cave-in, known as a “zone of danger”. Applying that standard here, the zone of danger was the area within four feet six inches from the south wall of the trench.

Mid Mountain asserts that the Department failed to meet its burden of establishing a violation because its employees were working in a portion of the trench that was less than four feet deep and more than five feet away from the zone of danger. However, the Court of Appeals found the employer’s argument to be misplaced.

It is irrelevant that Mid Mountain’s employees were in a portion of the trench less than four feet in depth. The proper standard is whether the employees had access to the hazard posed by the unprotected south wall that was subject to cave-in. And here, they did. Evidence supported findings that the employees were able to enter the “zone of danger” within the normal course of their expected and assigned job duties. The Court noted that although employees were not actually situated within the hazard area, “it is reasonably likely that [the employees] could have walked the short distance and been within the zone of danger. There was nothing to prevent entering the zone during the conduct of [ ] normal duties.”

## **VII. UNEMPLOYMENT COMPENSATION**

### **A. Legislature reinstates two quarter averaging for unemployment insurance benefit calculation, and also reinstates “liberal construction” mandate.**

This bill restores the benefit calculation formula to the average of a worker’s two high quarters of income, using a 3.85 multiplier (weekly benefit amount = average quarterly wages of during two highest quarters of income x .0385). This is for claims with an effective date after April 22, 2005. Before this bill passed, benefits were calculated using the four highest quarters of income, using a 4.0 multiplier.

ESSB 6885 also restored “liberal construction” to the law. That means that in gray-area cases involving unique circumstances, the unemployed worker gets the benefit of the doubt.

Finally, the bill allows spouses of military personnel transferred to another base to receive unemployment benefits if they cannot find work in the new location.

### **B. RCW 50.20.050(2)(b) provides an exclusive list of “good cause” reasons for voluntarily quitting without being disqualified from unemployment benefits.**

**Starr v. Department of Employment Security, \_\_\_ Wn. App. \_\_\_, No. 33003-2-II (November 22, 2005).**

*FACTS:* Dennis Starr worked for five months as a full-time salesman when he left his employer a telephone message that he was going to Alaska to help his daughters who were in dire circumstances: One daughter had been arrested and incarcerated for murder; the other had been in a serious car accident and was also incarcerated. Starr did not indicate when or whether he might return to his job. Starr’s employer paid him through the end of the week, and recorded his employment status as a “voluntary quit.”

Starr and his wife stayed in Alaska to take custody of their grandchildren while their daughter was incarcerated and to assist with her legal problems. Starr did not return to work for his Washington employer.

While still in Alaska, Starr applied for unemployment compensation with the Washington State Employment Security Department. The Department denied Starr's claim because he "did not have good cause to quit work." After an administrative hearing, the administrative law judge concluded that (1) "good cause" for voluntarily leaving employment is limited to the enumerated provisions of RCW 50.20.050(2)(b); and (2) "[e]ven though [Starr] had very compelling reasons to quit his job, these reasons were personal in nature . . . and did not otherwise fall under any qualifying "good cause category."

The superior court affirmed the decision denying Starr unemployment benefits, and Starr appealed. The Court of Appeals affirms.

*ANALYSIS:* The appeal presents a single issue of first impression: Under RCW 50.20.050(2)(a), can non-enumerated compelling personal reasons constitute good cause for voluntarily quitting a job or is good cause limited to the factors identified in RCW 50.20.050(2)(b)(i)-(x)? The Court of Appeals determined that good cause is limited to the latter.

Starr argued that the statute does not establish an exclusive list of non-disqualifying circumstances to obtain unemployment benefits. Instead, Starr asserted that the Legislature, in drafting recent revisions to the unemployment statutes, intended to include "other more general 'compelling personal reasons'" that would not disqualify an individual from compensation. The Court disagreed.

The plain language of the revised subsection lists ten reasons for non-disqualification and "contains no additional open-ended circumstance of any type; and it clearly contains no general category entitled 'compelling personal reasons'".

Further, the Court confirmed "[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature . . . Thus, because the Legislature specified . . . ten circumstances that will not disqualify an individual from unemployment benefits . . . we infer that [the subsection] comprises the Legislature's exclusive list of circumstances that will not defeat a claim for unemployment compensation when a worker voluntarily quits employment."

**C. Hearsay may be admitted into the record and support a determination by the administrative hearing officer if it is not the sole basis for the decision.**

**Pappas v. Department of Employment Security, \_\_ Wn. App. \_\_, October 2, 2006.**

Lisa Pappas was employed as a debt collector, and received a copy of the company personnel manual, which defined harassment to include "comments, jokes, innuendoes, unwelcome compliments, pictures, cartoons, pranks, or other verbal or physical conduct which . . . has the purpose or effect of creating an intimidating, hostile, or offensive working environment." During her employment, Pappas was disciplined and counseled about her unacceptable behavior (use of profanity, disparaging co-workers), for which she received prior written warnings.

Around March 2004, \$200 from Pappas' coat pocket disappeared, and Pappas targeted another coworker of taking the money. Pappas filed a police report, but law enforcement determined that there was insufficient evidence to proceed with criminal charges. Throughout this time, Pappas continued to make broad accusations against her coworker to peers, who themselves complained about being bothered by Pappas. Despite being told to stop this behavior, Pappas did not, and the employer eventually discharged Pappas on August 10, 2004.

The Employment Security Department denied Pappas' application for unemployment benefits because she was discharged for misconduct. This decision was upheld by the Superior Court. The Court of Appeals affirms.

In reaching its decision, the Appeals Court stated: Hearsay evidence may be admitted at an administrative hearing if the presiding officer determines that "it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." Here, the co-workers acted according to company policy by making management aware of Pappas' unacceptable behavior, *i.e.*, Pappas' persistent repetition of her suspicions and accusations. The information was relayed in writing, and is signed by both Pappas and management. Although she had the right to do so, Pappas failed to call any witnesses to rebut this evidence.

Although Pappas argues that the hearing officer's conclusion of law was based on solely on hearsay, the hearing officer acknowledges that she was precluded from basing her findings exclusively on hearsay evidence:

[The findings] are not based solely on hearsay written statements from co-workers. They are also based on the claimant's evasive answers, her ultimate acknowledgment that she received the instructions the employer alleges [not to speak of her suspicions to other co-workers], and her refusal to deny making the theft accusation to co-workers. She testified only that she did not recall making the specific statements alleged by the specific co-workers on the specific dates.

Pappas repeatedly refused to specifically deny that she accused the coworker of stealing. She admitted that management told her not to make accusations in front of other co-workers. It is clear from the conclusion itself and from a review of the record that Pappas' own testimony at the hearing contributed to the decision. The hearing officer did not rely solely on hearsay.

**D. Employee fails to show "good cause" for a voluntary quit since she did not take "all reasonable precautions" to protect her employment status before leaving to tend to her seriously ill mother.**

**Nordlund v. Department of Employment Security, \_\_ Wn. App. \_\_, October 10, 2006.**

Nordlund worked as an administrative assistant in Tacoma. From October 31 through November 7, 2003, Nordlund was absent due to personal illness. On the following Monday, November 10, Nordlund left a voice message on the employer's general "help line" that she would not be at work due to a family emergency.

Over the next month, Nordlund did not work and communicated sporadically with the human resources department about her need for continued absence. Nordlund's mother had become unexpectedly ill, and was scheduled to have a liver transplant. Subsequently, Nordlund's

mother died, and Nordlund left another voice message that she might need to travel to Montana to handle her mother's affairs. While she was away, Nordlund had her brother relocate her local residence to another location in Tacoma. However, Nordlund did not advise her employer of this change of address.

During Nordlund's absence, the human resources department called and sent Nordlund numerous communications requesting verification of Nordlund's need for extended leave, e.g., time off under the federal Family and Medical Leave Act. In these communications, the employer notified Nordlund that certain days were approved for bereavement leave, and reiterated her duty to submit appropriate leave forms and other documentation, or her absences would be considered unexcused.

When Nordlund failed to respond to the employer's telephone attempts and written letters for information, the employer terminated Nordlund for abandoning her job.

The Employment Security Department denied unemployment benefits to Nordlund, which was affirmed by Superior Court. The Court of Appeals affirms, on the grounds that Nordlund did not establish "good cause" for voluntarily leaving work.

RCW 50.20.050(1)(b)(ii) provides:

(b) An individual shall not be considered to have left work voluntarily without good cause when:

....

(ii) The separation was because of the illness or disability of the claimant or the death, illness, or disability of a member of the claimant's immediate family if the claimant took all reasonable precautions, in accordance with any regulations that the commissioner may prescribe, to protect his or her employment status by having promptly notified the employer of the reason for the absence and by having promptly requested reemployment when again able to assume employment: PROVIDED, That these precautions need not have been taken when they would have been a futile act, including those instances when the futility of the act was a result of a recognized labor/management dispatch system.

(emphasis added).

In Nordlund's case, the record substantially supported the Department's factual findings that Nordlund: (1) failed to comply with her employer's requests for information; (2) failed to make reasonable efforts to keep the employer informed about her mother's death and her need to take time off from work; (3) failed seek the employer's permission for an extended absence or to exhaust reasonable alternatives before leaving work without notice to the company; (4) failed to tell the employer that she was leaving the state for Montana for a period of time; and (5) failed to inform the employer that she changed her Tacoma address while she was in Montana. Moreover, Nordlund never asserted that exhaustion of alternatives would have been futile.

## **IX. OTHER LAWS**

- A. Executive Order 02-04 entitled “City Recognition of Valid Marriage Licenses,” which recognizes same sex marriages for purposes of employee benefits, is not invalid.**

**Leskovar v. Nickels, \_\_ Wn. App. \_\_, No. 54354-7 (September 17, 2007)**

A group of Washington State citizens and taxpayers challenged an executive order issued by the City of Seattle’s mayor, Gregory Nickels, which states in part: “[A]ll City Departments recognize the same sex marriage of City employees in the same manner as they currently recognize opposite sex marriages of City employees for purposes of granting employee benefits and other benefits ordinarily received in the course of employment.”

The citizens sought declaratory, injunctive and other relief that the executive order was invalid. The trial court found that the plaintiffs had not met their burden of proof, and dismissed the suit. In affirming the trial court’s decision that the executive order was not in violation or conflict with state statutes governing marriage, the Court of Appeals concluded that the extension of benefits to domestic partners was a matter of local concern rather than statewide.

“Further, there can be no serious dispute that the field of employee benefits for city employees has not been preempted by the state and remains a matter of local concern. Article XI, section 10 of the Washington Constitution allows first class cities to adopt city charters, which permit cities to exercise broad legislative powers. A first class city may make and enforce within their limits ‘regulations [that] are not in conflict with general laws.’”

“Thus, a first class city may, without sanction from the legislature, legislate regarding any local subject matter.” The regulation of employee benefits is a matter of local concern in which local governments have wide discretion.

- B. U.S. Citizenship and Immigration Services Revises Employment Eligibility Verification Form I-9**

U.S. Citizenship and Immigration Services (USCIS) announced on November 7, 2007, that a revised Employment Eligibility Verification Form (I-9) is now available for use. All employers are required to complete a Form I-9 for each employee hired in the United States.

The revised Form I-9 is a step in USCIS’ ongoing work toward reducing the number of documents used to confirm identity and work eligibility. The most significant change to the revised Form I-9 is the elimination of five documents from List A of the List of Acceptable Documents. The forms were removed because they lack features to help deter counterfeiting, tampering, and fraud.

In addition, instructions regarding Section 1 of the Form I-9 now indicate that the employee is not obliged to provide the Social Security Number in Section 1 of the Form I-9, unless he or she is employed by an employer who participates in E-Verify, an Internet-based system operated by DHS in partnership with SSA that allows participating employers to electronically verify the employment eligibility of their newly hired employees. The section on Photocopying and Retaining the Form I-9 now includes information about electronically signing

and retaining forms. The format, font, organization, and grammar of the text have been improved to make the form more readable and user-friendly.

The revised Form I-9 is available now and will become effective once the notice is published in the Federal Register. However, USCIS encourages employers to start using it as soon as possible. After the effective date, employers may incur fines and penalties for failing to use the new Form I-9. Employers must use the 2007 edition of the Form I-9, approved on June 5, 2007. All previous versions of Form I-9, in English or Spanish, are no longer valid. The 1988 version of Form I-9 in Spanish expired in 1991. Employers who continue to use the outdated editions of Form I-9 are subject to fines and penalties. Employers only need to complete the 2007 Form I-9 for new employees. Employers do not need to complete new forms for existing employees. However, employers must use the 2007 Form I-9 when their employees require re-verification.

**C. Federal Rules of Civil Procedure are amended to address the discovery of “electronically stored information”.**

Effective December 1, 2006, the Federal Rules of Civil Procedure were amended to clarify the preservation, discovery and disclosure of “electronically stored information” during the litigation process. Because electronic data and current technological data storage methods did not fit neatly into the wording and terminology of prior rules, the amendment now expressly require employers to preserve and produce electronically stored information as part of the “discovery” or evidence gathering period prior to trial.

During the discovery phase, a request for “documents” should generally be understood to encompass “electronically stored information”—a broad term that includes email (and attachments) and other data that is kept within video or audio devices. The new rules allow the requesting party to choose and specify the form(s)/format by which electronically stored information should be produced. While the responding party can raise objections to the requested form of disclosure, ultimately such materials must be produced, either in the form ordinarily maintained or in another reasonably usable form.

Each party involved in litigation has a duty to preserve all relevant evidence regardless of the format in which it is maintained, *i.e.*, electronically stored data as well as traditional documents. This duty is triggered whenever a party reasonably knows or should know that such evidence may be pertinent to anticipated litigation. Further, the duty to preserve and disclose information applies to data that may be in the actual possession of a third-party person or entity under “the control” of a party.

Electronically stored information that is not reasonably accessible because of undue burden or cost may not have to be produced, but the responding party has the burden to prove such inaccessibility. Further, if privileged information is inadvertently disclosed, privilege is not necessarily waived. The amended rules allow a party to later assert a protective claim, and notify the other party of the claim of privilege and grounds. The receiving party then is required to return, sequester, or destroy the identified information, and is prohibited from using or disclosing such information until the issue of privilege is resolved.

The amended rules also include a safe harbor provision that directs a court may not impose sanctions if a party fails to produce electronically stored information lost as a result of the routine, good-faith operations of an electronic information system. Of note, however, the safe harbor provision only applies to information that is unattainable because of “routine operations”

done or performed “in good faith”. Commentary to the new rules affirm, “[A] party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.” When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a “litigation hold”, *i.e.*, temporarily suspending the routine destruction of electronic information.