



2023 LEGAL UPDATE

42nd Annual Civil Service Conference | October 25, 2023

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Foster
Garvey

SEATTLE

PORTLAND

WASHINGTON, D.C.

NEW YORK

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BEIJING

2023 Legislation?

State Civil Service– Chapter 41.06 RCW

Definition of Manager (eff. 1/1/2024), and exempt positions.

City Fire – Chapter 41.08 RCW: No amendments.

City Police – Chapter 41.12 RCW: No amendments.

County Sheriffs – Chapter 41.14 RCW: No amendments.

Note SB 5274 to eliminate standard to read/write English. Did not pass.

A New Privilege!



Union – Member Privilege / RCW 5.60.060 (11)

Neither a union representative nor an employee the union represents or has represented shall be examined as to, or be required to disclose, any communication between an employee and union representative or between union representatives **made in the course of union representation** except:

(i) To the extent such examination or disclosure appears necessary to prevent the commission of a crime that is likely to result in a clear, imminent risk of serious physical injury or death of a person;

(ii) In actions, civil or criminal, in which the represented employee is accused of a crime or assault or battery; . . .

Lawful Use of Cannabis Ch. 359, Laws of 2023 (eff. 1/1/2024)

It is unlawful for an employer to discriminate against a person in the initial hiring for employment if the discrimination is based upon: (a) The person's use of cannabis off the job and away from the workplace; or (b) An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, urine or other bodily

Fluid.

NO APPLICATION TO **police, fire, EMS, dispatch, corrections**, and certain others.

Civil Service General

Franklin County's entire civil service commission just quit. What happens now?

Tri-Cities Herald (June 29, 2023)



RECRUITMENT

Vancouver Police Department boosts hiring efforts amid struggles to recruit, retain officers

The Columbian (May 23, 2023)

\$10,000 entry incentive

\$25,000 lateral incentive



Police Recruitment

RECRUITING NEW SEATTLE
COPS: NOT AS SIMPLE
AS IT SOUNDS...

"SO, WE NEED
OFFICERS WHO ARE PART
SOCIAL JUSTICE CHAMPION,
PART GRIEF COUNSELOR,
PART COMMUNITY
ORGANIZER, PART
STOIC PHILOSOPHER
AND JUST A DASH OF
NINJA WARRIOR.

BASICALLY,
MAHATMA GANDHI
WITH A *TASER*."



Recruitment – General (11/2/2022)

[New York City Council passes legislation to improve equity, inclusion and diversity in FDNY](#) 🇺🇸

The New York City Council has passed historic legislation to improve equity, inclusion and diversity in the FDNY. The legislation package requires the FDNY to report on its recruitment and retention efforts of firefighters of diverse racial and ethnic backgrounds. The department would also have to survey firehouses and ensure they are equipped to serve a mixed gender workforce. "By passing this package of bills today, we hope to move the FDNY forward to achieving a workforce fully reflective of the diversity of our city," New York City Council Speaker Adrienne Adams said. The council speaker says currently only 8% of firefighters are Black, 2% are Asian and only 1% are women.

WCBS-TV CBS 2 NEW YORK

Recruitment – Rehiring Retirees?

“Quincy [MA] officials are looking for state lawmakers to approve a request that would allow retired firefighters to come back on board for support duties. The Quincy City Council supports giving the fire chief the power to appoint retirees as "special firefighters" who'd help cover detail assignments. A home rule petition the council filed this week requires approval from the state Legislature for such positions to be created. An increased workload within the fire department has sparked the need for the special firefighters to man detail assignments, particularly at construction sites, said Tom Bowes, president of the Quincy Firefighters Association Local 792. . . .”

Boston Herald (May 2, 2023)

Washington State's Devastating Decline of Volunteer Firefighters

<https://www.governing.com/work/washington-states-devastating-decline-of-volunteer-firefighters>

In 1984, about 19,000 volunteer firefighters staffed stations across the state; today, the numbers have decreased to just around 10,000. For many parts of the state, the loss of volunteer teams could have devastating impacts.



Non-Police Personnel?

If you're involved in a fender bender in Wilmington, N.C., chances are about 50-50 that a uniformed police officer will show up at the scene. It's not because minor crashes aren't taken seriously or that workforce shortages are especially severe there. Instead, the city employs a squad of civilian technicians to respond to many of its non-injury accidents.

Wilmington has employed civilian crash investigators since 2007. The program has proven so successful that over the past couple of years it's tripled the number of employees involved, from two to six. They're on call from 7 a.m. to 7 p.m. through the week, with sworn officers taking care of business on nights and weekends. All told, the civilians now handle about 45 percent of the city's non-injury accidents.

[THIS WEEK IN GOVERNING \(SEPTEMBER 9, 2023\)](#)

Improve safety, diversity: Pass bill to allow police to work part-time?

Special to the *Seattle Times* by Sue Rahr and John Lovick (March 2023)

“In addition to attracting and retaining a more diverse workforce, and improving safety, the ability to utilize part-time work schedules can save tax dollars and enable police departments to better match field staffing levels to the volume of calls for service. Typically and historically police calls for service are significantly higher on Friday and Saturday nights between 4 p.m. and 4 a.m. Having a pool of part-time officers, paid to work only a 10-hour shift each Friday and Saturday night, allows agencies to pay for that increased level of staffing only when it’s needed.”

San Francisco Police - 1973

1973 suit by a group called Officers for Justice, mostly with black membership. The suit charged that discrimination in the department subjected black officers to abuse and damaged their careers.

As the suit dragged through the courts, it picked up support from the National Organization for Women, Chinese for Affirmative Action and the League of United Latin American Citizens. The National Association for the Advancement of Colored People joined the suit soon after it was filed, and the United States Department of Justice filed a separate action, which was merged with the original suit for trial.

San Francisco Police - 1979 Settlement

- At least 50 percent of vacancies in the department are to be filled with women or members of minority groups. In 1968, the department had three black inspectors, one black sergeant and 73 black patrolmen out of 1,755 sworn officers. It had nine women officers.
- At least 20 percent of new employees are to be women. Women who are members of minority groups will be counted toward both goals.
- Promotion policies will be changed to facilitate movement of minority members and women into command positions.

San Francisco Police - 2019

Twelve white male San Francisco police officers are suing the city, arguing they were passed over for promotions because of their race and gender.

The San Francisco Chronicle reports Wednesday that the lawsuit, which was filed Tuesday in federal court, is the latest round in a conflict that dates back decades. A 13th plaintiff who is now retired says she also was denied promotion, because she is a white lesbian.

The lawsuit challenges a test-scoring method that the city adopted in 1979 in response to a lawsuit from a group representing black and female officers, who alleged discrimination in hiring and promotions.

San Francisco "bands" promotional test scores so that people who score within a certain range are treated the same, which means the department can consider other factors such as language skills and experience in awarding promotions. The latest lawsuit challenges that method.

Associated Press (June 13, 2019)

San Francisco Police - Settlement

March 2023 - San Francisco agrees to settle 2019 suit.

Terms to be announced?!



Mass. Judge OKs \$40 Million Settlement Over Biased Exam

Law360 (May 11, 2023, 9:44 PM EDT) -- Hundreds of Black and Hispanic police officers throughout Massachusetts who took a racially biased promotional exam will share a \$40 million settlement that was granted final approval on Thursday by a Massachusetts judge after nearly 15 years of litigation.

Massachusetts – Test Discrimination

The promotional exams given by the state's human resources division to officers seeking promotion to sergeant were discriminatory against Black and Hispanic candidates. The tests, administered from 2005 to 2008 and in 2010 and 2012, relied on a series of multiple-choice written questions that prioritized rote memorization and put Black and Hispanic officers at a disadvantage

Massachusetts - Police Sergeant Testing

The long-ranging impact will be to improve policing by finding the best candidates, not just those who are good at memorizing and taking tests.

While the state will develop tests that measure other aspects of the work of a police sergeant, such as management skills, conflict resolution and interaction with the public.



Reminders on Race Considerations in light of *Students for Fair Admissions v. Harvard*

- The Supreme Court reverse long-time precedent allowing for race to be a “plus factor” in college admission decisions
- Court decision does not directly address employment matters, but expect new scrutiny in diversity initiatives under the Equal Protection clause
- Burden of strict scrutiny
- Focus should be on improving recruitment pool and creating a safe work environment for employees

Religious Accommodations & New “Undue Burden” Standard

- The Supreme Court overrules precedent that allowed an undue hardship to be established if an accommodation was “more than a *de minimis* cost”
- New standard requires that burden be substantial in the overall context of the employer’s business, e.g., substantially increased cost in relation to the conduct of its particular business

BUT WAIT! “Why We Need More College Graduates Behind the Badge”

“Attracting more people with four-year degrees — and more women — into policing is likely to produce better outcomes. Among other things, they are less likely to draw complaints and use force.”

<https://www.governing.com/security/why-we-need-more-college-graduates-behind-the-badge>



Wage Transparency

Effective January 1, 2023, certain Washington employers must provide updated wage disclosure information in all job postings. Washington employers include businesses with at least one Washington-based employee and 15 or more employees. Washington employers also include businesses without a physical presence in Washington State but who engage in business in Washington or recruit for jobs that could be filled by a Washington-based employee. If the position to be filled is entirely out of state (e.g., waitstaff in Idaho) but the posting may reach Washington-based applicants, the posting requirements do not apply. This "out-of-state" exception must be narrowly applied.

February 2 – DOL issues news release re PUMP Act

Beginning April 28, 2023, an employer who violates an employee's right to reasonable break time and space to pump breast milk will be liable for appropriate legal or equitable remedies under the FLSA. Remedies may include employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages, compensatory damages and make-whole relief, such as economic losses that resulted from violations, and punitive damages where appropriate. These remedies are available regardless of whether the employee has also experienced retaliation.

An employee may file a complaint with the Wage and Hour Division or may file a private cause of action seeking appropriate remedies.

Link to DOL resources: <https://www.dol.gov/agencies/whd/pump-at-work>

<https://www.dol.gov/agencies/whd/nursing-mothers/faq>

Revisiting Exempt Positions

- 1988 *Samuels v. City of Lake Stevens*: city's effort to exclude the position of chief of police from civil service violated Chapter 41.12 RCW
- 1987 A city or town may determine by ordinance that the civil service does **not** include
 - any fire chief appointed after July 1, 1987, RCW 41.08.050 ;
 - or a police chief appointed after July 1, 1987 (if the police department includes six or more commissioned officers), RCW 41.12.050.
- 2002 RCW 41.12.050 authorizes “unclassified service” for police
- 1958 RCW 41.14.070 exempt positions outset of county sheriff civil service
- Assignments?

FTE, Budget, or Actual?

RCW 41.12.050 Persons Included -- Restricted Exemptions

If the police chief is exempt, the classified civil service includes all full paid employees of the department of the city, town, or municipality, except the police chief and an additional number of positions, designated the unclassified service, determined as follows:

Department Position	Unclassified Position Appointments
6 through 10	2
11 through 20	3
21 through 50	4
51 through 100	5
101 through 250	6
251 through 500	8
501 and over	10

5th Circ. Closes Book On Black Officer's Union Bias Suit

Law360 (March 7, 2023, 4:41 PM EST) -- The Fifth Circuit will not revive a Louisiana state prison guard's Title VII lawsuit claiming the prison's alleged refusal to promote union members disproportionately affected Black people, saying the case record lacks evidence of racial discrimination. In a five-page unpublished opinion released Monday, the Fifth Circuit said the suit "lacks all but the barest of context," leaving the court with limited means by which to discern if David Wade Correctional Center employee Vincent Williams has a case against the state of Louisiana.

“Nothing in the complaint gives a court the ability to make a causal connection between Williams' race and the failure to promote him,” the court said in a decision. “Williams' complaint might sufficiently allege an anti-union bias, but Title VII provides no protection on that basis.”

11th Circ. Won't Reopen Ex-Georgia Trooper's Race Bias Suit

Law360 (May 31, 2023, 7:03 PM EDT) -- The Eleventh Circuit affirmed the defeat of a Black former state trooper's suit claiming the Georgia Department of Public Safety slow-walked a misconduct investigation and denied him a promotion because of his race, ruling Wednesday **he failed to identify a comparable co-worker who was treated better.**

Ohio Jury Awards \$2.6M To Ex-Patrol Officer In Gay Bias Suit

Law360 (August 8, 2023) A federal jury on Tuesday awarded a gay ex-Ohio State Highway Patrol officer \$2.6 million on her allegations that she was pushed out of the department because of her sex and sexual orientation. . . .

Stacey Yerkes sued the Ohio State Highway Patrol in 2017, alleging that she was targeted and criticized for minor infractions that other officers were not penalized for, such as leaving her vehicle on and unattended and failing to wear her hat during a traffic stop. According to the suit, Yerkes was also required to perform "demeaning" tasks that were not assigned to straight men.

9th Circ. Won't Revive Christian Ex-Fire Chief's Bias Suit

Law 360, (8/4/2023)

The panel said the evidence Stockton Fire Chief Ronald Hittle pointed to of perceived hostility toward his religion was only communicating city officials' fears that his behavior — attending a religious event on city time and favoring other Christian firefighters — could cause legal problems for Stockton.

"Because [city officials] did not use derogatory terms to express their own views, or focus on the religious aspect of Hittle's misconduct to express their own animus, but rather referenced other legitimate constitutional and business concerns, their terminology does not give rise to a genuine issue of discriminatory animus," the court's panel said.

Firefighters Union Says Social Media Policy Muzzles Speech



Social Media Policy?

Law360 (October 16, 2023, 5:30 PM EDT) -- A firefighters union sued a Rhode Island town and its fire department in federal court on Sunday over a new social media policy that members claim violates firefighters' free speech by forcing them to obtain manager approval before discussing workplace issues online.

The Tiverton Fire Department's social media policy, enacted on Oct. 12, was created in response to Local 1703 members airing safety concerns on the union's Facebook, saying that the department is **under-staffed** and firefighters are overworked, but the policy wrongly polices speech protected under the First Amendment given that the firefighters were discussing issues of public interest, the union asserts.

Disability Discrimination – *EEOC News*

January 24, 2023

UPDATED EEOC RESOURCE EXPLAINS ADA REQUIREMENTS FOR INDIVIDUALS WITH HEARING DISABILITIES IN THE WORKPLACE

- *Includes Information on Discrimination Against Job Applicants*

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WASHINGTON – The U.S. Equal Employment Opportunity Commission (EEOC) today released an updated resource document, “[Hearing Disabilities in the Workplace and the Americans with Disabilities Act](#),” explaining how the Americans with Disabilities Act (ADA) applies to job applicants and employees who are deaf or hard of hearing or have other hearing conditions. . . .

Industrial Insurance and PTSD

In 2018, the legislature amended RCW 51.08.142 and RCW 51.32.185, both part of the Industrial Insurance Act (the Act). Previously where mental conditions and mental disabilities caused by stress were excluded from the definition of “occupational disease,” these amendments now created an exception applicable solely to firefighters and law enforcement officers permitting claims resulting from PTSD. LAWS OF 2018, ch. 264 § 2. These amendments went into effect on June 7, 2018.

Industrial Insurance and PTSD

The 2018 amendments to RCW 51.08.142 and 51.32.185 only **apply prospectively**. As such, the Board of Industrial Insurance and the trial court did not err by denying DeYoung's request for occupational disease benefits and we affirm.

DeYoung v. City of Mount Vernon and Dept. of Labor and Industries
No. 84561-6-1 (October 2, 2023)

Inslee signs bill making sure first responders get treatment for job-related PTSD, other ailments

***KIRO* (May 9, 2023)**

Section 2, Chapter 293, Laws of 2023

(1) All self-insured municipal employers and self-insured private sector firefighter employers and their third-party administrators have a duty of good faith and fair dealing to workers relating to all aspects of this title. The duty of good faith requires fair dealing and equal consideration for the worker's interests.

(2) A self-insured municipal employer or self-insured private sector firefighter employer or their third-party administrator violates its duty to the worker if it coerces a worker to accept less than the compensation due under this title, or otherwise fails to act in good faith and fair dealing regarding its obligations under this title. . . .



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