
Wage & Hour Compliance

Beyond the Basics (Part I)

Wednesday, February 13, 2013

Foster Pepper PLLC
Seattle, Washington

Presented by:



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 - Steve Block, Foster Pepper PLLC
 - Steve DiJulio, Foster Pepper PLLC
 - Alicia Feichtmeir, Foster Pepper PLLC
 - Steve Peltin, Foster Pepper PLLC
 - Janelle Milodragovich, Foster Pepper PLLC
- Speaker Materials

8:00 am session schedule

- 8:00 – 8:05 am ----- Welcome & Introductions – Steve Peltin
- 8:05 – 8:15 am ----- New Developments in Employment & Labor Law – Steve Block
- 8:15 – 8:30 am ----- When is an Independent Contractor Not Independent? – Steve DiJulio
- 8:30 – 8:45 am ----- Interns & Volunteers – Alicia Feichtmeir
- 8:45 – 9:10 am ----- Who is Exempt from Minimum Wage & Overtime (White Collar, Professional, Executive) – Steve Peltin
- 9:10 – 9:35 am ----- Who is Exempt from Minimum Wage & Overtime (Administrative, Outside Sales, Computer Professional) – Janelle Milodragovich
- 9:35 – 9:45 am ----- Who is Exempt from Minimum Wage & Overtime (Other Industry & Individual Exemptions) – Alicia Feichtmeir
- 9:45 – 9:50 am ----- Avoiding & Correcting Misclassifications – Steve Peltin
- 9:50 – 10:00 am ----- Q&A

11:00 am session schedule

- 11:00 – 11:05 am ----- Welcome & Introductions – Steve Peltin
- 11:05 – 11:15 am ----- New Developments in Employment & Labor Law – Steve Block
- 11:15 – 11:30 am ----- When is an Independent Contractor Not Independent? – Steve DiJulio
- 11:30 – 11:45 am ----- Interns & Volunteers – Alicia Feichtmeir
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- 12:10 – 12:35 pm ----- Who is Exempt from Minimum Wage & Overtime (Administrative, Outside Sales, Computer Professional) – Janelle Milodragovich
- 12:35 – 12:45 pm ----- Who is Exempt from Minimum Wage & Overtime (Other Industry & Individual Exemptions) – Alicia Feichtmeir
- 12:45 – 12:50 pm ----- Avoiding & Correcting Misclassifications – Steve Peltin
- 12:50 – 1:00 pm ----- Q&A

Presentation

Presented by:





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WAGE AND HOUR COMPLIANCE – BEYOND THE BASICS (Part 1)

Presented by: Foster Pepper PLLC
Wednesday, February 13, 2013



Steves at Foster Pepper





Today's Program

- Independent contractor/employee
- Interns and volunteers
- “White collar” exemptions
- Outside sales
- Computer professionals
- Other individual/industry exemptions
- Correcting misclassifications



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New Developments in Employment and Labor Law



Decriminalization of Marijuana

- Still a work in progress with many uncertainties – future lawsuits likely to define
- Pot is illegal under federal law
- Employers may prohibit employee use and discipline violators
- Regulated industries must ensure nonuse
- Challenges for employer to tolerate off-duty use but still prohibit on-duty use



Obamacare (Affordable Care Act)

- Mandatory employee coverage
- Summary of benefits and coverage
- W-2 reporting requirement
- Comparative clinical effectiveness research fee
- Limit on Flexible Spending Account contributions
- Medical loss ratio rebates
- Health Insurance Exchange notices



<http://www.washingtonworkplacelaw.com/private-employers/obamas-victory-secures-future-of-the-affordable-care-act/>

Obamacare (Affordable Care Act)

- Essential health benefits
- Minimum value test
- Shared responsibility
- "Full-time" employees
- Automatic enrollment
- Wellness plans



Sick and Safe Leave: “Occasional Employee” Definition

- Seattle Office for Civil Rights provided guidance
- Employees who “work in Seattle on an occasional basis are covered by the Ordinance if they perform more than 240 hours of work in Seattle within a calendar year.” 70-040 (5).
- Only employees performing Seattle-based work on an *unforeseeable, random schedule* will be subject to the 240 hour threshold; others accrue leave at the first hour

<http://www.washingtonworkplacelaw.com/private-employers/the-seattle-office-for-civil-rights-clarifies-its-interpretation-of-occasional-employee/>



Proposed Ordinance Limits Investigation of Applicants' Criminal Backgrounds

- New proposal getting significant attention
- Would require “a conditional offer of employment” before criminal background check
- Would require “a direct relationship” between criminal history and the position
- Doesn't apply to those subject to federal regs
- Tracks FCRA, Washington Law Against Discrimination, and EEOC regs



<http://www.washingtonworkplacelaw.com/private-employers/proposed-seattle-ordinance-would-limit-employers-right-to-investigate-applicants-criminal-background/>



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When is an Independent Contractor Not Independent?



INDEPENDENT CONTRACTOR?

- Murphy Brown's Painter



INDEPENDENT CONTRACTOR?



INDEPENDENT CONTRACTOR?

- Can I just hire independent contractors?
They're easier than employees.

INDEPENDENT CONTRACTOR?

- Careful! State and federal laws have strict requirements covering who qualifies as an independent contractor. You could be liable for workers' comp and unemployment claims.

<http://www.lni.wa.gov/Main/smallbusiness/>

INDEPENDENT CONTRACTOR?

- Unless an individual is truly in business for himself or herself, is licensed and actively markets as such,
- has multiple clients/customers,

INDEPENDENT CONTRACTOR?

- and is performing work that is outside the business' normal activities,
- chances are state and federal law would require that the individual be treated as an employee.

INDEPENDENT CONTRACTOR?

- There is a substantial body of law distinguishing between the employment relationship and the independent contractor relationship.

Dolan v. King County, 172 Wn.2d 299 (2011)

Dolan v. King County

- The bedrock principle upon which relationships are analyzed under the common law is the right of control. *Hollingbery v. Dunn*, 68 Wn.2d 75, 80-81, 411 P.2d 431 (1966).

Dolan v. King County

The focus is on substance and not on corporate forms, titles, labels, or paperwork.

INDEPENDENT CONTRACTOR?

- RIGHT TO CONTROL, OR
- ECONOMIC DEPENDENCE?

Anfinson v. FedEx, 174 Wn.2d 851 (2012)

Anfinson v. FedEx

- *Anfinson* argues the key inquiry is whether the alleged employee is, as a matter of economic reality, dependent upon the business to which he or she renders service.

Anfinson v. FedEx

- This is a reasonable interpretation because one hallmark of the employer- employee relationship is the **employee's dependence upon the employer for income**; absent such dependence the relationship is, arguably, better categorized as an employer-independent contractor relationship.

Anfinson v. FedEx

- The relevant inquiry is “whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.”

[CITATIONS OMITTED]

Note on WISHA Compliance

- . . . jobsite owners must comply with WISHA regulations if they retain control over the manner and instrumentalities of work done at the jobsite.

Afoa v. Port of Seattle, __ Wn. 2d__ (January 31, 2013)

HB 1440

AN ACT Relating to ensuring fairness to employers
by protecting employees; . . .

HB 1440 Independent Contractor Status?

- **Summary of Bill**
- An individual who performs services for remuneration is presumed to be an employee, and a person asserting that an individual is not an employee must prove independent contractor status by a preponderance of the evidence.

<http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bill%20Reports/House/1440%20HBA%20LWD%2013.pdf>

HB 1440 Independent Contractor Status?

An individual is an independent contractor if:

- he or she is and will continue to be free from control or direction over the performance of the service;
- the service is outside the usual course of business for which the service is performed, or

HB 1440 Independent Contractor Status?

- the service is performed outside all the places of business of the enterprise for which the service is performed; and
- the individual is customarily engaged in an independently established trade.



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Interns and Volunteers



Interns and Volunteers



<http://www.dol.gov/whd/regs/compliance/whdfs71.htm>

<http://www.lni.wa.gov/WorkplaceRights/files/policies/esa1.pdf>

Who Is an Employee?

- All persons that are “employed,” defined as “suffer or permit to work.”
- Covered and non-exempt individuals who are “suffered or permitted” to work must be compensated for the services they perform for an employer.

Interns: Nonprofit Organizations

- Nonprofits and public sector organizations can offer unpaid internships, even if the intern provides services of value to the organization.



"We have an opening for a part-time unpaid intern, which could lead to a full-time unpaid internship."

Interns: For-Profit Entities

- Training (unpaid internship) vs. Employment
- DOL criteria:
 1. Similar to training which would be given in an educational environment;
 2. For the benefit of the intern;
 3. No displacement of regular employees; intern works under close supervision of existing staff;
 4. Employer derives no immediate advantage from the activities of the intern;
 5. No entitlement to job at conclusion of internship; and
 6. Mutual understanding that intern is not entitled to wages.
- Failure of one factor: intern is considered an employee, and minimum wage and overtime payments are required.

Interns: In the News

- **Hamilton College** (Jan. 2013): wage and hour class action by former paid intern who performed same tasks as full time assistant coaches, but received lower pay, classified as part-time, worked long hours and paid less than minimum wage.
- **Fox Searchlight, Hearst Corp., Charlie Rose show** (2012): unpaid interns in production/publishing claim minimum wage for doing same menial work as paid employees.



Volunteers

- Nonprofit Organizations
 - Can have volunteers
- Public Sector
 - Can have volunteers
- For-Profit Entities
 - No volunteers; must pay at least minimum wage to anyone who is permitted to work



Employers May Encourage Employees to Volunteer

- No pressure or coercion to donate time.
- Ensure employee's employment not affected decision to participate (or not).



Volunteers: Nonprofit Employees

- Employees volunteering need not be paid, but duties cannot be similar to paid job, or employer must pay for the volunteer time (if known or should have known).

Volunteers: Public Sector Employees

- Employee cannot volunteer to do work that is similar to paid job within the same jurisdiction; but can volunteer to do similar work in a different jurisdiction.

Volunteers: Private Sector Employees

- Can volunteer in nonprofit and public sector in jobs similar to the work they are paid to do in the private sector.
- For-profit companies cannot have volunteers doing company work without pay.



Rewarding Volunteers and Interns

- Nominal fees or gifts
- Reimbursements for expenses
- Stipends
 - One time, monthly or yearly
 - Must be less than 20% of what an employee doing the same work would make
 - Employers must withhold taxes for stipends that exceed \$600
- Cannot be tied to productivity



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Who is Exempt from Minimum Wage and Overtime?



Limitations on Exemptions

- Wage/hour laws applied to “furthest reaches”
- Exemptions “narrowly construed” – apply only if “plainly and unmistakably” within the law
- Burden on employer
- Exemptions ordinarily apply to *position*, but occasionally to individual or industry
- Watch for state law differences

Establishing Exemptions

- Job descriptions can be helpful/not controlling
- Job titles can be helpful/not controlling
- Focus on actual duties, not management direction or employee expectations

Exemptions Covered Today

- “White collar” exemptions
- Outside sales
- Computer professionals
- Other individual/industry exemptions



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White Collar Exemptions



White Collar Exemptions

- Professional
- Executive
- Administrative
- Highly compensated



Elements of White Collar Exemption

- Pay at least \$455 per week
- Pay on a salary basis
- Exempt duties

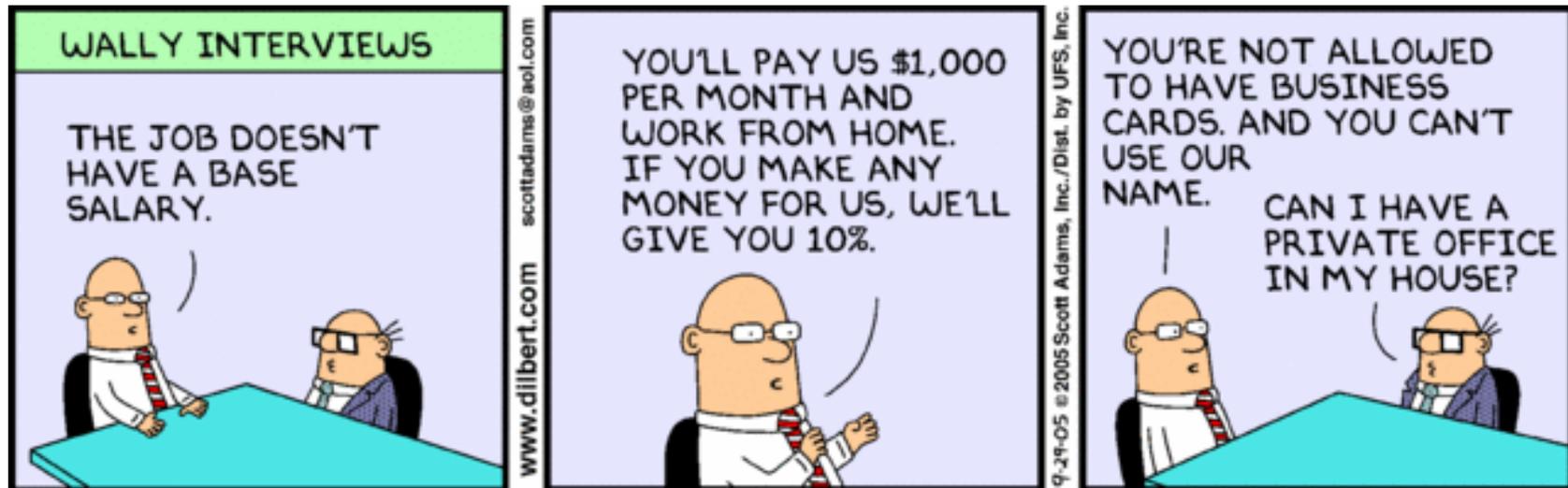
Exceptions to Salary Basis Test

- Doctors
- Lawyers
- Teachers

What Is the Salary Basis Test?

- Minimum amount of compensation
 - \$455 per week
 - “exclusive of board, lodging or other facilities”
- No reduction based on quality or quantity of work
- No improper deductions

What if We Pay Another Way?

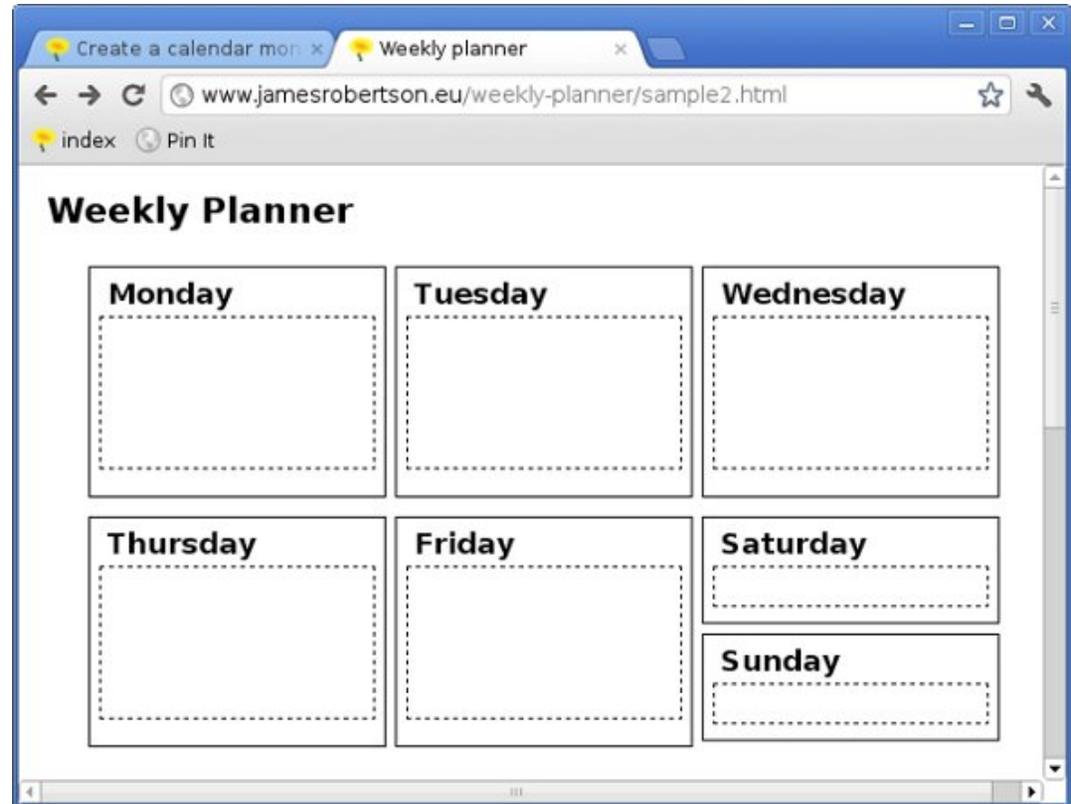


What if We Pay Another Way?

- Administrative/professional can be paid a “fee”
- Can pay a guaranteed draw against commission if actual pay is close to guarantee
- Can provide additional compensation based on hours or bonus – reasonable relationship needed

No Improper Deductions

- General rule: if employee works any part of week, must be paid for entire week



No Improper Deductions

- Early departure/late start
- Poor performance/low productivity
- Inclement weather
- Jury duty/witness fees/military leave
- No work to do
- Afternoon parent-teacher conference

Proper Deductions

- 1st week/last week
- FMLA
- Serious violation of safety rules
- Disciplinary suspension
- Illness/disability (full day; policy/plan)*
- Vacation/personal time (full day; policy/plan)*

**Special rule for public employees*

Proper Practices

- Deducting from accrued leave bank
- Requiring employee to record hours of work
- Requiring employee to work a specified schedule
- Bona fide, across-the-board schedule changes
- Bonuses based on productivity

Impact of Improper Deductions

- Isolated/inadvertent
 - OK if reimburse the employee
- Otherwise lose exempt status
 - For employee with the deduction
 - For all others in same job



"Oops, my bad ... It is vinegar."

Loss of Exemption Due to Improper Deductions – Factors

- Number of improper deductions
- Time period
- Number/location of affected employees
- Number/location of manager(s) making deduction
- Employer policy



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Professional Exemption

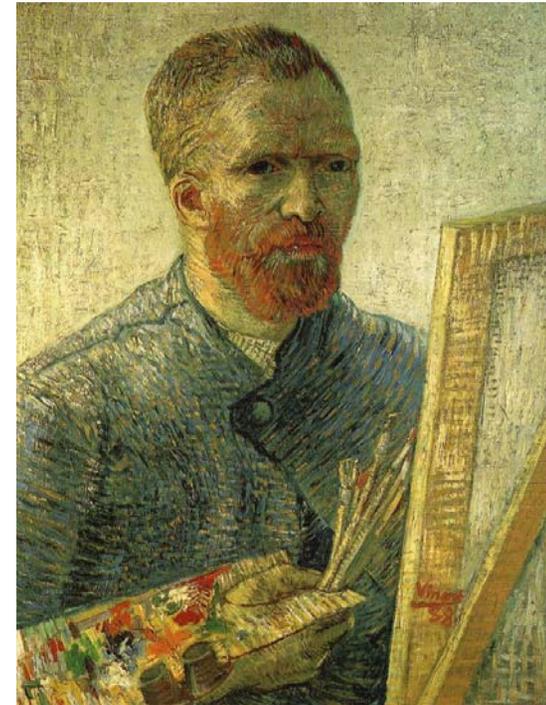
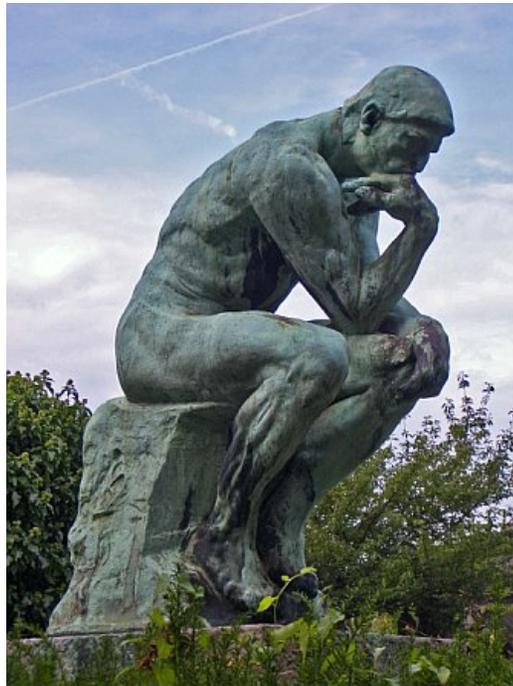


http://www.dol.gov/whd/regs/compliance/fairpay/fs17d_professional.htm



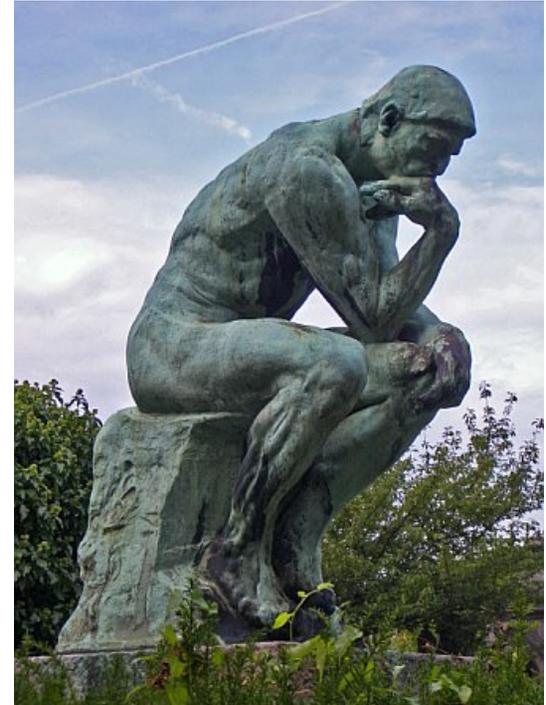
Two Kinds of Professionals

- Learned
- Creative



Learned Professionals Duty Test

- Primary duty
- Advanced knowledge
- Field of science or learning
- Prolonged course of specialized academic instruction



Primary Duty

- Principal, main, major, most important duty
- Generally 50% or more of time
- Based on all the facts / job as a whole

Advanced Knowledge

- Predominantly intellectual in character
- Requires consistent exercise of discretion and judgment; not routine mental, manual, mechanical or physical work
- Analyze, interpret or make deductions from varying facts or circumstances

Field of Science or Learning

- Traditional ones: law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, sciences, pharmacy
- Others: recognized professional status, not mechanical arts or skilled trades
- Changing over time

Prolonged Course of Specialized Academic Instruction

- Specialized academic training = usually a degree
- But OK if attain advanced knowledge through work experience and intellectual instruction
- Not exempt if general knowledge acquired by degree in *any* field, by apprenticeship, or by training
- Not exempt if most employees acquire skill by experience

Learned Professionals – Yes or No?

- Nurses?
- Physician Assistants?
- Dental Hygienists?
- Accountants?
- Chefs?
- Paralegals?



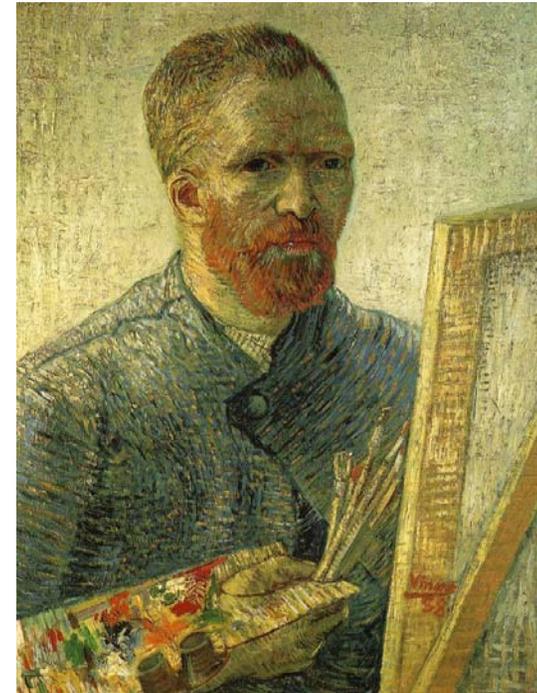
Learned Professionals – Yes or No?

- Athletic trainers?
- Funeral Directors/Embalmers?
- Probation Officers?
- EMTs?
- Social Workers?



Creative Professionals Duty Test

- Primary duty: invention, imagination, originality or talent
- Recognized field of artistic or creative endeavor
- Not based on intelligence, diligence or accuracy



Creative Professionals – Yes or No?

- Actors?
- Musicians?
- Painters?
- Cartoonists?
- Writers?
- Journalists?





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Executive Exemption



http://www.dol.gov/whd/regs/compliance/fairpay/fs17b_executive.htm



Executive Exemption Duty Test

- Primary duty: managing enterprise or customarily recognized department or subdivision
- Customarily and regularly direct work of 2+ FTEs
- Authority to hire/fire, or influence personnel decisions



Managing Enterprise or Customarily Recognized Department or Subdivision

- Lots of activities
- Not all require constant discretion and judgment



Business Owner Exemption

- Bona fide 20% equity interest
- Actively engaged in management



Influence Personnel Decisions

- Suggestions/recommendations as to hiring, firing, advancement, promotion or other change of status given particular weight
- Part of employee's job duties to make recommendations; occasional suggestions not enough
- Must pertain to subordinate employees
- OK even if higher level manager's recommendation is more important and even if manager can't make ultimate decision



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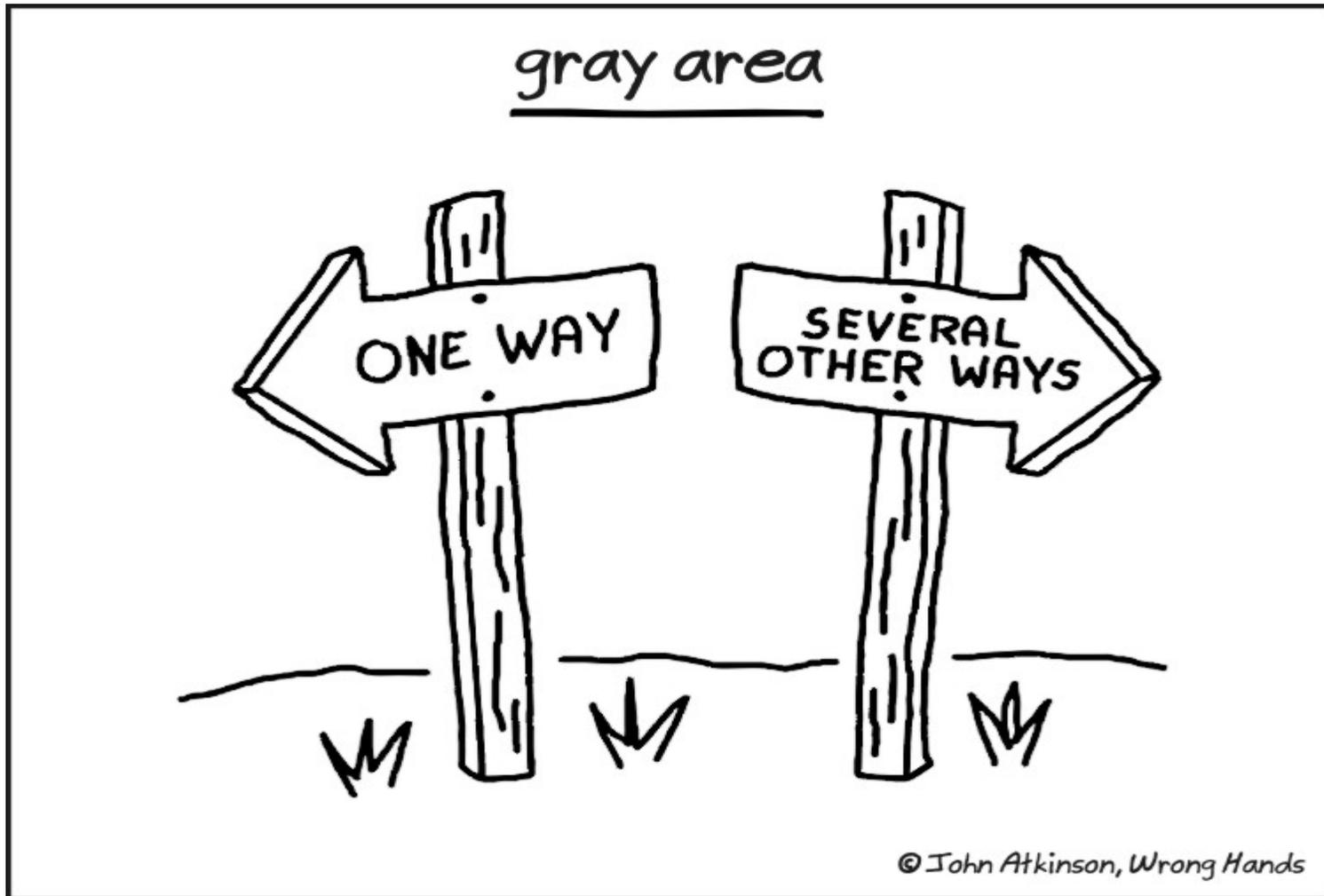
Administrative Exemption



http://www.dol.gov/whd/regs/compliance/fairpay/fs17c_administrative.htm



Administrative Exemption - Beware



Administrative Exemption Duty Test

- Primary duty: **office or non-manual work directly related to the management or general business operations** of the employer or the employer's customers; and
- Primary duty includes **exercise of discretion and independent judgment** with respect to **matters of significance**.

Administrative Exemption – Yes or No?



Administrative Exemption – Yes or No?



Administrative Exemption – “Directly Related”

- Example duties “directly related” to management or “general business operations” include:
 - Assisting with running or servicing the business
 - Working in certain functional areas of the business
 - Advising or providing consultation to the employer’s clients or customers

Administrative Exemption – Examples

- Tax/Accounting
- Insurance
- Purchasing
- Advertising
- Marketing
- HR & Legal



Administrative Exemption – “Matters of Significance”

- Examples of “exercising discretion and independent judgment” include:
 - Comparing and evaluating possible courses of conduct, and acting or making the resulting decision
 - Making recommendations for action, even if reviewed by superiors
 - Working in a way that involves more skillfully applying well-established techniques, procedures or standards

Administrative Exemption – Discretion

Employee may have sufficient discretion if he/she can:

- Formulate, interpret or implement policies and practices
- Commit the employer in matters of significant financial impact
- Waive or deviate from established policies and procedures without prior approval, or
- Negotiate and bind the company on significant matters

Administrative Exemption – Discretion (continued)

Employee may have sufficient discretion if he/she:

- Carries out major assignments
- Performs work that impacts business to substantial degree
- Provides consultation or expert advice to management
- Plans long term and short term business objectives
- Investigates and resolves “matters of significance”
- Represents the company to resolve complaints or grievances



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Outside Sales Exemption



http://www.dol.gov/whd/regs/compliance/fairpay/fs17f_outsidesales.htm



Outside Sales Exemption - Sales



Outside Sales Exemption Duty Test

- Primary duty involves making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer
- Employee must be customarily and regularly engaged away from the employer's place or places of business

Outside Sales Exemption – What Is a Sale?

- Sale
- Exchange
- Contract to sell
- Consignment for sale
- Shipment for sale
- “Other disposition,” including transfer of property title

Outside Sales Exemption – Location



Outside Sales Exemption - Exclusions



- Exclusions:
 - Sales made primarily by mail, phone or the internet
 - Use of a fixed location, including home offices



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Computer Professional Exemption



http://www.dol.gov/whd/regs/compliance/fairpay/fs17e_computer.htm



Computer Professional Exemption Duty Test

- Primary duty involves any of the following:
 - Systems analysis techniques and procedures
 - Design, development, documentation, testing, or modification of computer systems or programs
 - Design, documentation, testing, creation or modification of computer programs related to machine operating systems
- OR a combination of these duties, the performance of which requires the same level of skills

Computer Professional Exemption

- Help desk and tech support positions are **not** exempt unless they are very high level positions
- Due to rapidly changing technology, employers must look beyond job titles to examine the nature of work being performed.

Computer Professional Exemption

- Employees engaged in creation and design of programs and systems are likely exempt
- Employees who fix broken cables or assist employees in rebooting their computers are not exempt





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Other Industry and Individual Exemptions



Highly Compensated Employees



Highly Compensated Employees

- Total annual compensation exceeds \$100,000 per year
- Perform office or non-manual work
- Customarily perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee

Employing Minors



<http://www.Ini.wa.gov/WorkplaceRights/TeenWorkers/default.asp>

Child Labor Exemptions

- Limited Overtime
 - Most minors will not work more than 40 hours per week (L&I hour restrictions)
 - Teens 16 and up may work up to 8 hours of overtime during non-school weeks
- Minimum Wage Exemption
 - Teens ages 14 to 15 can receive 85% of the minimum wage (\$7.81)
- Special Overtime and/or Minimum Wage Exemptions
 - Family business
 - Agriculture
 - Theater
 - Newspaper delivery
 - Harvesting and making decorative evergreen wreaths at home

Industry Exemptions



<http://www.lni.wa.gov/WorkplaceRights/Wages/Overtime/Exemptions/default.asp>
<http://www.dol.gov/whd/industry.htm>

Retail or Service Commissioned Sales

- Overtime exemption if all three criteria met:
 1. Employed by “retail or service establishment”
 - E.g. department store, drug store, restaurant, theater (see L&I Administrative Policy ES.A.10.3 for complete list)
 2. Regular rate of pay is greater than 1.5 times the minimum wage for every hour worked in a workweek in which overtime hours are worked.
 3. More than half of wages during representative period (not less than one month) are from commissions on goods or services.

Cars, Trucks and Farm Implements Sales & Service

- Overtime exemption for salespeople, parts workers, and mechanics selling or servicing automobiles, trucks, or farm implements to ultimate purchasers.
- Overtime exemption for salespeople selling trailers, boats, or aircraft
- Commission sales: overtime exemption applies if employee receives regular pay greater than 1.5 times minimum wage and is paid primarily on a commission basis.

Health Care Industry

- Alternative overtime calculation.
- Compute employees' overtime using a 14 day work period.
- Employees may receive 1.5x regular rate of pay for over 8 hours in a workday or 80 hours in any 14 day period, whichever is greater.
- Employees must agree to the arrangement (collective bargaining agreement or otherwise consented to).

Transportation

- **Motor carriers:** Overtime exemption for drivers, driver's helpers, loaders, and mechanics of passenger buses, trucks, and certain other motor carriers engaged in interstate commerce.
- **Air carriers:** Overtime exemption for airline employees, but not to airport/flight personal who spent over 20% of time on repairs, instruction or plane/part sales.
- **Railroads, express companies, water carriers and oil pipeline companies:** Overtime exemption for enterprises involved in the transport of passengers or property by rail and/or water.

Law Enforcement/Fire Protection

- May establish a “work period” ranging from 7 to 28 days in which overtime need only be paid after a specified number of hours in each work period.
- Overtime exemption for fire/police employees of public agencies with less than five employees during workweek.
- Can give compensatory time in lieu of cash overtime payments.

Other Exempt Workers - Overtime

- Deckhands/seamen on American vessels
- Vessel operating crews on WA Ferries operated by DOT
- Domestic service workers (live at workplace)
- Movie theater employees
- Employees of youth camps focused on personal development (e.g. YMCA, church camp)
- Inmate, resident, or patient care workers of municipal institutions

Other Exempt Workers - Overtime

- Local delivery drivers
- Public officials
- Farm workers on larger farms
- Bulk oil distribution employees
- Announcers, news editors and chief engineers at radio/TV stations in small communities
- Taxicab drivers: If more than 20 hours of workweek on non-driving duties, not exempt

Other Exempt Workers – Overtime and Minimum Wage

- Family members: Exempt if the only regular employees are immediate family (parent/spouse/child) of the owner of a family business/establishment
- Fishermen
- Seamen on foreign vessels
- Newspaper delivery people
- Casual babysitters/elder companions
- Farm workers on small farms
- Small logging operations
- Employees of local newspapers
- Switchboard operators at small public phone companies

Exemptions Under Special Certificates

- Exempt from overtime or minimum wage requirements if employer obtains an authorizing certificate from DOL Wage & Hour Division:
 - Full-time students
 - Learners
 - Student learners
 - Apprentices
 - Disabled employees
 - Messengers (letters, not packages)



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Avoiding and Correcting Misclassifications



Practical Suggestions for Employers

- Wage and hour audit
- Personnel policy review
- Job description/title review
- Training payroll and management employees on deductions
- Recordkeeping

Learning About Classification Problems

- Self-audit or attorney audit
- Demand letter or employee inquiry
- Government audit
- Lawsuit

Correcting Misclassifications

- Correct improper deductions right away
- Adopt clear policy prohibiting improper deductions and providing reporting process

Correcting Misclassifications

- Reclassification (I/C to employee or exempt to nonexempt)
 - Don't delay, but plan carefully
 - Legal advice
 - Evaluate emotional and management issues; adjust duties?
 - Back pay? Timing is crucial
 - Employee communication / management training



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WAGE AND HOUR COMPLIANCE – BEYOND THE BASICS (Part 1)

Presented by: Foster Pepper PLLC
Wednesday, February 13, 2013



Speaker Bios

Presented by:





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Practices

Litigation and Dispute Resolution
Real Estate
Business
Employment and Labor Relations

Industries

Transportation Industries CHAIR
Infrastructure
Yacht and Aircraft
Retail

Practice Summary

Steve is a member with more than 25 years of litigation experience as a trial lawyer in four state jurisdictions. He concentrates his litigation practice on a variety of commercial, personal injury, transportation, regulatory, employment, product liability, and other matters. Steve has represented numerous local and national companies, including commercial property managers, transportation companies and consumers, fishing enterprises, tech industry businesses, and many others.

His transportation and logistics experience extends to all modes (domestic and international maritime, trucking, aviation and railroad). It includes cargo litigation, international trade and border security law, defense of personal injury claims, employment, insurance coverage, and general commercial disputes. Steve represents transportation companies in regulatory matters before various state and local government agencies.

Experience

Foster Pepper PLLC
Member, 2010-Present

Betts, Patterson & Mines, P.S.
Shareholder, 1997-2010

Bar Admissions

Washington

Alaska

New York

District of Columbia

United States District Courts
Western and Eastern Districts of Washington
Southern District of New York
District of Alaska

United States Courts of Appeal
Ninth Circuit

United States Court of International Trade

Activities

Anchorage Bar Association

Association of Transportation Law Professionals
National President, 2005-2006
Puget Sound Chapter President, 1999-2000

Conference of Freight Counsel

Defense Research Institute

Maritime Law Association of the United States
Proctor in Admiralty

National Industrial Transportation League
Associate Member

Seattle Transportation Club

Transportation Club of Tacoma

Transportation Lawyers Association
Co-chair, Admiralty and Maritime Law Committee

Washington Defense Trial Lawyers Association

Washington State Bar Association
Litigation Section

Publications

Steve is a prolific writer. He has authored numerous articles under his monthly column, *Legal Lookout*, as the western United States member of ForwarderLaw (an internet-based repository of legal resources of interest to the shipping community - www.forwarderlaw.com); and as co-editor of the Motor Column of ATLP Highlights. He is a frequent contributor to *The Transportation Lawyer* (published by the Transportation Lawyers Association).

LEGAL LOOKOUT

(To read articles written before 2010, visit the Legal Lookout ARCHIVES page.)

December 2012 - Competitors of a said-to-be fraudulently documented water carrier have no private right of action under state law

November 2012 - Classification Societies probably don't have duties to third parties, but even if they do, a "reckless misconduct" standard is tough to meet.

October 2012 - Product liability in the maritime law context: a federal court sitting in Admiralty sorts out state law issues.

September 2012 - COGSA can contractually kick in only after carrier takes custody

July-August 2012 - MAP-21: New Surface Transportation Legislation Overcomes Political Obstacles to Bring Law Closer to Industry Realities

June 2012 - A P&I primer: how the ocean shipping industry insures itself.

May 2012 - The Harbor Maintenance Tax: what's it really doing to the U.S. port volumes and imports; and what should be done about it?

April 2012 - A consignee isn't liable for damage to carriers' equipment caused by bad packaging; or Ocean Transportation Intermediaries' oft ambiguous role revisited.

March 2012 - Burdens of proof in COGSA claims: Ping Pong, anyone?

February 2012 - You snooze, you lose: how the passage of time can bar maritime claims.

January 2012 - The Discretionary Function Exception to Uncle Sam's Waiver of Sovereign Immunity shields Coasties from liability.

December 2011 - Transportation Service Providers Other Than Carriers Limit Their Liability Too!

November 2011 - Mitigation of damages: the plaintiff's duty to its wrongdoer

October 2011 - The evolution of ocean shipping deregulation continues: FMC considers relaxing its requirement of specified rates in service contracts.

September 2011 - The Pennsylvania Rule: Violation of a Safety Regulation Creates Presumption of Fault

August 2011 - The Intersection of Admiralty's Limitations – of Liability and Right to a Jury Trial

July 2011 - Regal Beloit/Kirby revisited: The Supreme Court's statutory analysis takes subsequent case law off course.

June 2011 - Charter parties: who's the "carrier" for purposes of COGSA liability?

May 2011 - Two maritime law queries: What constitutes "discharge" and "delivery" commencing the time to give notice of claim; and is a freight forwarder an "agent" in its relationships with ocean carriers and shippers?

April 2011 - Blurred lines: An intermediary's roles as cargo owner, dispatcher, and controller of trucking operations produce huge accident liability.

March 2011 - "It's just not fair": the doctrine of Unjust Enrichment under maritime law

February 2011 - The impact of a complex charter party arrangement on cargo liability.

January 2011 - But what about my attorneys' fees?!?!

November-December 2010 - The politics of piracy: contemporary U.S. law addresses a timeless issue.

October 2010 - "The Shipping Act of 2010": the Evolution Continues...

September 2010 - Expanding vessel owner liability and the rights of injured seamen: punitive damages are recoverable in vessel unseaworthiness claims.

July-August 2010 - Regal Beloit: Somo Japan and kin step aside – the U.S. Supreme Court strikes back by clarifying that Kirby applies to interstate connecting hauls.

June 2010 - The Outer Continental Shelf Land Act: the law's increasing recognition of land-based, maritime personal injury

May 2010 - NVOCC Tariff Exemption: Deregulation's stepchild continues making progress toward parity with its industry peers.

April 2010 - Saving Ryan: vessel owners who utilize employees of other maritime service providers must indemnify their employers for personal injury liability.

March 2010 - Who's an ocean carrier's "agent" for purposes of extension of COGSA to land-based service providers?

February 2010 - A "customary freight unit" can be determined by flat rate a carrier charges for entire load, but the Rotterdam Rules might change the outcome ...

January 2010 - Suit in a non-designated forum results in dismissal of case – and sanctions

HOT MOTOR CARRIER LAW

January 2013 - Recent Cases in Motor Carrier Law

November 2012 - Recent Cases in Motor Carrier Law

September 2012 - Recent Cases in Motor Carrier Law

July 2012 - Recent Cases in Motor Carrier Law

May 2012 - Recent Cases in Motor Carrier Law

March 2012 - Recent Cases in Motor Carrier Law

January 2012 - Recent Cases in Motor Carrier Law

November 2011 - Recent Cases in Motor Carrier Law

September 2011 - Recent Cases in Motor Carrier Law

July 2011 - Recent Cases in Motor Carrier Law

May 2011 - Recent Cases in Motor Carrier Law

March 2011 - Recent Cases in Motor Carrier Law

January 2011 - Recent Cases in Motor Carrier Law

November 2010 - Recent Cases in Motor Carrier Law

September 2010 - Recent Cases in Motor Carrier Law

July 2010 - Recent Cases in Motor Carrier Law

May 2010 - Recent Cases in Motor Carrier Law

March 2010 - Recent Cases in Motor Carrier Law

THE INTERMODAL LEAD

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ADDITIONAL PUBLICATIONS

What's up on the Washington Wharves? Developments in the U.S. Pacific Northwest's Ports
(presented at the Canadian Transportation Lawyers Association 2010 Conference)

Maritime Modal Update
(presented at the Transportation Lawyers Association 2010 Conference)

By Land or By Sea... A Comparison of the Fundamentals of the Carmack and COGSA Liability Regimes
(presented at the Transportation Lawyers Association 2009 Conference)

Presentations

How to Protect Evidence of a Trucking Accident from Crash to Trial

Speaker, Safety Management Council of the Washington Trucking Association, Fife, WA - December 2012

Update in Recent Regulatory and Legislative Developments

Speaker, Conducting Effective Workplace Investigations, Seattle, WA - February 22, 2012

Kirby-Sompo Japan-Royal Beloit

Speaker, Federal Bar Association Admiralty Committee & WSBA CLE Course, Seattle, WA - October 21, 2011

Evolution from the Sea

Speaker, Transportation Lawyers Association Webinar Series: Brief Survey of Maritime Law's Origins, Impacts and Future - August 11, 2011

The Jones Act: How vessel operators are their employees' *de facto* comprehensive life, health and disability insurers

Speaker, 43rd Transportation Law Institute, Kansas City, MO - October 22, 2010

West Coast Port and Marine Developments

Speaker, 2010 Canadian Transport Lawyers Association Annual Conference, Vancouver, B.C. Canada - September 25-30, 2010

Multimodal Lightning Round

Speaker, 2010 TLA Annual Conference and CTLA Mid-Year Meeting, Hilton Head Island, SC - April 30, 2010

Legal Implications of Insurance Coverages Available to Transportation Intermediaries

Speaker, TIA 32nd Annual Convention and Tradeshow, Tucson, AZ - April 8, 2010

Honors & Awards

Washington Super Lawyers®, 2008-2012

Education

American University, J.D., 1986

Tulane Law School, LL.M. in Admiralty, 1994

Middlebury College, M.A. in Russian studies, 1985

Moscow's Pushkin Institute, Certificate, 1983

University of North Carolina, B.A. in Russian studies, 1982

Personal / Interests

College sports, running, scuba diving, reading, fitness

Languages: Fluent in Russian



P. Stephen DiJulio

E-mail: dijup@foster.com
Tel: 206-447-8971 / Seattle
Fax: 206-749-1927



Practices

Municipal Government
Land Use
Litigation and Dispute Resolution
Employment and Labor Relations
Environmental
Real Estate

Industries

Right-of-Way CHAIR
Energy and Utilities
Infrastructure
Construction
Education and Schools
Sustainable Development / Green Building
Transportation Industries
Sports and Sports Facility

Practice Summary

Areas of Concentration:

Appellate Team
Condemnation and Eminent Domain
Design-Build
Public Disclosure Team
Real Estate Litigation
School Law

Steve's practice focuses on litigation involving state and local governments; civil service and public employment; and, land use and environmental law. His particular experience includes representation of jurisdictions on eminent domain, utilities (water, wastewater, storm water, solid waste systems), local improvement districts, facility siting and contractor litigation.

Experience

Foster Pepper PLLC
Member, 1990-Present
Associate, 1986-1990

City of Kent - Kent, Washington
City Attorney, 1982-1986

City of Seattle - Seattle, Washington
Assistant City Attorney, 1977-1982

Bar Admissions

United States District Court, Eastern District of Washington, 1993

United States Court of Appeals for the Ninth Circuit, 1980

Supreme Court, State of Washington, 1976

United States District Court, Western District of Washington, 1976

Representative Cases

Brower v. State/Football Northwest

137 Wn.2d 44, 969 P.2d 42 (1998) (Successful defense of public-private stadium project and legislative referendum).

Central Puget Sound Regional Transit Authority v. Miller

156 Wn.2d 403, 128 P.3d 588 (2006) (successful defense of Sound Transit eminent domain action)

HTK v. Seattle Popular Monorail

155 Wn.2d 612, 121 P.3d 1166 (2005) (successful defense of municipal condemnation authority)

Servais v. Port of Bellingham

127 Wn.2d 820, __ P.2d __ (1995) (amicus for Washington Public Ports Association in defense of protected public records).

Klickitat Citizens v. Klickitat County

122 Wn.2d 619, 860 P.2d 390 (1993) (Defense of comprehensive plan and environmental impact statement).

Rabanco v. King County

125 Wn.App. 794, 106 P.3d 802 (2005) (successful defense of county solid waste management authority)

Wong, et al. v. City of Long Beach

119 Wn. App. 628, 82 P.3d 259 (2004) rev. denied 152 Wn.2d 1015 (2004) (successful defense of city trail project)

Washington Waste Systems, Inc. v. Clark County

115 Wn.2d 74, 794 P.2d 508 (1990) (Defense of multi-million dollar government contract procurement).

Barnier v. City of Kent

44 Wn. App. 868, 723 P.2d 1167 (1986) (Defense of development assessment process).

Tiffany Family Trust v. City of Kent

119 Wn. App 262, 77 P.3d 354 (2003); affirmed 155 Wash.2d 225, 119 P.3d 325 (2005) (successful defense of assessments and rejection of civil rights claims)

Grant County Fire District No. 5 v. Moses Lake

Supreme Court, 150 Wn.2d 791, 83 P.3d 419 (2004) (Court reconsiders and unanimously reverses earlier ruling; affirms city annexation authority)

Jensen v. Torr

44 Wn. App. 207, 721 P.2d 992 (1986) (Defense of government permit process and immunity of government officials).

Prater v. City of Kent

40 Wn. App. 639, 699 P.2d 1248 (1985) (Defense of claims of discrimination in employment).

Babcock v. Mason County Fire Dist. No. 6

144 Wn.2d 774, 30 P.3d 1261 (2001) (amicus for Fire Commissioners Association regarding public duty doctrine)

Little Deli Marts, Inc. v. City of Kent

108 Wn. App. 1, 32 P.3d 286 (2001); 107 Wash. App. 1011 (2001) rev. denied 145 Wn.2d 1030 (2002) (successful defense of local improvement district process)

City of Seattle v. Auto Sheet Metal Workers Local 387

27 Wn. App. 669, 620 P.2d 119 (1980) (Defense of City charter and personnel system reorganization).

Leonard v. Civil Service Commission of City of Seattle

25 Wn. App. 699, 611 P.2d 1290 (1980) (Judicial review of administrative proceedings).

Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.

103 Wn. App. 411, 12 P.3d 1022 (2000) rev. denied 143 Wn.2d 1013 (2001) (successful defense of connection charges)

Petersen v. City of Seattle

21 Wn. App. 108, 583 P.2d 1259 (1978) (Constitutionality of reckless driving laws upheld).

City of Seattle v. Platt

19 Wn. App. 904, 578 P.2d 873 (1978) (Prosecution and public record defense in criminal proceedings).

City of Seattle v. Shepherd

93 Wn.2d 861, 613 P.2d 1158 (1980) (upholding crime victims' rights to recovery of stolen property)

Activities

Municipal League

Board of Trustees, 2010-Present

Washington State Association of Municipal Attorneys

International Municipal Lawyers Association

American Bar Association

Member, State and Local Government Law and Labor and Employment Law Sections

Washington State Bar Association

Member, Environmental and Land Use Law and Administrative Law Sections

Member, Amicus Brief Committee

Featured in 2009 Foster Pepper Pro Bono Annual Report

Pro Bono in Action - Advocating for Victim's Rights

King County Bar Association

Trustee, 1986-1989

South King County Bar Association

Trustee, 1986-1988

South King County Legal Clinic
Attorney Coordinator, 1985-1986
Volunteer, 1978-1989

University of Washington
Lecturer / Affiliate Professor, Evans Graduate School of Public Affairs
Winter Quarter 2001, "The Law of Public Administration"

Publications

Steve DiJulio is a contributor to Foster Pepper's Local Open Government Blog.
Check out the latest news in this fast-changing area at:www.localopengovernment.com.

A Blessing on Your Meeting?
Co-Author, *MRSC In Focus: Council/Commission Advisor* - April 2012

Giving for the City: Constitutional Limits on Municipal Economic Development Programs
Cityvision Magazine - March/April 2012

2011 Washington Real Property Deskbook: Causes of Action, Taxation, Regulation
Editor

Council Meeting Conduct and Citizen Rights under the First Amendment
Author, Municipal Research and Services Center of Washington - November 2009

News

Breaking Down Freedom of Information Laws
The Willis Report, FOX Business News - July 29, 2010

Presentations

Basic Training for New Commissioners and Staff; Annual Legal Update
Presenter, 2012 Civil Service Conference, Wenatchee, WA - September 2012

Basic Training for New Commissioners and Staff; Annual Legal Update
Presenter, 2011 Civil Service Conference, Ellensburg, WA - September 2011

Basic Training for New Commissioners and Staff; Annual Legal Update
Presenter, 2010 Civil Service Conference, Yakima, WA - October 2010

Basic Training for New Commissioners and Staff; Annual Legal Update
Presenter, 2009 Civil Service Conference, Wenatchee, WA - September 2009

LIDs: Nuts and Bolts
Speaker, Washington State Association of Municipal Attorneys (WSAMA)
Fairmont Chateau Whistler, British Columbia - May 2008

Newly Elected Officials Workshop
Speaker, Association of Washington Cities
Yakima, Spokane, Lynnwood, & Tacoma - January 2008

Eminent Domain
Speaker, Lorman Seminar - Tacoma, WA - September 2006

Knowing the Legal Territory

Association of Washington Cities, 1988-2006 (Newly Elected Officials Workshop).

Road and Access Law in Washington

National Business Institute, 1999 and 2001

Inverse Condemnation Issues in the Direct Condemnation Setting

Law Seminars International, Seattle, November 2000; Seattle, December 1999; Bellevue, December 1998; and other programs

Washington State Association of Fire Chiefs

Executive Officer Labor Relations Training Courses, 1998, 1993, 1992, 1989

The People's War: In the Trenches with Nuisances, NIMBYs, and Essential Public Facilities

Washington State Bar Association, Environmental & Land Use Law Section - May 1997

The ABCs of LUDs

Washington Public Utility Districts Association, Mt. Vernon - July 1996, 1997

Honors & Awards

Best in the Business: Leading Lawyers in the Puget Sound Region, *Seattle Business* magazine
Appellate Practice, 2013

The Best Lawyers in America® - Appellate Practice, 2012-2013

Washington Super Lawyers®, 2002-2012

2010 Top Lawyer, *Seattle Metropolitan* magazine

Martindale-Hubbell AV rating

Education

Seattle University, J.D., 1976

University of Washington, B.A., 1973 (Oval Club Scholastic Honorary)



Alicia M. Feichtmeir

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Tel: 206-447-8929 / Seattle

Fax: 206-749-2003

Practices

Litigation and Dispute Resolution
Employment and Labor Relations

Industries

Transportation Industries

Practice Summary

Areas of Concentration:

Adversarial Proceedings / Litigation
Electronically Stored Information - ESI Squad
Employment Counseling
Environmental Litigation
Intellectual Property
Public Disclosure Team
Privacy, Security and Data Protection

As a member of the Litigation group, Alicia's practice focuses on resolution of civil cases, including employment disputes, commercial litigation, environmental and regulatory issues. She counsels clients on all aspects of the litigation process, including case strategy, risk evaluation, discovery and trial planning.

In her employment practice, Alicia has experience defending managers in litigation involving discrimination, wrongful discharge and unemployment claims. She has assisted employers with preventative work including employee handbooks and management policies.

Experience

Foster Pepper PLLC
Associate, 2010-Present
Summer Associate, 2008

Solid Ground (Fremont Public Association)
Legal Intern, 2007-2008

Immigrant Families Advocacy Project, University of Washington School of Law
Volunteer Advocate, 2007-2009

Seattle Art Museum
Community Campaign Coordinator, 2005-2006

Bar Admissions

U.S. District Court
Western District of Washington, 2011
Eastern District of Washington, 2011

Washington, 2009

Activities

Federal Bar Association of the Western District of Washington
Website/Communications Committee Co-Chair, 2011-Present

Solid Ground Family Assistance Program
Advisory Board Member, 2009-Present

Featured in 2010 Foster Pepper Pro Bono Annual Report
KCBA Housing Justice Project
In the Community - Seattle Municipal Court Conflict Attorney Panel

Publications

Alicia Feichtmeir is a contributor to two of Foster Pepper's blogs:
Local Open Government Blog - www.localopengovernment.com
Washington Workplace Law Blog - www.washingtonworkplacelaw.com

Advocating for the Native American Child: Comprehensive Overview of the Indian Child Welfare Act
Chapter Contributor, Native American Practice Group and CASA CLE Manual - November 2008

News

Judicial Candidates Pledge Ethical Campaigns
May 20, 2010

Presentations

"Mandatory/Permissive Bargaining" and "Public Records/Information Disclosure"
Speaker, Managing the Process of Labor Relations, Spokane, WA - October 2011

Education

University of Washington School of Law, J.D., 2009
Articles Editor, *Washington Law Review*
Alumnae Event Chair, Law Women's Caucus

Wesleyan University, B.A., Sociology, 2003

Personal / Interests

Alicia's interests include attending local arts & cultural events, practicing yoga and dance, sampling international cuisine, and travelling throughout Europe, North Africa and Southeast Asia.



Steven R. Peltin

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Fax: 206-749-2094



Practices

Employment and Labor Relations CHAIR

Industries

Emerging Companies and Venture Capital
Retail

Practice Summary

Steve's practice covers the gamut of employment and labor law. His advice practice is dedicated to helping employers solve problems such as employee discipline and discharge, leaves of absence, discrimination and harassment claims, and threats of employee violence. Steve enhances employee handbooks and prepares and negotiates employment, confidentiality and non-compete agreements. He also counsels executives and professionals on employment and separation agreements, and assists with corporate transactions such as purchases and sales of businesses.

On the litigation side, Steve represents public and private employers in lawsuits claiming discrimination, harassment, wrongful discharge and violations of wage and hour, employee benefits, trade secrets and non-compete obligations. He also appears before local, state and federal administrative agencies and arbitrators in employment and labor matters.

Experience

Foster Pepper PLLC
Member, 2010-Present

K&L Gates LLP / Preston Gates & Ellis, LLP
Partner, 1998-2010

Georgia-Pacific Corporation
Senior Counsel, 1996-1998

Alzheimer & Gray, Chicago, IL
Associate and Partner, 1986-1996

Isham Lincoln & Beale, Chicago, IL
Associate, 1983-1986

U.S. District Court for the Western District of Wisconsin
Law Clerk for Hon. John C. Shabaz, 1982-1983

Bar Admissions

Washington, 1999

Illinois, 1983

Representative Cases

Won a jury trial for an employer accused of age discrimination by laid-off union employee.

Prevailed in a hearing before the United States Department of Labor brought by a union business agent who claimed that the company conspired with the union to discharge him.

Co-counsel in class action claiming pay for commuting in company vehicle; certification defeated and individual claim resolved promptly.

Co-counsel for large employers in two US Department of Labor collective actions claiming that employees worked off the clock; summary judgment obtained in one case, and the other was settled favorably.

Won summary judgment on discrimination / harassment claim for financial services company.

Obtained temporary restraining orders in two cases where employees removed and refused to return computerized documents and information.

Won summary judgment on sex bias claim by male employee of performing arts client.

Convinced OSHA that a safety whistleblower on a construction site was not subject to a hostile work environment.

Obtained anti-harassment orders against former employees.

Defended company in ERISA case brought by former executive seeking payments under a Supplemental Executive Retirement Plan.

Representative Transactions

Employment and labor counsel in sales of business, including drafting of purchase agreement language, preparation of offer letters, executive employment agreements and employee communications.

Assistance to client in reductions in force.

Counseling of clients facing threat of workplace violence.

Creation of documentation for background investigations, hiring, leaves of absence, requests for disability accommodation, last chance agreement and severance agreements.

Preparation on policies such as travel pay, use of cell phones and blogging.

Management training on employment law topics, including avoiding harassment and discrimination, performance management and hiring.

Activities

Seattle Theatre Group
Board of Directors
Executive Committee

University Preparatory Academy
Board of Directors 2011-2012
Chair of Personnel Committee 2011-2012

Publications

Steve Peltin is a frequent contributor to Foster Pepper's Washington Workplace Law blog.
Check out the latest news in this fast-changing area at: www.washingtonworkplacelaw.com.

- Employee or Independent Contractor? Washington Supreme Court Changes the Rules (Parts 1 and 2)
- Employee or Independent Contractor? Washington Supreme Court Changes the Rules
- Not So Fast III: NLRB Employer Posting Requirement Again Delayed
- Back to Basics: Family and Medical Leaves (Parts 1, 2, 3 and 4)
- Can't I Require a Job Applicant to Have a High School Diploma?
- Not So Fast II: NLRB Again Delays Employer Posting Requirements
- Court Rejects Arbitration Award Reinstating Employee Who Hung Noose at Work
- Interns & Volunteers: Do We Really Have to Pay Them?
- Letting Someone Else Dig for the Dirt: Hiring Vendors to Assist in Social Media Searches
- Some Things Don't Have to Be In Writing: Supreme Court Protects Employees Against Retaliation After Making Verbal Complaints of Wage and Hour Violations
- Unsafe at Any Speed: Unauthorized Passengers in Employer-Owned Vehicles May Sue Employer for Driver's Negligence

Effective Negotiation of Executive Employment Agreements

Author, *Inside the Minds: Negotiating and Employment Agreements, Leading Lawyers on Constructing Effective Employment Contracts*, 2012 Edition

Employers: Beware of High School Diploma Requirements

Author, *WIB HR & Training Digest* - February 2012

Bad Acts: Smaller Employers Should Confront Threats of On-The-Job Physical Assaults

Author, *Washington Journal*

Telecommuting: Legal and Management Risks For Employers

Author, *Corporate Counsel Magazine*

Reducing Telecommuting Management Risks

Author, *National Underwriter Magazine*

How To Reduce Workplace Violence

Author, *National Underwriter Magazine*

Whose Workforce Is It Anyway? The Worker Adjustment and Retraining Act in the M&A Context

Author, *Preston Gates & Ellis LLP E-Alert*

50-State Survey of Employment Libel and Privacy Law, Washington Chapter

Author, *Media Law & Resource Center*

Hiring Employees: Disability Questions and Medical Exams

Author, *Realty & Building*

Workplace Sexual Harassment

Author, *Realty & Building*

Department of Labor Expands FMLA Leave Rights for Non-traditional Families

Author, *K&L Gates Labor and Employment Alert*

News

"In Person" Feature - Best Practices for Employers to Comply with the City of Seattle's Paid Sick and Safe Time Ordinance

Interviewed in *Puget Sound Business Journal* - November 2012

It's Not Just Paid Time Off -- It's the Law: Attorneys explain what Seattle's new sick leave ordinance means for employers

Quoted in *Puget Sound Business Journal* - September 2011

Your Office Away from the Office

Quoted in *Utah CEO Magazine*

Keeping violent employees out of the workplace

Quoted in *Risk Management Magazine*

10 Considerations in Developing Telecommuting Policies and Agreements

Quoted in HR.COM

Presentations

Filling the Empty Chairs: Legal and Effective Hiring

Speaker/Moderator, Foster Pepper Client Briefing

Out of Sight But Not Out of Mind: *Untangling Leave of Absence Requirements*

Speaker, 15th Annual Labor & Employment Law Seminar, The Seminar Group

Understanding Seattle Paid Sick and Safe Time

Speaker, Washington Trucking Associations

Speaker, Northwest Marine Trade Association

Seattle Paid Sick and Safe Time: Practical Guidance Employers Need to Know

Speaker/Moderator, Foster Pepper Client Briefing

Legal Issues for Startups: Employment Law

Presenter, SURF Incubator

Employment Law Challenges for Public Employers and Current Developments under the Public Employees Collective Bargaining Act

Panelist, 2012 Association of Washington Housing Authorities (AWHA) Meeting

Reasonably Accommodating Employees with Disabilities

Speaker/Moderator, Foster Pepper Client Briefing

High-Stakes Employment and IP Protections: Protect your Company from Increasing Employment Risks and Shield your Valuable Intellectual Property

Panelist, Foster Pepper and Washington State Chapter of ACC America

Conducting Effective Workplace Investigations

Speaker/Moderator, Foster Pepper Client Briefing

Managing the Process of Labor Negotiations

Panelist, Washington Fire Commissioners Association 63rd Annual Conference

Out of Sight but Not Out of Mind: Untangling Employer Obligations under FMLA and Other Leave Statutes

Speaker/Moderator, Foster Pepper Client Briefing

FMLA and Leave Law

Speaker, 14th Annual Labor & Employment Law Conference, The Seminar Group

Social Media in the Workplace

Speaker/Moderator, Foster Pepper Client Briefing

Payroll Management

Speaker, Lorman Educational Services

Time Off: State and Federal Laws on Employee Leave, Vacations and Holidays

Speaker, Lorman Educational Services

When Hand Washing is Not Enough: Legal Challenges Presented By the Flu Pandemic

Speaker, K&L Gates Breakfast briefing

Recent Developments under the Family and Medical Leave Act

Speaker, National Council of State Housing Agencies

10 Scary Issues You Need to Know About Your Employees

Speaker, ASTRA Women's Business Alliance

New Developments in Employment Law

Speaker, Seattle CFO Arts Roundtable

Best Practice in FMLA Administration

Speaker, Council on Education in Management

Conducting Effective Investigations Into Employee Complaints

Speaker, PUD and Municipal Attorneys Association

Cyberstalking: The Washington Employer's Perspective

Speaker, King County Bar Association

Blowing the Whistle: Policies & Procures under Sarbanes-Oxley

Speaker, Preston Gates & Ellis LLP Breakfast Briefing

Workplace Investigations

Speaker, Council on Education in Management

Email and the Internet – Legal Challenges for Employers

Speaker, PUD and Municipal Attorneys Association

Minimizing Risks When Upsizing, Downsizing, and Using Alternative Work Arrangements

Speaker, Preston Gates & Ellis LLP Breakfast Briefing

Negligent Hiring Liability, Pre-Hire Investigations and the Fair Credit Reporting Act

Speaker, Preston Gates & Ellis LLP Breakfast Briefing

Honors & Awards

The Best Lawyers in America®

Labor Law – Management, 2012-2013

Litigation – Labor & Employment, 2013

Best in the Business: Leading Lawyers in the Puget Sound Region, *Seattle Business* magazine

Labor: Management, 2013

Litigation: Labor & Employment, 2013

Education

Cornell Law School, J.D., *cum laude*, 1983

University of Wisconsin-Madison, B.A., *with distinction*, 1978

Phi Beta Kappa

Personal / Interests

Raised in Milwaukee, Wisconsin

Investor and part-time employee in *Nena*, Steve's wife's gift and vintage shop in Seattle's Madrona neighborhood

Enthusiastic traveler, dog owner, and poker player



Janelle Milodragovich

E-mail: miloj@foster.com

Tel: 206-447-6220 / Seattle

Fax: 206-749-2120

Practices

Litigation and Dispute Resolution
Employment and Labor Relations
Intellectual Property
Business

Industries

Media, Entertainment and Games
Emerging Companies and Venture Capital
Transportation Industries
Retail
Wineries, Breweries and Distilleries

Practice Summary

Ms. Milodragovich advises and represents all types of employers in a broad range of labor and employment law matters, including union avoidance, wage and hour disputes, discrimination complaints, progressive discipline issues, and employee terminations. She represents corporations and small business in union negotiations, organizing campaigns, elections and labor arbitrations. Ms. Milodragovich's practice also includes representing clients in unfair labor practice proceedings and 10j actions before the National Labor Relations Board and related administrative agencies.

In addition to her traditional labor experience, Ms. Milodragovich has significant experience defending employers of all sizes in employment litigation involving claims of disability and employment discrimination, wrongful termination, and wage and hour class actions. She has extensive California litigation experience, including representing employers in California state administrative proceedings. Ms. Milodragovich works closely with Human Resource professionals to ensure clients' compliance with applicable state and federal labor laws, as well as other statutory and contractual obligations. She also serves as Publisher of Foster Pepper's Washington Workplace Law blog: www.washingtonworkplacelaw.com.

In the area of intellectual property, Janelle focuses her practice on the defense of patent infringement claims and challenges to patent validity. Janelle's experience includes the review of a diverse array of patents, including consumer products and HVAC system implementation. Her practice also includes trademark infringement litigation.

Prior to law school, Ms. Milodragovich worked as a Human Resources Generalist for a multi-state education company.

Experience

Foster Pepper PLLC
Associate, 2010-Present

Little Mendelson, PC - San Francisco, CA
Associate, 2005-2010

Office of the Washington State Attorney General, Ecology Division - Olympia, WA
Clerk, June-September 2004

Office of the Washington State Attorney General, UW Division - Seattle, WA
Clerk, June 2003-June 2004; September-December 2004

Bar Admissions

United States District Court
Eastern District of Washington, 2012
Central District of California, 2009
Northern District of California, 2006

Washington, 2010

California, 2005

Ninth Circuit Appellate Court

Activities

American Bar Association

King County Bar Association

Washington State Bar Association

California Bar Association

Serbian Bar Association of America

Publications

Janelle Milodragovich is a contributor to Foster Pepper's Washington Workplace Law blog.
Check out the latest news in this fast-changing area at: www.washingtonworkplacelaw.com.

Presentations

Filling the Empty Chairs: Legal and Effective Hiring
Presenter, Seattle, WA - October 2012

Coordination with and Management of Elected Officials
Co-Presenter, WAPELRA Fall Conference - September 2012

Employment Inquiries in the Age of Social Media
Speaker, 2012 Civil Service Conference - September 2012

Seattle Paid Sick and Safe Time: Practical Guidance Employers Need to Know
Panelist, Seattle, WA - August 2012

The NLRB's Expanding Agenda

Speaker, Employment Law Beyond the Basics, Spokane, WA - August 2012

Legal Issues for Startups: Employment Law

Presenter, SURF Incubator - July 2012

Managing the Process of Labor Negotiations

Panelist, Washington Fire Commissioners Association 63rd Annual Conference - October 2011

Civil Service & Collective Bargaining – A Short History

Speaker, 2011 Civil Service Conference - September 2011

Out of Sight, But Not Out of Mind: Untangling Employer Obligations Under FMLA and Other Statutes

Speaker, Seattle, WA - September 2011

Issues Arising From Off-Duty Use of Social Media

Speaker, Social Media in the Workplace - May 2011

Collective Bargaining and Managing The Unionized Workforce

Speaker, PNRC-NAHRO conference - May 2011

Employment-Related Due Diligence For Transactional Attorneys

Speaker, WSBA YLD Summit - April 2011

Employment Issues for Filmmakers

Co-Presenter, Washington Lawyers for the Arts - March 2011

Trends in Collective Bargaining

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Washington Workplace Law

Foster Pepper PLLC

Sixteen, Going On Seventeen: An Overview Of Washington Child Labor Laws

Posted by [Janelle Milodragovich](#) on July 26, 2011

Many Washington employers hire workers under the age of 18 to work in a variety of jobs, but they need to follow special rules. Employment of children between 14 and 17 is governed by the [Washington State Department of Labor and Industries](#) (L&I) and the [U.S. Department of Labor](#) (DOL). Absent limited exceptions, such as for agricultural or theatrical jobs, children younger than 14 ordinarily cannot be employed at all.

Federal and state regulations regarding the employment of 14- to 17-year olds are found on the DOL and L&I sites. The regulations include specific requirements and limitations unique to minor employees in areas such as [hours of work](#), [meal and rest breaks](#), and [prohibited job duties](#).

In Washington, employers must also obtain a [minor work permit](#) through L&I on their Master Business License for each work location with employees under the age of 18, and renew the permit annually. The minor work permit application may be [completed online](#).

In addition to posting the minor work permit, Washington employers must also maintain the following information about each minor worker in a file at the minor's work site:

- 1. Personal data:** Name, address, and a copy of the minor's Social Security card and [other appropriate employment documents including an I-9](#).
- 2. Proof of age:** Copy of birth certificate, driver's license, baptismal record, etc.
- 3. Job description:** Must include equipment used, such as copiers, computers, power equipment, or vehicles.
- 4. Work schedule:** Must show earliest and latest work hours ([download chart showing work hour limits, PDF](#)).
- 5. [Parent/School Authorization Form](#):** signed by parent/guardian and high school (if in session).

6. Special Variance Form: For a 16- or 17-year old high school student who wants or needs to work more than four hours a day or 20 hours per week (up to maximum 28 hours per week), a special variance form is available from the student's high school.

7. Position funding: Must pay at least minimum wage, [currently \\$8.67/hour](#) (effective January 1, 2010).

Employers must maintain employment records for three years after hiring a minor employee.

Civil and criminal penalties may be assessed for violations of state or federal child labor regulations. Under federal law, child labor violations by employers may be subject to a civil penalty up to \$11,000 per minor worker.

If you have questions about employment of minor workers, please contact the [Foster Pepper Employment and Labor Relations Practice Group](#).

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Interns & Volunteers: Do We Really Have to Pay Them?

Posted by [Steve Peltin](#) on July 15, 2011

Now that summer is here, many workplaces find new faces in the hallways: students eager for work experience. Some are willing to donate their time to gain practical experience, others wish to support a worthy organization, and still others are focused on adding to their resume. But can the organization accept the efforts of these students without paying them?

Do we have to pay our summer interns?

As a general rule, the organization must pay all persons it "employs," which is broadly defined to mean "suffer or permit to work."

Nonprofits and public sector organizations usually are permitted to offer unpaid internships, even if the intern provides services of value to the organization.

The situation with for-profit entities is different. The company first must determine whether the intern is participating in a training program (and therefore not entitled to compensation) or is simply "employed." Before permitting unpaid interns or trainees, the US Department of Labor requires the company to meet the following criteria:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If the company fails to satisfy any one of these requirements, the worker is considered an employee and [must be paid](#) at least [minimum wage](#).

Do we have to pay our volunteers?

Nonprofit and public sector organizations may have volunteers as long as the volunteers are not employees of the organization and give time and services gratuitously. There can't be any pressure or coercion to donate time, and all services must be free and voluntary.

For-profit companies cannot have volunteers. Companies must pay at least minimum wage to anyone who is permitted to work.

The US Department of Labor has offered [guidance on volunteers](#), and the Washington Department of Labor & Industries has even more complete [information](#).

Can we encourage our employees to volunteer their time, either to our organization or to other organizations?

It depends. Of course all volunteers must give their time freely, and they can't be coerced or forced to participate.

A non-profit employer need not pay employees for volunteer activities so long as the volunteers perform duties that are not similar to their paid job and the employer doesn't control the activity. However, if the employer requires or controls the volunteer work, and the activities benefit the employer, the employer may need to pay for time spent on the activities. Also, if employees on their own volition perform volunteer activities that are related to their job, and the employer knew or should have known that the employees would be participating, the employer may be required to pay for the time. For example, a charity can't require or allow a bookkeeper to voluntarily process payroll, if that is the kind of work that he completes in his paid position. However, if the bookkeeper decides on his own to hand out t-shirts at the annual 5K race, he probably would not have to be paid.

According to the [Department of Labor](#), public sector employees can't volunteer to do work that is similar to their paid job within the same jurisdiction where they work, although they may volunteer to do similar work in different jurisdictions or different kinds of work in the same jurisdiction. For example, a bus driver for the Auburn public schools could not volunteer to drive an extra shift at her elementary school for no pay. However, she could donate her time to drive for a class trip in the SeaTac schools. Or, if the driver prefers to spend her free time closer to home, the Auburn schools would not be obligated to pay her for volunteering to help restore a playground.

Private sector employees can volunteer in nonprofit and public sector in jobs that are similar to the work that they are paid to do in the business world. For-profit companies can never have volunteers doing company work without pay.

Can we give our unpaid interns and volunteers gift cards or stipends?

Yes. Volunteers and unpaid interns for nonprofit or public sector organizations can receive stipends or other nominal fees or gifts, as long as the gifts are not tied to productivity. Monthly or yearly stipends are fine, too, as are reimbursements for expenses.

However there is a limit. If volunteers are paid more than a reimbursement for expenses, reasonable benefits or a nominal fee, the nonprofit might start to establish an employment relationship with the volunteer that would be subject to minimum wage requirements. The Department of Labor has defined "nominal fee" as 20% or less of what an employee doing the same work would make. For example, a custodian who serves as a coach for the varsity track team can receive a stipend for his work without losing volunteer status, as long as the stipend is 20% or less of what the school [would have to pay an employee to do the same work](#). Note also that employers also may need to withhold taxes for stipends that exceed \$600.

If you have questions about paying interns or volunteers, please contact our [Employment and Labor Relations attorneys](#).

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Employee or Independent Contractor? Washington Supreme Court Changes the Rules

Posted by [Steve Peltin](#) on July 23, 2012

In a case with potentially sweeping impact on many Washington enterprises, the Washington Supreme Court announced a new test for determining whether a worker is an employee entitled to minimum wage and overtime, or an independent contractor entitled only to compensation set by the parties. Under the "economic-dependence test," the worker is an employee if "as a matter of economic reality," the individual "is economically dependent upon the alleged employer or is instead in business for himself." *Anfinson v. FedEx Ground Package Sys., Inc.* (click for separate [majority opinion](#) and [dissent](#))

Although the full consequences of the July 19 decision are not yet clear, many workers who have been treated as independent contractors may now have the right to minimum wage and overtime compensation, and businesses and government agencies can expect a flurry of new lawsuits, including class actions.

The Lawsuit

Randy Anfinson, a delivery driver for FedEx Ground, was engaged as an independent contractor. Along with two other drivers, Anfinson filed a class action lawsuit seeking overtime wages under the Washington Minimum Wage Act. The case was certified as a class action that covered 320 current and former drivers.

After a four week trial, the jury found that the workers were independent contractors and therefore not entitled to overtime pay. The plaintiffs appealed. The Court of Appeals and Supreme Court found the jury instructions to be erroneous and prejudicial, and sent the case back for a new trial.

The Supreme Court's Analysis

The Supreme Court rejected an eight-factor "right to control test" that formed the basis of the jury instructions. Under this test, the main issue was whether the enterprise controlled, or had the right to control, the details of the worker's performance, and the eight factors were relevant only in deciding control or right to control.

According to the Supreme Court, the correct inquiry is "whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself." Unfortunately, the Court did not list the factors it would apply to the economic-dependence test, or suggest how to flesh out the general outlines of the test. The Court referred obliquely to "competing lists of nonexclusive factors" that some federal courts use.

The dissenting Supreme Court justices objected to the absence of a definite set of factors. They wrote that employee status under the Minimum Wage Act now is governed by a single determination – whether the worker is economically dependent upon the alleged employer – and any other factor will be relevant only in deciding economic dependence. The dissenting justices concluded that economic dependence focus potentially sweeps in almost any work done by one person on behalf of another.

For its part, the majority acknowledged that the economic-dependence test will result in "a more inclusive definition of employee than does the right-to-control test." In other words, more workers will be considered employees under the economic-dependence test than under the right-to-control test.

Competing Standards

Unfortunately, the determination in the Anfinson case applies only to the Washington Minimum Wage Act. Courts and agencies, such as the Internal Revenue Service, the Washington Department of Labor and Industries, and the Equal Employment Opportunity Commission, apply different formulations. Therefore, a worker could be considered either an employee or an independent contractor depending on the law or agency. For example, a worker who qualifies as an independent contractor for federal income tax purposes might be entitled to overtime pay as an employee under the Washington Minimum Wage Act.

Conclusion

As noted above, the consequences of the Anfinson decision remains to be seen. We will continue to cover developments on the Washington Workplace Law blog. If you have a question about avoiding liability for misclassifying employees as independent contractors, please contact the [Foster Pepper Employment and Labor Relations group](#).

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Employee or Independent Contractor? Washington Supreme Court Changes the Rules - Part Two

Posted by [Steve Peltin](#) on July 25, 2012

In an article posted earlier this week, we wrote about the [Washington Supreme Court's new test](#) for determining whether a worker is an employee entitled to minimum wage and overtime, or an independent contractor entitled only to compensation set by the parties. The article described the "economic-dependence test" in general terms: the worker is an employee if "as a matter of economic reality," the individual "is economically dependent upon the alleged employer or is instead in business for himself." *Anfinson v. FedEx Ground Package Sys., Inc.*

The article noted that the Court did not list the factors it would apply to the economic-dependence test, or suggest how to flesh out the general outlines of the test, but merely referred in passing to "competing lists of nonexclusive factors" that some federal courts use. Finally, the article warned that other courts and agencies have different factors for determining whether a worker is an employee or independent contractor.

In this post we will detail the factors used by the federal courts cited in the *Anfinson* decision, as well as the factors applied under other laws.

Cases cited in Anfinson

In supporting its economic-dependence test, the Supreme Court mentioned "competing lists of nonexclusive factors" that some federal courts use, citing *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008) and *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 (9th Cir. 1979).

Hopkins applied these "non-exhaustive" factors:

- (1) the degree of control exercised by the alleged employer;
- (2) the extent of the relative investments of the worker and the alleged employer;
- (3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer;

- (4) the skill and initiative required in performing the job; and
- (5) the permanency of the relationship.

Real applied these factors:

- (1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
- (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
- (4) whether the service rendered requires a special skill;
- (5) the degree of permanence of the working relationship; and
- (6) whether the service rendered is an integral part of the alleged employer's business.

Other formulations

The *Anfinson* case applies only to the [Washington Minimum Wage Act](#). Courts and agencies apply different formulations for different laws. Therefore, a worker could be considered either an employee or an independent contractor depending on the law or agency. For example, a worker who qualifies as an independent contractor for federal income tax purposes may be entitled to overtime pay as an employee under the Washington Minimum Wage Act.

A few of those formulations, along with links to source materials, follow below:

[United States Department of Labor](#) (applying the federal Fair Labor Standards Act, governing minimum wage and overtime):

- (1) The extent to which the services rendered are an integral part of the principal's business.
- (2) The permanency of the relationship.
- (3) The amount of the alleged contractor's investment in facilities and equipment.
- (4) The nature and degree of control by the principal.
- (5) The alleged contractor's opportunities for profit and loss.
- (6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
- (7) The degree of independent business organization and operation.

Washington Department of Labor and Industries (covering workers compensation and safety requirements):

(1) Are you hiring someone for more than personal labor? ["Yes" answers tend to favor an independent contractor relationship.]

- Are they bringing employees?
- Are they bringing heavy equipment?

(2) Are you supervising?

- You ARE NOT supervising if you are only scheduling and inspecting the work.
- You ARE supervising if you are telling your worker or a subcontractor's workers how to do the job, assigning tasks, training, keeping time sheets, paying a wage or setting regular hours.

(3) Do they have an established business of their own? ["Yes" answers tend to favor an independent contractor relationship.]

- Supervision: Does the worker perform work free of your direction and control?
- Separate business: Does worker offer services that are different from what you provide? *Or*, does the worker maintain and pay for a place of business that is separate from yours? *Or*, does the worker perform service in a location that is separate from your business or job sites?
- Previously established business: Does the worker have an established, independent business that existed before you hired?
- IRS taxes: When you entered into the contract, was this person responsible for filing a tax return with the IRS for his or her business?
- Required registrations: Is the worker up-to-date on required Washington State business registrations?
- Maintains books: Does the worker maintain his or her own set of books dedicated to the expenses and earnings of the business?
- Construction trades: If the work performed is in the construction trades, does the worker have an active contractor registration or electrical contractor's license?

Internal Revenue Service (covering federal income tax responsibilities):

The IRS traditionally applied a 20 factor test enunciated in a 1987 revenue ruling. The IRS since has modified its analysis to cover three factors and a number of sub-factors. They are:

(1) Behavioral: Does the company control or have the right to control what the worker does and how the worker does the job? [These factors tend to favor an employment relationship]

- Type of instructions given (when and where to do the work; what tools or equipment to use; what workers to hire or to assist with the work; where to purchase supplies and services; what work must be performed by a specified individual; what order or sequence to follow when performing the work)
- Degree of instruction (the more detailed the instructions, the more control the business exercises over the worker)
- Evaluation system (measures the details of how the work is performed)
- Training (training on how to do the job, and periodic or on-going training about procedures and methods)

(2) Financial: Are the business aspects of the worker's job controlled by the payer (such as how the worker is paid, whether expenses are reimbursed, and who provides tools/supplies)? [These factors tend to favor an independent contractor relationship.]

- Worker's significant investment in equipment
- Unreimbursed expenses
- Opportunity for profit or loss
- Services available to the market (rather than just to one enterprise)
- Method of payment (e.g., flat fee)

(3) Type of Relationship: Are there written contracts or employee type benefits (such as pension plan, insurance, or vacation pay)? Will the relationship continue, and is the work performed a key aspect of the business?

- Written contracts (not controlling)
- Employee benefits (tend to show employee status)
- Permanency of the relationship (indefinite engagement tends to show employer-employee relationship)
- Services provided as key activity of the business (if worker's services are a key aspect of the business, it's more likely an employment relationship)

The IRS uses [Form SS-8](#) in determining whether the worker is an employee or independent contractor for federal income tax purposes.

[Equal Employment Opportunity Commission](#) (covering federal anti-discrimination law, including Title VII of the Civil Rights Act of 1964, list below found at note 67):

- (1) The employer has the right to control when, where, and how the worker performs the job.
- (2) The work does not require a high level of skill or expertise.
- (3) The employer furnishes the tools, materials, and equipment.
- (4) The work is performed on the employer's premises.
- (5) There is a continuing relationship between the worker and the employer.
- (6) The employer has the right to assign additional projects to the worker.
- (7) The employer sets the hours of work and the duration of the job.
- (8) The worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job.
- (9) The worker does not hire and pay assistants.
- (10) The work performed by the worker is part of the regular business of the employer.
- (11) The employer is in business.
- (12) The worker is not engaged in his/her own distinct occupation or business.
- (13) The employer provides the worker with benefits such as insurance, leave, or workers' compensation.
- (14) The worker is considered an employee of the employer for tax purposes (i.e., the employer withholds federal, state, and Social Security taxes).
- (15) The employer can discharge the worker.
- (16) The worker and the employer believe that they are creating an employer-employee relationship.

This list is not exhaustive. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met. Rather, the determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship.

Washington Common Law (covering the responsibility of the principal for the negligence of agents):

- (1) the extent of control which, by the agreement, the principal may exercise over the details of the work;

- (2) whether or not the worker is engaged in a distinct occupation or business;
- (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of an employer or by a specialist without supervision;
- (4) the skill required in the particular occupation;
- (5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work;
- (6) the length of time for which the worker is engaged;
- (7) the method of payment, whether by the time or by the job;
- (8) whether or not the work is a part of the regular business of the principal;
- (9) whether or not the parties believe they are creating the relation of principal and agent; and
- (10) whether the principal is or is not in business.

Hollingbery v. Dunn, 68 Wash.2d 75, 79-80 (1966).

Conclusion

The conflicting standards imposed by various courts and agencies make it difficult for businesses, non-profits and government entities to determine whether the people engaged to provide services are employees or independent contractors. Foster Pepper's [Employment and Labor Relations attorneys](#) can assist.

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