Washington State's New Smoking Ban

Legal Alert
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Garvey Schubert Barer Legal Update, February 16, 2005.

Summary of Initiative 901

As you've probably read in the newspapers, as of December 8, 2005, smoking is prohibited:

In any "workplace" in Washington – meaning any area which employees are required to pass through during the course of employment.

In any "public place" in Washington – meaning any building or vehicle used by and open to the public, for example, schools, bars, restaurants, schools, elevators, stores, bowling alleys, skating rinks, and non-tribal casinos.

Within 25 feet of entrances, exits, windows that open, and ventilation intakes for work places or public places.

In effect, Initiative 901 repealed the rules providing for designated non-smoking areas in some establishments and made every workplace and public place a designated non-smoking area. Businesses located in national parks, military installations or on federally recognized tribal lands are exempt.

You can apply to the local health department for an exception to the 25-foot rule, if you have clear and convincing evidence that unique factors presented by the location of entrances, windows or ventilation sources do not allow smoke to your building.

What the New Law Means for Your Company and Your Employees

Post "no smoking" signs at each building entrance. Retail establishments must also place signs at prominent places throughout the building.

Change your employee policies and handbooks to reflect the new law.

Advise your employees of the new law and ensure that they adhere to it in all company-controlled areas.

Make sure that any areas where employees smoke are at least 25 feet from any areas where employees must pass through.

Have an answer for the employee who asks, "Where can I smoke?"

Would Your I-9s Survive an Audit?

Several recent developments affect "I-9" procedures – the immigration-related process of verifying that a new employee is legally authorized to work in the United States. Every employer must prepare and retain I-9s for all employees, so you need to know about these issues.

Government investigations and audits of I-9 compliance appear to be increasing.

A new Form I-9 has been issued. You can continue to use the old forms, despite what some I-9 sales companies are saying, but the new form, designate as "(Rev. 5/31/05)Y," is preferred and most businesses should plan to migrate to it.

Several types of documents in "List A" are no longer acceptable to rely upon when completing the I-9: Items 2, 3, 8 and 9 have been eliminated, Form I-151 in Item 5 has been eliminated, and Form I-766 has been added to item 10. More changes are expected in 2006. Employers should advise those responsible for I-9 preparation of these changes.

If you discover that you've improperly completed an I-9, you must use a specific procedure to "fix" it. Any changes to an I-9 must be annotated, with each change showing the date of the change and the initials of the person making the change. It is illegal to change the form without following the proper procedure.

You are not required to keep I-9s forever. Establish a document retention policy and follow it. We know of employers who could have legally destroyed I-9s after their period of required retention but who suffered thousands of dollars in fines caused by errors and omissions on I-9s that could have been destroyed.

Affirmative Action Plans Subject to Increased Oversight

If your company has contracts with the federal government that require affirmative action plans, now is the time to make sure your plan complies with government requirements. The Office of Federal Contract Compliance Programs (OFCCP) has become more aggressive and is now focusing more on eliminating systematic discrimination and less on technical aspects of compliance (such as notice postings). The number of compliance reviews, cases referred for litigation, and corporate management reviews (which include glass ceiling claims by women and minorities) have all increased significantly in recent years.

Your affirmative action plan (AAP) needs to be ready for prime time at a moment's notice, because you will only have 30 days' notice of an OFCCP audit. The OFCCP uses both anecdotal evidence of discrimination and evidence that women and minorities are given lower-paying jobs and (for larger employers) a controversial multiple regression analysis to identify systemic discrimination. It can be valuable (and may be required under the new rules) to do a self-evaluation to evaluate and remedy any potentially troublesome situations, and proper involvement of a lawyer in that process may help avoid having to disclose the results.

For employers that use electronic data technologies in recruiting and hiring, the OFCCP has issued new regulations that will make compliance with the OFCCP's recordkeeping requirements easier. However, employers must get their application processes in line with the new regulations by February 2006.