



# **Best Employment Defense Strategies For Today and Tomorrow**

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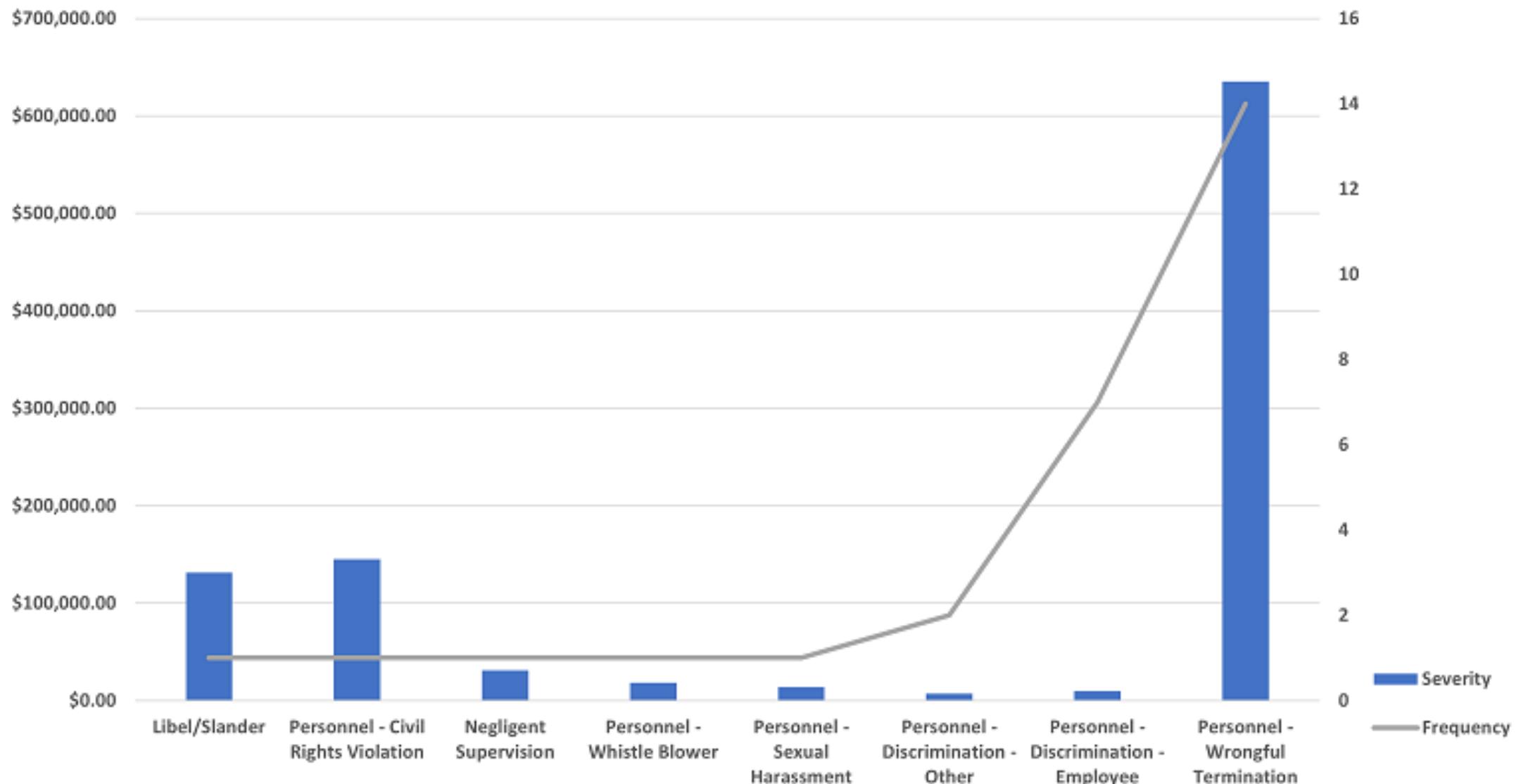


# Employment Claims

- Most are fee-shifting
- Include loss of wages and benefits
- Are legally complex (Title VII, FLSA, ADEA, FMLA, PFML, ADA)
- Offers of Judgment (OOJ) are critical
- Are costly

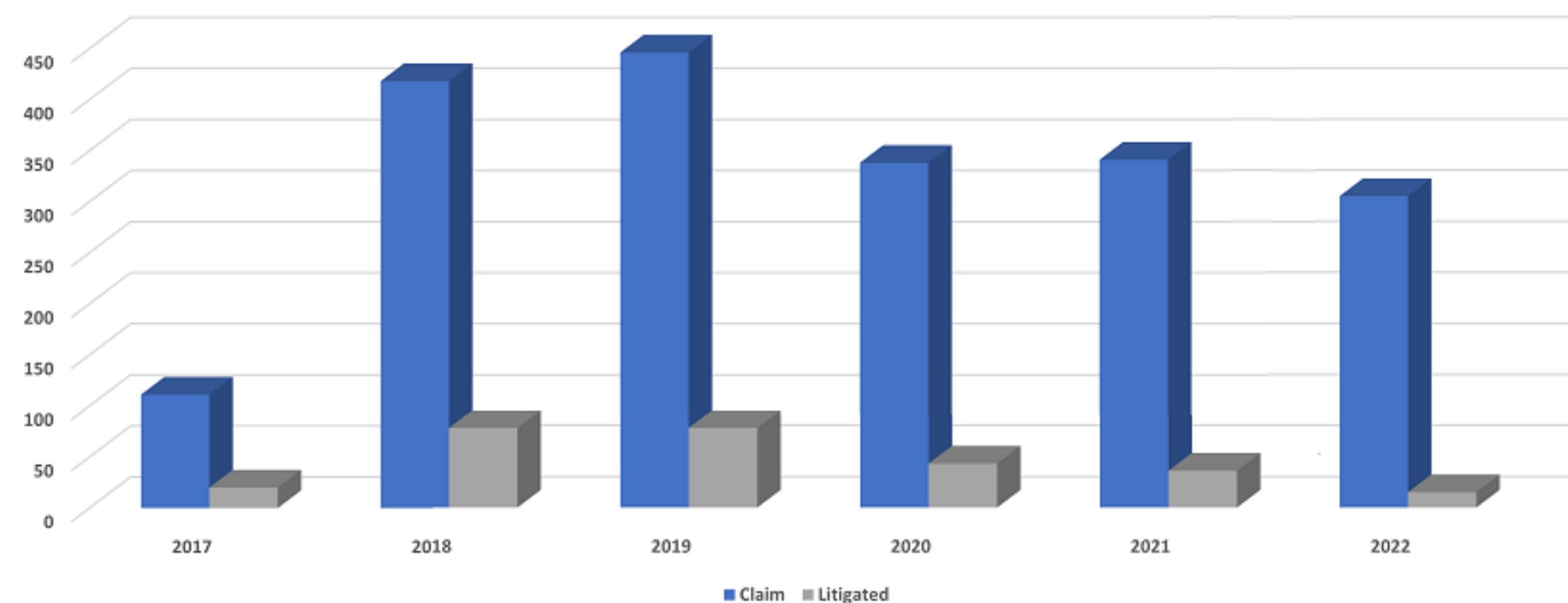


## WCRP Employment Claims – Frequency/Severity – Three Years



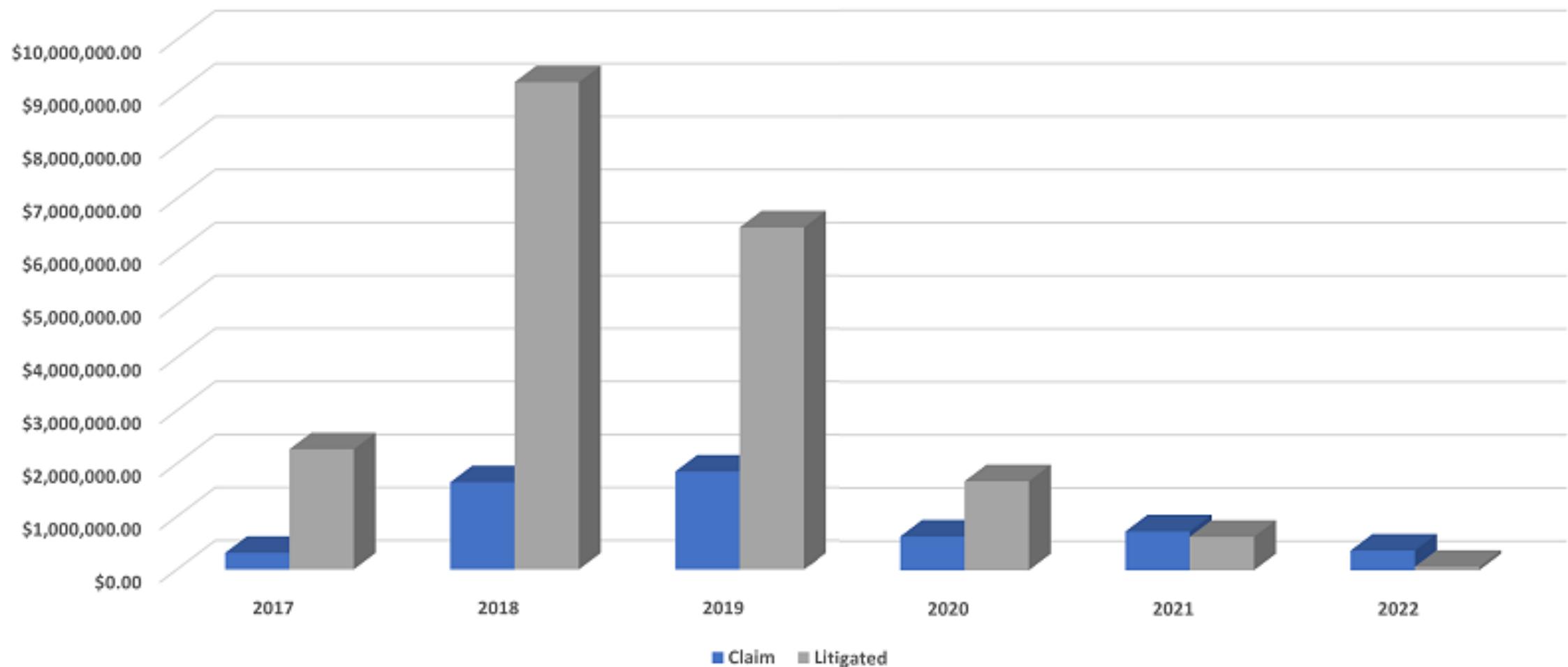
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## *Litigation vs Claim Number of Files*



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## *Litigation vs Claim By Cost*



# ROADMAP

- Workplaces are back in business!
- Today's Challenges to Resolving Cases
- Trending Issues In Employment Law
- Settlement Agreement Best Practices
- Jury Selection and Trial Procedure in the Post pandemic world



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# Workplaces are Back In Business

- The Great Resignation
- The Great Retirement
- The Great Return



# Workplaces are Back In Business

- Employment issues are popping up again
- HR staff may be rusty or overwhelmed
- Staffing challenges can lead to risky compromise
- New pandemic related issues with very little guiding precedent



# Challenges in Resolving Cases

- *Alfredo Martinez and Justin Page v. Southern California Edison Co. and Edison International, June 2022*
  - Sexual harassment and retaliation for reporting the misconduct
  - Total jury verdict = **\$464,577,265**
  - \$440,000,000 in punitive damages
  - Lack of adequate investigation, cover up, retaliation for reporting



# Challenges in Resolving Cases

- *Yarborough, et al. v. Glow Networks*, E.D. of Texas, February 2022
  - Section 1981 race discrimination suit by 10 employees
  - **Total jury verdict = \$70,000,000**
  - Title VII/Section 1983 caps compensatory and punitive damages – 1981 does not
    - The max they could have recovered is \$3,000,000 for 10 plaintiffs under a 1983 claim
  - No EEOC complaint required – much longer statute of limitations



# Challenges in Resolving Cases

- *Sheila Larose v. King County and Public Defender Association*, Pierce County, August 2021 (on appeal)
  - Hostile Work Environment/Failure to keep public defender safe after a criminal client harassed and stalked her
  - **Total jury verdict = \$7,000,000**
  - Plaintiff's counsel were Susan Mindenbergs, Mary Ruth Mann, James Kytle

# Challenges in Resolving Cases

- Liberal laws in WA favoring plaintiffs
- Lack of any legislative tort control
- No state law caps on damages
- Hostile work environment & retaliation claims can cover expansive time periods despite the three year statute of limitations



# Challenges in Resolving Cases

- How do you get a group of plaintiff's lawyers to smile for a photo?
  - Tell them to say, "Fees!"



# How Do We Meet the Challenge?



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# How Do We Meet the Challenge?

- Short game
  - Pre-Defense Program
- Long game
  - Make litigation against WCRP members unattractive and risky for plaintiff attorneys
  - Defense Verdicts



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# How Do We Meet the Challenge?

- Avoid common pitfalls
  - Lack of documentation to support employment actions
  - Lack of follow up with employees to ensure directives are met
  - Lack of investigation when issues are raised
  - Lack of training and mentorship for new supervisors
  - No good deed goes unpunished!



# Legal Developments & Trends

- Accommodation of religious practices
- *Suarez v. State*, Div. III, September 2022
- “undue hardship” under federal law is something more than a de minimis cost
- “undue hardship” under WA law is an action requiring significant difficulty or expense
- Sets out 10 factors the employer should consider regarding whether to grant leave



# Legal Developments & Trends

- WA Equal Pay Act – RCW 49.58.020
  - No discrimination in pay between similarly situated employees
  - Job requires similar skill, effort and responsibility under similar working conditions
  - Okay to pay differently based on bona fide job factors including:
    - Education, training or experience
    - Seniority or merit system
    - If it accounts for the entire differential in pay



# Legal Developments & Trends

- WA Equal Pay Act – RCW 49.58.020
- **Prior wage or salary is not a defense**
  - Cannot ask for it until after initial offer is made
- Employer has the burden of proof on the bona fide factor defenses
- Jury can substitute its opinion for that of the employer
- Do you negotiate placement on the step scale? Or in salary ranges?
  - Examine current practices and safeguards

# Legal Developments & Trends

- Is being susceptible to complications of Covid 19 a serious health condition requiring an accommodation of remote work?
- Is it an essential job function to work on site?
- Is telework a reasonable accommodation now post pandemic?



# Legal Developments & Trends

- Increase in FMLA/WA Paid leave Act interference claims
  - Actions that would dissuade an employee from taking leave
- Very broad
- Summary judgment dismissal can be challenging



# Legal Developments & Trends

- Silenced No More Act – RCW 49.44.211(3)
  - Potential impact in workplace investigations?
  - It is a violation for an employer to discharge or otherwise discriminate or retaliate against an employee for disclosing or discussing conduct that the employee reasonably believed to be illegal harassment, illegal discrimination, illegal retaliation, wage and hour violations, or sexual assault...



# Settlement Agreement Considerations

- RCW 49.44.211 - (1) Cannot have an agreement not to disclose or discuss conduct or a settlement involving conduct the employee believes to be discrimination, harassment, retaliation, a wage and hour violation, or conduct against public policy.
- **Prohibits nondisclosure and non-disparagement provisions** that concern conduct that occurs at the workplace, at work-related events coordinated by or through the employer, between employees, or between an employer and an employee, whether on or off the employment premises.



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- **Prohibits nondisclosure and non-disparagement provisions** that concern conduct that occurs at the workplace, at work-related events coordinated by or through the employer, between employees, or between an employer and an employee, whether on or off the employment premises.
- **Penalty for violation is actual damages or statutory damages of \$10,000, whichever is more, as well as reasonable attorneys' fees and costs**



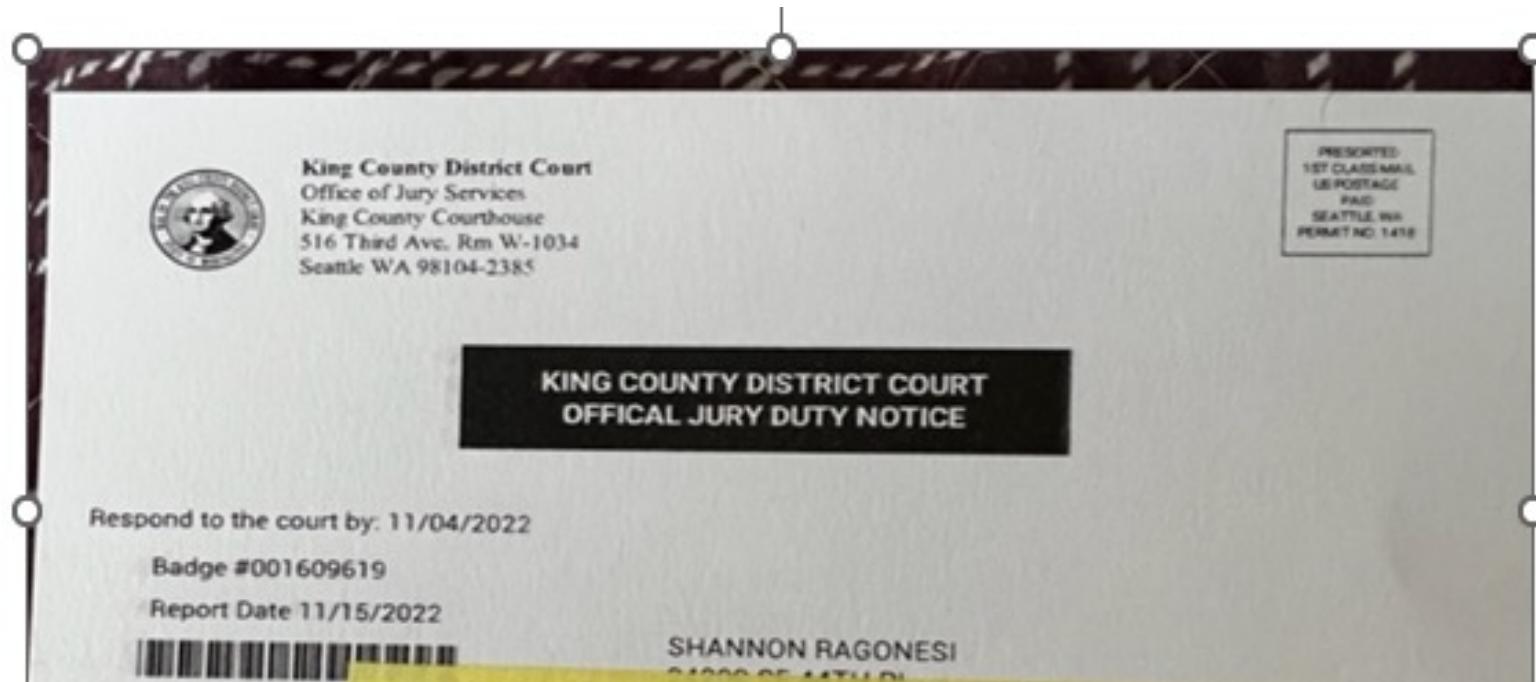
# Settlement Agreement Considerations

- **References – to whom should they go?**
  - *Sherrer v. SVSD*: enforcement of a settlement agreement / breach of contract lawsuit
  - Employee controls who s/he lists as a reference on job applications, not the former employer
  - List by title, not individual, to account for future staffing changes



# Post Pandemic Trial Factors

- Continuances are being denied
- Virtual jury selection



# Post Pandemic Trial Factors

- Unconscious/implicit bias instruction to the jury
- Unconscious/implicit bias as a theory to support intentional discrimination claim
- Are you providing training to supervisors and employees?



# Post Pandemic Trial Factors

- Short cuts our brains take to make judgments
- Pause – recognize – act upon
- Use factors and info that are neutral
- Am I making a snap decision?
- Consistency in treatment of employees is key



# Post Pandemic Trial Factors

- Present each witness long enough for the jury to understand why they are credible
- Show decisions were based on fact, not appearances or stereotypes
- Picture your most productive employee...would you treat them the same or different?



# Risk Management Takeaways

- Review personnel handbooks
- Review workplace accommodation procedure
- Update job descriptions if work on site is an essential function



# Risk Management Takeaways

- Tighten up settlement agreement provisions
- Be forward thinking in agreeing to provide future references
- Develop training or a plan to help employees identify implicit biases



# Risk Management Takeaways

- Be consistent with past practices
- Use the Pre-Defense program!



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# Questions?



# Thank you!

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