NO MAJOR RENOVATIONS

2020 OREGON EMPLOYMENT LAW UPDATE

LEGISLATIVE UPDATE

After a busy session in 2019, there were few legislative developments affecting employers this year.[1]

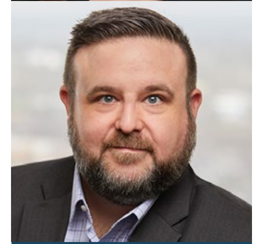
The legislature appeared to be poised to enact a bill that would have (1) prohibited places of public accommodation from refusing to accept cash in exchange for goods and services, (2) prohibited discrimination against individuals for paying for goods and services in cash, and (3) expanded definitions for race discrimination to include discrimination based on physical characteristics that are historically associated with race—specifically "natural hair, hair texture, hair type, and protective hairstyles," including but not limited to braids, locs, and twists (HB 4107)—but that bill has not yet been enacted into law. We will be sure to update you if that changes.

Notwithstanding the quiet legislative session, employers should be aware that a number of provisions of the Oregon Workplace Fairness Act—passed last year—became effective in October 2020.

Oregon Workplace Fairness Act: Fully Effective October 1, 2020

The Oregon Workplace Fairness Act was enacted last year and brought significant changes for all employers with Oregon employees.[2]

Beginning on October 1, 2019, the Act provided a five-year statute of limitations for claims of employment discrimination or harassment based on a wide range of protected classes, including race, color, religion, sex, sexual orientation, national origin, marital status, age, expunged juvenile record, uniformed service, and disability.



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But most of the Act's provisions became effective on October 1, 2020:

- Nondisclosure, nondisparagement, and no-rehire provisions cannot be included in employment agreements if they have the purpose or effect of preventing employees from disclosing or discussing conduct that constitutes unlawful discrimination or harassment. This also applies to post-employment agreements—including settlement, separation, and severance agreements—with individuals claiming to be aggrieved by conduct that constitutes unlawful employment discrimination or harassment unless the employee requests such a provision and is given seven days to revoke the agreement after signing it.
- Employers must adopt and distribute new written antidiscrimination and harassment policies. These policies must include certain information required by the Act and must be (1) made available to employees, (2) provided to new employees at the time of hire, and (3) provided to an employee at the time that the employee discloses information regarding prohibited discrimination or harassment.

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[1] COVID-related developments are discussed in the COVID-19 seminar materials.

[2] See Miller Nash Graham & Dunn articles "Oregon Workplace Fairness Act: Significant Changes with Broad Implications" and "Oregon Public Employers, Keep Reading: New Legislation Expands Upon Recently-Enacted Workplace Fairness Act" for more information.

- Employers may void certain severance agreements. An employer may void a prior severance agreement with an executive, manager, or supervisor if the employer determines after a good-faith investigation that (1) the individual violated the Act's requirements, and (2) the violation was a substantial contributing factor for terminating the employment relationship.

KEY TAKEAWAY: Employers should (1) ensure that their antidiscrimination and harassment policies comply with the Act, (2) review employment agreements for nondisclosure, nondisparagement, and no-rehire provisions for compliance with the Act, and (3) ensure that document-retention policies and practices account for the expanded five-year statute of limitations.

NOTABLE CASES

***Robillard v. Opal Labs, Inc.*, 428 F. Supp. 3d 412 (D. Or. Dec. 17, 2019): A reminder to (1) review compensation and vacation policies to ensure clarity, and (2) be consistent in documenting performance issues**

Employee began working for a start-up software company as a software engineer on November 10, 2014, at the age of 41. Although employer had a number of performance concerns about employee—including issues with projects that employee was working on, employee's failure to provide status updates to the customer success team, and a missed meeting—none of those concerns were formally documented. Although employee's supervisor had met employee for coffee in January 2015 and (according to employer) discussed performance issues and concerns, he did not reference any potential discipline or corrective action.

Shortly after employee missed an important client meeting on May 29, 2015, employer terminated his employment. Employee brought claims for, among other things, (1) failure to pay promised vacation time upon termination and (2) age discrimination.

Employer's vacation policy: "Work to live, don't live to work." Employer had a flexible Paid Time Off (PTO) policy under which it "encourage[d] employees to take three paid weeks off each year," but did not track PTO. Employee's offer letter reflected that the offer "includes three (3) weeks [PTO] per year, but [employer] has a liberal vacation policy as long as advance notice is provided and performance objectives are achieved." Employee had used only one week of PTO during his employment, and asserted that he was entitled to receive payment for the two unused weeks. Employer maintained that because it did not track PTO, employees did not accrue PTO, and therefore are not entitled to unused PTO at separation. The court concluded that viewing the offer letter, policies, and employment agreement—which provided that employee was "entitled to vacation, sick leave, and holidays according to [employer's] applicable policies"—in the light most favorable to employee, there was a genuine issue of material fact about whether employee was entitled to payment of unused PTO.

Lack of documentation and inconsistent reasons for dismissal. Although the court rejected employee's contention that other employees' referring to him as "Dad" and "Old Greg" constituted direct evidence of age discrimination, it concluded that an issue of fact precluded an award of summary judgment to employer. Most important to the court's decision were employer's (1) failure to have formal discussions with employee about performance concerns or the possibility for discipline or corrective action, (2) failure to formally document concerns about employee's performance, and (3) inconsistent reasons for terminating employee's employment—specifically, that it was unclear whether employee was dismissed for performance issues, for missing a client meeting, or for a combination of the two.

KEY TAKEAWAYS:

- Employers should ensure that offer letters, employment agreements, and policies are consistent with respect to accrual and payment of PTO, and that PTO policies are clear and unambiguous, even if they are flexible.
- When employee performance concerns arise, ensure that those concerns are communicated to the employee—ideally in person and in writing—with reference to potential discipline and corrective action.
- When imposing discipline (including dismissal), make sure that the reasons for the discipline are consistent.

***Summerfield v. Oregon Liquor Control Comm'n*, 366 Or. 763, 472 P.3d 231 (2020): Employees bear the burden of proving the existence of an available and suitable position for reemployment claims**

State employee asserted claims against his employer arising out of alleged racial discrimination and harassment. Employee alleged that employer ignored his repeated reports of discrimination and harassment, passed employee over for promotions, and promoted individuals who had engaged in discrimination. Employee also alleged that after he had filed a race discrimination complaint with the Oregon Bureau of Labor and Industries (BOLI), he found a noose in his work area.

Employee filed a workers' compensation claim for acute stress, and his claim was accepted. After his medical provider released him to return to work, employee requested reemployment, but employer did not reemploy him—instead, employer initiated an investigation into employee's alleged workplace misconduct, and at the conclusion of the investigation, terminated employee's employment.

> **Employee's failure to offer evidence of another available and suitable position was fatal to reemployment claim.** Under ORS 659A.046, when an employee sustains a compensable injury, an employer must, upon demand, reemploy the employee "at employment which is available and suitable." Here, the court distinguished the "employer's obligation to identify suitable work in response to an injured worker's demand" from the employee's "obligation at trial to prove his statutory claim under ORS 659A.046" and dismissed employee's reemployment claim because employee presented no evidence that other available and suitable employment existed.

KEY TAKEAWAY: An employee returning from a compensable injury is entitled to reemployment in a suitable and available position—employers have a duty to be aware of the availability of suitable employment and offer a suitable available position to an employee returning to work after a compensable injury.

***H.K. v. Spine Surgery Ctr. of Eugene, LLC*, 305 Or. App. 606, 470 P.3d 403 (2020): Employer's knowledge of misconduct is irrelevant when the alleged bad actor is the employer or someone who stands in its shoes**

Employee sued employer and its owner for sexual harassment, intentional infliction of emotional distress, and battery. At trial, employee's attorney offered documents from a BOLI investigation file relating to a claim filed by another employee five years earlier—the documents were offered to establish that employer had notice and knowledge of harassing behavior by one of its employees (owner) but failed to take corrective action. The jury entered a verdict in favor of employee against employer and owner.

The court of appeals reversed, concluding that the documents should not have been admitted into evidence and that the error was not harmless. Although an employer's notice and knowledge of an employee's harassing behavior (and failure to take prompt remedial action) is an essential factor for establishing the employer's vicarious liability for creating a hostile work environment, that factor did not apply here because the person creating the hostile work environment was the owner: "the employer itself or someone who stands in the employer's shoes." Because employer was directly liable for owner's conduct, there was no burden to establish employer's knowledge, and the BOLI documents were not relevant and should have been excluded from evidence.

KEY TAKEAWAY: Employers who have notice or knowledge of harassing behavior by an employee must take prompt and immediate remedial action to avoid vicarious liability.

***Cilione v. Techfive, LLC*, No. 3:18-cv-02030, 2020 WL 1932275 (D. Or. Apr. 21, 2020): Prompt remedial measures are critical for avoiding risk**

Employee asserted claims against employer for discrimination and harassment based on her gender and retaliation for complaints about gender-based harassment. The court determined that:

- Employee's allegations—that (1) she was passed over for a special project after reporting a coworker who had violated a company rule, (2) her supervisor assisted male colleagues more often than her, and (3) her supervisor did not reply to a request for flexible scheduling as it coincided with intermittent leave—did not amount to significant changes in her employment

status, and thus did not constitute adverse employment actions.

- Employer's remedial measures—including the prompt investigation of employee's many work-related harassment complaints—were sufficient to defeat employee's claims of adverse treatment by coworkers.

KEY TAKEAWAY: Promptly respond to employee complaints of harassment—a prompt and thorough investigation can defeat claims based on an employer's failure to address conduct that it knew about but failed to remedy.

Vergara v. Patel, 305 Or. App. 288, 471 P.3d 141 (2020): Claims for wrongful discharge are precluded when individuals have an adequate statutory remedy

Employee, a hotel housekeeper, complained to her supervisor about not being provided with adequate gloves to safely perform her work. Employer insisted that she work without gloves, and when employee refused, employer terminated her employment. Employee brought claims against employer for violations of the Oregon Safe Employment Act, whistleblower retaliation, and common-law wrongful discharge. The trial court dismissed employee's wrongful-discharge claim, and employee appealed.

The court of appeals affirmed the dismissal of employee's wrongful-discharge claim because (1) employee had adequate statutory remedies to vindicate the alleged wrongful conduct, and (2) employee's discharge was not for fulfilling an important public duty.

KEY TAKEAWAY: The Oregon Safe Employment Act (ORS 654.010 et seq.) requires employers to maintain safe and healthful workplaces and provide employees with "such devices and safeguards" to protect their life, safety, and health.

McLaughlin v. Wilson, 365 Or. 535, 449 P.3d 492 (2019): Post-employment retaliatory conduct is actionable against employers and even individuals

Employee, a medical assistant for an orthopedic surgeon, applied to a graduate program, and her supervisor provided her with a glowing reference. Subsequently, supervisor allegedly began sexually harassing employee, who did not immediately report the harassment because she feared retaliation. After employee was accepted into her graduate program, supervisor's conduct worsened, and employee reported supervisor's conduct to employer.

Sometime after employee left employer to begin her graduate program, supervisor met with the admissions director of employee's graduate program and stated that employee was manipulative and coercive, and that she had "left her past two jobs by getting large amounts of money and a gag order." Supervisor's statements were spread to others in employee's graduate program, causing her to suffer emotional distress.

Employee sued supervisor for defamation, intentional infliction of emotional distress, and retaliation under ORS 659A.030(1)(f), which makes it an unlawful employment practice to retaliate against an individual for opposing or reporting harassment or discrimination. The trial court dismissed employee's retaliation claims because supervisor was not employee's employer when the alleged retaliation occurred.

The court of appeals reversed the trial court's decision, concluding that (1) individuals can be held liable under Oregon's retaliation statute, and (2) retaliation claims are not limited to conduct that takes place inside the workplace, and that supervisor's statements to the admissions director of employee's graduate program were actionable.

KEY TAKEAWAYS:

- Supervisors can be held liable for retaliatory conduct, so employers should ensure that all personnel receive training about unlawful retaliation.
- Employers should be cautious about engaging in conduct with respect to former employees because potential liability for retaliation does not stop at the conclusion of employment.

Maza v. Waterford Operations, LLC, 300 Or. App. 471, 455 P.3d 569 (2019): Employers face strict liability for failing to require employees to take required meal breaks

Putative class of employees alleged violations of ORS 653.055 for failure to pay wages for meal periods. Although employer had authorized hourly employees to take an unpaid 30-minute meal period—and although employer's policies reflected that meal periods are mandatory and cannot be skipped—some employees took unpaid meal periods that were shorter than 30 minutes, and under OAR 839-020-0050, "if an employee

is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire 30 minute meal period."

The trial court denied class certification, concluding that liability under OAR 839-020-0050 would require a fact-specific inquiry into the circumstances of each employee's shortened meal period. The court of appeals reversed, holding that employers "must not merely authorize but must actually require that employees take a duty-free meal period for a full 30 minutes," and that wages must be paid for the entire meal period "if, for whatever reason, an employee takes a shorter meal period."

KEY TAKEAWAY: It is not enough to require meal breaks in an employee handbook—employers must also take steps to monitor employees' meal periods to ensure that they are taken.

***Linn County v. Brown*, 366 Or. 334, 461 P.3d 966 (2020): All Oregon counties are required to provide paid sick leave for their employees**

Nine counties challenged Oregon's mandatory paid sick-leave law, which requires employers that employ at least ten employees to provide paid sick leave to their employees. The counties argued that the law violated the unfunded-programs provision of the Oregon Constitution, but the court disagreed, determining that the law is not a "program," and thus does not exempt counties from compliance.

KEY TAKEAWAY: All Oregon employers that employ more than ten employees should continue to comply with Oregon's paid sick-leave law.

***Tapley v. Cracker Barrel Old Country Store, Inc.*, 448 F. Supp. 3d 1143 (D. Or. 2020): Mandatory arbitration agreements will be enforced if they are not procedurally or substantively unconscionable**

When she was hired, employee signed an alternative dispute resolution agreement providing that "any legal dispute arising out of or related to [her] employment * * * must be resolved using informal conciliation and final and binding arbitration and not by a court or jury trial." The arbitration agreement expressly included claims for harassment, discrimination, and retaliation, and included an express waiver to employee's right to a jury trial.

Employee brought a lawsuit in federal court against employer alleging sex discrimination and whistleblower retaliation, and employer moved to compel arbitration. The court granted employer's motion over employee's objections that (1) the Federal Arbitration Act did not apply because employer was engaged in interstate commerce, (2) the arbitration agreement was invalid under Oregon law, (3) enforcement of the arbitration agreement would be unconscionable, and (4) employer waived its right to arbitrate the dispute.

KEY TAKEAWAY: Employers should review mandatory arbitration agreements to ensure that they comply with Oregon and federal law, and if a claim that falls within the scope of an arbitration is filed in court, employers should seek to compel arbitration before actively litigating the claim in court.

***Warren v. Smart Choice Payments, Inc.*, 306 Or. App. 634, ___ P.3d ___ (2020): Subsequent employment agreement superseded prior agreement containing arbitration clause, so former employee could maintain claims in court**

In May 2008, employee and employer entered into an agreement containing a mandatory arbitration provision that "shall survive termination of this Agreement." In November 2009, employer and employee entered into a subsequent agreement that did not include an arbitration provision—indeed, it contained provisions indicating that the parties anticipated that any disputes would be resolved through a "lawsuit"—but did contain a broad integration clause providing that the November 2009 agreement "upon execution, shall supersede any and all other employment and compensation agreements between the [employer] and the Employee."

Employee filed a lawsuit against employer alleging claims for breach of contract, unjust enrichment, and fraud. Employer petitioned to stay the lawsuit and compel arbitration, contending that employee's claims arose out of the May 2008 agreement, and therefore were subject to mandatory arbitration. The trial court denied employer's petition to compel arbitration, and employer appealed. The court of appeals affirmed, concluding that the November 2009 agreement superseded the prior agreement and did not require arbitration of the dispute.

KEY TAKEAWAY: Employers should pay careful attention to "boilerplate" contract language in employment agreements to avoid unintended consequences.