OREGON LEGAL UPDATES

LEGISLATION, REGULATIONS & NOTABLE CASES

OREGON LEGISLATION

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Senate Bill 1515: Changes to the Oregon Family Leave Act (OFLA) and Paid Leave Oregon (PLO)

In March, the Oregon Legislature passed SB 1515, a long-awaited bill that primarily repealed provisions of OFLA that were duplicated by PLO.

When first enacted, qualifying reasons for leave under PLO generally mirrored qualifying reasons for leave under OFLA. Other states instituting paid leave laws rescinded their pre-existing unpaid leave laws, but Oregon did not. As a result, until SB 1515 was enacted, the co-existence of OFLA and PLO caused significant confusion, particularly with respect to questions around concurrency.

Although SB 1515 implements some amendments to PLO, it largely amends qualifying reasons for leave under OFLA. For example, the following changes to OFLA took effect on July 1, 2024:

- Parental leave and serious health condition leave for an employee or family member are no longer qualifying reasons for leave;
- An employee may take sick child leave to care for a child suffering from *any* illness, injury or condition that requires home care.
- Bereavement leave is capped at four weeks per year; and
- Between July 1, 2024, and December 31, 2024, an employee may be eligible for two additional weeks of protected leave to effectuate the legal process for the placement of a foster child or the adoption of a child.

In addition, SB 1515 amended PLO to include the following:

- Beginning January 1, 2025, family leave is amended to include leave to effectuate the legal process for the placement of a foster child or the adoption of a child; and
- Employees may decide whether to use any accrued paid time off, in addition to their PLO benefits, during any period of leave under PLO, provided the total amount received by the employee does not exceed an amount equal to the employee's full wage replacement. However, an employer may permit employees to use accrued paid time off, such that the total combined amounts exceed the employee's full wage replacement amount.

KEY TAKEAWAYS

Employers should revisit their leave-related policies and practices following the enactment of SB 1515 to incorporate key changes to language regarding the concurrency of OFLA and PLO, as well as changes to qualifying reasons for protected leave. In addition, employers should evaluate current policy language and practices regarding an employee's use of paid accrued time off during a period of leave under PLO.

OREGON REGULATIONS

Oregon's Bureau of Labor and Industries Proposes Amendments to Administrative Rule Defining "Appropriate Corrective Action" and "Promptly Correcting Harassing Behavior"

In June 2024, Oregon's BOLI proposed amendments to OAR 839-005-0010, which governs theories of discrimination within the employment context. The proposed amendments attempt to clarify when and how an employer may be required to respond to instances of workplace harassment. Specifically, the proposed amendments define the terms "appropriate corrective action" and "promptly correcting harassing behavior." In doing so, BOLI proposes to incorporate additional express obligations on the part of the employer when responding to reports of harassment in the workplace, including to:

- Intervene without avoidable delay to effectively halt harassing behavior;
- Adequately investigate and ascertain the extent of the harassing behavior;
- Take appropriate disciplinary measures proportionate to the seriousness of the offense;
- Not penalize the reporting employee or make the aggrieved party worse off; and
- Effectively act to prevent further harassment or retaliation against the reporting employee or aggrieved party for reporting or exercising rights concerning harassing behavior.

The rule would also clarify that the success or failure of the corrective action is relevant but not in and of itself conclusive proof that the employer acted appropriately.

KEY TAKEAWAYS

If the rule is enacted, all employers should promptly review their harassment and discrimination policies and procedures to ensure compliance with each of the new requirements. In addition, training should be provided to all front line managers who may receive complaints of harassment and may be responsible for recommending disciplinary action. Investigations should be conducted by individuals with sufficient experience or training or by an outside investigator. Finally, human resources should monitor and ensure that employees who engage in harassment receive consistent discipline across the organization. The Miller Nash employment law & labor relations team will continue to monitor the status of this updated rule. Check our *Employment Law in Motion* blog for regular updates.

OREGON CASES

McClusky v. City of North Bend, 332 Or. App. 1, 549 P.3d 557 (2024)

In *McClusky*, the Oregon Court of Appeals clarified that adverse actions taken against an employee within one month of protected activity may be sufficient to independently establish a causal link between the adverse action and the protected activity. The Court further clarified that, to avail oneself of whistleblower protections under Oregon law within the employment context, disclosures based on an employee's opinion about mismanagement or personnel issues does not give rise to protected whistleblowing activity. Nor does conveying concerns or advice about matters that are part of an employee's day-to-day responsibilities.

CASE BACKGROUND

In this case, McClusky, an IT manager employed by a public library, raised concerns that the library's director was not complying with public meetings law, following the director's announcement that she planned to migrate the library's network to a cloud-based service provided by Google without seeking the approval of the library's advisory board. Notwithstanding McClusky's concerns, the library directed McClusky to hand over materials and guidelines for the library's information systems, so the library district could provide them to an outside contractor. McClusky initially objected, but eventually complied.

McClusky then filed a complaint with the Bureau of Labor and Industries (BOLI) alleging that he had complained "about a lack of policies for his position, misappropriation of budget funds, and violations of record retention rules, and that [the library district] had retaliated against him by changing his duties, taking control of the IT department, and making changes without communicating them." Five days after the library received a copy of McClusky's BOLI complaint and a letter warning against any further disciplinary action, the library issued McClusky a notice of potential termination. On the sixth day following the library's receipt of McClusky's BOLI complaint, the library director recommended McClusky's termination, citing conduct that violated the library district's personnel policies and that fell below position expectations.

The Court ultimately held that McClusky's conduct constituted a "report" under Oregon's whistleblower statute, because McClusky expressed his opinion about the merits of a decision that had already been made. In other words, the alleged violation had already occurred. Notwithstanding evidence that the adverse action was recommended due to unrelated performance concerns, the Court held that temporal proximity between the alleged protected activity and alleged adverse action precluded summary judgment in favor of the library district.

KEY TAKEAWAYS

When evaluating possible employee discipline, it is important to consider whether the employee has engaged in protected activity under Oregon's whistleblower statutes by making a complaint about a decision that has been made, whether the disciplinary action is based on the employee's protected activity (in whole or in part) or perceived protected activity, and the proximity in timing between any disciplinary action and the employee's

protected activity. Even if the disciplinary action is unrelated to the protected activity, if it follows on the heels of protected activity, that fact alone may expose an employer to liability under Oregon's whistleblower statutes.

***Summit RWP, Inc. v. Hallin*, 334 Or. App. 529, — P3d — (2024)**

The Oregon Court of Appeals upheld a trial court's enforcement of a plaintiff employer's nonsolicitation provision in the employee's employment agreement, where the defendant employee contacted multiple employees of plaintiff employer and those employees subsequently terminated their employment to work for a competitor of plaintiff employer.

CASE BACKGROUND

In *Summit*, David Hallin and Summit executed an employment agreement that prohibited Hallin from attempting to influence other employees to terminate their employment or entering employment with another business. Summit later terminated Hallin's employment and declined to pay out Hallin's earned bonus upon termination.

Within 24 hours after Summit terminated Hallin, Hallin received a call from a Summit employee who later left Summit for employment with Hallin's son's competing company. Hallin also spoke with two other Summit employees who, shortly thereafter, also left Summit for employment with Hallin's son's competing company.

Additionally, after Hallin's termination, Hallin submitted several reimbursement requests to Summit relating to expenses incurred 11 to 24 months prior to Hallin's termination.

In light of evidence presented that Hallin intended to be legally bound by the employment agreement as a result of his signing the agreement, and that Hallin influenced Summit employees to terminate their employment to work for a competing company, the Court of Appeals affirmed the trial court's enforcement of the nonsolicitation provision. Relying on evidence of Summit's past practices, the Court held that the company's flexibility in offering employees some leniency in the reimbursement request deadline was not a waiver and intent to abandon the policy, because there was no record the company had approved a reimbursement request that was 11 to 24 months beyond the deadline set forth in the policy.

In addition, because Hallin had earned the disputed bonus prior to his termination, the Court held Hallin was entitled to statutory penalties. However, the Court remanded the issue of whether Hallin was entitled to attorney fees to the trial court, in light of Summit's argument that Hallin was unable to recover such fees due to his willful violation of the employment agreement.

KEY TAKEAWAYS

This case represents Oregon courts' continued enforcement of employee nonsolicitation provisions. As a reminder, although employee nonsolicitation provisions are not subject to Oregon's strict enforcement of noncompetition provisions or agreements, a nonsolicitation provision that has a similar purpose or effect as a noncompetition agreement will be subject to the statutory requirements governing noncompetition agreements.

In addition, employers must carefully consider and define when, and under what circumstances, a bonus is deemed earned and payable. Once earned, bonuses constitute wages. Claims for unpaid wages may give rise to statutory penalties and attorney fees which can aggregate quickly, so it's important to review and evaluate all policies governing payment of bonuses and to ensure timely payment to eliminate risk.

Cuddigan-Placito v. State Accident Ins. Fund, 335 Or App 663 (2024)

In *Cuddigan-Placito v. State Accident Ins. Fund*, the Oregon Court of Appeals reinforced that, to constitute protected activity for purposes of Oregon's whistleblower laws, the employee whistleblower must present evidence that they are engaging in the alleged protected activity for the purpose of asserting or defending an individuals' rights at the time of the alleged protected activity.

CASE BACKGROUND

In *Cuddigan-Placito*, State Accident Insurance Fund Corporation (SAIF) claim investigator Jasmine Cuddigan-Placito was assigned to investigate an employee claim of stress and harassment. As part of the investigation, Cuddigan-Placito contacted a potential witness and left a voicemail, in which Cuddigan-Placito requested a meeting with the witness and stated she knew that other witnesses were lying to her. Cuddigan-Placito later told her supervisor that she tried to delete the message, that it was unprofessional, and that she feared she would be fired. Cuddigan-Placito also sent multiple text messages to her supervisor explaining her reasoning for her actions.

Cuddigan-Placito was ultimately terminated based on the voicemail. Following her termination, Cuddigan-Placito alleged her termination constituted discrimination and retaliation, because her voicemail to the witness and text messages to her supervisor constituted reports of unlawful conduct. The Court concluded that the voicemail was not protected activity under Oregon law, because there was no evidence that she left the voicemail for the purpose of asserting or defending an employee's rights under the law. However, because Cuddigan-Placito presented evidence that the text messages at issue related to concerns that an individual was subject to racial discrimination, Cuddigan-Placito's claims based on such conduct survived summary judgment.

KEY TAKEAWAYS

When evaluating possible employee discipline, it is important to closely evaluate whether the employee may have engaged in protected activity, including whether the employee has reported concerns regarding safety, compliance, or violation of potentially applicable laws.

Disclaimer: This summary is not legal advice and is based upon current statutes, regulations, and related guidance that is subject to change. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps employers must take under applicable laws. For legal advice on these or related issues, please consult qualified legal counsel directly.