2021 OREGON UPDATE

LEGISLATIVE UPDATES

The Oregon Legislature passed a number of bills this session that may affect employers, including further restricting noncompetition agreements, expanding employment and school district discrimination definitions related to hairstyles and dress codes, and updating the Oregon Family Leave Act (OFLA) to address pandemic-related issues. Outlined below are changes employers should know about.

Noncompetition Agreements (SB 169)

The Legislature again amended Oregon's law regulating noncompetition agreements (ORS 653.295). Under the law, an employer may impose a noncompetition agreement only when satisfying specified criteria, including (1) notice that it required a noncompetition agreement two weeks before commencing employment or upon a bona fide advancement, (2) the employee is exempt or excluded from overtime laws, (3) the employer has a "protectable interest," (4) the employee meets certain income limitations, and (5) written notice of the terms of the noncompetition agreement within 30 days of termination. There is a carve-out for criteria (2) and (4), which is waived if the employee is paid a minimum amount set by statute during the noncompetition period.

Under the bill, agreements entered on or after January 1, 2022, are further restricted as follows:

- Noncompetition agreements not compliant with the statute are void and unenforceable. *Previously, noncompliant agreements were voidable.*
- To be enforceable, the noncompetition agreement must be in writing and the employer must provide a signed, written copy of the agreement to the terminated employee within 30 days of termination. *Previously, oral and unsigned written statements could suffice.*
- Noncompetition agreements are valid for only 12 months. *Previously, agreements were valid for 18 months.*
- The employee's annual gross salary and commissions must exceed $100,533, adjusted annually for inflation. *The prior version indexed the amount to 50% of the median family income, slightly lower in 2021 than the new amount.*
- The bill revises the minimum amount of payment during the noncompetition period to satisfy the carve-out for employees who do not meet the overtime exclusion (criterion (2) above) and income minimum (criterion (4) above). To satisfy this carve-out, the employee must be paid during the noncompetition period the greater of (1) 50% of the employee's gross base salary and commissions at the time of

WRITTEN BY:
Jeff Chicoine
Shanelle Honda

termination, or (2) $100,533, adjusted for inflation. *This is basically the same as before, although the index is defined differently.*

- The statute continues to be inapplicable to agreements not to solicit employees or customers and bonus-restriction agreements.

Hairstyles and dress codes (HB 2935)

The Legislature expanded the state's employment discrimination law, ORS 659A.001, to protect certain hairstyles. It did so by defining "race" to include "physical characteristics that are historically associated with race, including but not limited to natural hair, hair texture, hair type, and protective hairstyles." And it then defined "protective hairstyle" to mean "a hairstyle, hair color, or manner of wearing hair that includes, but is not limited to, braids, regardless of whether the braids are created with extensions or styled with adornments, locs, and twists."

The bill also limited the carve-out that permitted dress codes in ORS 659A.030(5) to one that "does not have a disproportionate adverse impact on members of a protected class to a greater extent than the policy impacts persons generally." This revision seems to undercut the traditional business-necessity defense to disparate-impact claims.

School district discrimination (HB 2935)

HB 2935 also redefines discrimination in education in public school districts provided in ORS 659.850 to align with the expanded definition of race to include hairstyles and dress codes as provided in the amended statutes outlined above.

Further, HB 2935 requires that interscholastic activity organizations that districts join to facilitate programming and scheduling must implement "equity-focused" policies. Such policies must prohibit discrimination as defined in ORS 659.850 and permit students "to wear religious clothing in accordance with the student's sincerely held religious belief and consistent with any safety and health requirements and to "balance the health, safety, and reasonable accommodation needs of participants on an activity-by-activity basis."

OFLA amendments (HB 2474)

The Legislature expanded OFLA rights to address three issues that arose from the pandemic:

- Any employer with at least one employee will be subject to OFLA during a public health emergency as defined in the bill, subject to certain exceptions. The exceptions are for an employee who was employed for fewer than 30 days prior to commencing leave or who worked an average of less than 25 hours per week in the 30 days prior to commencing leave.
- Provides special break-in-service provisions for meeting employee eligibility requirements if the employee (1) was eligible at the time of separation and was reemployed within 180 days of separation, or (2) was eligible at the beginning of the temporary cessation of scheduled hours of 180 days or less and who returned to work at the end of the cessation period. The bill provides for restoration of time worked by an employee when the employee returns to work after the separation or temporary cessation period.
- Expands the definition of "sick child" to include care for the employee's child whose school or day care is closed due to a public health emergency. Allows employers to request verification of the need for leave due to such closure.

Hiring, retention, and vaccine bonuses excluded from equal pay (HB 2818)

Effective June 23, 2021, vaccine incentives, hiring bonuses, and retention bonuses are temporarily removed from the definition of "compensation" for purposes of pay equity requirements. This change sunsets

on March 1, 2022. There is a separate provision, which does not sunset, excluding vaccine incentives for immunizations to an infectious disease for which a public health emergency is declared.

Gender identity (HB 3041)

Gender identity is defined and included as a protected class in several employment-related statutes, including ORS 652.210, ORS 653.547, and throughout ORS chapter 659A.

Child-care accommodation (SB 716)

An employer is prohibited from retaliating against an applicant or employee asking for a schedule that meets child-care needs. But the employer is not obligated to accommodate such requests. This bill takes effect upon passage.

Rebuttable presumption of retaliation against employees who make health or safety complaints (SB 483)

SB 483 creates a rebuttable presumption of retaliation if an employer fails to hire or discharges an employee within 60 days of making a health or safety complaint under ORS chapter 654. The employer may rebut the presumption by a preponderance of the evidence.

Extends time to file BOLI complaint of retaliation for reporting unsafe working conditions (HB 2420)

The time period is extended from 90 days to one year for filing a retaliation complaint with BOLI for reporting unsafe working conditions under ORS chapter 654.

Mandating driver's license (SB 569)

It is now an unlawful employment practice within ORS chapter 659A for (1) an employer to make a driver's license a condition of employment, unless the ability to legally drive is an essential function of the job or is related to a legitimate business purpose, or (2) to refuse to accept alternative identification documents for verifying identification and employment authorization under federal immigration law.

Class size (SB 580)

The Legislature added "class size and caseload limits" to the definition of employment relations in the Public Employee Collective Bargaining Act (PECBA) applicable to bargaining for K 12 schools receiving federal funds for low-income families. For such schools, proposals addressing class size and caseload would be mandatory for bargaining. In doing so, the Legislature chipped away at a key component of the 1995 reforms of PECBA.

Police misconduct arbitrations (HB 2930)

The Legislature amended various PECBA provisions related to arbitration of police misconduct cases. First, the Legislature directed the Employment Relations Board to appoint a person to arbitrate such cases from a "list of qualified, indifferent, and unbiased" persons. Second, arbitrators are required to make determinations in accordance with uniform standards created by a newly established Commission on Statewide Law Enforcement Standards of Conduct and Discipline. Third, the bill created such a commission, authorized it to create such standards, and specified the composition of the Commission. Fourth, the bill repealed recent legislative initiatives making it mandatory to bargain over discipline guides. Fifth, the bill bars the arbitrator from changing the discipline if the arbitrator finds that the misconduct occurred, so long as the disciplinary action imposed was in accordance with the uniform standards developed by the Commission.

NOTABLE CASES

***Walker v. Oregon Travel Info. Council*, 367 Or 761, 484 P3d 1035 (2021): To be protected from wrongful discharge due to whistleblower activities, an employee must have had an "objectively reasonable belief" that the conduct was a violation which is an issue of fact for the jury to decide and not the court.**

Employee of a semi-independent state agency was discharged from her position as the CEO. Employee sued her employer, alleging claims for violation of Oregon's whistleblower statute governing public employees and for common-law wrongful discharge.

Because the statutory whistleblowing claim sought equitable relief (the only relief available at the time of the litigation), it was tried to the court. The trial court dismissed the claim for failing to establish the required elements. Employee appealed the dismissal and the Oregon Court of Appeals affirmed the trial court's decision. The wrongful discharge claim was tried to a jury. The employer moved for a directed verdict at trial, which the court denied. The jury found in favor of employee and awarded her $1.2 million in damages. The employer appealed the court's ruling on its motion for directed verdict, and the court of appeals, agreeing with the employer, reversed the judgment in favor of employee. The appellate court held that whether employee had an "objectively reasonable belief" of the violation was for the court to decide, not the jury, and that the evidence was not legally sufficient to show that employee had an objectively reasonable basis to believe that her employer had acted unlawfully at the time she reported the conduct. Both parties appealed.

The Oregon Supreme Court reversed the court of appeals on the wrongful discharge claim and reinstated the jury's verdict. Whistleblowing by a public employee can give rise to a common-law wrongful discharge claim if the employee is terminated because of that activity. However, whether the employee had an "objectively reasonable belief" that her employer had engaged in unlawful activity is a question for the jury. The Supreme Court further concluded that there was evidence in the record from which the jury could find for employee.

With respect to employee's statutory whistleblower claim, employee argued that the trial court should have given credit to the jury's finding on the wrongful discharge claim in her favor when the court considered her whistleblower claim. The court of appeals rejected this argument. As a result of the Supreme Court's reversal on the wrongful discharge claim, however, the Supreme Court remanded the case to the court of appeals to decide the issue anew.

The court of appeals reconsidered the issue in *Walker v. State by & through Semi-Indep. State Agency*, 315 Or App 14, ___ P3d ___ (2021), and stood by its initial decision. The court of appeals explained that the statutory whistleblowing claim was tried to the trial court based on equitable remedies in the 2015 version of the statute and that the jury's determinations on the wrongful discharge claim did not bind the trial court when sitting in equity. Thus, the trial court could make new findings on the statutory claim that are separate from the jury's finding on the wrongful discharge claim.

It should be noted that under the 2015 version of ORS 659A.203, when this case was litigated, only equitable remedies were recoverable. As a result, an employee could also bring a common-law wrongful discharge claim to seek other damages not available under the statute at that time. The statute, however, was amended in 2016 and provides additional remedies, including compensatory damages. Because the current statute provides a complete remedy, an employee today would likely be unable to bring both a statutory whistleblower claim and a common-law wrongful discharge claim.

KEY TAKEAWAY

Whether an employee has a reasonable belief that an employer's conduct violates the law is a question of fact for the jury to decide.

***Zweizig v. Rote*, 368 Or. 79, 486 P.3d 763 (2021): Oregon's statutory noneconomic damages cap is not applicable to an award of noneconomic damages in an unlawful-employment-practices claim.**

Employee sued his employer's former executive, alleging that the executive had aided and abetted retaliation against him for whistleblowing. Employee had not suffered any physical injuries. A jury found in favor of employee and awarded him $1 million in noneconomic damages.

Under ORS 31.710(1), Oregon law caps noneconomic damages at $500,000 for claims arising out of bodily injury, including emotional injury or distress, death, or property damage. Applying this statute, the federal district court cut the jury award in half, to $500,000.

Employee appealed the district court's decision to impose the noneconomic damages cap in an unlawful-employment-practices action. The Ninth Circuit Court of Appeals certified the following question to the Oregon Supreme Court: "Does Oregon Revised Statute § 31.710(1) cap the noneconomic damages awarded on an employment discrimination claim under Oregon Revised Statute § 659A.030?"

The former employee/plaintiff argued that the statutory cap for noneconomic damages does not apply when there is no bodily injury. The Oregon Supreme Court agreed, concluding that ORS 31.710(1) does not cap the noneconomic damages awarded on unlawful-employment-practices claims, "which do not involve a plaintiff seeking damages arising out of bodily injury, death, or property damage."

KEY TAKEAWAY

There is no cap on "noneconomic damages" in unlawful-employment-practices claims brought under ORS 659A.030 and, presumably, any other provision of ORS chapter 659 or any other law barring discrimination, retaliation, or whistleblowing where there is no claim bodily injury, death or property damage.

***Hernandez v. Catholic Health Initiatives*, 311 Or App 70, 490 P3d 166 (2021): Anyone qualifying as a "person" under ORS 659A.001(9) may be an aider or abettor of an unlawful employment practice in a way that subjects them to liability under ORS 659A.030(1)(g).**

Employee, a registered nurse, was hired to work at a hospital operated by Catholic Health Initiatives and Mercy Medical Center, Inc. (collectively, "Mercy Health"). Mercy Health also administered the employee-benefits program. Employee injured her back while lifting a patient. Her treating physician submitted a workers' compensation claim on her behalf, which the employer's workers' compensation insurer accepted.

Employee was placed on work restrictions by her physician, which prevented her from performing her regular work duties for several months. She requested to be placed in a different position at work, positions that were consistent with her modified restrictions, but her employer refused.

About two months later, her employer provided separate notices to employee that she had exhausted her medical leave and that she would be "administratively separated" because she had used up her available medical leave.

Employee filed a lawsuit alleging that defendants as administrators of benefit plans unlawfully aided and abetted unlawful employment practices by violating ORS 659A.030(1)(g) by mismanaging her medical-leave benefits. Defendants moved

to dismiss the claim, arguing that the statute applies to conduct by employers and employees and excludes third parties to the employment relationship. The court disagreed.

After examining the legislative history of the statute, the court concluded that the Legislature meant to apply the statute broadly to anyone falling within the definition of "person" articulated in ORS 659A.001(9), which includes individuals, associations, and labor organizations, to name a few. Therefore, aid-or-abet liability under ORS 659A.030(1)(g) is not limited to employers and employees.

KEY TAKEAWAY

Benefit-plan administrators and other third parties to employment relationships can be liable for aiding or abetting an unlawful employment practice.

***Charlton v. Ed Staub and Sons Petroleum, Inc.*, 312 Or App 522, 494 P3d 977 (2021): An employer's customer may also be an aider or abettor of an unlawful employment practice and subject to liability under ORS 659A.030(1)(g).**

Employee was a fuel-truck driver. While delivering fuel to a customer, employee observed a dog that appeared to be emaciated. He told another driver about the dog and said that he was going to report the dog's condition to the police. Employee was later confronted by his employer and told that the customer decided to take its business elsewhere, which employee alleges was due to his complaint concerning the welfare of the dog.

Employee brought an action against the employer as well as the customer. He alleged that the customer had aided and abetted discrimination and retaliation against him by prompting the employer to terminate him. The customer argued that ORS 659A.030(1)(g) applied only to the employer, coworkers, and supervisors. The court disagreed for the same reasons discussed in Hernandez.

KEY TAKEAWAY

Customers may be liable for aiding or abetting an unlawful employment practice.

***Rohrer v. Oswego Cove*, LLC, 309 Or App 489, 482 P3d 811 (2021): A common-law wrongful-termination claim is an exception to "at-will" employment and remains an available remedy when no other statutory remedies are available to address a violation of public policy.**

Employee, an assistant manager of an apartment rental company, repeatedly received "harassing" calls from an individual. Employee notified her employer, who "laughed off" the situation. Employee then complained to her supervisor that her employer's inaction was compromising her safety. She also reached out to a lawyer for legal advice on the calls. The employer was allegedly upset that employee sought legal advice, and employee's employment ended shortly thereafter.

Employee filed a common-law claim for wrongful termination, and the employer filed a motion to dismiss, arguing that employee's claim was "a garden variety retaliation claim" that must be brought, if at all, under either a federal or state statute. A common-law wrongful-termination claim can only exist where the discharge is in violation of public policy and there is no other adequate statutory remedy. The court specifically analyzed whether an adequate remedy existed under ORS 659A.199, Oregon's whistleblower statute. The court determined that it did not because employee's common-law wrongful-termination claim was not premised on an allegation that she reported evidence of unlawful activity. Instead, she alleged that her termination was the result of seeking legal advice about the harassing calls. Therefore, because there was no statutory

remedy available to employee, her common-law wrongful-termination claim was not precluded.

KEY TAKEAWAY

Under Oregon law, common-law wrongful-termination claims remain available to employees for a range of employer actions that purportedly violate or undercut public policy where no specific statutory protections exist.

***United Academics of Oregon State Univ. v. Oregon State Univ.*, 315 Or App 348,___ P3d ___ (2021): University violated 2013 neutrality law (ORS 243.670) barring public employers from attempting to influence support or opposition for labor unions by publishing frequently asked questions during faculty organizing drive.**

Oregon State University (OSU) published a set of frequently asked questions (FAQs) during a drive to organize a faculty union. The union challenged the FAQs as an unlawful attempt to influence faculty members. In an unfair-labor-practice case, the Employment Relations Board inferred that OSU was attempting to influence faculty members to oppose the union because OSU had:

- crafted some of the questions itself;
- solicited questions from faculty;
- edited the questions submitted;
- failed to expressly inform faculty that the FAQs were not actual questions submitted;
- provided answers that exceeded the scope of the question; and
- offered opinions in two instances.

On appeal, the court conclude that those facts were sufficient to support an inference that OSU had attempted to influence the faculty. Ironically, neither the Board nor the court were concerned that such actions were not barred by the statute and were typical of the frequently-asked-question format.

Throughout the organizing drive, OSU had not taken a public position in support of or in opposition to the organizing drive. The court and the Board discounted or disregarded that the purpose of the statute, as expressly stated in the statute and in the legislative history, was for employers to stay neutral and not take a position about the union-organizing drive or that the proponents of the law stated that it did not bar employers from answering questions raised by employees. The Board and the court also concluded that the employer's activities did not fall within an exception that permitted employers to express an opinion about organizing when asked.

KEY TAKEAWAY

This case applies only to Oregon public employers and establishes that the Board and courts will take an aggressive posture in construing and enforcing the neutrality law. The opinion exception, however, may remain a viable avenue to express positions about organizing drives.