ALL ABOARD THE HR EXPRESS:

OREGON LEGAL UPDATE

Legislative Updates

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A number of Oregon laws that may affect employers went into effect in 2022, and some will go into effect in 2023, including Oregon's Paid Family and Medical Leave Insurance Program (called "Paid Leave Oregon"). Outlined below are changes employers should know about.

Noncompetition Agreements (ORS 653.295)

This law modifies the requirements for enforceable noncompetition agreements, makes noncompliant agreements void rather than voidable, and limits the term of noncompetition agreements to 12 months. *Effective January 1, 2022.*

Mandating Driver License (ORS 659A.347)

This law makes it an unlawful employment practice for an employer to require an employee or prospective employee to possess a valid driver license as a condition or continuation of employment, unless driving is an essential function of their job or related to a legitimate business purpose. This law requires an employer to accept other forms of acceptable identification to verify identity or for hiring purposes. *Effective January 1, 2022.*

Multiemployer Collective Bargaining Agreements (ORS 653.646)

This law provides that an employer to a multiemployer collective bargaining agreement is considered to have met sick leave requirements if the terms of the collective bargaining agreement provide a sick leave policy or other paid time off that is substantially equivalent to or more generous than the minimum requirements of sick time provisions. This law removes the provision exempting certain employees covered under a collective bargaining agreement from sick leave requirements. This law provides that minimum sick time requirements do not apply to certain longshore workers. *Effective January 1, 2023.*

Additional Time to File Certain BOLI Complaints (ORS 654.062)

This law extends the timeline from 90 days to **one year** for filing a complaint with the Oregon Bureau of Labor and Industries (BOLI) alleging retaliation or discrimination for reporting unlawful employment practices or exercising certain rights relating to safety and health in the workplace. *Effective January 1, 2022.*

OFLA Amendments (ORS 659A.156)

This law expands the applicability of certain provisions relating to family leave including (1) making the closure of a child care provider or school due to public health emergency a qualifying purpose for which leave may be taken; (2) reducing the amount of time an

employee must work for an employer before becoming eligible to take leave; and (3) allowing for leave eligibility notwithstanding temporary separation from work or cessation of hours. The law also removes gendered language from provisions related to pregnancy. *Effective January 1, 2022.*

Hairstyles and Dress Codes (ORS 659A.001, ORS 332.075, ORS 659.850, and ORS 659A.030)

This law (known as the "Crown Act") clarifies that "race" for purposes of Oregon's anti-discrimination statutes includes "physical characteristics that are historically associated with race, including but not limited to natural hair, hair texture, hair type and protective hairstyles." The law limits the authority of a school district to become a member of voluntary organization that administers interscholastic activities unless the organization implements a policy that prohibits discrimination (as defined by ORS 659.850). The law clarifies that a valid school dress code or policy may not have a disproportionate adverse impact on members of a protected class to an extent that is greater than the impact on persons generally. *Effective January 1, 2022.*

Oregon's Paid Family and Medical Leave Insurance Program (ORS 657B.340)

This law delays implementation requirements for Oregon's Paid Family and Medical Leave Insurance program. It includes the following parameters:

- All Oregon employers must allow employees to take up to 12 weeks of paid leave off in a year. In some pregnancy-related situations, an employee may be able to take up to two more weeks for a total of 14 weeks.
- If the business or organization has 25 or more employees and at least one eligible employee in Oregon (including a remote employee), it is required to contribute to Paid Leave Oregon. If the business has fewer than 25 employees, it is not required to make payments, but its employees still pay their portion and the business still must collect and submit their payments.
- Paid Leave Oregon is paid for by employers and employees. Employers pay 40% and employees pay 60% of the contribution rate, which is 1 percent for 2023.
- Paid Leave Oregon will manage the administration of the program, which includes determining eligibility and making benefit payments when the employee is on leave. Employees apply for Paid Leave directly through the program—not the employer. Organizations will only need to collect and submit employee payments.
- The Oregon Employment Department has finalized some rules for this program.
- Contributions to the program will commence on January 1, 2023.
- Employees will be eligible to use benefits on or after September 3, 2023.
- For more information, please see Eden Vasquez's helpful materials on Paid Leave Oregon and visit the Paid Leave Oregon website.

Oregon's Minimum Wage Increase

On July 1, 2022, Oregon's minimum wage increase went into effect. In Oregon, the minimum wage rate varies depending on an employer's location categorized by (1) standard counties; (2) Portland's metropolitan area; and (3) nonurban counties. The wage increase for each location will be as follows: (1) standard counties: $13.50 per hour; (2) Portland metropolitan area: $14.75 per hour; and (3) nonurban counties: $12.50 per hour. BOLI provides a map identifying the applicable minimum wage for each county.

Notable Recent Cases

Courts across the country, including the U.S. Supreme Court, issued a number of decisions (referred to as opinions) that may affect employers and their operations in 2022. Outlined below are the notable Oregon opinions employers should know about.

Oregon Supreme Court

***Lowell v. Medford School Dist. 549C*, 370 Or 79, 515 P3d (2022)**

A piano tuner, who provided piano tuning services to the school district and assisted in producing concerts performed in school district facilities, brought a defamation action against a school theater technician, a technician's supervisor, and a district support services assistant based on their alleged statements that he had been intoxicated on school district premises.

On appeal, the plaintiff challenged the trial court's grant of summary judgment in the defendant's favor, concluding that the defendant was entitled to the affirmative defense of absolute privilege in this defamation action. The plaintiff argued that the trial court erred because the absolute privilege defense applies only to statements of public officers who exercise policy-making governmental authority, but not to mere employees engaged in operational functions.

The Oregon Court of Appeals affirmed, holding that the affirmative defense of absolute privilege applies to all employees of a public body when the defamatory statement was made in the performance of the employee's official duties.

The Oregon Supreme Court reversed, holding that the defendant public employer was not entitled to the affirmative defense of absolute privilege because it had not argued that its employees are "officers" equivalent to the university department head in Shearer v. Lambert, 274 Or 449, 547 P2d 98 (1976).

KEY TAKEAWAY

The Oregon courts have extended the absolute privilege to judicial and quasi-judicial officers at all levels. The Oregon Supreme Court previously ruled that the privilege is applicable to subordinate legislative bodies including port commissions, school boards, and special service districts. The Court then ruled that the privilege should be extended to lesser executive or administrative officers, for example, the head of a university department. That's as low as the bar will go for now.

***Abraham v. Corizon Health, Inc.*, 369 Or 735, 511 P3d 1083 (2022)**

The Ninth Circuit certified to the Oregon Supreme Court the following question: "Is a private contractor providing healthcare services at a county jail a 'place of public accommodation' within the meaning of Oregon Revised Statutes § 659A.400 and subject to liability under § 659A.142?"

The Oregon Supreme Court accepted the certified question and answered, yes, a private contractor providing healthcare services at a county jail is a "place of public accommodation" within the meaning of ORS 659A.400 and can be subject to liability under the Oregon Public Accommodations Act (OPAA).

KEY TAKEAWAY

The Oregon Supreme Court appears to be willing to expand the definition of a place of public accommodation in the OPAA.

Oregon Court of Appeals

***Crosbie v. Asante*, 322 Or App 250, P3d (2022)**

Crosbie, an experienced and skilled Registered Nurse First Assistant, sued her employer, a hospital, alleging she was fired in retaliation of complaining about safety issues in violation of the Oregon Safe Employment Act, ORS 654.062 (OSEA), including violations committed by other nurses.

At trial, the employer argued that Crosbie was fired for her persistent bullying behavior toward other nursing staff. According to the employer's witnesses, Crosbie was rude, dismissive, and prevented the other nurses from forming relationships with the surgeons. Several nurses testified that Crosbie withheld necessary information from them, and even went so far as to sabotage them by fabricating mistakes that they did not make. For example, Crosbie was issued a corrective action on January 27, 2017, because "[t]hree separate complaints were received concerning [her] inappropriate behavior," including that she "questioned another employee regarding their practice in a loud, confrontational tone * * * and humiliated the other individual in front of the patient, physician and coworkers" and "made a non-solicited derogatory remark regarding one of her coworkers to a physician." According to the termination notice, three staff members reported that Crosbie refused to "assist a new nurse regarding the appropriate medication to use," then "aggressively slammed her chair."

Crosbie, on the other hand, claimed that she was actually fired in retaliation for reporting safety issues, including violations committed by the other nurses. She testified that safety issues increased in frequency after the employer purchased Crosbie's former employer (a different hospital) due in part to its hiring of inexperienced nurses, and that she often had to step in to correct those nurses' mistakes. In her view, the instances of "bullying" were actually examples of corrections of other nurses' mistakes, and those nurses exaggerated her behavior to protect themselves. For example, she explained that in the incident other nurses characterized as "confrontational" and "humiliat[ing]," she had simply asked the other nurse to confirm the contents of a medication because it was not properly labelled.

Three out of five of Crosbie's claims went to the jury: unlawful retaliation under ORS 659A.1992 and ORS 659A.030,3 and unlawful employment practice under the OSEA, ORS 654.062. The crux of all three claims was whether protected safety complaints

were a "substantial factor" in her termination. In her proposed jury instructions, Crosbie requested an instruction called "Imputation of Subordinate Bias," otherwise known as the "cat's paw" instruction, which allows the jury to impute a subordinate employee's bias to the person who made the adverse employment decision if the subordinate somehow caused the decision-maker's action.

The employer asserted the trial court erred in its "cat's paw" jury instruction. The employer argued that the cat's paw instruction is only appropriate to give when the biased coworker is a supervisor and not a peer or coworker.

The Oregon Court of Appeals reversed and remanded for a new trial. It found that the "cat's paw" jury instruction is appropriate in cases where the biased employee is a coworker if there is evidence that the biased coworker actually influenced or was involved in making the adverse employment decision. However, the instruction's requirement that the jury find the biased employee "influenced, affected or was involved in" the employment decision was too broad. Behavior that "affects" an employment decision, such as setting a complaint in motion, is not enough to create "cat's paw" liability. Instead, the biased employee must have been involved in or have influenced the ultimate decision-making process.

KEY TAKEAWAY

An employer may be liable for an unlawful employment practice, including retaliation, if there is evidence that a biased coworker actually influenced or was involved in making the adverse employment decision.

***I. K. v. Banana Republic, LLC*, 317 Or App 249, 505 P3d 1078 (2022)**

The employer hired an employee who had been discharged from his previous employer for surreptitiously video recording other employees while they were using the restroom. The employee also video recorded employees at the employer's store in Portland.

The plaintiffs brought negligent infliction of emotional distress claims against the employer. The trial courts dismissed the claims because they did not allege violation of a legally protected right.

The Oregon Court of Appeals held that the plaintiffs adequately pleaded facts for a negligent infliction of emotional distress claim, explaining that the right to privacy includes a right to be free from being secretly video recorded in an employee restroom. An employer has a duty to protect that right to privacy when the employer knows or has reason to know that someone will likely attempt to place a video recording device in a restroom yet fails to take steps to prevent it. Given the employee's history of making similar secret recordings at a previous place of employment, it was foreseeable that the same behavior would occur at his new workplace.

KEY TAKEAWAY

The right to privacy includes a right to be free from being secretly video recorded in an employee restroom. An employer has a duty to protect that right to privacy when the employer knows or has reason to know that someone will likely attempt to place a video recording device in a restroom yet fails to take steps to prevent it.

***Klein v. Oregon Bureau of Labor & Indus.*, 317 Or App 138, 506 P3d 1108, *review denied*, 369 Or 705, 509 P3d 119 (2022)**

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. ___, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018), the United States Supreme Court ruled in favor of a Colorado baker who had been fined for refusing service to a same-sex couple on religious grounds and found Colorado's penalty had shown bias against the baker's religion. The Court also ordered that the Oregon Court of Appeals take a fresh look at its decision in *Klein v. Oregon Bureau of Labor and Industries*, __U.S. __, 139 S. Ct. 2713, 204 L. Ed. 2d 1107 (2019).

On that second look (called a remand), and applying the new standards set by the Supreme Court, the Oregon Court of Appeals adhered to its prior decision upholding a determination by BOLI that the petitioner Aaron Klein, the co-owner of the bakery Sweet Cakes by Melissa, unlawfully discriminated against the complainants, the Bowman-Cryers, by refusing to bake them a wedding cake because of their sexual orientation, in violation of ORS 659A.403, and that neither the state constitution nor the federal constitution precludes the enforcement of the statute against him. The couple had argued that baking the cake would infringe on their religious rights.

But on the issue of damages to be assessed for that discrimination, the Court of Appeals concluded that BOLI's handling of the damages portion of the case did not comport with the First Amendment's requirement of strict neutrality toward religion as described in *Masterpiece Cakeshop*. Specifically, the Court of Appeals opinion states "BOLI at least subtly departed from principles of neutrality when it awarded noneconomic damages based on Aaron's quotation of Leviticus." The Court of Appeals set aside the damages award, $135,000, and remanded the decision to BOLI for further proceedings on remedy.

In July 2022, in compliance with Court of Appeals decision, Oregon State Labor Commissioner Val Hoyle announced that BOLI is ordering Klein to pay $30,000 damages in the case, down from a $135,000 penalty handed out in 2015. In a statement Commissioner Hoyle, wrote: "Per the direction of the Court of Appeals, we have recalibrated the damages awarded to complainants to fall squarely within the range of such awards in previous BOLI public accommodations cases, given the record established in this case . . . [t]his award is based on the violation of law, the record in the proceeding, and is consistent with BOLI case history."

KEY TAKEAWAY

It appears high courts are going to continue to enforce the general principle that business owners cannot rely on religious or philosophical objections to discriminate against protected individuals, including LGBT individuals, in violation of applicable public accommodation laws.