All Aboard the HR Express:

A Tour of Federal, State, & Labor Legal Updates

2022 Employment Law Seminar

MILLER NASH LLP

Speaker Introductions

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Tour of Update Station

- Platform 1: Federal
- Platform 2: Washington
- Platform 3: Oregon
- Platform 4: Labor

Federal Legal Updates

Federal Legal Updates

- Notable Cases
- Legislation and Agency Guidance

Notable Cases

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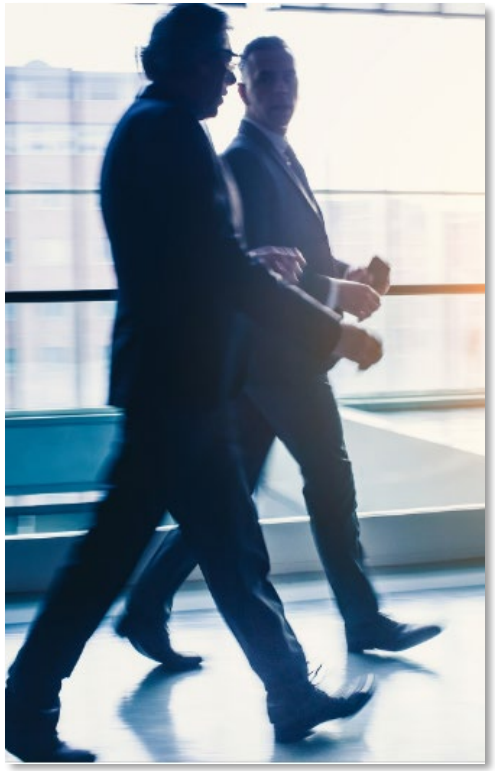
Kennedy v. Bremerton School District

- **Facts:** Bremerton School District high school football coach Kennedy alleged that his rights were violated under the First Amendment and Title VII when the District prohibited him from praying at the conclusion of football games, in the center of the field, potentially surrounded by Bremerton students and members of the community.
- **Held:** Employee's right to exercise his religion trumped the School's concerns about Free Exercise.

9th Circuit:
Buchanan v. Watkins & Letofsky

- **Facts:** Buchanan sued her employer for, among other things, discrimination under the ADA. The lower court dismissed her ADA-related claims, finding that her employer did not have the requisite 15 employees to come under the ADA's jurisdiction because she could not show that the employers' California and Nevada entities were sufficiently integrated to be recognized as a single employer.
- **Holding:** The Ninth Circuit reversed and remanded given what it saw as potential evidence of integration:
  - Shared website, 800 number, and email template footers which identified both offices, operational administrative work, a single IRS taxpayer ID and an employee roster;
  - Two partners who managed both offices;
  - And the same two partners owned both companies.



9th Circuit:
Shields v. Credit One Bank

- **Facts:** Shields alleged that her former employer violated the ADA by failing to accommodate her disability and instead terminating her from her human resources job after she underwent a bone biopsy surgery of her right shoulder and arm. The lower court concluded that Shields failed to plead a "disability" because she did not adequately allege any permanent or long-term effects for her condition, and dismissed her case.
- **Holding:** Employers, and Courts, are to construe the definition of "disability" in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADAAA.

9th Circuit:
Hill v. Walmart

- **Facts:** Hill, a model assigned by an agency, appeared in ten 1-2 day photo shoots organized by Walmart between July 2016 and August 2017. She sued Walmart for more than $540,000 in penalties for failing to pay her "wages" immediately after each photo shoot ended as required under the California wage statute.
- **Holding:** Walmart wasn't liable under the statute because it proved sufficient facts to support that it had a reasonable belief that she was an independent contractor.

Legislation and Agency Guidance

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New Limits to Arbitration Agreements and Class Action Waivers

- On March 3, 2022, President Biden signed **H.R. 4445**, amending the FAA to provide that a person pursuing a dispute based on sexual harassment or sexual assault allegations may elect to have any mandatory arbitration provisions rendered unenforceable.
- It is entirely the employee's option to pursue such claims in state, federal or tribal court rather than in arbitration—even if they signed a mandatory arbitration.

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

- Additionally, if an employee's claims involve sexual harassment or sexual assault, employers can no longer enforce joint-action waiver provisions in which the employee waived the right to participate in joint, class, or collective actions (whether a lawsuit, arbitration, or other forum).
- Also provides that whether the Act applies at all, will be determined by a Court, **not** an Arbitrator.
- Also applies retroactively so long as the claim or dispute arose on or after March 3, 2022.

EEOC Updates COVID-19 Guidance

- After August, employers now have to prove that testing requirements are consistent with a "business necessity" and are job-related, rather than relying upon the prior guidance that it was always permissible. While there is no single factor to assess such a necessity, the EEOC has outlined a number of possible considerations including:
  - The level of community transmission;
  - The vaccination status of employees;
  - The accuracy and speed of processing for different types of COVID-19 viral tests;
  - The degree to which breakthrough infections are possible for employees who are "up to date" on vaccinations;
  - The ease of transmissibility of the current variant(s);
  - The possible severity of illness from the current variant;
  - What types of contacts employees may have with others in the workplace or elsewhere that they are required to work (e.g., working with medically vulnerable individuals); and
  - The potential impact on operations if an employee enters the workplace with COVID-19.

EEOC Updates COVID-19 Guidance

- When making this assessment, employers should also consider updated CDC guidance (along with other relevant sources) to determine whether screening testing is appropriate. (EEOC, A.6.)

- Given the current CDC guidance on antibody tests (that these tests cannot determine if someone is currently inflected with COVID-19 or immune), the new guidance now prohibits employers from requiring an antibody test from employees returning to the workplace.

EEOC Updates COVID-19 Guidance

- For job applicants or potential employees, employers can require screening for symptoms of COVID-19, as long as there is a conditional job offer and the policy is applied uniformly.

- Additionally, an employer can rescind a job offer after a positive COVID-19 test, if the job requires an immediate start date, the current guidelines applicable to the employee prohibit close proximity to others, and the job requires close proximity to others. The EEOC notes that given the short period for isolation or quarantine, while rescission may be permissible, employers should first consider adjusting the start date or permitting telework (for job duties that could be performed remotely) where possible. Updated CDC guidance (along with other relevant sources) should be used to determine whether screening testing is appropriate. (EEOC, A.6.)

Department of Labor Retaliation Enforcement

- New Field Assistance Bulletin (FAB) seeks to provide guidance about worker protections related to retaliation.
  - Under FLSA
  - Under FMLA
  - Under the Migrant and Seasonal Worker Protection Act (MSWPA)
  - Under Visa Programs (H-IB, E-3, H-2)
- FAB 2022-2: Protecting Workers from Retaliation (dol.gov)

Department of Labor Retaliation Enforcement

- Examples of “adverse actions” it included:
  - excluding an employee from a regularly scheduled meeting;
  - intimidating employees to return wages found due (“kickbacks”);
  - threatening an employee with deportation;
  - confiscating a worker’s passport or other immigration documents;
  - reduction of work hours or rate of pay;
  - shift changes or elimination of premium pay
- Also addresses “Constructive Discharge”

New Proposed Independent Contractor Rules

- Would rescind the 2021 Rule adopted by the prior Administration.
- Restores the multifactor, totality-of-the-circumstances “Economic Realities” test to determine whether a worker is an employee or an independent contactor under the FLSA:
  - Factors include the investment, permanency, degree control and opportunity for profit or loss factors.
  - It also adds back consideration of whether the contracted work is integral to the employer’s business.
- Comment period is now open through November 28, 2022.

Washington Legal Updates

Legislative Updates

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Job Postings Must Include Comp & Benefits Information

- Starting January 1, 2023
- Employers with 15+ employees (anywhere)
- Paper, electronic, digital postings
- Postings for a specific position that includes qualifications

Job Postings Must Include Comp & Benefits Information

Each posting must include:

- Wage scale or salary range (top and bottom)
- General description of benefits
- General description of other compensation

Job Postings Must Include Comp & Benefits Information

Consequences of violations:

- Private lawsuit
  - Greater of actual or $5K statutory damages
  - 12% interest
  - Attorney fees
- DLI action
  - See above
  - Plus, civil penalties ranging from $500 to 10% of employee's damages

Limits Confidentiality of Allegations

- Cannot prohibit disclosure of allegations of:
  - Discrimination
  - Harassment
  - Retaliation
  - Sexual assault
  - Wage and hour violations
  - Violation of public policy

Limits Confidentiality of Allegations

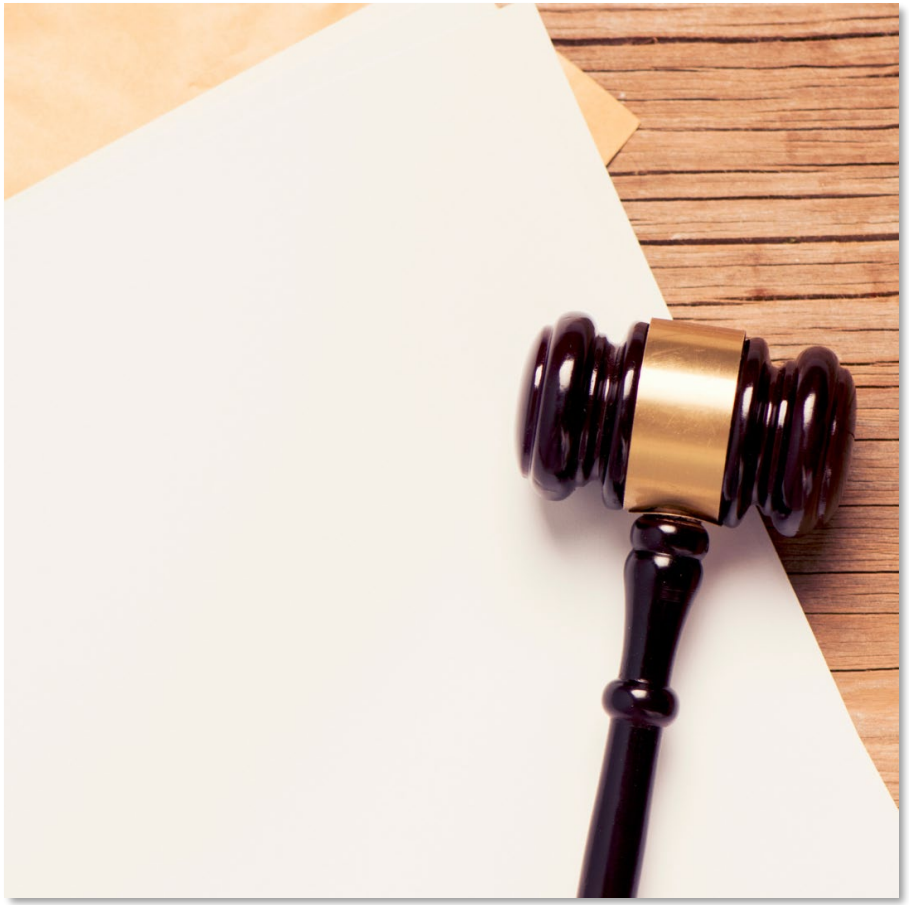
- Applies to conduct
  - Occurring during work
  - At work-related events coordinated by or through the employer,
  - Between employees, or
  - Between an employer and an employee, and
  - Whether on or off the work premises

Limits Confidentiality of Allegations

- Effective June 9, 2022
- Employee must have a “reasonable belief” conduct is illegal
- Applies to nondisparagement provisions, too
- Applies to Settlement Agreements
  - Pre-June agreements can still enforce confidentiality of allegation provisions
  - Can still require confidentiality of amount paid to settle
- Does **not** apply to NDA’s of trade secrets/confidential business info
- Also no discipline based on disclosing such allegations

Limits Confidentiality of Allegations

- Private Right of Action
  - Actual or statutory damages of $10,000 (whichever is greater), and
  - Attorney fees



Agency Updates

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Washington Paid Family Medical Leave Update

- Premiums increasing to 0.8% (January 2023)
- Bereavement leave for death of newborn (June 2022)
- Employees currently not covered due to CBA will be covered (January 2024)

The Washington Cares Act—What's Next?

- 2022: Premium collection delayed until July 1, 2023
- 2023: Another premium delay? Unknown.

Minimum Wage Increases (Jan. 1, 2023)

- **Washington State: $15.74 per hour**
- **City of Seattle: $18.29 per hour**
  - Employers with fewer than 500 employees worldwide can meet this by paying $16.50/hour and $2.19/hour in paid benefits or allowed tips.
- **City of SeaTac: $19.06 per hour**
  - Hospitality and transportation employees only.

Salary Thresholds Increase for Exempt Employee Positions (January 2023)

- Executive, Administrative, and Professional (EAP)
  - Small businesses (1-50 employees): $1,101.80 a week ($57,293.60 a year)
  - Large businesses (51+ employees): $1,259.20 a week ($65,478.40 a year)
- Computer Professionals
  - Alternatively, can be exempt if paid $55.09 per hour
- Must also meet the duties tests for one of the exemptions

Minimum Comp to Enforce Noncompetition Provisions (January 2023)

- Employees: $116,593.18
- Independent Contractors: $281,482.95

“Comp” means taxable income (Box 1 W-2 income)

Notable Cases

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Oakley v. Domino's Pizza

Employee who transported ingredients and supplies for Domino's restaurants signed an agreement to arbitrate under federal law, and to waive class action lawsuits. Filed a class action lawsuit anyway.

- **Court held:**
  - Arbitration Agreements
    - If a transportation employee, Federal Arbitration Act (FAA) doesn't apply
  - Class Action Waivers
    - Court held that Class Action Waivers are void under state law
- **Bottom line:** to require arbitration and class action waivers, have the FAA apply to your agreement.
- **Reminder:** FAA prohibits any agreement (under any law) to require employees to arbitrate or waive class actions for claims of sexual assault or sexual harassment.

Suarez v. Washington

Employee of state agency sought schedule changes as an accommodation of her religious practices.

- **Court of Appeals revived her claims**
  - Question of fact as to whether employer reasonably accommodated employee.
  - Court agreed employer did not have to make schedule changes that violated CBA provisions.
  - But Court also found a lack of affirmative attempts by employer to accommodate employee.
  - Court was particularly troubled by the employer's failure to suggest employee apply for open position it knew would have accommodated her religious practices.
- **May only apply to public sector employers**
- **Bottom line:** When faced with an employee request for religious accommodation, engage in an interactive process and ascertain if there are any reasonable accommodations available.

Oregon Legal Updates

Legislative Updates

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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

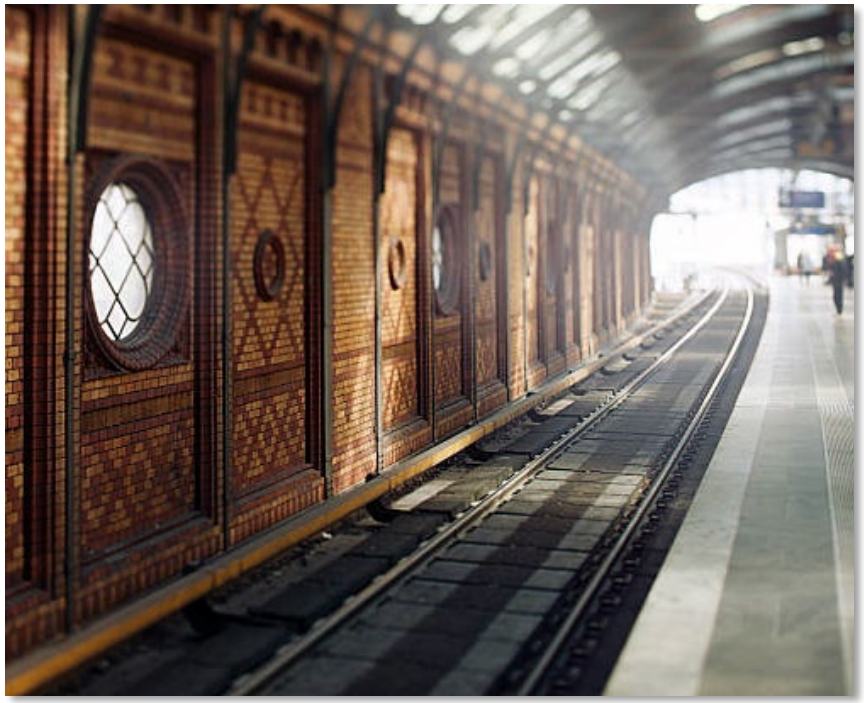
Mandating Driver License (ORS 659A.347)

- 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, 2022

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:
  - Making the closure of a child care provider or school due to public health emergency a qualifying purpose for which leave may be taken;
  - Reducing the amount of time an employee must work for an employer before becoming eligible to take leave; and
  - Allowing for leave eligibility notwithstanding temporary separation from work or cessation of hours.
- 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)

- 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."
- It 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 bill 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 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:
  - Standard counties: $13.50 per hour;
  - Portland metropolitan area: $14.75 per hour; and
  - Nonurban counties: $12.50 per hour.
- BOLI provides a map identifying the applicable minimum wage for each county: https://www.oregon.gov/boli/workers/Pages/minimum-wage.aspx.
- Effective July 1, 2022

Notable Cases

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Oregon Supreme Court
Lowell v. Medford School Dist. (2022)

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

Oregon Supreme Court
Abraham v. Corizon Health, Inc. (2022)

- **Key Takeaway:** The Oregon Supreme Court appears to be willing to expand the definition of a place of public accommodation in ORS 659A.142, Oregon's Public Accommodations Act (OPAA).

Oregon Court of Appeals
Crosbie v. Asante (2022)

- **Key Takeaway:** The "cat's paw" 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.

Oregon Court of Appeals
I.K. v. Banana Republic (2022)

- **Key Takeaways:**
  - 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.

Oregon Court of Appeals
Klein v. Oregon Bureau of Labor & Industries

- The United States Supreme Court recently 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*.
- On that second look, the Oregon Court of Appeals adhered to its prior decision upholding a determination by BOLI that the petitioner, the co-owner of the bakery Sweet Cakes by Melissa, unlawfully discriminated against the complainants, 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.

Oregon Court of Appeals
Klein v. Oregon Bureau of Labor & Industries

- 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.
- 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, 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.

Oregon Court of Appeals
Klein v. Oregon Bureau of Labor & Industries

- **Key Takeaways:**
  - 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.
  - Courts are on the lookout for evidence of bias on the part of government bodies against individuals, especially when religious freedom is involved.

Oregon Paid Family Medical Leave Act Updates

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What is Oregon's Paid Family Medical Leave Act?

- Establishes a paid family and medical leave insurance (PFMLI) program
- Provides **all** Oregon employers must allow employees to take up to 12 weeks of **paid leave in a year**
- For some pregnancy-related situations, an employee may be able to take up to a total of 14 weeks
- Qualifying reasons for leave include:
  - To care for and bond with a child following the child's birth or adoption;
  - To recover from a serious health condition or care for a family member's serious health condition; or
  - To take leave if the employee (or an employee's family member) has experienced domestic violence, sexual assault, or harassment

Interaction with Other Leave Laws or Workers' Compensation

- Oregon's paid leave does not provide additional leave beyond what is provided under the Oregon Family Leave Act (OFLA) or the federal Family and Medical Leave Act (FMLA)
- OFLA, FMLA, and Oregon's paid leave run **concurrently**
- Employees cannot get paid leave benefits if they are receiving workers' compensation or unemployment insurance benefits

Paid Leave Oregon has a detailed OFLA, FMLA, and Oregon Sick Leave comparison chart: https://paidleave.oregon.gov/Documents/Paid-Leave-OFLA-FMLA-Chart-EN.pdf

Contributions

- PFMLI program is funded by employee and “large employer” contributions in the form of payroll deductions
- Large employers (**25 or more employees**) are required to contribute to the PFMLI fund
- Small employers (**fewer than 25 employees**) are **not** required to make contributions, but need to collect employee contributions
- Employees pay 60% of the set contribution rate, and employers pay 40% (the rate for 2023 is 1%)
  - For example, if an employee made $1,000 in wages, the employee would contribute $6 and a large employer would pay $4
- Employers can cover the employee portion as a benefit for their employees
- Contributions begin on **January 1, 2023**

Administering Oregon Paid Leave and Employer Equivalent Plans

- **Paid Leave Oregon** will manage the program, which includes determining eligibility and making payments to employees
- Employees apply directly to Paid Leave Oregon
- Employers can apply to Paid Leave Oregon for approval to offer an equivalent plan
- **An equivalent plan must:**
  - Offer benefits that are **equal to or greater** than the benefits provided by Paid Leave Oregon.
  - Not cost the employee more than what they would pay into Paid Leave Oregon.
  - Cover all employees who have been continuously employed with the employer for at least 30 calendar days.

Employer Next Steps

- Update employee handbooks and policies
- Review Paid Leave Oregon's website
- Determine if you should apply for Equivalent Plan approval
- Post Paid Leave Oregon's Model Notice at each worksite no later than January 1, 2023
  - For remote employees (or employees without a regular worksite) send electronic notice
- Employees can start taking paid leave in September 2023
  - Employees can give notice of paid leave in August 2023

Paid Leave Oregon

What you need to know

Starting in September 2023, Paid Leave Oregon will serve most employees in Oregon by providing paid leave for the birth or adoption of a child, your or a loved one's serious illness or if you experience sexual assault, domestic violence, harassment, or stalking.

What benefits are provided through Paid Leave Oregon and who is eligible?

Employees in Oregon that have earned at least $1,000 in the prior year may qualify for up to 12 weeks of paid family, medical or safe leave in a benefit year. While on leave, Paid Leave Oregon pays employees a percentage of their wages. Benefit amounts depend on what an employee earned in the prior year.

Who pays for Paid Leave Oregon?

Starting on January 1, 2023, employees and employers contribute to Paid Leave Oregon through payroll taxes. Contributions are calculated as a percentage of wages and your employer will deduct your portion of the contribution rate from your paycheck.

When do I need to tell my employer about taking leave?

If your leave is foreseeable, you are required to give notice to your employer at least 30 days before starting paid family, medical or safe leave. If you do not give the required notice, Paid Leave Oregon may reduce your first weekly benefit by 25%.

How do I apply for Paid Leave?

In September 2023, you can apply for leave with Paid Leave Oregon online at **paidleave.oregon.gov** or request a paper application from the department. If your application is denied, you can appeal the decision with the Oregon Employment Department.

State of Oregon Employment Department

What are my rights?

If you are eligible for paid leave, your employer cannot prevent you from taking it. Your job is protected while you take paid leave if you have worked for your employer for at least 90 consecutive calendar days. You will not lose your pension rights while on leave and your employer must keep giving you the same health benefits as when you are working.

How is my information protected?

Any health information related to family, medical or safe leave that you choose to share with your employer is confidential and can only be released with your permission, unless the release is required by law.

What if I have questions about my rights?

It is unlawful for your employer to discriminate or retaliate against you because you asked about or claimed paid leave benefits. If your employer is not following the law, you have the right to bring a civil suit in court or to file a complaint with the Oregon Bureau of Labor & Industries (BOLI). You can file a complaint with BOLI online, via phone or email:

Web: www.oregon.gov/boli
Call: 971-245-3844
Email: help@boli.oregon.gov

Learn more about Paid Leave Oregon
Web: **paidleave.oregon.gov**
Call: 833-854-0166
Email: paidleave@oregon.gov

Paid Leave Model Notice Poster

Oregon Paid Family Medical Leave Update Webinar

- Need-to-Know Details
- Employer Best Practices
- Key Takeaways

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Labor Updates

Washington Public Employment Relations Commission Updates

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Ben Franklin Transit (Teamsters Local 839) Decision 13409-A (PECB, 2022)

- Union's lead negotiator engaged in hostile behavior and used vulgar language to express his frustrations about the employer.
- He did not threaten or intimidate the employer or its representatives with violence.
- PERC was concerned with free speech under the First Amendment and Washington Constitution.
- ***Employer Takeaway:*** Absent direct threats of violence or intimidation, union representatives are afforded broad First Amendment protection, and vulgar speech does not breach a union's good faith bargaining obligation.

University of Washington Decision 13483-A (PSRA, 2022)

- Campus police were responsible for patrolling residence halls.
- Students called for the University to “disarm and divest” from the University’s police department.
- Although nationally there had been concerns with police misconduct, campus police had not engaged in inappropriate behavior.
- ***Employer Takeaway:*** An employer’s concern with nation police misconduct does not justify skimming bargaining unit work, when the union had not behaved improperly.

Oregon Employment Relations Board Updates

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Unilateral Change

- ***Salem Keizer Ed. Assn. v. Salem Keizer School Dist.***
  - District changed calculation of full-time equivalency (FTE) from prior year
    - No notice or bargaining with union over change
  - Was this a unilateral change?
    - FTE not controlled by CBA terms
    - Found change inconsistent practice for prior school year
    - Disregarded how FTE calculated in prior years
- **Takeaway**
  - Current ERB will disregard history of multiple changes and just look to most recent to establish a past practice

Unilateral Changes (Duty to Bargain—Pandemic Changes)

- *Marion County*
  - County return to workplace directive (7-2021)
    - Unlawful unilateral change
  - ERB held work-from-home policy created new status quo
    - Alternative sources of status quo:
      - Term of CBA or other agreement, written policy or work rule, practice
    - Adopted and followed for 15 months
    - Temporary status of work-from-home not abrogate bargaining duty

Bargaining Arrangement

United Food and Commercial Workers Declaratory Ruling

Union asked two questions on bargaining arrangements:

1) Can one party insist on virtual or hybrid settings?
   - Yes, so long as proposal is reasonable under the totality of the circumstances
     - Unreasonable only if restricts choice of bargaining reps or interferes with bargaining process
   - Rejected outdated NLRB rules because of technology advances
   - Declined to rule this a ground rule (and permissive)
     - Ruled: it was over fundamental obligation to meet and bargain

Bargaining Arrangement

United Food and Commercial Workers Declaratory Ruling

2) Can an employer insist that bargaining unit employees be allowed to attend negotiation sessions as observers?
   - No. Observers was a ground rule and a permissive subject
   - It was a precondition that the employer could not insist on it
   - Rationale also applies to Union insisting on observers

Duty to Bargain (SB 1049)

- *Hillsboro Fire Department*
  - Dept. rejected union demand to bargain over 2020 SB 1049 required diversion of PERS contributions to address underfunding
  - No bargaining obligation—if covered by contract terms
    - The CBA had a comprehensive article on retirement benefits
    - An exception to Union's ability to demand to bargain under the *Multnomah* case

Duty to Bargain (SB 1049)

- *OSEA v. Silver Falls School Dist.*
  - Employer agreed to interim bargain SB 1049 effects
  - ERB majority (2-1) held: ER engaged in surface bargaining
    - Key: before bargaining, Asst. Supt. Emailed others—intended not to offer retirement compensation
  - Dissent:
    - Can't bargain in bad faith without statutory duty to bargain
    - Failed to consider all the facts (totality of circumstances analysis)

National Labor Relations Board Updates

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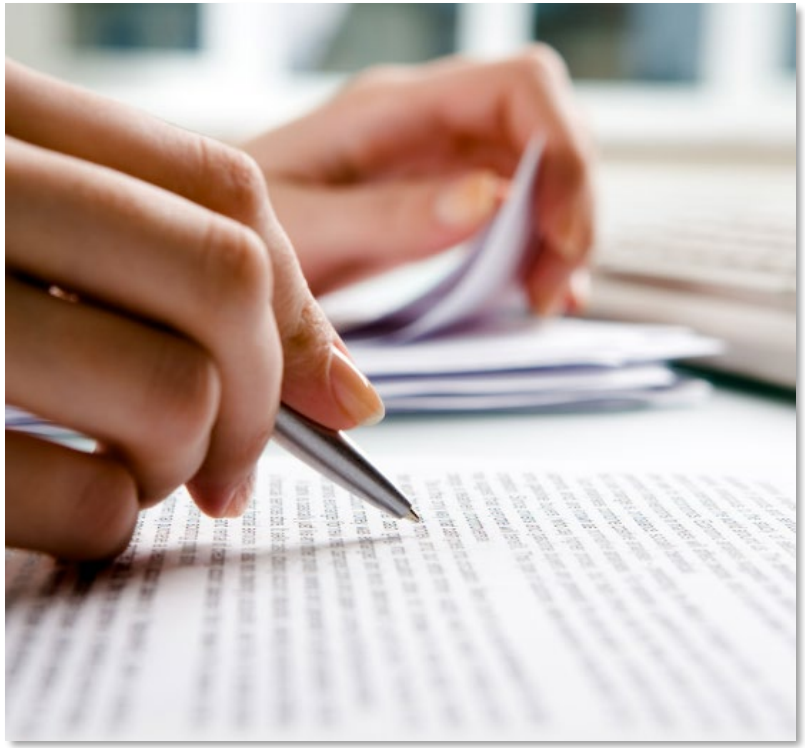
What is Happening at the NLRB

- General Counsel Jennifer Abruzzo
  - Chief Prosecutor
  - Aggressive pursuit of pro-union agenda
- Board
  - Re-examining Trump-era rulings
- Nothing new: history of flip-flop

Joint Employer Rulemaking



- Replace Trump-era rule with new rule that a 3rd party is an employer when:
  - Retaining right to control essential terms
  - Directly or indirectly
- Expanding who can be considered employers
  - Franchisors—Golden Arches
  - Outsourced work

Independent Contractors

- Think gig workers
- Invite briefing—back in December 2021
- Return to Obama-era rule
  - Actual “entrepreneurial opportunity”
  - Operate as independent business

Independent Contractors

- Effect?
  - Right to organize union
  - Gain protections under NLRA
- General Counsel: misclassification as *per se* unfair labor practice

Micro-Units

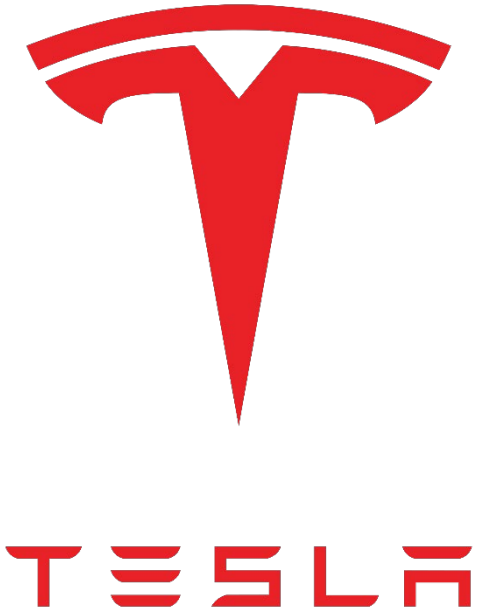
- Return to an Obama-era ruling
  - Permitted union cherry-picking
  - Whatever group the union targets/proposes is presumed a valid bargaining unit
    - Unless employers shows other employees to share **overwhelming** community of interest with targeted group
- Board invited briefing—December 2021

Targets of General Counsel

- Return to card checks
  - Reinstate 1949 *Joy Silk* rule
- Bar captive audience speeches
  - Citing 1946 *Clark Bros.* case (overturned by 1947 legislation)
- Concerted activity not required to be protected
  - Brief filed in *American Fed. of Children*

Board Reverses Trump-Era Board

- *Tesla, Inc.*
  - Reverted to the 1949 *Republic Aviation* standard
  - Union t-shirt could be worn on shop floor
  - Rules against union insignia presumptively invalid
  - Except for “special circumstances” such as:
    - Maintain production or discipline
    - Uniform look for customer-facing positions



Board Reverses Trump-Era Board

- *Valley Hospital Medical Center*
  - Dues deduction obligation continues past contract expiration
  - Removes financial risk to union going on strike

Injunctive Relief Petitions

- GC aggressively pursuing injunctions that interfere with organizing efforts
  - Issued guidance memorandum
- Seeks reinstatement—three Starbucks cases

Expanded Remedies

- GC issued three guidance memoranda
- Scope of remedies required in settlement agreements
- Additional remedies pled in complaints
- Expanding types of remedies
  - Consequential damages (extra costs for substitute job—traveling, child care, housing, interest on loans and credit cards, overdrafts, job training)
  - Expanded posting requirements, requiring manager/owner to read notice, issue letter of apology

Thank You!

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