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It's 2008: Are Your Policies for Oregon Employees Up to Date?

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Breaking Developments In Labor and Employment Law
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We are now three weeks into the New Year and that means its time to ensure that your business is current on new laws that went into effect on January 1 (or in late 2007). Below is a summary of 19 new laws affecting employers in Oregon:

1. Oregon Legislature Toughens Laws on Noncompete Agreements

On August 6, 2007, Senate Bill 248 was signed into law, making more onerous the requirements for a valid noncompetition agreement between employers and their employees. Oregon law now makes noncompete agreements voidable unless all of the following four requirements are met:

(a) The employer informs the employee that a signed non-compete agreement is a required condition of employment. This notification must be given to the employee in a written employment offer at least two weeks before the employee's first day of work.

(b) The employee is an individual engaged in administrative, executive or professional work who: (1) performs predominately intellectual, managerial or creative tasks; (2) exercises discretion and independent judgment; and (3) is paid on a salary basis.

(c) The employer has a "protectable interest," meaning that the employee: (1) has access to trade secrets; (2) has access to competitively sensitive confidential business or professional information (*i.e.*, product development plans, product launch plans, marketing strategy or sales plans); or (3) is employed as an on-air talent.

(d) The total amount of the employee's gross salary and commissions on an annual basis at the time of termination exceeds the median family income for a family of four as determined by the United States Census Bureau.

One positive for employers in the new law is that the requirements do not apply to a covenant not to solicit employees of the employer, or to solicit or transact business with customers of the employer. Employers can still have their employees sign these covenants as long as they are separate from the noncompete agreements. The effective date for this legislation is January 1,

2008. Only agreements entered on or after that date are affected by the new law.

2. Employment Arbitration Agreements

SB 248 amends Oregon law concerning the enforceability of agreements between an employer and an employee to arbitrate disputes arising out of employment. Under the new statute, which goes into effect on July 1, 2008, a written arbitration agreement entered into between an employer and employee is voidable and may not be enforced by a court unless (1) the employer informs the employee in a written employment offer received by the employee at least two weeks before the first day of the employee's employment that an arbitration agreement is required as a condition of employment; or (2) the arbitration agreement is entered into upon a subsequent bona fide advancement of the employee by the employer.

It is reasonable to conclude that the term "subsequent bona fide advancement" will have the same meaning as it has in current ORS 653.295. A "bona fide advancement" has been interpreted by the courts to mean that the employee must be given an increase in responsibilities and duties, *and* an increase in pay.

3. Amendments to the Oregon Family Leave Act ("OFLA")

Three bills (HB 2635, HB 2485 and HB 2460) make several changes to the Oregon Family Leave Act ("OFLA") (ORS 659A.150 to 659A.186). These changes are effective January 1, 2008:

Inclusion of Grandparents or Grandchildren as Family Members

The grandparent or grandchild of the employee is now included within the definition of "family member." (Amending ORS 659A.154). As a result of the amendment, an eligible employee will be entitled to OFLA leave to care for his or her grandparent or grandchild who suffers from a serious health condition.

Protection Against Retaliation

ORS 659A.183 has been amended to explicitly prohibit an employer from retaliating or in any way discriminating against an individual with respect to hire or tenure or any other term or condition of employment because the individual has inquired about OFLA leave, submitted a request for family leave or invoked any provisions of OFLA. The amendments concerning non-retaliation apply to all conduct by an employer, whether occurring before, on or after the effective date of the amendment.

Use of Accrued Sick Leave

ORS 659A.174 is amended to provide that an employee taking family leave is entitled to use any paid accrued sick leave during the period of family leave. This amendment applies only to periods of family leave taken on or after the effective date of the amendment (January 1, 2008).

Changes Concerning OFLA Leave and its Relationship to Leave Taken Because an Employee is Unable to Work Due to a Disabling Work Related Injury

Under existing law, leave attributable to an employee's disabling compensable work-related injury runs concurrently with OFLA leave. Under the new amendments, family leave does not include leave taken by an eligible employee who is unable to work because of a disabling compensable injury. (Amended ORS 659A.150(3).) A covered employer may not reduce the amount of family leave available to an eligible employee by any period the employee is unable to work because of a disabling compensable injury. (Amended ORS 659A.162(7).) Under the new amendments, special rules also apply when an employee is offered reinstatement to his or her former position or to an existing position that is vacant and suitable, or offered re-employment that is available and suitable. If an employee refuses an offer of reinstatement or re-employment and is otherwise entitled to OFLA leave, the employee: (1) automatically commences a period of family leave under OFLA upon refusing the offer of re-employment or reinstatement; (2) need not give additional written or oral notice to the employer that the employee is commencing a period of OFLA leave. (Amended ORS 659A.043(4) and ORS 659A.046(5).)

4. Leave for Domestic Violence, Sexual Assault or Stalking

Senate Bill 946 amends ORS 659A to provide mandatory leave for employees who are the victims of domestic violence, sexual assault or stalking.

Covered Employers

A covered employer means an employer who employs six or more individuals in the state of Oregon for each working day during each of 20 or more calendar weeks in the year in which an eligible employee takes leave to address domestic violence, sexual assault or stalking, or in the year preceding the year in which an eligible employee takes such leave.

Eligible Employees

An eligible employee means an employee who worked an average of more than 25 hours per week for a covered employer for at least 180 days immediately before the date the employee takes leave and is the victim of domestic violence, sexual assault or stalking, or is the parent or guardian of a minor child or dependent who is a victim of domestic violence, sexual assault or stalking. Note: under the new statute, the terms "victim of domestic violence," "victims of sexual assault" and "victim of stalking" will be further defined under regulations issued by the Bureau of Labor and Industries ("BOLI").

Leave from Work

Except in cases of undue hardship, an employer shall allow an eligible employee to take reasonable leave from employment for any of the following purposes: (1) to seek legal or law enforcement assistance or remedies to ensure the health and safety of the employee or the employee's minor child or dependent, including preparing for and participating in protective

order proceedings or other civil or criminal legal proceedings related to domestic violence, sexual assault or stalking; (2) to seek medical treatment for or to recover from injuries caused by domestic violence or sexual assault or stalking of the eligible employee or the eligible employee's minor child or dependent; (3) to obtain or to assist a minor child or dependent in obtaining counseling from a licensed mental health professional related to domestic violence, sexual assault or stalking; (4) to obtain services from a victim's services provider for the eligible employee or the employee's minor child or dependent; (5) to relocate or take steps to secure an existing home to ensure the safety and health of the eligible employee or the employee's minor child or dependent.

Undue Hardship

The statute permits an employer to deny leave in cases of "undue hardship." Undue hardship means a significant difficulty and expense to a covered employer's business, and includes consideration of the size of the employer's business and the employer's critical need for the eligible employee. An employer may also limit the amount of leave an eligible employee takes if the employee's leave creates an undue hardship on the employer's business.

Denial of Leave

It is an unlawful employment practice for a covered employer to deny leave to an eligible employee or to discharge, threaten to discharge, demote, suspend, or in any manner discriminate or retaliate against an employee with regards to promotion, compensation or other terms, conditions or privileges of employment because the employee takes such covered leave.

Notice to Employer

An eligible employee must give the covered employer reasonable advance notice of the employee's intention to take leave unless giving the advance notice is "not feasible."

Certification

The employer may require the eligible employee to provide certification that (1) the employee or the employee's minor child or dependent is a victim of domestic violence, sexual assault or stalking; and (2) the leave is taken for one of the purposes authorized by the statute (*e.g.* law enforcement assistance, medical treatment, obtaining or assisting with counseling for a minor child, necessary services from a victim's services provider, relocation).

What Constitutes Sufficient Certification?

Any of the following constitutes sufficient certification: (1) a copy of a police report indicating that the eligible employee or the employee's minor child or dependent was a victim of domestic violence, sexual assault or stalking; (2) a copy of a protective order or other evidence from a court or attorney that the eligible employee appeared in or was preparing for civil or criminal proceeding related to domestic violence, sexual assault or stalking; (3) documentation from an attorney, law enforcement officer, healthcare professional, licensed mental health professional or

counselor, member of the clergy, or victim's services provider that the eligible employee or the employee's minor child or dependent was undergoing treatment or counseling, obtaining services, or relocating as a result of domestic violence, sexual assault or stalking.

Confidentiality of Records

All records and information kept by an employer regarding leaves under the new law are confidential and may not be released without the expressed permission of the employee, or unless otherwise required by law.

Use of Paid Leave

Leave is unpaid unless otherwise provided by the terms of an agreement between the employee and the covered employer, a collective bargaining agreement or an employer policy.

Use of Accrued Vacation or Paid Time Off

Notwithstanding that leave is otherwise unpaid, an employee who takes leave may use any paid accrued vacation leave or any other paid leave that is offered by the covered employer, in lieu of vacation leave, during the period of leave.

Employer May Determine Order of Leave Use

Subject to an agreement between an eligible employee and the covered employer, a collective bargaining agreement or employer policy, the covered employer may determine the order in which paid accrued leave is to be used when more than one type of paid accrued leave is available to the employee.

Remedies

Employees may file actions to enforce their rights and recover back pay, reinstatement, injunctive relief, costs and attorneys' fees.

Effective Date

The requirements of the new law are effective immediately.

5. Rest Period to Express Breast Milk

HB 2372 adds new requirements that employers permit employees a 30-minute rest period to express breast milk. Under the new legislation, and subject to an exception for "undue hardship," an employer must provide an employee a 30-minute rest period to express milk during each four-hour work period, or a major part of a four-hour work period, to be taken by the employee approximately in the middle of the work period. If feasible, the employee shall take the rest period to express milk at the same time as the rest period or meal period that is otherwise

provided to the employee.

Paid or Unpaid Breaks

If the employer is required by law or contract to provide the employee with paid rest periods, the employer shall treat the rest periods used by the employee for expressing milk as paid rest periods up to the amount of time that the employer is required to provide as paid rest periods. If the employee takes unpaid rest periods, the employer may allow the employee to work before or after her normal shift to make up the amount of time used during the unpaid rest period. If the employee does not work to make up the amount of time either during the unpaid rest periods, the employer is not required to compensate the employee for that time.

Contributions for Health Insurance

When the employer's contribution to health insurance is influenced by the number of hours the employee works, the employer shall treat any unpaid rest period to express milk as paid work time for the purpose of measuring the number of hours the employee works attributable to health insurance.

Undue Hardship

An employer is not required to provide rest periods if it would impose an undue hardship on the operation of the employer's business. "Undue hardship" means significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business.

Additional Rest Period

The statute may also impose additional rest period obligations, because it states that an employer shall provide "reasonable unpaid rest periods" to accommodate an employee who needs to express milk for her child.

Notice to Employer

The employee must provide reasonable notice to the employer that she intends to express milk upon returning to work.

Physical Facilities

An employer is required to make reasonable efforts to provide a location other than a public restroom or toilet stall, in close proximity to the employee's work area, for the employee to express milk in private. That location may include the employee's work area, or a room connected to the public restroom such as a lounge or child care facility.

Coverage

The law applies only to employers who employ 25 or more employees in the state for each working day during each 20 or more calendar work weeks in the year in which the rest periods are taken, or in the year immediately proceeding the year in which the rest periods are taken. This section applies only to an employer whose employee is expressing milk for her child 18 months of age or younger. The law also applies to employees who are exempt from overtime, *e.g.*, white collar exempt employees. The Bureau of Labor and Industries ("BOLI") may implement rules to interpret and enforce the new statute.

Effective Date

The law is effective on January 1, 2008.

6. Rest Periods for Tipped Employees

SB 403 amends ORS 653.261 relating to rest periods for employees who serve food or beverages, receive tips and report the tips to the employer. The statute directs that the BOLI Commissioner adopt rules providing that an employee who serves food or beverages and receives tips and reports the tips to the employer may waive a meal period. However, an employer may not coerce an employee into waiving a meal period.

7. New State-Wide Prohibition Against Discrimination on the Basis of Sexual Orientation

SB 2 makes major changes to Oregon law relating to discrimination on the basis of sexual orientation. ORS 659A (which encompasses discrimination in employment and housing) is amended in a number of significant ways to now prohibit discrimination on the basis of sexual orientation.

Sexual orientation is defined in the new statute as "an individual's actual or perceived heterosexuality, homosexuality, bi-sexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth." Subject to the two qualifications noted below, ORS 659A is amended to add discrimination on the basis of sexual orientation as an unlawful employment practice, and a category of prohibited discrimination. Thus, all of the current provision of Oregon employment discrimination law that currently prohibit discrimination on the basis of race, religion, sex, color, marital status, age or disability now apply to discrimination on the basis of sexual orientation, as defined above.

Special Rules Concerning Dress Codes

Added to the statute was a provision that clarifies that the amendments do not prohibit an employer from enforcing an otherwise valid dress code or policy, as long as the employer provides, on a case-by-case basis, for reasonable accommodation of an individual based on the health and safety needs of the individual. (ORS 659A.030(5).)

Special Rules Regarding Churches or Other Religious Institutions

Under the new statute, it is not an unlawful employment practice for a bona fide church or other religious institution to take any employment action based on a bona fide religious belief about sexual orientation (1) in employment positions directly related to the operation of a church or other place of worship, such as clergy, religious instructors and support staff; (2) in employment positions in a non-profit religious school, non-profit religious camp, non-profit religious day-care center, non-profit religious thrift store, non-profit religious bookstore, non-profit religious radio station, or non-profit religious shelter; or (3) in other employment positions that involve religious activities, as long as the employment involved is closely connected with or related to the primary purpose of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution. (ORS 659A.006(5).)

Effective Date

The amendments relating to employment discrimination apply to acts committed on or after January 1, 2008.

8. New Authorization for Employment-Related Preferences by Religious Institutions

SB 2 amends ORS 659A.006 to permit religious-based employment preferences by a church or religious institution. The statute applies to a bona fide church or other religious institution, including but not limited to a school, hospital or church camp. Such an employer may prefer an employee or an applicant for employment of one religious sect or persuasion over another if (1) the religious sect or persuasion to which the employee or applicant belongs is the same as that of the church or institution; (2) in the opinion of the church or institution, the preference will best serve the purposes of the church or institution; and (3) the employment involved is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution.

Effective Date

These changes apply to acts committed on or after January 1, 2008.

9. Expansion of Punitive Damages and Compensatory Damage Remedies

HB 2260 amends ORS 659A.885 to expand the availability of remedies for certain types of discrimination otherwise prohibited by state law. Under the new statute, punitive damages and compensatory damages may now be recovered in any claim in which it is shown that the employer discriminated against an individual on the basis of race, religion, color, sex, national origin, marital status, age (if the individual is 18 years of age or older), expunged juvenile record, or because of the race, religion, color, sex, national origin, marital status or age of any other person with whom the individual associates.

Effective Date

The new law goes into effect on January 1, 2008. It applies to any actions commenced on or after that date.

10. Addition of Familial Status as a Protected Category

SB 725 amends ORS 659A.003 to add familial status as one of the enumerated categories entitled to protection from unlawful discrimination in employment.

The Legislature did not also amend ORS 659A.030 to designate that discrimination in employment on the basis of "familial status" is an unlawful employment practice and may not, therefore, be independently actionable. However, inclusion of the language may add fuel to the developing body of the law discrimination because of family responsibilities associated with other protected classes (*e.g.*, gender, disability) may be actionable on the basis that it constitutes discrimination on the basis of, for example, the gender or disability of a person with whom an employee associates. Inclusion of the term "familial status" may also afford a vehicle for employees to urge that common law (*i.e.*, judge made law), remedies may be available for familial status discrimination because of the public policy articulated by the Legislature to otherwise prohibit familial status discrimination.

11. Deductions From Wages

HB 2674 makes changes to Oregon law relating to deductions from an employee's wage. It amends ORS 652.610 to provide that when an employer deducts an amount from an employee's wages as required or authorized by law or agreement (*e.g.*, for taxes, insurance, employee benefit contributions), the employer shall pay the amount deducted to the appropriate recipient as required by the law or agreement. The employer shall pay the amount deducted within the time required by the law or the agreement, or, if the time for payment is not specified by the law or agreement, within seven days after the date the wages from which the deductions are made are due. Failure to pay the amount as required constitutes an unlawful deduction.

This amendment, while purporting simply to ensure that employers promptly pay over amounts deducted for benefits and other purposes may create a substantial potential liability exposure for many employers. Under Oregon law, if an employer makes an unlawful deduction, the employer may be sued for actual damages or $200, whichever is greater, plus attorneys' fees. In cases in which an employer violates the statute and a number of employees may be affected, an employer may be vulnerable to multi-party or class action lawsuits for damages.

12. Payment of Wages by Direct Deposit, Automated Teller Machine Card, Payroll Cards or Other Electronic Transfer

HB 2256 amends ORS 652.110 to permit payment of wages through means other than cash or check. It permits an employer and an employee to agree that the employer may pay wages through a direct deposit system, automated teller machine card, payroll card or other means of electronic transfer, provided that the employee may: (1) make an initial withdrawal of the entire

amount of net pay without cost to the employee; (2) choose to use other means of payment of wages that involve no cost to the employee.

Special Rules Applicable to the Language of the Agreement and its Revocation

An agreement to permit payment by these methods must be made in the language that the employer principally uses to communicate with the employee. An employee may revoke the agreement by giving the employer a written notice. Unless the employer and employee agree otherwise, the agreement is revoked 30 days after the date the notice is received by the employer. However, a shorter time period (10 days) applies to employees who work as seasonal farm workers, or who are employed in packing, canning, freezing or drying agricultural crops. Such employees may give oral or written notice, which becomes effective 10 days after the notice is received by the employer.

13. New Rules Concerning Underpayment of Compensation

HB 2258 amends ORS 652.120 to specify the time period in which an employer must correct underpayments made on regular pay days. When an employer has notice that an employee has not been paid the full amount owed on a regular pay day, and there is no dispute between the employer and the employee regarding the amount of the unpaid wages: (1) if the unpaid amount is less than 5 percent of the employee's gross wage due on the regular pay day, the employer shall pay the employee the unpaid amount no later than the next regular pay day; and (2) if the unpaid amount is 5 percent or more of the employee's gross wages due on a regular pay day, the employer shall pay the employee the unpaid amount within three days after the employer has notice of the unpaid amount, excluding Saturdays, Sundays and holidays.

14. Claims for Retaliation Relating to Wage Complaints

Under existing law (ORS 652.355), an employer may not discharge or in any manner discriminate against an employee because the employee has made a wage claim or discussed, inquired about, or consulted an attorney or agency about a wage claim, the employee has caused to institute a proceeding to enforce a claim for wages, or the employee has testified or is about to testify in any such proceeding. HB 2255 amends ORS 652.355 and 659A.885 to provide for the award of compensatory and punitive damages against an employer for unlawful retaliation against an employee in violation of ORS 652.355.

15. Safety Committees for Small Employers

Under current law (ORS 654.176), employers with 10 or fewer employees are not required to establish and administer a safety committee except under certain circumstances. That requirement is currently based on such factors as lost work days, and the employer's worker's compensation premium. HB 2222 amends ORS 654.176 to require all employers to establish and administer a safety committee or hold safety meetings.

16. New Time Limitation on Providing Employee Personnel Records

Under current ORS 652.750, an employer is required to permit an employee to inspect personnel records, and, in the case of a terminated employee, to provide a certified copy of those records. HB 2254 amends ORS 652.750 to require that the employer permit the employee to inspect his records within 45 days after receipt of a request, and, within 45 days after receipt of a request for a copy, furnish a certified copy of the records to the employee or former employee. If the personnel records are not readily available, the employer and the employee may agree to extend the time in which to provide the employee an opportunity to inspect the records or furnish the employee a certified copy of the records.

17. Unemployment Benefits in Case of Lockouts

Under current ORS 657.200, an employee unemployed due to a lockout may be ineligible for unemployment benefits when (1) the lockout is not a result of a dispute between a multi-employer bargaining unit and an employer, (2) the recognized or certified bargaining agent has announced that the employees are ready, willing and able to work pending negotiation of a new contract, and (3) the employer employs individuals who are not employed by the employer immediately prior to the labor dispute to replace the individual unable to work during the lockout. HB 3339 eliminates these three conditions and permits employees who are unemployed due to a lockout to be eligible for unemployment benefits.

The amendment applies to claims for unemployment benefits made on or after January 1, 2008.

18. Change in Statute of Limitations for Safety-Related Retaliation Claims

HB 2259 amends ORS 654.062 to change the statute of limitations for filing complaints relating to retaliation because an employee has opposed unsafe practices, made a complaint, testified or is about to testify, or has assisted another employee or prospective employee relating to a safety-related complaint. The current statute of limitation of 30 days has increased to 90 days. This change became effective on June 1, 2007.

19. Certification for Return to Work from a Disabling Compensable Injury

HB 2247 amends ORS 659A.043, 659A.046, 659A.049, and 659A.063 to permit medical certification to be provided by a certified nurse practitioner that an employee may return to duty, or concerning medical fitness to assume the duties of an available or suitable position when offered reemployment or reinstatement. The nurse practitioner must be authorized to provide medical services pursuant to ORS 656.245. This change goes into effect January 1, 2008.

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