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Oregon Enacts Sweeping #MeToo Law

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Our Insights

- Labor & Employment
- Election Law / Legislative News

- Oregon

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On June 11, 2019, Governor Kate Brown signed into law the Oregon Workplace Fairness Act (SB 726), which will significantly impact all Oregon employers. The Act addresses concerns of the #MeToo movement by imposing strict requirements on how Oregon employers respond to complaints of harassment and discrimination. The legislation also significantly increases the statute of limitations within which an employee may assert a claim of discrimination, from one year to five years. Oregon now has one of the longest statute of limitations for such claims in the nation.

Effect on Employment Agreements

Beginning October 1, 2020, it will be unlawful for Oregon employers to enter into agreements with employees, whether as a condition of employment, continued employment, promotion, compensation, or the receipt of benefits, that contain any provision (such as a nondisclosure or nondisparagement provision) that has the purpose or effect of preventing employees from discussing or disclosing conduct that constitutes “sexual assault” or discrimination on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, age, uniformed service, or disability. The Act defines “sexual assault” as “unwanted conduct of a sexual nature

that is inflicted upon a person or compelled through the use of physical force, manipulation, threat or intimidation."

The Act's limitations on employment agreements apply to any conduct constituting sexual assault or discrimination that occurs between employees or between an employer and an employee, whether in the workplace or off the employment premises, including at an off-premises work-related event that is coordinated by or through the employer.

If an employer violates the Act's limitations on provisions in employment agreements, a current or prospective employee will be able to file a complaint with the Bureau of Labor and Industries (BOLI) or initiate a private civil action and pursue claims for damages and attorneys' fees.

Exemption for Human Resources Employees and Others "Tasked by Law"

Notwithstanding the Act's prohibitions, Oregon employers may require employees who are "tasked by law" to receive reports of discrimination, sexual assault, or harassment to maintain the confidentiality of such reports. The statute does not specify which employees are "tasked by law" to receive reports. However, elsewhere, it requires employers to designate one or more individuals to receive complaints of harassment and discrimination. Once designated, presumably these individuals (for example, human resources employees and supervisors) are "tasked by law" to receive reports and are generally exempt from the Act's prohibitions on agreements that prevent the discussion or disclosure of conduct that constitutes sexual assault or discrimination.

Notably, unlike a similar law in the state of Washington, Oregon's statute does not permit employers to require employees who are participating in an open and ongoing investigation to maintain the confidentiality of alleged sexual assault or unlawful discrimination during the pendency of the investigation. In such circumstances, presumably Oregon employers may still express a preference that employees maintain confidentiality during an open investigation, but they must be careful not to suggest that confidentiality is required.

Effect on Separation, Severance, and Settlement Agreements

The Act's prohibitions on agreement provisions that have the purpose or effect of preventing employees from discussing or disclosing conduct that constitutes sexual assault or discrimination extend to separation, severance, and settlement agreements. In addition, the statute prohibits employers from including a "no-rehire" provision in a separation, severance, or settlement agreement that would prevent an employee from seeking reemployment with the employer.

There are two limited exceptions: (1) if an employee claiming to be aggrieved by sexual assault or unlawful discrimination specifically requests it, or (2) if an employer makes a "good faith determination" that an employee with whom it is entering an agreement engaged in sexual assault or unlawful discrimination, then the employer may include:

1. a provision that has the purpose or effect of preventing the employee from disclosing or discussing conduct that constitutes sexual assault or discrimination, such as a nondisclosure or nondisparagement provision;
2. a provision that prevents the disclosure of factual information relating to a claim of sexual assault or discrimination; or
3. a no-rehire provision.

However, in the first scenario, i.e., when the employer is including one of these normally prohibited provisions at the specific request of an employee, the employer must allow the employee at least seven days after executing the agreement to revoke the agreement.

Employers should keep in mind that the foregoing limitations do not extend to nondisclosure or nondisparagement provisions that apply to matters other than conduct constituting sexual assault or discrimination. In particular, the Act does not prohibit employers from requiring employees to keep the amount of a severance or settlement payment confidential.

Increase in Statute of Limitations

The Act significantly increases the statute of limitations within which an aggrieved employee may file a lawsuit or administrative claim alleging, among other things, discrimination on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, age, uniformed service, or disability.

Currently, Oregon employees must file most claims within one year. With the new law, employees will have five years to file a claim for any occurrence of an unlawful employment practice under ORS 659A.030, ORS 659A.082, or 659A.112 (which include discrimination on the basis of most protected classes) that occurs on or after September 29, 2019, the date the new legislation takes effect. This is one of the longest statute of limitations for such claims in the nation. By comparison, the statute of limitations for similar claims in Washington is three years.

Beginning October 1, 2020, Oregon employees will also have five years to file a claim for a violation of the Act's prohibitions on agreement provisions that have the purpose or effect of preventing employees from discussing or disclosing conduct that constitutes sexual assault or discrimination.

Required Policy for Reduction and Prevention of Discrimination

Beginning October 1, 2020, Oregon employers will be required to adopt a written policy with procedures and practices for the "reduction and prevention" of sexual assault or discrimination on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, age, uniformed service, or disability. The policy must:

- provide a process for employees to report prohibited conduct;
- identify the individual designated by the employer who is responsible for receiving reports of prohibited conduct, including an individual designated as an alternate to receive such reports;

- disclose the statute of limitations period for sexual assault, prohibited discrimination, and violations of the law's prohibitions on certain terms in agreements (i.e., five years);
- state that "an employer may not require or coerce an employee to enter into a nondisclosure or nondisparagement agreement," and include definitions of "nondisclosure agreement" and "nondisparagement agreement";
- explain that an employee has a right to voluntarily request to enter into an agreement otherwise prohibited under the law and explain the seven-day revocation period for such agreements; and
- include a statement that advises employers and employees to document any incidents involving sexual assault or discrimination on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, age, uniformed service, or disability.

The Act also requires employers to disseminate the policy to employees in three ways:

- the policy must be made generally available to employees "within the workplace";
- a copy must be provided to new employees at the time of hire; and
- a copy must be provided to an employee by the person designated to receive complaints at the time the employee discloses information regarding prohibited discrimination or harassment.

The Act has tasked BOLI to make available model procedures or policies that employers may use as guidance.

Voiding Golden Parachutes

Lastly, the Act provides employers with a means of voiding so-called "golden parachute" provisions, i.e., lucrative, mandatory severance packages that are sometimes negotiated as a term of employment agreements with high-level executives.

Beginning October 1, 2020, an Oregon employer will have the option to "void" any provision of an agreement with a person who has the authority to hire and fire employees that requires severance or separation payments, if, after a "good faith investigation," the employer determines that (1) the person violated the Act's prohibitions on imposing an agreement provision that has the purpose or effect of preventing employees from discussing or disclosing conduct that constitutes sexual assault or discrimination or violated the employer's written harassment and discrimination policy, and (2) the violations were a "substantial contributing factor" in causing the person's separation from employment.

Notably, the Act does not define "good faith investigation" or provide guidance on when a violation is a "substantial contributing factor" in causing separation from employment.

Key Takeaways

Most provisions of the law do not go into effect until October 1, 2020, which gives employers time to review and revise their policies, procedures, and agreements. BOLI will be providing further guidance in the coming months, as the Act has tasked the agency with adopting rules to administer and enforce the law by March 31, 2020, in addition to developing model procedures and policies. We will provide further updates once these rules and model documents are available.

In the short-term, employers should consider reviewing and revising their document retention practices to reflect the increased five-year statute of limitations period that will apply to many employment claims starting at the end of September 2019.