

2nd Quarter 2017 Employment and Business Law Newsletter

June 29, 2017

Oregon Enacts The Most Comprehensive and Expansive Equal Pay Act in the Country

By Shane P. Swilley, *Employment Law Attorney*



This month, Governor Kate Brown signed into law the Oregon Equal Pay Act of 2017. The law significantly amends Oregon's current equal pay law, with the goal of reducing pay disparities and expanding protections for employees who are victims of discriminatory pay practices. Employers need to be aware of these changes now so they can start preparing to be in compliance when the law takes effect on January 1, 2019.

The law expands who is required to receive equal pay for equal work. Before, Oregon's equal pay law was limited to pay disparities between men and women. The new law expands equal pay protections beyond gender, to include race, color, religion, sexual orientation, national origin, marital status, veteran status, disability and age. These are known as "protected classes" of employees.

The law goes beyond requiring equal wages or salary. It also applies to bonuses, benefits, fringe benefits and equity-based compensation.

The law revises and clarifies what qualifies as equal work requiring equal pay. The previous law required equal pay for "work of comparable character, the performance of which requires comparable skills." The new law requires equal pay for "work of comparable character," which is now defined as "work that requires substantially similar knowledge, skill, effort, responsibility and working conditions in the performance of work, regardless of job description or title." "Working conditions" includes the "work environment, hours, time of day, physical surroundings and potential hazards encountered by an employee."

The law goes beyond just prohibiting discriminatory pay practices. The law makes it an unlawful employment practice:

- to discriminate on the basis of a protected class in the payment of wages and other compensation for work of comparable character;
- to pay wages or other compensation to any employee at a rate greater than that which the employer pays to employees of a protected class for work of a comparable character;
- to screen job applicants based on current or past compensation;
- to determine compensation based on current or past compensation of a prospective employee; and
- to seek the salary history of an applicant or an employee from the applicant or employee or from a current or former employer of the applicant or employee. This section does not prohibit an employer from requesting from a prospective employee written authorization to confirm prior compensation after the employer makes an offer of employment to the prospective employee that includes the compensation for the position.

The law does provide exceptions for different compensation levels if the difference is based on a bona fide factor that is related to the job position and is based on:

- a seniority system;
- a merit system;
- a system that measures earnings by quantity or quality of production, including piece-rate work;
- workplace locations;
- travel, if travel is necessary and regular for the employee;
- education;
- training;
- experience; or
- any combination of factors if the combination of factors accounts for the entire compensation differential.

Persons aggrieved by violations of the law will be able to file a claim with BOLI or bring a lawsuit. Remedies include two years of back pay, compensatory damages (i.e., emotional distress damages), and punitive damages if it is proved by clear and convincing evidence that the employer engaged in fraud, acted with malice, acted with willful and wanton misconduct or has repeat violations of the law.

The law encourages employers to examine their own pay practices, and correct any disparities, by not allowing employees to recover compensatory and punitive damages if the employer has conducted an equal-pay analysis within 3 years before

the action, and taken steps to correct pay disparities. The equal-pay analysis must have been completed in good faith, be reasonable in detail and in scope, be related to the protected class asserted by the plaintiff in the action, eliminated the wage disparity for the plaintiff, and made reasonable and substantial progress toward eliminating wage disparities on the whole. However, the fact that an employer has not completed an equal-pay analysis may not be used as evidence of a violation of the law.

The employer cannot eliminate wage disparities by reducing the compensation level of an employee. Rather, the lesser-compensated employees must have their compensation increased.

Most of the new law doesn't take effect until January 1, 2019. The exception is the prohibition on seeking the salary history of an applicant or employee which goes into effect 91 days after the 2017 Oregon Legislature adjourns.

January 1, 2019, may seem like a long ways away. However, completing an equal-pay analysis can be time-consuming process. Employers should start developing a plan now so that the process is completed, and any compensation disparities that may be identified have been corrected, before the law takes effect. Involving an employment law attorney in that process is highly recommended.

Getting Up to Speed on Oregon OSHA's New Recordkeeping and Reporting Rules

By Josh P. Dennis, *OSHA Attorney*



New Electronic Recordkeeping Rules

As has always been the case, if your company has had more than 10 employees at any time during the previous calendar year, Oregon OSHA rules require you to use and maintain OSHA 300 Log, OSHA 300-A Summary, and DCBS Form 801 to record work-related fatalities, injuries and illnesses.

Under the previous rule, there was no requirement to submit the completed Log and Summary to Oregon OSHA unless specifically asked to do so. However, the new

rule requires certain employers to electronically submit information from the 300 Log, 300-A Summary, and 801 Forms, directly to federal OSHA. This information must be submitted once a year, but no later than July 1st for 2017 and 2018, and no later than March 2nd beginning in 2019. The rule applies to employers with 250 or more employees or establishments with 20-249 employees in certain industries.

Notably, the Oregon rule requires employers to submit this information to a “secure website” created by federal OSHA. Despite the looming deadline, however, OSHA has not yet rolled out the website for submitting information electronically. According to OSHA’s website, they not accepting electronic submissions at this time and have published a notice of proposed rulemaking to extend the date by which certain employers are required to submit their forms electronically. Nevertheless, covered employers in Oregon should be mindful of this new requirement and be prepared to submit the information electronically once the website is rolled out.

New Anti-Retaliation Protections

Along with the new electronic reporting requirements, Oregon OSHA also adopted the new federal rules prohibiting employers from discouraging workers from reporting an injury or illness. Under the previous version of the rule, employers were only required to inform employees of how they were to report an injury or illness. Now, employers must “establish a reasonable procedure for employees to report injuries and illnesses promptly and accurately.” The rule also specifically states that if a procedure would deter or discourage an employee from accurately reporting an injury or illness, it is not reasonable. As an example, procedures that do not allow a reasonable amount of time for an employee to realize they have suffered a work-related injury or illness could violate this rule.

Where this rule has had the most significant effect, is in regards to post-injury drug testing. Under the new rule, mandatory post-injury drug testing would be considered not reasonable because of the deterrent effect the policy may have on reporting injuries. Instead, employers must have an “objectively reasonable” basis for drug testing employees who report work-related injuries.

Under the new rule, post-injury drug testing should be limited to situations where there is a reasonable possibility that drug test results could provide the employer insight on the root causes of the injury or there is a heightened interest in determining if drug use could have contributed to the injury due to the hazardousness of the work being performed. In either instance, drug testing should not be limited to the injured employee and should include all employees whose conduct could have contributed to the incident.

The new rule does not prohibit drug testing conducted under a state workers’ compensation law or other state or federal law. Nor does the new rule prohibit employers from having a zero-tolerance drug policy, nor would it prohibit pre-hire, random, or for-cause drug tests. Some federal OSHA discussions leave the impression that drug testing is not allowed unless it measures impairment, but Oregon OSHA has specifically stated that is not their approach.

Indemnity Provisions in Contracts: A Brief Summary of Oregon's Approach

By Chester D. Hill, *Business Litigation Attorney*

Contracts frequently contain indemnity provisions. An indemnity provision is a clause that transfers risk between the parties to a contract. Under such a provision, one party (called the indemnitor) agrees to defend and reimburse the other party (the indemnitee) for damages or losses resulting from claims arising out of the

contract. Indemnity provisions can be useful mechanisms to allocate risk. However, they can be broadly worded or ambiguous with respect to certain disputes.

There are a number of trends that have emerged from Oregon courts regarding indemnity provisions. These trends are useful to keep in mind during contract negotiations, particularly when the parties anticipate that there may be third party claims arising out of the contract. In general, indemnity provisions are interpreted according to the plain meaning of the language used where the meaning is unambiguously expressed. However, there are a number of caveats, including the two described below.

First, indemnity provisions do not generally cover claims between the parties to the provision. Accordingly, while the provision could cover a claim brought by a third party against the indemnitee, it may not apply to a claim brought by the indemnitor against the indemnitee. Oregon courts have found that even where the language of an indemnity provision is broad enough to encompass liability for first party claims between the parties, such an interpretation would lead to absurd and unreasonable results. If an indemnity provision were given that effect, an indemnitor could never sue the indemnitee for breach of the contract without having to indemnify the indemnitee for that suit. Regardless of the merits or outcome of the indemnitor's claims, the indemnitor would be required to indemnify the indemnitee and, accordingly, could not obtain relief on a first-party claim against the indemnitee.

Second, indemnity provisions do not cover losses to the indemnitee caused by the indemnitee's own negligence unless that intention is expressed in clear and unequivocal terms in the provision. Additionally, where the language of the provision is broad but indefinite, Oregon courts determine its enforceability, including whether it covers first party claims for negligence, by considering extrinsic considerations, including the sophistication of the parties, whether the indemnification language was specifically negotiated, or whether the indemnitor's activities exposed him to liability.

As always, it is prudent to ask an attorney to review any contract before it is executed. This is particularly true where the contract contains an indemnity provision. These provisions can have unintended or unforeseen consequences years after the contract is executed. To that end, a lawyer can draft a provision that will have a predictable interpretation if the parties to the contract have a dispute. In the end, this manages risk and allows for effective planning.

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