

C O S G R A V E

V E R G E E R K E S T E R



Agenda

1. WORKPLACE FAIRNESS ACT
2. PAID FAMILY LEAVE
3. PREGNANCY ACCOMMODATIONS
4. EXPRESSION OF BREAST MILK
5. EMPLOYEE NOTIFICATION OF I.C.E. INSPECTIONS
6. PAY EQUITY
7. MINIMUM WAGE CHANGES (EXEMPTIONS)
8. TRANSGENDER ISSUES
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WORKPLACE FAIRNESS ACT



Workplace Fairness Act | Legislative background

The **2019 Legislative Assembly** passed SB 726 to modernize protections for sexual harassment victims in the workplace.

The law includes four main components:

- Extends the **statute of limitations** for most employment civil rights complaints from **one year to five**
- Prohibits employers from asking for **non-disclosure agreements** or **no-rehire provisions** for discrimination settlements (employee can request one but has 7 days to revoke).
- Employer can void **severance agreements** for managers who violate harassment or discrimination policies
- Requires employers to **adopt a policy** prohibiting discrimination and sexual assault and directs BOLI to develop model policy



Workplace Fairness Act | Employer policy requirements

The policy must:

- Provide a process for harassment reporting
- Include the name of one person and one alternate for reporting
- Describe the relevant statute of limitation provisions
- Make clear that an employer cannot require an NDA, but an employee may voluntarily enter into an NDA and revoke the agreement within 7 days
- Advise employees to document and report incidents of harassment and assault

Employers must:

- Make the policy available to current employees
- Provide the policy to all new hires
- Give employees a written copy when they report sexual assault/harassment/discrimination



Workplace Fairness Act | Effective dates

- The law regulates **conduct occurring** on or after **September 28, 2019**
- Prohibition on **non-disclosure/no-rehire agreements**, the requirement to **adopt a compliant policy**, and the provision on **voidable NDA agreements** to severance on separation takes effect on **October 1, 2020**



Paid Family Leave | Legislative background

The **2019 Legislative Assembly** passed HR 2005 to provide paid family leave for bonding with a new child, to care for a family member with a serious health condition, for an employee's own serious health condition, and "safe leave" for victims of domestic violence, sexual assault, stalking or harassment.

The new family and medical leave insurance program **will take effect January 2023.**

The law includes three main components:

- **Up to 12 weeks of paid family leave** (plus some additional time up to 18 weeks)
- **Employer contribution requirements** for employers with 25 or more employees
- **Anti-discrimination, anti-retaliation** protection

Next: The Oregon Employment Department will issue administrative rules.



Paid Family Leave | Coverage

Covered:

- Bonding time with a new child, newly adopted or newly placed foster child within the first year after birth or placement
- Employee's own serious health condition
- Serious health condition of a "family member"
- Safe leave (domestic violence, sexual assault, stalking or harassment) ORS 659A.272

Not covered:

- Bereavement leave
- Sick child leave for non-serious health conditions
- Oregon Military Family Leave

An employee is eligible for coverage after 90 days of employment.



Paid Family Leave | “Family members”

Adopts a broader standard than OFLA/FMLA for “family members”:

- Parents, spouses, domestic partners and children (*and in loco parentis*) and the spouses or domestic partners of parents and children;
- Grandparents and grandchildren and their spouses or domestic partners;
- Siblings and stepsiblings and their spouses or domestic partners; and
- Any individual related by blood **or affinity** whose close association is the equivalent of a family relationship (*there will be rules on this one*)



Paid Family Leave | Employee/employer contributions

Employers:

- **No contribution** required for employers with fewer than 25 employees
- Employers with 25 or more employees pay a **percentage of total payroll**, as determined by the Employment Department
- Total rate may **not exceed 1%** of employee wages, up to a **max of \$132,900 in wages**
- **Quarterly reports** of wages earned/contributions made

Employees:

- **All employees pay** into the fund as a percentage of income
- **Self-employed workers may opt** to pay into the fund (not to exceed 1%)



Paid Family Leave | Income replacement

Wage replacement is based on how the **employee's salary compares to the state average**

Lower-wage workers get a larger percentage of their weekly salary

- Employees with salary at 65% or less of the state average receive **100% of salary**
- **Higher-paid employees** will receive income replacement based on a formula that combines (1) 65% of the average state average PLUS (2) 50% of their salary that is beyond the state 65% of the average state wage.

Fret not: The Employment Department, not individual employers, will administer and distribute funds.



Paid Family Leave | Employee/employer notice



Employer Responsibilities:

- Written notice (*Employment Department will provide sample*) to each employee that includes:
 - Rights to job protection
 - Discrimination and retaliation prohibition
 - Health information is confidential
 - How to file a claim

Employee Notice Requirements:

- ER may require at least 30 days' written notice of leave **if foreseeable** and an explanation of the need for leave
 - But the Sick Leave Law limits to 10 days = CONFUSION!
- *Safe leave* requires reasonable advance notice if feasible

Paid Family Leave | Anti-retaliation protection

- **No discrimination or adverse employment** action against employee who invokes paid leave
- Employers must maintain **health care coverage** during the leave period
- Employers with fewer than 25 employees may provide a **similar job with similar duties** upon the employee's return *if the original job no longer exists*
- An employer who hires a **temporary worker** to fill in for an eligible employee on leave is **not required to retain** that worker later
- An employer with an **equivalent plan** may apply for approval to opt out and avoid contributions.
- **Grants will be available** for employers of fewer than 25 employees to cover temporary workers and wage-related costs (details to come)





PREGNANCY ACCOMMODATIONS



Pregnancy Accommodations | Legislative background

The **2019 Legislative Assembly** passed House Bill 2341 to provide greater protection for pregnant employees. **Takes effect January 1, 2020**

Covers employers with 6 or more employees.

The law includes four main components:

- Unlawful practice to deny employment opportunity **because of** need for pregnancy accommodation
- Employer must make **reasonable accommodations** for pregnant employees unless it would impose an undue hardship
- Employee **can't** be forced to take **leave time** or **accept accommodations** if there's no known limitation
- No **retaliation** for accommodation requests



Pregnancy Accommodations | Reasonable accommodation

The new law requires employers to accommodate pregnant employees.

Examples of accommodations include:

- Modifying equipment
- More frequent or longer breaks and rest, including lactation breaks
- Help with manual labor
- Work schedule or job assignment adjustments



Pregnancy Accommodations | Undue hardship

What represents an undue hardship? Same as under Oregon's ADA.

Factors to consider include:

- Nature and the **cost of the accommodation**
- The overall **financial resources** of the employer:
- **Size of the business**
- Number of **locations**
- Type of **operations**
- **Composition, structure and functions** of the workforce
- **Geographic** separateness

Bottom line: An employer will have to justify its position when it denies an accommodation. The more documentation and data, the better.



Pregnancy Accommodations | Notice requirements

Employers **must display a poster in a conspicuous and accessible place**, giving notice of the rights and responsibilities of the law.

In addition, the employer shall **provide a written copy** of the notice to:

- New employees at the time of hire
- Existing employees (within 180 days after law takes effect)
- An employee who informs an employer of a pregnancy (within 10 days of receiving the information)



Pregnancy Accommodations | Potential remedies

- Back pay for the two year period prior to the complaint
- Reinstatement
- Compensable and punitive damages
- Either party can move the case to civil court
- Civil penalties not to exceed:
 - \$50,000 first violation
 - \$100,000 any subsequent violation
- Reasonable attorneys fees and court costs





EXPRESSION OF BREAK MILK



Expression of Breast Milk | Legislative background

The 2019 Legislative Assembly passed House Bill 2593 to expand protections for employees looking to express breast milk at work. **Effective September 28, 2019**

Basics of the law include:

- Employer shall provide the employee with a **reasonable rest period** to express breast milk **each time** the employee has a need (this moves past the previous 30 min requirement)
- **All employers covered**, not just those with 25 or more
- **When possible**, the employee shall provide reasonable notice that the employee intends to express breast milk
- Employer **may not discipline** an employee for failure to provide notice
- **Only employers with 10 or fewer employees** are eligible for an **undue hardship defense**



Expression of Breast Milk | Existing rules

These periods may be added to and made a part of the paid rest breaks already being provided. Time spent expressing breast milk beyond the paid rest break is **unpaid**. The employer *may* allow the employee to come in early and/or stay late to make up for earnings lost during these breaks.

Employers must make **reasonable efforts** to provide a **private location**, other than a restroom or toilet stall, in close proximity to the employee's work area for the employee to express milk.

Employer obligations continue until the child reaches the **age of 18 months**.



A blurred background image of police lights, showing a horizontal row of red, yellow, and blue lights in the center, with two white lights above them. The lights are out of focus, creating a bokeh effect.

EMPLOYER NOTIFICATION OF I.C.E. INSPECTIONS

Employer Notice | Legislative background

The **2019 Legislative Assembly** passed SB 370 to provide workers timely notice of upcoming federal audits.

The law includes two main components:

- Employers **must notify employees** within **three days** of receiving notice of a federal inspection or I-9 audit
- Directs BOLI to develop a **template for employee notification**

Effective now!!!!

Employer Notice | Notice checklist

- ✓ Employers must post notice
- ✓ Employers must make reasonable attempts to individually notify employees

Notice must include:

1. A copy of the federal notice
2. Date of inspection
3. Info about scope of the audit (if known)
4. The employer's legal obligation to inform its workforce
5. Telephone number for information and advocacy related to immigrant and refugee worker rights
(BOLI will provide)



PAY EQUITY— *SOME* CLARIFICATION

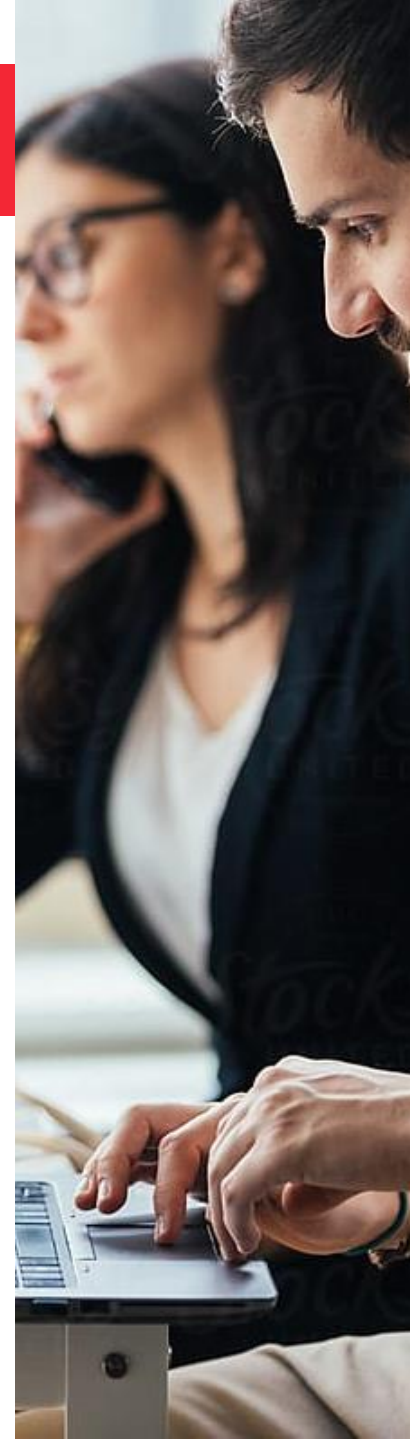


Equal Pay Update | Background

Work of comparable character means work that requires substantially similar knowledge, skill, effort, responsibility and working conditions regardless of job title.

The **8 bona fide factors**, one or more of which may be applied to justify entire differentials in compensation for work of comparable character are:

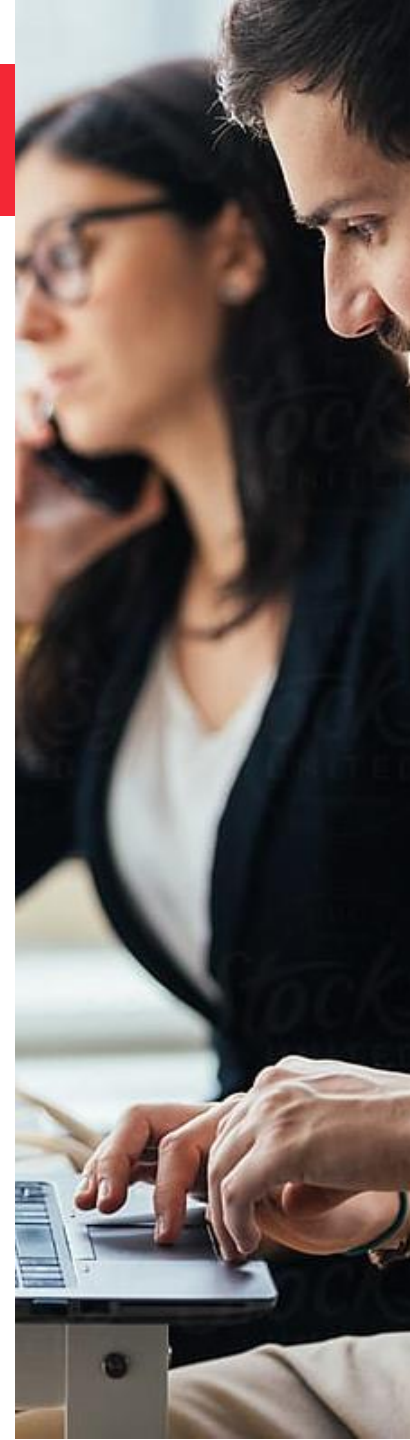
- A seniority system
- A merit system
- A system that measures earnings by quantity or quality of production, including piece-rate work
- Workplace locations
- Travel, if it is regular and necessary for the employee
- Education
- Training
- Experience



Equal Pay Update | **New provisions**

The law has been amended to clarify that it is not unlawful to **pay different levels of compensation** when an employee is:

- Performing modified (**light duty**) work because of a workers' compensation injury; or
- ***Temporarily*** performing modified work because of a **medical condition** that is:
 - Authorized by a **licensed medical professional**, or
 - **Requested by the employee** and authorized by the employer in a non-discriminatory manner

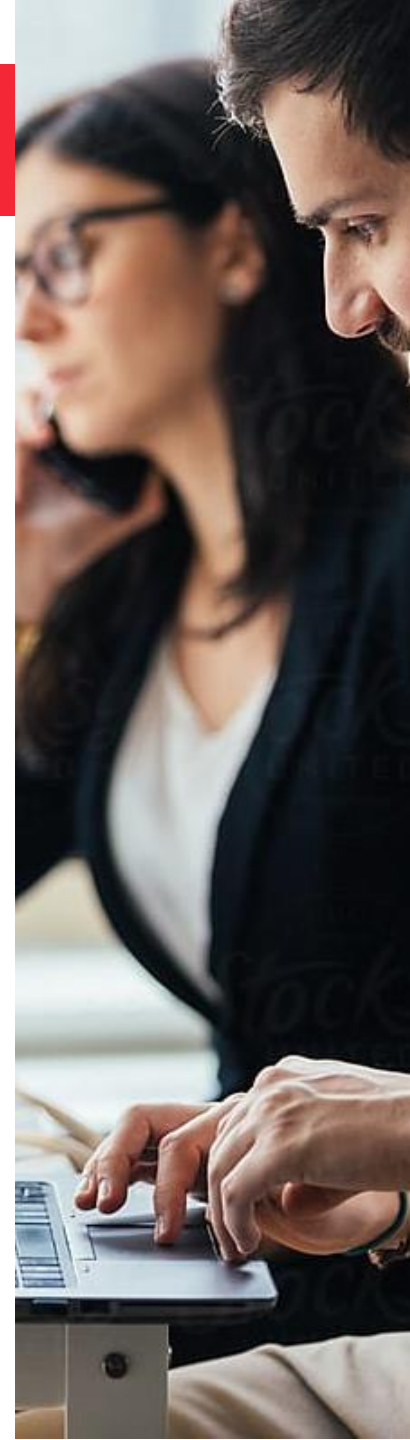


Equal Pay Update | New provisions

Best practices include **systemizing your pay structures** and **conducting an equal pay analysis** at least every three years.

“**System**” is now defined as a **consistent and verifiable method in use at the time** that a violation of the equal pay law is alleged. Ad hoc, after-the-fact justifications for disparities is not a “system”.

An equal pay analysis serves not only as a best practice to ensure pay equity, but also provides an **affirmative defense to claims of compensatory and punitive damages**.





NONCOMPETITION AGREEMENTS

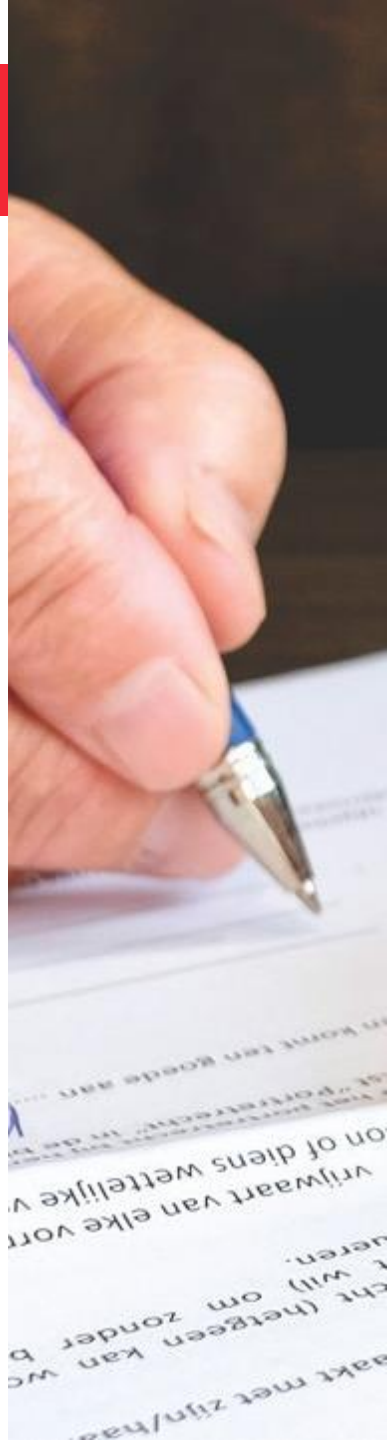


Noncompetition Agreements | Legislative background

Oregon law has long put restrictions on noncompetition agreements.

Existing requirements:

- **Employers must inform** the new employee in writing of the requirement of the agreement as a condition of employment at least **two weeks before the first day** of employment or upon a bona fide promotion
- The employee must be a **salaried exempt employee**
- The employer must have a **protectable interest**
- The employee's annual salary and commissions exceeds the **median family income for a four-person family (from the U.S. Census Bureau) – currently about \$90,000**



Noncompetition Agreements | New requirements

Additional provisions of the law, ORS 653.295:

- The term of the agreement may **not exceed 18 months**.
- This law does not apply to **bonus restriction** agreements, **non-solicitation** agreements or **confidentiality agreements**.
- The requirements of salaried exempt status and median family income **do not apply** if the employer pays the employee during the restriction period at least **50% of the employee's annual gross base salary and commissions** or **50% of the median family income at the time of termination**

What's new? Effective 1/1/20, within 30 days of termination of employment, the **employer must provide a signed, written copy of the terms** of the noncompetition agreement to the employee.





MINIMUM WAGE



Minimum Wage Update | Garnishments

75% of an employee's disposable income is exempt from most garnishments. **This has not changed.**

However, effective January 1, 2020, the minimum amount of an employee's disposable income exempt from garnishment increases as follows:

- **\$254** for any period of one week or less;
- **\$509** for any two-week period;
- **\$545** for any half-month period;
- **\$1,090** for any one-month period

These limits also apply to payroll deductions for the repayment of cash loans on final paychecks under ORS 652.610(3)

Minimum Wage Update | Phase-out of sub-minimum wages

Oregon wage and hour law has long allowed employers of **persons with disabilities** to apply for a special certificate to pay less than minimum wage. The intent was to expand employment and training opportunities to people with disabilities and to give them independence.

Because of concerns that “sheltered workshops” can lead to the exploitation of vulnerable individuals, the program is being phased out.



TRANSGENDER ISSUES



Transgender Legal Update | Legislative Update

House Bill 2589 seeks to provide clarification on the issue of what constitutes a disability.

- Previously, Oregon anti-discrimination law specified that *homosexuality and bisexuality* are not physical or mental impairments for purposes of the definition of a disability.
- This bill changes that language to *sexual orientation*, specifying that it is not a physical or mental impairment as disability is defined.
- This is significant because Oregon Administrative Rules define sexual orientation to include *gender identity*. That is defined as an individual's gender-related identity, whether or not it differs from the assigned sex at birth, including cisgender, transgender or androgynous.



Transgender Legal Update | What it means

What does this mean for employers?

- Someone's **gender identity** (who they are) – just as someone's **sexual orientation** (whom they love) or **gender expression** (how they present themselves) – **is not a disability** and employers should not assume that a person has a disability. In fact, that's unlawful.
- However, a person whose gender identity does not match their assigned gender at birth may experience *gender dysphoria*.
 - A person with gender dysphoria may have a disability (requiring **reasonable accommodation**, including time off to obtain medically necessary treatment recommended for transgender people).
 - *Gender dysphoria* is now listed in the DSM-V as a psychiatric diagnosis of a mental disorder.





OREGONSAVES



OregonSaves | Civil rights enforcement

This Oregon State Treasury-led program will require **all employers** to offer a retirement savings option by enrolling employees in the program:

- Employers may file for an exemption if they offer a 401(k) or comparable plan

Once enrolled, **contributions are automatic.**

- Start at 5% and increase 1% per year until employee reaches 10% unless employee opts out

Employers must:

- **Collect and remit** contributions
- Record and **retain contribution preferences** for at least 3 years
- Generally **administer** the program

Employers do not make separate contributions.



OregonSaves | Civil rights enforcement

Effective January 1, 2020, it will be an **unlawful** employment practice for employers **to fail to develop a plan**.

BOLI may assess **civil penalties** against an employer of **up to \$5,000** (subject to increase or decrease based on aggravating or mitigating circumstances).

Other remedies? Potential claims for damages (as with other civil rights violations) if they **retaliate or discriminate** against employees who **inquire about their rights** to have a plan in place.





Questions?

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