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I. AT-WILL EMPLOYMENT

A. Statute

There is no statutory codification of the at-will employment doctrine in Oregon.

B. Case Law

Oregon is an employment at-will state. The general rule is that absent a contractual, statutory or constitutional requirement, an employer may discharge an employee at any time for any reason (or for no reason), and an employee may terminate employment at any time for any reason. Lewis v. Oregon Beauty Supply Co., 733 P.2d 430, 302 Or. 616 (1987).

From this general rule follows that absent a contractual, statutory or constitutional requirement, an Oregon employer is free to set or modify *unilaterally and prospectively* the compensation and the terms and conditions of the work and the employee may accept or reject those conditions. By continuing to work for the employer after the employee is aware of the change to the employer's policies, the employee impliedly accepts the change in his or her employment contract. Swenson v. Legacy Health Systems, 9 P.3d 145, 169 Or. App. 546 (2000).

However, an employee may accept an employer's unilateral offer of certain terms and conditions of employment by part performance. Once the employee embarks on performance, the employer cannot unilaterally modify the resulting contract so as to alter rights that have vested under it. Furrer v. Southwestern Oregon Community College, 103 P.3d 118, 196 Or. App. 374 (2004)

An at-will employment contract can be interfered with. Porter v. Oba, Inc., 42 P. 3d 931, 180 Or. App. 207 (2002). See also Section IX below.

The at-will nature of employment does not create a conclusive presumption barring an employee from recovering future lost pay where the employee has been unlawfully terminated from the job. Cocchiara v. Lithia Motors, Inc., 297 P.3d 1277,

353 Or. 282 (2013).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

In Zacker v. N. Tillamook County Hosp. Dist., a personnel manual created an employment contract because the manual was intended to communicate express terms of the employment relationship and new employees had to agree to it. However, the manual did not restrict the employer's right to discharge employees at will. An employer's personnel policy manual intending to communicate the express terms of employment, but providing that either the employer or employee may terminate employment, does not modify an at-will employment relationship. The employer was still free to discharge at will without breaching the employment contract. Thus, to sustain a breach of contract claim as to termination, an employee must allege and prove that the employer's personnel policy manual modified the at-will employment relationship, the policy manual constituted an employment contract, and that contract was breached. 811 P. 2d 647, 107 Or. App. 142 (1991).

Employee handbooks are subject to the basic rules of contract construction, just like any other contract. In a dispute between the employer and employee over the terms and conditions of employment, the unambiguous employment contract controls. Swartout v. Precision Castparts Corp., 730 P. 2d 1270, 83 Or. App. 203, 206 (1986).

There is no special rule of construction for employment contracts that gives the employer sole ability to determine the meaning of ambiguous contract terms. That is a judicial function. Fleming v. Kids and Kin Head Start, 693 P.2d 1363, 71 Or. App. 718 (1985).

If the manual and other policy materials provide that a policy becomes binding only upon the happening of an event other than distribution of the manual or policy, then the specified event must occur in order for the employee or employer to be bound by the new terms. Hreha v. Nemecek, 849 P.2d 1131, 119 Or. App. 65 (1993).

Where an employee manual or "Code of Conduct" discusses progressive discipline but expressly retains the right to terminate for any reason, the at-will relationship remains and an employee can be fired at any time. Thomas v. Bourdette, 608 P.2d 178, 45 Or. App. 195 (1980).

In contrast, in Yartzoff v. Democrat-Herald Publ'g Co., the court overturned summary judgment for the employer where changes to the employee handbook outlined progressive discipline or warning steps the employer would follow before an employee was terminated, and provided that an employee could be terminated immediately for "gross misconduct." The employee's continued employment constituted adequate consideration for any contract resulting from the change to the employer’s policy. A material issue of fact existed as to whether such terms amounted to an agreement to terminate employment only for "cause." 576 P.2d 356, 281 Or. 651 (1978).

If an employer unilaterally imposes a restriction on its power to terminate an employee at will, the employer has the right to determine whether facts constituting compliance with that restriction exist, if it has not transferred that right to another arbiter. However, the employer must make the determination in good faith, based on facts reasonably believed to be true and not for any arbitrary, capricious, or illegal reason. Gilbert v. Tektronix, Inc., 827 P.2d 919, 112 Or. App. 34 (1992); Simpson v. Western Graphics Corp., 643 P.2d 1276, 293 Or. 96 (l982).

2. Provisions Regarding Fair Treatment

There are no Oregon cases, statutes, rule or regulations expressly addressing fair treatment provisions.

3. Disclaimers

Disclaimer clauses in employee handbooks and personnel manuals, stating that the handbook or manual does not change the at-will nature of the employment relationship, have been held to defeat breach of implied contract claims based on employment policies, handbooks, or manuals. See, e.g., Mobley v. Manheim Servs. Corp., 889 P.2d 1342, 133 Or. App. 89, 93-94 (1995); Gilbert v. Tektronix, Inc., 827 P.2d 919, 112 Or. App. 34 (1992).

4. Implied Covenants of Good Faith and Fair Dealing

The parties to an employment agreement are subject to an implied duty of good faith and fair dealing as to the terms of the agreement, but not as to the employer's right to terminate at will, because "[t]he foundation of the at-will employment agreement is the express or implied understanding that either party may terminate the contract for any reason, even for a bad cause." Sheets v. Knight, 779 P.2d 1000, 308 Or. 220, 233 (1989); Elliott v. Tektronix, Inc., 796 P.2d 361, 102 Or. App. 388, 396 (1990). However, express terms regarding grounds for termination may create an implied agreement to terminate only “for cause,” which then creates a duty of good faith and fair dealing as to termination. Elliott, 102 Or. App. at 396.

The implied covenant of good faith and fair dealing in every contract is separate and distinct from the tortious duty of good faith and fair dealing, which exists only where there is a "special relationship" between the parties, such that "one party has authorized the other to exercise independent judgment in his or her behalf and, consequently, the party who owes the duty has a special responsibility to administer, oversee, or otherwise take care of certain affairs belonging to the other party." Bennett v. Farmers Ins. Co. of Oregon, 26 P.3d 785, 332 Or. 138, 161 (2001). Employment, by itself, does not create a "special relationship" or fiduciary-type relationship as a basis for a claim of tortious breach of the duty of good faith and fair dealing. Vanderselt v. Pope, 963 P.2d 130, 155 Or. App. 334, 343 (1998).

B. Public Policy Exceptions

1. General

> "Although this court repeatedly has affirmed the general validity of the at-will employment rule, it has acknowledged that a discharge of an at-will employee nonetheless may be deemed 'wrongful' (and, therefore, actionable) . . . (1) when the discharge is for exercising
> a job-related right that reflects an important public policy . . .; or (2) when the discharge is for fulfilling some important public duty."

Babick v. Oregon Arena Corp., 40 P.3d 1059, 333 Or. 401, 407 (2002).

A claim for wrongful discharge cannot be brought if an adequate statutory remedy exists. Walsh v Consol. Freightways, 563 P.2d 1205, 278 Or. 347 (1977) (no wrongful discharge claim where an adequate statutory remedy was in place for employees who were discharged for reporting safety violations).

Whether statutory remedies are adequate is determined by looking at the remedies available at the time of the alleged termination. Kemp v. Masterbrand Cabinets, Inc., 307 P.3d 491, 257 Or. App. 530 (2013).

The defendant must demonstrate *both* that the provided remedy is adequate and that the legislature intended the statute to abrogate preexisting common law remedies. Olsen v. Deschutes County, 127 P.3d 655, 204 Or. App. 7, 14 (2006).

Oregon state courts almost never find that an adequate statutory remedy exists so as to preclude a wrongful discharge claim. In contrast, Oregon Federal District courts are often willing to find an adequate statutory remedy, see Neighorn v. Quest Health Care, 870 F. Supp.2d 1069 (D. Or. 2012); even going so far as to ignore Oregon state court precedent when the statutory remedies are later expanded by the legislature. See, e.g, Lynch v. Klamath County School Dist., 2015 WL 2239226 (D. Or. May 12, 2015); Gladfelder v. Pacific Courier Services, 2013 WL 2318840 (D. Or. May 28, 2013).

An at-will employee must establish a "causal connection" between a protected activity and the wrongful discharge, i.e. the employee's protected activity must have been a "substantial factor" in the employer's motivation to discharge the employee. Estes v. Lewis & Clark ColI., 954 P.2d 792, 152 Or. App. 372, 381 (1998). To be a "substantial factor, "the employer's wrongful purpose must have been a factor that "made a difference" in the discharge decision. Id. at 381.

Holien v. Sears, Roebuck & Co., 689 P.2d 1292, 298 Or. 76, 83 (1984) identifies the kinds of "socially undesirable motive[s]" that might give rise to a wrongful discharge claim, such as termination for: fulfilling jury duty, Id. at 83-86, 97, citing Nees v. Hocks, 536 P.2d 512, 272 Or. 210 (1975); filing a workers' compensation claim, citing Brown v. Transcon Lines, 588 P.2d 1087, 284 Or. 597 (1978); "refusing to sign a false and potentially defamatory statement," citing Delaney v. Taco Time Int'l, 681 P.2d 114, 297 Or. 10 (1984); and opposing sexual harassment (the claim at issue in Holien). The Holien court distinguished situations in which an employee is exercising a purely private right not sufficiently linked to important societal interests. See, e.g., Campbell v. Ford Indus., Inc., 546 P.2d 141, 274 Or. 243, 253 (1976) (finding "a stockholder's statutory right to inspect corporate records possessed insufficient societal importance to warrant a tort

cause of action for wrongful discharge").

Since Holien, the court has further clarified the circumstances under which a wrongful discharge claim will not lie. See, e.g., Sheet s v. Knight, 779 P.2d 1000, 308 Or. 220, 231 (1989) (discharge " as a result of plaintiff's knowledge of improper activities by the defendants personal and political considerations [and] vindictiveness . . . might question the defendants' motivations, but . . . contain no allegations that the plaintiff was 'discharged' for complying with or fulfilling a public duty or for exercising an employment-related right").

A wrongful discharge claim can be based on either an actual or constructive discharge theory. Hernandez-Noltz v. Washington County, 315 P.3d 428, 259 Or. App. 630, 631 (2013).

2. Exercising a Legal Right Relating To Employment

An employer may not discharge an employee for exercising a statutory right that relates to employment and reflects an important public policy. The right must be of public importance or interest (e.g., making a worker's compensation claim or making a report under whistleblower statutes). A statute protecting only a private and proprietary interest is not sufficient. Brown v. Transcon Lines, 588 P.2d 1087, 284 Or. 597 (1978); Campbell v. Ford Indus., 546 P.2d 141, 274 Or. 243 (1976).

It is wrongful to discharge an employee for resisting or opposing sexual harassment or discrimination. Holien v. Sears, Roebuck & Co., 689 P. 2d 1292, 298 Or. 76, 83 (1984); Goodlette v. LTM, Inc., 874 P.2d 1354, 128 Or. App. 62 (1994). However, the employee must have been opposing discrimination; firing an employee for discriminatory reasons (i.e. race, gender, etc.) will not qualify as a tortious wrongful discharge. Kofoid v. Woodard Hotels, 716 P .2d 771, 78 Or. App. 283, 288-289 (1986).

It is wrongful to discharge an employee for engaging in concerted activity to bargain collectively with their employer. Rauda v. Oregon Roses, Inc., 935 P.2d 469, 147 Or. App. 106 (1999).

Terminating an employee for exercising private rights not related to employment or that are not of public importance will not give rise to a wrongful discharge claim. See, e.g. Karren v. Far West Federal Sav., 717 P.2d 1271, 79 Or. App. 131 (1986) (terminated for getting married); Sieverson v. Allied Stores Corp., 776 P.2d 38, 97 Or. App. 315 (1989) (terminated for internal report of employee abuse by supervisor within a private corporation); Lockhart v. Louisiana-Pacific Corp., 795 P.2d 602, 102 Or. App. 593 (1990) (terminated for opposing employer's non-discriminatory dress and grooming rules); Downs v. Waremart, Inc., 903 P.2d 888, 137 Or. App. 119 (1995) (terminated for insisting on having a lawyer present during police investigation at work); Dymock v. Norwest Safety Protective Eguip. for Or. Indus., 45 P.3d 114, 334 Or. 55 (2002) (terminated for refusing to sign a non-competition agreement).

Desire for an orderly society is an insufficient public interest where security guards were fired after arresting concert attendees. Babick v. Or. Arena Corp., 40 P.3d

1059, 333 Or. 401 (2002).

3. Refusing to Violate the Law

The following has been found to give rise to a wrongful discharge claim: refusing to sign a false declaration, Delaney v. Taco Time Int'l, Inc., P.2d 114, 297 Or. 10, 16-17 (1984); refusing to disclose confidential bank customer information, Banaitis v. Mitsubishi Bank, Ltd., 897 P.2d 1288, 129 Or. App. 371 (1994); refusing to install defective parts in aircraft in violation of safety, Anderson v. Evergreen Int'l Airlines, 886 P.2d 1068, 131 Or. App. 726 (1994); and refusing to make a false statement on insurance forms, Borough v. D.G. Averill Trucking, 951 P.2d 202, 151 Or. App. 723 (1997).

4. Exposing Illegal Activity (Whistleblowers)

i. Common Law Protections

It is wrongful to discharge employees for fulfilling their legal obligations to report suspected abuse or dangerous conditions. McQuary v. Bel Air Convalescent Home, Inc., 684 P.2d 21, 69 Or. App. 107 (1984); Hirsovescu v. Shangri-La Corp., 831 P.2d 73, 113 Or. App. 145 (1992); Huber v. Or. Dep't of Educ., 230 P.3d 937, 235 Or. App. 230 (2010).

It was also wrongful to discharge a pharmacy technician who insisted her employer comply with administrative rules governing drug inventory and recordkeeping requirements. Dalby v. Sisters of Providence, 865 P.2d 391, 125 Or. App. 149 (1993). See, also, Koller v. Schmaing, 296 P.3d 529, 296 Or. App. 115 (2012) (wrongful to discharge receptionist for reporting health professional misconduct).

By contrast, in Handam v. Wilsonville Holiday Partners, LLC, the court held that an employee's reports of violations of Oregon liquor control laws and immigration laws by co-workers was not protected activity. The law did not encourage reporting of such violations, nor did the conduct plaintiff reported present a "significant concern to public health and safety." 201 P.3d 920, 225 Or. App. 442, 448-451 (2009), aff'd on remand, 235 Or. App. 688 (2010).

An internal report or threat to make a report can qualify as protected activity. When an employee reports, or prepares to report, his or her employer to the proper authorities for purported violations, the employee fulfills an important public duty. Koller v. Schmainq, 296 P.3d 529, 254 Or. App. 115 (2012).

B. Statutory Protections

1. Public Employees

Oregon's "Whistleblower Law" for public employees is found at Or. Rev. Stat. §§ 659A.200 to 659A.224.

The statute protects public employees who report what they reasonably believe to be violations of law. Huber v. Or. Dep't of Educ., 230 P. 3d 937, 235 Or. App. 230

(2010).

Complaining about policies that employees must implement or practices that employees do not like is not whistleblowing by a public employee. Bjurstrom v. Oregon Lottery, 120 P.3d 1235, 202 Or. App. 162 (2005).

"Mismanagement," as used in the public employee whistleblower law, "refer[s] to serious agency misconduct having the effect of actually or potentially undermining the agency's ability to fulfill its public mission." Bjurstrom v. Oregon Lottery, 120 P.3d 1235, 202 Or. App. 162, 173 (2005).

Vague complaints do not constitute whistleblowing by a public employee so as to give rise to a wrongful discharge claim; rather, the complaints must "be grounded in" some applicable statute or rule regarding the public entity's obligations. Love v. Polk County Fire Dist., 149 P.3d 199, 209 Or. App. 474, 486 (2006).

2. All Employees

Under Or. Rev. Stat. § 659A.230(1), an employer may not discriminate or retaliate against an employee who has:

- in good faith reported criminal activity by any person;
- in good faith caused a complainant's information or complaint to be filed against any person;
- in good faith cooperated with any law enforcement agency conducting a criminal investigation;
- in good faith brought a civil proceeding against an employer; or
- testified in good faith at a civil proceeding or criminal trial.

The statute protects employees who complain to agencies who have the authority to sanction the employer. OR. ADMIN. R. § 839-010-0140, provides that contacting, or even threatening to contact, an administrative agency the employee "believes in good faith to have jurisdiction and the ability to sanction the employer" constitutes protected conduct. See Huber v. Or. Dep't of Educ., 230 P.3d 937, 235 Or. App. 230 (2010) (complaint to Department of Health and Human Services was an administrative matter - not a criminal or civil action - and was therefore not protected by the statute).

Under Or. Rev. Stat. § 659A.199, employer may not "discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation." The statute does not apply to public employers. Lindsey v. Clatskanie People's Utility District, 140 F.Supp.3d

1077, 1095 (D. Or. 2015).

To qualify as a "disclosure" entitled to protection under Or. Rev. Stat. § 659A.199, a report must do more than alert a wrongdoer that his conduct is unlawful, it must reveal previously unknown conduct; it is insufficient to merely identify or label conduct which is known to have occurred as either unlawful or improper. Id. at 1093. Reporting publicly available information is not a disclosure. Id. at 1092. Similarly, complaints to a supervisor about the supervisor's own conduct are not "disclosures" covered by Oregon whistleblower protection statutes, but complaints to a supervisor about other employees' conduct or other misconduct may be covered as "disclosures." Id. at 1094.

The employee does not need to prove an actual violation of law, rule or regulation occurred to be protected by the statute. Hall v. State, 366 P.3d 345, 274 Or. App. 445 (2015). The employee only needs to subjectively believe a violation had occurred, and act in good faith in making the report. Id.

In cases filed in Oregon state court, an employee may bring a tort claim of wrongful discharge for "blowing the whistle" in addition to a claim of retaliation under the Oregon whistleblower statutes; those statutes do not provide an "adequate statutory remedy*"* so as to preclude a wrongful discharge claim. Olsen v. Deschutes County, 127 P.3d 655, 204 Or. App. 7 (2006). However, Oregon Federal District Courts have held that the statute does provide an adequate statutory remedy that precludes a common law wrongful discharge claim. See Neighorn v. Quest Health Care, 870 F. Supp.2d (D. Or. 2012).

See also statutes cited in Section XV, below.

5. Fulfilling a Public Duty

"[The] court cannot create a public duty but must find one in constitutional or statutory provisions or case law." Eusterman v. Northwest Permanente, P.C., 129 P.3d 213, 204 Or. App. 224, 229-30, rev. den., 341 Or. 579 (2006). The constitutional or statutory provisions or case law must "specifically encourage or require a particular action," or "otherwise demonstrat[e] that such act[ion] enjoys high social value." Love v. Polk County Fire District, 149 P.3d 199, 209 Or. App. 474, 486 (2006), quoting Eusterman, 204 Or. App. at 230. Moreover, "high social value" is defined as "at *least* . . . (1) conduct that, by statute or rule, is explicitly described as being of high social value; and (2) conduct that is similar to that giving rise to legally compelled obligations to act in other, analogous contexts." Love, 209 Or. App. at 487.

For the purpose of a common-law wrongful discharge claim, in the absence of a mandatory reporting requirement, an employee can demonstrate that an important public duty exists by citing statutes or other authority indicating legislative policies to promote the reporting of violations and prevent employers from retaliating against employees who report such violations. Huber v. Or. Dep't of Educ., 230 P.3d 937, 235 Or. App. 230 (2010).

In Delaney v. Taco Time Int'l, Inc., the employer wrongly discharged an employee for refusing to a sign a false, tortious statement regarding another former employee. The court found that a member of society has an obligation not to defame others. 681 P.2d 114, 297 Or. 10 (1984). Similarly, an employee was wrongfully discharged for refusing to make a false allegation of sexual harassment against a co-worker. Thorson v. State, 15 P.3d 1005, 171 Or. App. 704 (2000).

An employer may not discharge an employee for fulfilling a societal obligation such as jury duty. Nees v. Hocks, 536 P.2d 512, 272 Or. 210 (1975).

Lamson v. Crater Lake Motors, Inc., recognized that terminating an employee for reporting violations of the Unlawful Trade Practices Act to an agency with the authority to act on that report would qualify as a wrongful discharge. 216 P.3d 852, 346 Or. 628 (2009). See, also, Koller v. Schmaing, 296 P.3d 529, 296 Or. App. 115 (2012) (wrongful to discharge receptionist for reporting health professional misconduct to regulatory licensing board); Huber v. Or. Dep't of Educ., 230 P.3d 937, 235 Or. App. 230 (2010) (wrongful to discharge nurse for threatening to report substandard nursing practices to Oregon State Board of Nursing).

III. CONSTRUCTIVE DISCHARGE

Constructive discharge may result from an employer intentionally making working conditions so unpleasant that an employee is forced to quit. To sustain an action for constructive discharge based on intolerable working conditions, the employee must prove:

1. The employer deliberately created or maintained working conditions for a wrongful or discriminatory purpose;

2. Those working conditions were so intolerable that a reasonable person in the employee's place would have resigned because of them;

3. The employer desired to cause the employee to leave as a result of those working conditions, or knew that the employee was certain or substantially certain to leave employment as a result of those working conditions; and

4. The employee left employment as a result of those working conditions.

Doe v. Denny's Inc., 963 P.2d 650, 327 Or. 354, 359 (1998), citing McGanty v. Staudenraus, 901 P.2d 841, 321 Or. 532, 557 (1995).

An employer telling an employee to "resign or be fired" can constitute a constructive discharge and satisfy the "discharge" requirement of a wrongful discharge claim. Swanson v. Eagle Crest Partners, Ltd., 805 P.2d 727, 105 Or. App. 506 (1991).

An employee quitting because of the employer's retaliation for engaging in protected activity (e.g., reporting sexual harassment) may constitute constructive discharge. It is not necessary for the employee to be directly discharged or unequivocally told "resign or be fired." Mains v. II Morrow, Inc., 877 P.2d 88, 128 Or. App. 625

(1994).

An employer is liable for constructive discharge under respondeat superior if the employer's supervisor forces an employee to quit or resign due to intolerable working conditions intentionally created by the supervisor to force the employee's resignation. However, if the employer terminates the supervisor and offers to unconditionally reinstate the employee in the same or other suitable position, the employee must present a valid reason for refusing to return to work. Absent proof of a continuing hostile environment or pretext, constructive discharge does not then exist. Seitz v. Albina Human Res. Ctr., 788 P.2d 1004, 100 Or. App. 665 (1990).

In a mixed motive case, the plaintiff must show that he or she would not have been constructively discharged "but for" the unlawful discriminatory motive of the employer. Hardie v. Legacy Health Sys., 6 P.3d 531, 167 Or. App. 425, 435 (2000).

IV. WRITTEN AGREEMENTS

Most written individual employment contracts cover executives, performers, or other highly paid individuals whose services are specialized or unique. The contract need not be elaborate. A letter containing the usual elements of an employment agreement, such as the term of employment, amount of compensation, place of employment, type of employment, and a general description of the employee's duties, has been held to be a valid employment contract. Gaswint v. Amigo Motor Homes, 509 P.2d 19, 265 Or. 248 (1973).

If the parties to an individual written employment agreement fail to agree on a modification of the agreement, the original contract remains in effect. Neiss v. Ehlers, 899 P.2d 700, 135 Or. App. 218 (1995).

In the absence of a written agreement, an employer is free to set the terms and conditions of work and compensation, and to unilaterally change those terms for the future. By continuing to work for an employer, the employee implies acceptance of a change in the employment agreement. Brett v. City of Eugene, 880 P.2d 937, 130 Or. App. 53, 57-58 (1994), citing Page v. Kay Woolen Mill Co., 123 P.2d 982, 168 Or. 434, 439 (1942); State ex rel Roberts v. Pub. Fin. Co., 662 P.2d 330, 294 Or. 713 (1983). See also Fish v. Trans-Box Sys., Inc., 914 P.2d 1107, 140 Or. App. 255, (1996).

A. Standard "For Cause" Termination

Good cause exists when an employee has materially breached a contract of employment or the employee reasonably appears unable to satisfactorily perform a material part of the promised work. Thomas v. Bourdette, 608 P.2d 178, 45 Or. App. 195 (1980).

Where an employer's handbook unilaterally agrees to discharge employees only "for cause," a court need only find that the employer acted on a good faith determination that facts reasonably believed to be true and constituting just cause for discharge existed, and not for any arbitrary, capricious, or discriminatory reason. Simpson v. W. Graphics

Corp., 643 P. 2d 1276, 293 Or. 96 (1982). There must be some evidence of the existence of facts justifying the termination. Mobley v. Manheim Services Corp., 889 P.2d 1342, 133 Or. App. 89, 94 (1995).

B. Status of Arbitration Clauses

OR. REV. STAT. § 36.620(5) provides that arbitration agreements entered into between an employer and employee are valid and enforceable if:

(a) At least 72 hours before the first day of the employee's employment, the employee has received notice in a written employment offer from the employer that an arbitration agreement is required as a condition of employment, and the employee has been provided with the required arbitration agreement that includes the acknowledgment in boldface type, to be signed by the employee:

> **"I acknowledge that I have received and read or have had the opportunity to read this arbitration agreement. I understand that this arbitration agreement requires that disputes that involve the matters subject to the agreement be submitted to mediation or arbitration pursuant to the arbitration agreement rather than to a judge and jury in court."**

or

(b) the arbitration agreement is entered into upon a subsequent bona fide advancement of the employee by the employer.

The term "bona fide advancement" is not defined in the statute. It has been interpreted by the courts to mean an "increase or improvement in job status or responsibilities that justifies a change in the way the employer entrusts client contacts and business related information with the employee." It generally will include new, more responsible duties, different reporting relationships, a change in title, and very likely should include increased pay or benefits. An advancement consisting only of increased pay or benefits is not enough. Nike, Inc. v. McCarthy, 379 F.3d 576 (9th Cir. 2004); See also, Mail-Well Envelope Co. v. Saley, 497 P.2d 364, 262 Or. 143 (1972); Pettibone v. Dept. of Revenue, 17 Or. Tax 470 (2003).

In Roque v. Applied Materials, Inc., 2004 WL 1212110 (D. Or. 2004), the court granted the defendant's motion to compel arbitration under Oregon law. Under the arbitration provision at issue, the employer provided the employee a job and agreed to arbitrate *most* employment-related claims in exchange for the employee's agreement to arbitrate *all* employment-related claims. The court held that the arbitration provision was not unconscionable under Oregon law because there was mutuality of obligation. Id. at 7.

Employee arbitration agreements can be challenged as unconscionable. There must be some evidence of deception, compulsion, or unfair surprise. Unequal bargaining power between employer and employee, omission of a term as to which party would pay arbitration costs, and lack of mutuality of arbitration requirement does not render an arbitration agreement unconscionable. Motsinger v. Lithia Rose-FT, Inc., 156 P.3d 156,

211 Or. App. 610 (2007).

V. ORAL AGREEMENTS

A. Promissory Estoppel

The at-will agreement may be modified by promissory estoppel. An employer's offer may contain a promise of a future benefit. If so, then the employee's right to that benefit accrues at the time of acceptance, and, if the employer fails to perform the promise, that failure amounts to an actionable breach. Watkins v. Josephine County, 259 P.3d 79, 243 Or. App. 52, 58 (2011). For example, "an at-will employee who continues employment in reliance on a promise of a future salary increase may hold the employer liable for breach of contract." Stuart v. Tektronix, Inc., 730 P.2d 619, 83 Or. App. 139 (1986).

The fact that an employer has the right to fire an at-will employee does not mean that a prospective employee can never reasonably rely on a promise of at-will employment as an element of a promissory estoppel or fraudulent misrepresentation claim. Cocchiara v. Lithia Motors, Inc., 297 P.3d 1277, 353 Or. 282 (2013), abrogating Slate v. Saxon, Marguoit, Bertoni & Todd, 999 P.2d 1152, 166 Or. App. 1 (2000). Additionally, the at-will nature of the prospective employment does not foreclose a plaintiff asserting a promissory estoppel claim from attempting to prove the likely duration of employment had he been hired as promised and allowed to start work, although at-will employment may be a factor that bears on whether the proof is sufficient in a particular case. Id.

However, an employee who accepts the employer's change or modification of the original terms of employment cannot continue to rely on the employer's earlier representations regarding the original terms of employment. Elliott v. Tektronix, Inc., 796 P.2d 361, 102 Or. App. 388 (1990); Brett v. City of Eugene, 880 P. 2d 937, 130 Or. App. 53, 57-58 (1994); Fish v. Trans-Box Sys., Inc., 914 P.2d 1107, 140 Or. App. 255, (1996).

The fact that an employee entered into a "less favorable" employment contract based on the employer's representations does not support a claim for breach of contract. If an employer complies with representations it made about the job, equitable estoppel does not apply. Gish v. Douglas County, 817 P.2d 1341, 109 Or. App. 84 (1991).

The fact that employees may be discharged only “for cause” does not alter the presumption that the other terms and conditions of the employment may be modified “at will” by the employer at any time. Wooton v. Viking Distrib. Co., 899 P.2d 1219, 136 Or. App. 56 (1995).

Neither an employer's statements about long-term employment and retirement benefits during an employment interview, nor the provision of annual bonuses, profit-sharing, and periodic praise, creates a reasonable expectation of long-term employment that is enforceable as a matter of contract. Wooton, 899 P.2d 1219, 136 Or. App. 56.

Equitable estoppel is not an available affirmative defense to an employee's worker's compensation claim. The employer may not avoid payment of compensation based on an employee falsely stating a health condition on her pre-employment application. Stovall v. Sally Salmon Seafood, 757 P.2d 410, 306 Or. 25 (1988).

B. Fraud

In an action for fraud, the employee must establish that he or she had a right to rely on the employer's representations concerning the terms of employment and "that . . . [the employer] had no intention of fulfilling [those terms]." That a position is "at-will" does not defeat the employee's reliance on the employer's representations. The employee may rely on the employer's representations "until she knew or should have known that the terms [of employment] had been modified." Albrant v. Sterling Furniture Co., 736 P.2d 201, 85 Or. App. 272 (1987). See also Cocchiara v. Lithia Motors, Inc., 297 P.3d 1277, 353 Or. 282, 296-99 (2013); Fish v. Trans-Box Sys., Inc., 914 P.2d 1107, 140 Or. App. 255, 261 (1996).

That the employment was at-will, and, therefore, for an indefinite period of time, does not render a fraud action against an employer based upon alleged misrepresentations concerning terms of employment legally insufficient due to inability to prove legally recoverable damages. The employee is entitled to demonstrate what he or she lost as a result of the alleged fraud. Albrant v. Sterling Furniture Co., 736 P.2d 201, 85 Or. App. 272 (1987).

C. Statute of Frauds

The Oregon Statute of Frauds is codified at OR. REV. STAT. § 41.580.

Settlement agreement provisions stating that the defendant would not reapply for employment, and would keep the agreement confidential, did not violate the Statute of Frauds on the ground that such provisions could not be performed within one year. "[If the defendant . . . died within a year . . . of the agreement, the promises of forbearance would be [fully] completed." Kaiser Found. Health Plan of the Nw. v. Doe, 903 P.2d 375, 136 Or. App. 566 (1995).

An oral promise of retirement benefits is not void simply because the employer cannot perform its obligations within one year. Lauderdale v. Eugene Water & Elec. Bd., 177 P.3d 13, 217 Or. App. 551 (2008). "[W]e have held that OR. REV. STAT. § 41.580(1) does not apply when *either* party has fully performed within one year. And we have also held that, for purposes of the statute of frauds, when an employer offers pension benefits, the person to whom the benefits are offered completely performs his or her part of the agreement when he or she accepts the employer's job offer." Id. at 18.

VI. DEFAMATION

A. General Rule

To state a claim for defamation, the plaintiff must show:

1. The defendant defamed the plaintiff;

2. The defendant communicated the defamatory statement to third persons; and

3. The defamatory statements caused the plaintiff harm.

Wallulis v. Dymoski, 918 P.2d 755, 323 Or. 337, 342 -43 (1996).

Whether a statement "was capable of a defamatory meaning" is a question of law; whether the statement actually "was defamatory presents a factual issue to be determined by the factfinder." Affolter v. Baugh Construction Oregon, Inc., 51 P.3d 642, 183 Or. App. 198, 203 n. 2 (2002).

A statement is defamatory if it subjects a person to "'hatred, contempt or ridicule,' tends to diminish the 'respect, goodwill or confidence' in which the person is held, or 'excites adverse, derogatory or unpleasant feelings or opinions.'" Bickford v. Tektronix, Inc., 842 P.2d 432, 116 Or. App. 547, 550 (1992).

Intentional or negligent intra-company communication of a defamatory statement *is* publication for purposes of defamation. Benassi v. Georgia-Pacific, 662 P.2d 760, 62 Or. App. 698, 705 (1983); Wallulis v. Dymoski, 895 P.2d 315, 134 Or. App. 219, 229 (1995), aff'd 323 Or. 337 (1996).

Evidence of an employee's past unrelated business acts is not admissible in a defamation action for harm to the employee's business reputation. Shirley v. Freunscht, 735 P.2d 600, 303 Or. 234 (1987).

1. Libel

Libel is actionable without proof of special damage. The court first determines whether the communication is capable of a defamatory meaning, then the jury determines whether the recipient understood it to be defamatory. Hinkle v. Alexander, 411 P. 2d 829, 244 Or. 267 (1966).

2. Slander

If the defamation is not *per se*, the defamed party must prove special damages, which is "the loss of something having an economic or pecuniary value." Herrera v. C & M Victor Co., 337 P.3d 154, 265 Or. App. 689 (2014).

Slander that ascribes to the defamed party characteristics or conduct that would adversely affect his fitness for his occupation or profession is actionable *per se,* and the plaintiff need not allege or prove any special damage. Fowler v. Donnelly, 358 P.2d 485, 225 Or. 287, 293 (1960). See also Affolter v. Baugh Const. Or., Inc., 51 P.3d 642, 183 Or. App. 198 (2002). This includes "statements that are 'likely to lead people to question [a] plaintiff's fitness to perform his job, that 'cast aspersions on the plaintiffs

ability to perform essential [job] functions,' that 'assert that the plaintiff lacks a characteristic necessary to successful performance of his or her job,' or that include 'imputations of moral turpitude.'" Herrera, 265 Or. App. at 701.

B. References

An employer who, in good faith, discloses information about a former employee upon request of a prospective employer or the former employee is immune from civil liability for such disclosure. OR. REV. STAT. § 30.178. For purposes of the statute, an employer does not act in good faith when the information disclosed by the employer was knowingly false or deliberately misleading, was rendered with malicious purpose, or violated any civil right of the former employee protected under OR. REV. STAT. chapter 659 or 659A.

A former employer has a qualified privilege to make defamatory statements about the character or conduct of an employee to present or prospective employers. The privilege is lost if abused. The employee bears the burden of proving abuse. Testimony that an employee was a "good and productive" worker is not sufficient to prove an employer's disbelief in the statements it made about an employee. Walsh v. Consol. Freightways, 563 P.2d 1205, 278 Or. 347, 356 (1977).

An employee who requests a reference does not necessarily consent to the publication of defamatory statements regarding his or her job performance. A defendant asserting consent as a defense must produce evidence that the plaintiff had reason to know the reference would be unfavorable. Christensen v. Marvin, 539 P.2d 1082, 273 Or. 97 (1975) (referring to § 583 of THE RESTATEMENT OF TORTS).

C. Privileges

"Oregon recognizes the defenses of qualified privilege and absolute privilege to allegations of defamation. The former requires a plaintiff to prove that a defendant acted with actual malice; the latter bars the defamation claim altogether." DeLong v. Yu Enters., 47 P.3d 8, 334 Or. 166, 170 (2002).

In DeLong, an employer's statements to the police were protected by qualified-rather than absolute-privilege, but only if the statements were made in good faith. 334 Or. at 170.

The defendant has the burden of proving that the defamatory statements are privileged as a matter of law. Walsh v. Consol. Freightways, 563 P.2d 1205, 278 Or. 347, 355-56 (1977). "A 'qualified privilege' requires the plaintiff to prove that the defendant abused the 'privileged occasion.'" DeLong, 334 Or. at 170.

An employer has a qualified privilege to defame a former employee:

1. To protect the employer's legitimate interests;

2. If the statement relates to a subject of mutual concern to the defendant and those to whom it is made; or

3. To protect employee morale.

Wallulis v. Dymoski, 918 P.2d 755, 323 Or. 337, 350 (1996); Benassi v. Georgia-Pacific, 662 P.2d 760, 62 Or. App. 698, 702-03 (1983).

An employer's statement to employees that a former employee was terminated because he was "drunk and misbehaving" is protected by the employer's qualified or conditional privilege. The plaintiff has the burden of showing an abuse of privilege. Benassi, 62 Or. App. at 702-03; Walsh, 278 Or. at 356.

A privilege may be abused in four ways:

1. The publisher lacks belief or reasonable grounds for belief in the truth of the statement;

2. The statement is published for purpose other than that for which privilege is given;

3. The statement is published to "unnecessary party"; or

4. The statement contains defamatory matter unnecessary to accomplish privileged purpose.

Benassi, 62 Or. App. at 703. Whether a privilege has been abused, and thus forfeited, is generally a question for the trier of fact. Id. at 704.

Discussing allegations of theft with managerial employees involved in the decision to terminate plaintiff was subject to qualified privileged, and the discussions did not abuse the privilege even if the employer was mistaken in its belief that the employee had stolen. Lewis v. Carson Oil Co., 127 P.3d 1207, 204 Or. App. 99 (2006).

An employer's statement that an employee was terminated due to chronic performance problems is privileged because it was made to protect or promote employee morale. An employer posting a security guard in the hallway during and shortly after an employee's termination is not defamatory. Bickford v. Tektronix, 842 P.2d 432, 116 Or. App. 547 (1992).

D. Other Defenses

1. Truth

Truth is an affirmative defense that the defendant must plead and prove. Fowler v. Donnelly, 358 P.2d 485, 225 Or. 287, 292 (1960).

Truth of a statement is a question for the jury. A statement is substantially true if the "gist" or "sting" of the statement is true, even though it contains inaccuracies. However, if the details are right, but the "gist" is wrong, the defendant is liable. Hickey v. Settlemeier, 841 P.2d 675, 116 Or. App. 436, 439-40, 441 n.2 (1992), aff'd in part and rev'd in part on other grounds 318 Or. 196 (1993).

2. No Publication

To be actionable, the defamatory statement must be published to a third person. See Section VI.A.

3. Self-Publication

If the defamed person shows the defamatory statement to someone, the defendant has not published it to a third person. However, if the defendant knows or has reason to know a third person will read it, such as a secretary opening mail, or the plaintiff is blind and will need someone else to read it, the publication requirement is satisfied. Lane v. Schilling, 279 P.267, 130 Or. 119 (1929).

4. Invited Libel

There are no pertinent Oregon cases.

5. Opinion

A statement of opinion is actionable if the recipient could reasonably conclude that the statement was based on undisclosed defamatory facts. Affolter v. Baugh Constr. Oregon, Inc., 51 P.3d 642, 183 Or. App. 198, 203 (2002). A statement by a supervisor that he thought a particular worker had too much to drink is an example of an actionable statement of opinion. Id.

E. Job Reference and Blacklisting Statutes

OR. REV. STAT. § 659.805 provides:

> No corporation, company or individual shall blacklist or publish, or cause to be blacklisted or published, any employee, mechanic or laborer discharged by such corporation, company or individual, with intent and for the purpose of preventing such employee, mechanic or laborer from engaging in or securing similar or other employment from any other corporation, company or individual.

OR. REV. STAT. § 659.805 further prohibits "conspiring or contriving by correspondence or otherwise" to prevent a former employee from securing employment.

F. Non-Disparagement Clauses

There are no pertinent Oregon cases.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

To prevail on a claim for intentional infliction of emotional distress, a plaintiff must prove:

1. The defendant intended to inflict severe emotional distress on the plaintiff;

2. The defendant's acts were the cause of the plaintiff's severe emotional distress; and

3. The defendant's acts constitute an extraordinary transgression of the bounds of socially tolerable conduct.

McGanty *v.* Staudenraus, 901 P.2d 841, 321 Or. 532, 543 (1995).

An employer's reasonable investigation of an employee's potential wrongdoing does not, of itself, constitute outrageous conduct. Lewis v. Carson Oil Co., 127 P.3d 1207, 204 Or. App. 99 (2006).

An inadequate response, or a complete lack thereof, to complaints of harassment is not, alone, a transgression of the bounds of socially tolerable conduct. The employee must show that the employer directed or otherwise encouraged the harassment. Wheeler v. Marathon Printing, Inc., 974 P.2d 207, 157 Or. App. 290, 307-308 (1998); Lewis *v.* Oregon Beauty Supply Co., 974 P.2d 207, 302 Or. 616, 627-628 (1987).

Managerial decisions that might give rise to employment-related claims do not qualify as intentional infliction of severe mental distress unless they are also the kind of aggravated acts of persecution that a jury could find beyond all tolerable bounds of civilized behavior. Clemente v. State, 206 P.3d 249, 227 Or. App. 434, 442-443 (2009).

A wrongful discharge from employment is not, standing alone, the type of conduct that would support an intentional infliction of emotional distress claim. Madani v. Kendall Ford, 818 P.2d 930, 312 Or. 198 (1991).

In cases in which Oregon courts have allowed an intentional infliction of emotional distress claim asserted in the context of an employment relationship to proceed to a jury, the employer engaged in conduct that was not only aggravating, insensitive, petty, irritating, perhaps unlawful, and mean - it also contained some further and more serious aspect. In some cases, the employer engaged in, or credibly threatened to engage in, unwanted physical contact of a sexual or violent nature. E.g., Lathrope-Olson v. Oregon Dep't of Transp., 876 P.2d 345, 128 Or. App. 405, 407-408 (1994); Franklin v. PCC, 787 P.2d 489, 100 Or. App. 465, 471-472 (1990). Employers in other cases repeatedly used derogatory racial, gender, or ethnic slurs, usually accompanied by some other aggravating circumstance. E.g., Whelan v. Albertson's, Inc., 879 P.2d 888, 129 Or. App. 501, 504 -506 (1994); Franklin v. Portland Community College, 787 P.2d 489, 100 Or. App. 465, 471-472 (1990). In other situations, the employer exposed the plaintiff to actual physical danger. E.g., Babick v. Or. Arena Corp, 40 P.3d 1059, 333 Or . 401, 413-414 (2002); MacCrone v. Edwards Center, Inc., 980 P.2d 1156, 160 Or. App. 91, 100-101 (1999), vacated on other grounds, 22 P.3d 758, 332 Or. 41 (2001).

In Schoen v. Freightliner LLC, 199 P.3d 332, 224 Or. App. 613, 615-620, 629 (2008), the employer repeatedly subjected the plaintiff to verbal abuse, forced her to do work from which she was medically exempted, and forced her to engage in illegal conduct.

It may be outrageous conduct to threaten an employee with criminal prosecution for failure to sign a confession. Smithson v. Nordstrom, 664 P.2d 1119, 63 Or. App. 423 (1983).

B. Negligent Infliction of Emotional Distress

Oregon does not permit recovery for negligent infliction of emotional distress unless accompanied by actual or threatened physical harm or injury to another legally protected interest. Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318, 293 Or. 543 (1982).

VIII. PRIVACY RIGHTS

A. Generally

Oregon generally recognizes a legal right of privacy and the corresponding causes of action for damages: (1) intrusion upon seclusion; (2) misappropriation of name or likeness; (3) publicity of private life; and (4) false light. Privacy is a personal or cultural value placed on seclusion or personal control over access to places or things, thoughts or acts. It can also label one or more legally recognized interests. Anderson v. Fisher Broad. Co., 712 P.2d 803, 300 Or. 452 (1986).

An on-the-job investigation is not coercive interrogation, and thus not invasion of privacy, if the employee consents and the investigation terminates after the employee expresses reluctance to answer further questions considered to be personal. Downs v. Waremart, Inc., 903 P.2d 888, 137 Or. App. 119 (1995), rev'd in part, 926 P.2d 314, 324 Or. 307 (1996).

To sustain a claim for intrusion upon seclusion, the employee must establish that the intrusion would be highly offensive to a reasonable person; a technical trespass is not sufficient. Mauri v. Smith, 901 P.2d 247, 135 Or. App. 662 (1995), rev' d in part, 929 P.2d 307, 324 Or. 476 (1996); Reesman v. Highfill, 965 P. 2d 1030, 327 Or. 597, 607 (1998).

A plaintiff states a claim for false light invasion of privacy if he or she shows that an actor publicized a matter that places the plaintiff in a false light if:

1. The false light would be highly offensive to a reasonable person; and

2. The actor acted with malice (i.e., acted with knowledge of or reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed).

Muresan v. Philadelphia Romanian Pentecostal Church, 962 P.2d 711, 154 Or. App. 465, 475 (1998).

"Publication" is satisfied by proof that the false information reached, or was sure to reach, either the public or a large number of persons in the plaintiff's work community. Muresan, 154 Or. App. at 475.

The truthful presentation of facts concerning a person, even facts a reasonable person would wish to keep private and that are not "newsworthy," does not give rise to common law tort liability for mental or emotional distress, unless the manner or purpose of the defendant's conduct is wrongful in some respect apart from causing the plaintiff hurt feelings. Anderson, 712 P.2d 803, 300 Or. 452.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

Oregon does not have state specific eligibility and reporting procedures regarding new hires.

2. Background Checks

OR. REV. STAT. § 659A.360 prohibits an employer from excluding an applicant from an initial interview because of past criminal conviction. An employer excludes an applicant from an initial interview if the employer:

(a) Requires an applicant to disclose on an employment application a criminal conviction;

(b) Requires an applicant to disclose, prior to an initial interview, a criminal conviction; or

(c) If no interview is conducted, requires an applicant to disclose, prior to making a conditional offer of employment, a criminal conviction.

The statute does not prohibit an employer from considering an applicant's conviction history when making a hiring decision.

The law does not apply: (a) if federal, state or local law, including corresponding rules and regulations, requires the consideration of an applicant's criminal history; (b) to an employer that is a law enforcement agency; (c) to an employer in the criminal justice system; or (d) to an employer seeking a nonemployee volunteer. OR. REV. STAT. 659A.360(4).

OR. REV. STAT. § 659A.320 prohibits employers from obtaining or using credit reports or credit history for employment decisions. This prohibition does not apply to:

(a) Employers that are federally insured banks or credit unions;

(b) Employers that are required by state or federal law to use individual credit history for employment purposes;

(c) The employment of a public safety officer who is a member of a law enforcement unit, who is employed as a peace officer commissioned by a city, port, school district, mass transit district, county, Indian reservation, the Criminal Justice Division of the Department of Justice, the Oregon

> State Lottery Commission or the Governor and who is responsible for enforcing the criminal laws of this state or laws or ordinances related to airport security; or
>
> (d) The obtainment or use by an employer of information in the credit history of an applicant or employee because the information is substantially job-related and the employer's reasons for the use of such information are disclosed to the employee or prospective employee in writing.

Credit history information of an applicant or employee is "substantially job-related" if:

> (a) An essential function of the position at issue requires access to financial information not customarily provided in a retail transaction that is not a loan or extension of credit. Financial information customarily provided in a retail transaction includes information related to the exchange of cash, checks and credit or debit card numbers; or
>
> (b) The position at issue is one for which an employer is required to obtain credit history as a condition of obtaining insurance or a surety or fidelity bond.

OR. ADMIN. RULE 839-005-0080(2).

For a violation of this statute, an employee or applicant for employment can file a civil action for injunctive and equitable relief, back pay, and costs and attorney fees. Other damages, including emotional distress and punitive damages, are not recoverable. OR. REV. STAT. § 659A.885.

C. Other Specific Issues

1. Workplace Searches

There are no pertinent Oregon cases.

2. Electronic Monitoring

In Thygeson v. U.S. Bancorp. 2004 WL 2066746 (D. Or. 2004), the plaintiff was terminated for keeping inappropriate e-mails on his company computer in a file labeled "personal." The defendant had a policy reserving the right to monitor its employees' company e-mail use and computer files. The court concluded that the employee had no reasonable expectation of privacy in his "personal" file saved on the company computer. Therefore, the plaintiff could not state a claim for invasion of privacy. Id. at 20-21.

3. Social Media

OR. REV. STAT. § 659A.330 prohibits employers, including employment agencies, from: (1) requiring or requesting that an employee, or an applicant for employment, disclose their user name, password, or other information that provides access to a personal social media account; (2) compelling an employee or applicant to access their personal social media account in the presence of the employer; (3) compelling an employee or applicant to add the employer to the employee's list of contacts associated with a social media account; (4) requesting that employees and applicants establish or maintain a personal social media account; or (5) requiring employees to advertise for the employer on the employees' personal social media accounts. Employers cannot retaliate or threaten to retaliate against employees or applicants, including not hiring someone, because the employee or applicant refuse an unlawful request.

"Social media" is broadly defined as any "electronic medium that allows users to create, share and view user-generated content, including, but not limited to, uploading or downloading videos, still photographs, blogs, video blogs, podcasts, instant messages, electronic mail or Internet website profiles or locations." OR. REV. STAT. 659A.330(7)(b).

"Personal social media account" means "a social media account that is used by an employee or applicant for employment exclusively for personal purposes unrelated to any business purpose of the employer or prospective employer and that is not provided by or paid for by the employer or prospective employer." OR. REV. STAT. 659A.330(7)(a).

The law provides some limited exceptions: (1) it does not prohibit employers from complying with state and federal laws, rules and regulations, and the rules of self-regulatory organizations; (2) if the employer provided the social media account, or if the account was provided on behalf of the employer to be used for the benefit of employer, then the employee can be required to disclose his or her username and password; and (3) if an employer inadvertently gains knowledge of an employee's access information by monitoring usage of the employer's network or employer-provided electronic devices, the employer is not liable for having the information so long as the employer does not use the information to access the employee's social media account.

When conducting an investigation to ensure compliance with laws, regulatory requirements or prohibitions against work-related employee misconduct, employers can require an employee to share content from a social media site that has (a) been reported to the employer, and (b) is necessary for the employer to make a factual determination about the matter. However, the employer still cannot require the employee to disclose a username and/or password, or otherwise allow access to his or her social media accounts.

4. Taping of Employees

Generally, it is a crime in Oregon to record a person without their knowledge. The person being recorded does not need to consent to the recording so long as they know of

it. OR. REV. STAT. § 165.540.

5. Release of Personal Information On Employees

See Sections VI.B. and VIII.

6. Medical Information

Under OR. REV. STAT. § 659A.133, an employer must maintain a separate medical file and keep medical information confidential, subject to the following exceptions:

(A) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations.

(B) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment.

(C) Officers and employees of the Bureau of Labor and Industries investigating compliance with OR. REV. STAT. §§ 659A.112 to 659A.139 shall be provided relevant information on request.

Under OR. REV. STAT. § 659A.303, an employer may not seek to obtain, obtain, or use genetic information of an employee or a prospective employee, or of a blood relative of the employee or prospective employee, to distinguish between or discriminate against or restrict any right or benefit otherwise due or available to an employee or a prospective employee.

"Genetic information" means information about an individual or the individual's blood relatives obtained from a genetic test. OR. REV. STAT. § 192.531(11).

7. Restrictions on Requesting Salary History

Oregon law prohibits employers from: (1) seeking the salary history of an applicant or employee from the applicant or employee or their current or former employer; (2) screening applicants based on salary history; and (3) determining compensation based on current or past compensation of an applicant. OR. REV. STAT. § 659A.357; OR. REV. STAT. § 652.220(1)(c)-(d); OR. ADMIN. R. § 839-008-0005(1)-(2). The unsolicited disclosure of a job applicant's current or past compensation by a job applicant, employee or a current or former employer of the applicant or employee that is not considered by an employer is not a violation of the law. OR. ADMIN. R. § 839-008-0005(3).

Employers may, however, request from a prospective employee written authorization to confirm prior compensation after the employer makes an offer of employment to the prospective employee that includes an amount of compensation. OR. REV. STAT. § 659A.357. Employers may also still consider the salary history of a current employee during a transfer, move or promotion of the employee to a new position. OR. REV. STAT. § 652.220(1)(d).

IX. WORKPLACE SAFETY

A. Negligent Hiring

"[T]he common law rule regarding providing a safe work place by controlling the conduct of others contemplates that the putative tortfeasor has the opportunity to prevent the risk of harm that results in the injury. Although it is not necessary that the person be able to foresee the exact harm that occurs, the duty to prevent harm or to warn of it does not arise until there is something that would put a reasonable person on notice that a generalized risk of harm exists and that there is an opportunity to prevent the risk." Friedrich v. Adesman, 934 P.2d 587, 589, 146 Or. App. 624 (1997).

Employers are liable for negligently hiring or retaining employees if the employer negligently places "an employee with known dangerous propensities, or dangerous propensities which could have been discovered by a reasonable investigation, in a position where it is foreseeable that he could injure the plaintiff in the course of the work. Chesterman v. Barmon, 727 P.2d 130, 132, 82 Or. App. 1 (1986) review allowed, 302 Or. 64 (1987), opinion affirmed and remanded, 305 Or. 439 (1988).

B. Negligent Supervision/Retention

To establish a claim for negligent supervision, the plaintiff must prove that the defendant knew or should have known about improper conduct by its employees that created a risk of harm to the plaintiff. Whelan v. Albertson's, Inc., 879 P.2d 888, 129 Or. App. 624 (1997). See also Dolan v. U.S., 2008 WL 362556 (D. Or. 2008) ("Plaintiff has failed to present any admissible evidence that the BLM knew or should have known or had any reason to investigate Mr. Mathews regarding tendencies to sexually harass or assault female employees. There is no evidence of any prior complaints against Mr. Mathews for sexual harassment. There is no admissible evidence that the BLM had any reason to investigate Mr. Mathews. Therefore, defendants are entitled to summary judgment on plaintiff's negligent supervision claim."). Compare Panpat v. Owens-Brockway Glass Container, Inc., 71 P.3d 553, 188 Or. App. 384 (2003) (summary judgment for employer was not appropriate where employer knew that employee had history of mental illness that included intermittent explosive disorder, knew employee was having difficulty coping with breakup with his wife, who was also employed by employer, and knew the employee had several confrontations with ex-wife in the workplace).

C. Interplay with Workers' Comp Bar

With certain exceptions, the liability of employers and the remedies of employees for "injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment" are governed exclusively by Oregon's Workers' Compensation Law (OR. REV. STAT. CH. 656). OR. REV. STAT. § 656.018(1)(a), (2).

The exemption from liability is lost if the injury is caused by the willful act of a person who is otherwise exempt. OR. REV. STAT. §§ 656.018(3)(a), 656.156. A plaintiff

cannot use the statutory exception to support a negligence claim. The exception requires proof of deliberate and intentional conduct. Harris v. Pameco Corp., 12 P.3d 524, 170 Or .App. 164, 174 (2000).

In Hanson v. Versarail Sys., 28 P.3d 626, 175 Or. App. 92 (2001), the court held that the plaintiff could not recover from his employer when his supervisor hit him. The plaintiff could not rely on the doctrine of respondeat superior to bring his claim within the "deliberate injury" exception to the exclusive-remedy provision absent proof that the employer commanded or authorized the supervisor's conduct. The court questioned the plaintiff's additional argument that the supervisor should be regarded as the "employer" for purposes of OR. REV. STAT. § 656.156(2), stating that such an argument might convert every supervisor into the employer, but ultimately did not find it necessary to decide that issue. See Campbell v. Safeway, Inc., 332 F. Supp.2d 1367, 1380 (D. Or. 2004) (explaining that the defendant's conduct (threats of jail time, physical violence, and denying plaintiff the chance to meet her children) could lead a reasonable jury to conclude the defendant deliberately intended to cause the plaintiff emotional distress).

An employee may be able to bring common law negligence and negligence *per se* claims against the employer if the injury is determined to be non-compensable under the workers' compensation system. See Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 332 Or. 83, 86 (2001) (an employee may not be deprived of a remedy for an injury that is partially job-related if the job is not a major contributing cause of the injury); Alcutt v. Adams Family Food Services, Inc., 311 P.3d 959, 258 Or. App. 767 (2013).

D. Firearms In The Workplace

Oregon does not have laws prohibiting or regulating firearms specifically in the workplace. Employers are generally free to impose policies prohibiting the possession of firearms on their property.

In Doe v. Medford School Dist. 549C, the court upheld a school district's internal employment policy prohibiting its employees from possessing firearms on school district property or at school-sponsored events. 221 P.3d 787, 232 Or. App. 38 (2009).

E. Use of Mobile Devices

OR. REV. STAT. § 811.507 prohibits the use of cell phones and other mobile communication devices while driving, with the following exceptions for using a mobile device for voice communication:

(a) summoning medical or other emergency help if no other person in the vehicle is capable of summoning help;

(b) 18 years of age or older and using a hands-free accessory;

(c) operating an ambulance or emergency vehicle while acting within the scope of the person's employment;

(d) was a police officer, firefighter or emergency medical services

provider acting within the scope of the person's employment;

(e) Was 18 years of age or older, held a valid amateur radio operator license issued or any other license issued by the Federal Communications Commission and was operating an amateur radio;

(f) operating a two-way radio device that transmits radio communication transmitted by a station operating on an authorized frequency within the business, citizens' or family radio service bands in accordance with rules of the Federal Communications Commission to summon medical or other emergency help; or

(g) Was using a medical device.

The law prohibits text messaging while driving, no exceptions.

"Hands-free accessory" means an attachment or built-in feature for or an addition to a mobile communication device that when used allows a person to maintain both hands on the steering wheel. OR. REV. STAT. § 811.507(1)(b).

X. TORT LIABILITIES

A. Respondeat Superior Liability

Under doctrine of respondeat superior, the test on whether an employee was acting within the scope of her employment is whether: (1) the act occurred substantially within the time and space limits authorized by the employment; (2) the employee was motivated, at least partially, by a purpose to serve the employer; and (3) the act is of a kind that the employee was hired to perform. Mannex Corp. v. Bruns, 279 P.3d 278, 250 Or. App. 50 (2012); Chesterman v. Barman, 753 P.2d 404, 305 Or. 439, 442 (1988).

In Schaff v. Ray's Land & Seafood Co., Inc., 45 P.3d 936, 334 Or. 94 (2002), a salesman was an independent contractor, not an employee, thus the defendant could not be held vicariously liable for the alleged negligence of the salesman.

Although in most instances, the relevant act for respondeat superior analysis is the act that was the immediate cause of the harm, this rule is inappropriate in cases in which there is a time-lag between the act allegedly producing the harm and the resulting harm; in those cases, the focus should be on the act on which vicarious liability is based and not on when the act results in injury. Minnis v. Or. Mut. Ins. Co., 48 P.3d 137, 334 Or. 191 (2002) (employer not liable for off-duty supervisor's off-premises sexual assault of employees since the assault was not within the course and scope of the employee's employment). But see, Chesterman v. Barman, 753 P.2d 404, 305 Or. 439 (1988) (material issue of fact existed precluding summary judgment as to whether employee was acting within scope of employment when he took drug and whether taking of drug resulted in employee's breaking into woman's house and assaulting her; employee took drug while on property of potential customers of employer, employee took drug to enable him to perform work for employer, and jury could find employee had authority to take

steps enabling him to continue work for employer even to extent of ingesting drug.)

B. Tortious Interference with Business/Contractual Relations

The parties to an at-will employment relationship have the same interest in the integrity of their contract as any other contracting parties. The contract is valid until it is terminated and a defendant may not improperly interfere with it. Porter v. Oba, Inc., 42 P.3d 931, 180 Or. App. 207 (2002).

To state a claim for intentional interference with an employment agreement, plaintiff must allege:

1. The existence of [an employment relationship];

2. Intentional interference with that relationship;

3. By a third party;

4. Accomplished by improper means or for an improper purpose;

5. Causal effect between the interference and damage to the economic relationship; and

6. Damages.

McGanty v. Staudenraus, 901 P.2d 841, 32l Or. 532, 535 (1995).

Whether a supervisor or other employee is a "third party" to an employee's contract depends on whether that employee was acting within the scope of his or her employment. Kaelon v. USF Reddaway, Inc., 42 P.3d 344, 180 Or. App. 89 (2002). An employee acting within the course and scope of his/her employment is not a third party to the contract. McGanty, 321 Or. at 535.

A parent company's ownership of a subsidiary's stock is not sufficient to shield it from liability for interfering with a contract between the subsidiary and a third party. Giordano v. Aerolift, Inc., 818 P.2d 950, 109 Or. App. 122 (1991).

The managing officer of a corporation may be a “third party” for purposes of a claim of interference with the employment relationship if he/she is not acting within his/her employment capacity, but out of some improper personal motive. Giordano, 109 Or. App. at 125-26.

Improper motives or means may be defined by statute, regulation, recognized rule, common law, or an established standard of a trade or profession. They include violence, threats, intimidation, defamation or disparaging falsehood. The salient inquiry is whether the defendant's tortious conduct damaged the plaintiff's economic or contractual relationship. This includes causing a third party to discontinue a relationship with the plaintiff. Banaitis v. Mitsubishi Bank, Ltd., 879 P.2d 1288, 129 Or. App. 371 (1994).

Conduct causing the plaintiff stress in performing his contract is not sufficient to sustain a claim for intentional interference with contractual relations. "Defendant's wrongful actions must have rendered plaintiff's obligations more onerous or prevented plaintiff from realizing the full benefit of his contract with a third party." Banaitis v. Mitsubishi Bank, Ltd., 879 P.2d 1288, 129 Or. App. 371 (1994).

A male employee who was discharged for refusing to comply with the employer's dress and grooming requirements does not have a claim for intentional interference with employment contract. Lockhart v. Louisiana-Pacific Corp., 795 P.2d 602, 102 Or. App 593 (1990).

Maximizing profits or other legitimate business purposes is not an "improper motive." Eusterman v. Nw. Permanente, P.C., 129 P.3d 213, 204 Or. App. 244, 238 (2006.

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

Oregon does not favor non-competition agreements. Pursuant to OR. REV. STAT. § 653.295, a non-competition agreement is *voidable* unless:

1) At least two weeks before the employee begins work, the employer notifies the prospective employee in a written employment offer that s/he must sign a non-competition agreement, or the agreement is entered into upon" subsequent bona fide advancement;" and

2) The non-competition agreement lasts for no more than eighteen (18) months after employment ends; and

3) The position is "administrative, executive, or professional," as defined by OR. REV. STAT. § 653.020 (3); and

4) The employer has and articulates a legitimate "protectable interest;" and

5) At the time of termination, the employee is earning more than the "median family income for a four person family" as determined by the United States Census Bureau for the most recent year available at the time of the employee's termination.

Under the statute, an employer has a protectable interest when the employee: (A) has access to trade secrets, as that term is defined in OR. REV. STAT. § 646.461; (B) has access to competitively sensitive confidential business or professional information that otherwise would not qualify as a trade secret, including product development plans, product launch plans, marketing strategy or sales plans; or (C) is employed as an on-air talent by an employer in the business of broadcasting and the employer:

The statute carves out an exception for agreements not to solicit employees of the

employer or solicit or transact business with customers of the employer, effectively overturning Dymock v. Nw. Safety Protective Equip., 45 P.3d 114, 334 Or. 55 (2002).

A "bona fide advancement" must encompass more than simply an increase in compensation, and often includes a change in job title and increased job duties or responsibilities. See, e.g., Nike v. McCarthy, 379 F.3d 576 (9th Cir. 2004).

Failure to meet the requirements of the statute does not render the noncompetition agreement unenforceable. Rather, the agreement is voidable. The employee must take affirmative steps to void the contract or it remains enforceable. Bernard v. S.B., Inc., 350 P.3d 460, 270 Or. App. 710 (2015).

Common law restrictions that are unchanged by the statute include the following:

1. The restriction must be partial or restricted in its operation in respect to time or territory; a restriction regarding either time or territory is sufficient and may be implied from the terms of the agreement. The court may imply a reasonable time where there is only a territorial limitation. Kelite Prod. Inc. v. Brandt, 294 P.2d 320, 206 Or. 636 (1956);

2. It must be reasonable, i.e., provide only fair protection, and not be so large in operation to interfere with public interests; the restraint must not be larger than is required for the necessary protection of the party with whom the contract is made. Eldridge v. Johnston, 245 P.2d 239, 195 Or. 379 (1952); and

3. There must be a protectable interest. Protectable information includes customer lists and contacts or "good will," knowledge of customers, suppliers' names and requirements, and confidential information about the nature of the employer's business. N. Pac. Lbr. Co. v. Moore, 551 P.2d 431, 275 Or. 359 (1976). Trade secrets, to be protectable, must be particular secrets of the employer, not general secrets of the trade. Rem Metals Corp. v. Logan, 565 P.2d 1080, 278 Or. 715 (1977).

A non-competition agreement that fails to set out limitations as to territory is not void as a matter of law. The clause will, if possible, be interpreted so as to make the extent of its operation reasonable. Renzema v. Nichols, 731 P.2d 1048, 83 Or. App. 322, 323 (1987).

B. Blue Penciling

A covenant that is unreasonable in scope does not mean the covenant is void. Rather, the court may apply the "blue pencil doctrine" and enforce the covenant to a lesser extent. The court may decline to do this if it finds there is some basis on which the court may not fix other boundaries. See, e.g., Eldridge v. Johnston, 245 P.2d 239, 195 Or. 379 (1952). Eldridge has not been overturned, and has been cited for the proposition that a contract may be severed and enforced as to its enforceable sections. However there have been no decisions specifically relating to non-competition agreements on this issue

since Eldridge.

C. Confidentiality Agreements

There are no pertinent Oregon cases.

D. Trade Secrets Statute

An employer may bring an action for violation of the Uniform Trade Secrets Act, OR. REV. STAT. §§ 646.461 to 646. 475. The elements of such a claim are:

1. Trade Secret - The employer must demonstrate the existence of a trade secret, meaning information not generally known to the public, and is the subject of reasonable efforts by the employer to keep the information secret. OR. REV. STAT. § 646.461 (4);

2. Misappropriation - Misappropriation generally includes acquisition or disclosure of a trade secret by a person who used improper means to acquire the information or had reason to know it was acquired by improper means. OR. REV. STAT. § 646.461(2) (a) & (b).

3. Improper Means - The trade secret must have been acquired by improper means, including such actions as theft, bribery, misrepresentation, or breach of a duty to maintain secrecy. OR. REV. STAT. § 646.461(1).

An employer may seek injunctive relief or damages, including actual damages, unjust enrichment, and punitive damages not exceeding twice the other monetary awards for "willful or malicious" misappropriation. OR. REV. STAT. §§ 646.463, 646.465.

The prevailing party may be entitled to attorneys' fees under circumstances specified in OR. REV. STAT. § 646.467.

E. Fiduciary Duty and Other Considerations

Oregon courts apply Section 393 of the Restatement (Second) of Agency (1980) to actions involving claims of unfair competition by a principal against former employees. Western Alliance Corp. v. Western Reliance Corp., 643 P.2d 1382, 57 Or. App. 263 (1982). See Alexander & Alexander Benefits Services, Inc. v. Benefit Brokers & Consultants, Inc., 756 F.Supp. 1408, 1411-12 (D. Or. 1991).

In Crowd Management Services, Inc. v. Finley, defendant was found to have acted against his employer's interests by directing security guards and supervisors who worked for plaintiff to provide security service through a competing business and by using company information to benefit the competitor. 784 P.2d 104, 99 Or. App. 688 (1989).

A corporate officer who engages in activities which constitute either a breach of his duty of loyalty or a willful breach of his contract of employment is not entitled to any compensation for services rendered during that period of time, even though part of those services may have been properly performed. American Timber & Trading Co. v.

Niedermeyer, 558 P.2d 1211, 276 Or. 1135 (1976).

Independent contractors, like any agent, owe a duty of loyalty and obedience to the principal. Marnon v. Vaughan Motor Co., 194 P.2d 992, 184 Or. 103 (1948).

There are no other considerations to report.

XII. DRUG TESTING LAWS

A. Public Employers

See discussion below regarding "Private Employers." See also OR. REV. STAT. § 659A.124.

B. Private Employers

As with the federal Americans with Disabilities Act, Oregon law protects individuals with a record of alcoholism or drug addiction. However, OR. REV. STAT. § 659A.124 provides that the protections of civil rights laws protecting against discrimination based on disability do not prohibit an employer from taking action based on the current use of illegal drugs. An employer with notice of illegal drug use may adopt or administer reasonable policies and procedures, including drug testing, to ensure that an applicant or employee is no longer engaging in the illegal use of drugs. OR. REV. STAT. § 659A.124 (3). Furthermore, an employer "may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment, job performance and behavior to which the employer holds other employees, even if the unsatisfactory performance or behavior is related to the alcoholism of or the illegal use of drugs by the employee." OR. REV. STAT. § 659A.127.

An employee is discharged or suspended "for misconduct," and is thus ineligible for unemployment compensation benefits, if the preponderance of evidence shows that the employee was under the influence of intoxicants on the job, possessed cannabis or drugs in violation of the employer's written policies, or tested positive for alcohol, cannabis or unlawful drug in connection with employment. OR. REV. STAT. § 657.176(9)(a)(D)-(F).

An employer currently does not need to accommodate an employee's medical use of marijuana, even if the employee is not impaired at work. Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 348 Or. 159 (2010). Note that the Emerald Steel decision hinges on the current illegality of marijuana under Federal law. If that status changes, Emerald Steel may no longer be good law, and employers may then have a duty to accommodate medical marijuana use associated with a disability.

Reinstatement of a deputy sheriff who used marijuana off duty did not violate public policy. The Oregon Supreme Court found that OR. REV. STAT. § 181.662 (3) was limited to "convictions," and did not express a policy against "use." Washington County Police Officers' Ass'n v. Washington County, 63 P.3d 1167, 335 Or. 198 (2003).

An employer cannot require an employee to pay for a drug test. OR. REV. STAT. § 659A.306.

In some instances, federal regulations regarding drug use and drug testing may preempt state law. Burns Bros., Inc. v. Employment Div., 890 P.2d 423, 133 Or. App. 56, 61 (1995).

Oregon's law legalizing the use, possession and sale of recreational marijuana, does not contain any protections for employees who use legal marijuana or marijuana products.

XIII. STATE ANTI-DISCRIMINATION STATUTES

A. Employers/Employees Covered

For purposes of Oregon's anti-discrimination statute, an "employer" is any person in Oregon who "directly or through an agent, engages or uses the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed." OR. REV. STAT. § 659A.001(4).

The statute exempts "any individual employed by the individual's parents, spouse or child or in the domestic service of any person." OR. REV. STAT. § 659A.001(3).

Under OR. REV. STAT. § 659A.350, unpaid interns are considered "employees" for purposes of Oregon's laws against discrimination, including: discrimination and harassment (including sexual harassment) based on race, color, religion, gender, sexual orientation, national origin, marital status or age; discrimination based on military service: disability discrimination, including impermissible medical inquiries and examinations: whistleblower retaliation; requiring breathalyzer, polygraph, psychological stress or brain-wave tests; limits on obtaining or using genetic information; and discrimination based on tobacco use during non-work hours. However, employee protections for violations of wage and hour, occupational safety and health, worker's compensation, and unemployment laws do not extend to interns. Additionally, interns are not eligible for leave under Oregon's Family Leave Act.

B. Types of Conduct Prohibited

The Oregon Fair Employment Practices Act ("OFEPA"), OR. REV. STAT. § 659A.030, prohibits discriminating against or harassing an employee based on race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, sexual orientation, national origin, marital status or age of any other person with whom the individual associates, or because of an individual's juvenile record that has been expunged. It also prohibits any person from retaliating against an employee who files a complaint or participates in proceedings under the Act. OR. REV. STAT. § 659A.030(1)(f).

The Oregon Bureau of Labor & Industries has enacted regulations interpreting the term "sexual orientation" to include "perceived or actual" hetero- or homosexuality,

bisexuality, gender identity, and gender expression. See OR. ADMIN. RULE 839-005-0003; OR. ADMIN. RULE 839-009-0210.

Same sex harassment is actionable under the OFEPA. Harris v. Pameco Corp., 12 P.3d 524, 170 Or. App. 164 (2000).

The McDonnell-Douglas burden shifting framework applies to a claim under the OFEPA only if brought in federal court. Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080 (9th Cir. Co., 2001).

A "substantial factor" test is used to determine whether an employee's protected activities were the cause of an employer's adverse employment actions. Seitz v. State, 788 P.2d 1004, 100 Or. App. 665 (1990). A “substantial factor” is a factor that made a difference, meaning but for the protected activity the adverse employment action would not have been taken. Hardie v. Legacy Health System, 6 P.3d 531, 167 Or App 425, 435 (2000).

OR. REV. STAT. §§ 659A.103 to 659A.142 prohibits employers with 6 or more employees from discriminating against individuals with a disability. The statute also prohibits retaliation against employees who utilize the procedures or benefits provided for under the statute. OR. REV. STAT. §§ 659A.109. The statute is substantially similar to, and is construed in accordance with, the Americans with Disabilities Act of 1990, as amended by the ADA Amendments Act of 2008. OR. REV. STAT §§ 659A.139 (1).

Oregon disability law mandates a broad interpretation of what it means to be "otherwise qualified” for a position. A sheriff's office was therefore required to accommodate a plaintiff's heart condition by assigning him to a post which limited contact with inmates, even though deputies were required to rotate through different posts, many of which required inmate contact. Evans v. Multnomah County Sheriff's Office, 57 P.3d 211, 184 Or. App. 733 (2002), rev. den., 63 P.3d 27, 335 Or. 180 (2003).

Other protected classes include: filing an injury report or workers' compensation claim (OR. REV. STAT. § 659A.040 et seq.); military service (OR. REV. STAT. § 659A.082); requesting or taking medical leave (OR. REV. STAT. § 659A.183 et seq.); "whistleblowing" (OR. REV. STAT. §§ 659A.199 to 659A.233); testifying before the legislature or legislative committee (OR. REV. STAT. § 659A.236); victims of domestic violence (OR. REV. STAT. § 659A.290); employment of a family member (OR. REV. STAT. § 659A.309); making a claim for unpaid wages (OR. REV. STAT. § 652.355); taking leave to donate bone marrow (OR. REV. STAT. § 659A.312); use of tobacco during nonworking hours (OR. REV. STAT. § 659A.315); having a degree in theology or religious occupations (OR. REV. STAT. § 659A.318); refusing to attend a meeting of the employer about religious or political matters (OR. REV. STAT. § 659.785); and participating in an athletic event sanctioned by the U.S. Olympic Committee (OR. REV. STAT. § 659.865).

C. Administrative Requirements

There is no exhaustion of administrative remedies requirement under Oregon law.

OR. REV. STAT. § 659A.870(2).

A claim under state anti-discrimination laws may be brought before the Oregon Bureau of Labor & Industries, in conjunction with any claim under federal anti-discrimination laws. During the pendency of the investigation, applicable statutes of limitations are tolled. If the Bureau does not find substantial evidence of discrimination, the claim will be dismissed and a notice issued that the complainant has 90 days to file suit in court on the same claims.

The three-day mailing rule does not apply to the 90-day right-to-sue time period under Quillen v. Roseburg Forest Prods., Inc., 976 P.2d 91, 159 Or. App. 6 (1999).

D. Remedies Available

In addition to an action for retaliation under the OFEPA, an action for common law "wrongful discharge" may be brought See, e.g. , Holien v. Sears, Roebuck & Co., 689 P.2d 1292, 298 Or. 76 (1984) (discharge resulting from an employee's rightful resistance to her supervisor's sexual harassment is actionable under the common law tort of wrongful discharge). See also discussion in Section II.B., above, regarding wrongful discharge in violation of public policy claims.

This is significant, inasmuch as the statute of limitations for bringing an action under OR. REV. STAT. § 659A.030(1)(f) is one year, whereas the statute of limitations for bringing a claim of wrongful discharge is two years.

OR. REV. STAT. § 659A.885 provides the remedies available for violation of Oregon's anti-discrimination statutes. Generally, an employee who alleges an unlawful employment practice can file a civil suit for injunctive or equitable relief, lost wages and other compensatory damages (including emotional distress), punitive damages, and costs and attorney fees. The employee also, generally, has a right to a jury trial. However, some claims, such as discrimination for claiming unpaid wages, do not allow for recovery of punitive damages or for a jury trial. Accordingly, a careful reading of the statute is required to determine the exact remedies available for a particular statutory discrimination claim.

OR. REV. STAT. § 659A.885(3) provides for prevailing party costs and attorney fees. However, a defendant's attorney fees are generally awarded only if the action is frivolous, pursuant to OR. REV. STAT. § 20.107.

For employment related tort claims, the employee can recover compensatory (economic and non-economic) damages and punitive damages. However, punitive damages are not available in tort actions based on speech, such as defamation. Wheeler v. Green, 593 P2d 777, 286 Or 99, 119 (1979).

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

OR. REV. STAT. § 10.090 provides that no employee may be discharged for

serving on jury duty. Employers cannot require employees to use accrued vacation, sick leave or other paid time off for time spent serving on a jury. OR. REV. STAT. § 10.090 (2).

Employers with 10 or more employees must, at the employee's request, continue health, disability, life or other insurance benefits while an employee serves on a jury. OR. REV. STAT. § 10.092.

OR. REV. STAT. § 659A.230 prohibits discriminating against employees who have testified in good faith in a civil or criminal proceeding.

OR. REV. STAT. § 659A.233 prohibits discriminating against employees who have testified in good faith at an unemployment hearing or other hearing brought under Oregon's Unemployment Insurance law (OR. REV. STAT. Ch. 657).

OR. REV. STAT. § 659A.236 prohibits discriminating against employees who have testified before the Legislative Assembly or any of its interim or statutory committees, including advisory committees and subcommittees thereof, or task forces.

B. Voting

There are no pertinent Oregon statutes. Oregon uses vote-by-mail, making it unnecessary to provide employees leave to vote.

C. Family/Medical Leave

The Oregon Family Leave Act ("OFLA"), OR. REV. STAT. §§ 659A.150 to 659A.186, is modeled after the federal Family and Medical Leave Act (FMLA). OFLA covers employers with 25 or more employees in the state of Oregon during 20 or more workweeks in the year in which leave is taken, or the preceding year. Also refer to OR. ADMIN. R. 839-009-0200 et seq. for rules interpreting Oregon leave laws.

An "eligible employee" is one who worked an average of 25 hours per week during the 180 days immediately preceding the date when the leave would begin, unless (he leave is to care for a newborn child or newly placed adoptive or foster child ("parental leave"). Employees are automatically eligible to take parental leave.

OFLA allows eligible employees to take up to 12 weeks per leave year for an employee's or family member's serious health condition, for parental leave, and to care for the nonserious health condition of a child requiring home care ("sick child leave"). OFLA defines "family member" as a spouse, parent, parent-in-law, grandparent, grandchild, same-sex domestic partner, or newborn, newly adopted, or newly placed foster child.

Eligible employees may take leave to care for a parent or child in the case of an "in loco parentis" relationship, that is, when one party has been responsible for day-to-day care and financial support of the other. A legal or biological relationship is not necessary. OR. REV. STAT. § 659A.150(4); OR. ADMIN. RULE 839-009-0210 (9).

A female employee who takes OFLA leave for a pregnancy related disability (including routine prenatal care) may take up to an additional 12 weeks of OFLA leave for any other OFLA qualifying purpose. OR. REV. STAT. § 659A.162; OR. ADMIN. RULE 839-009-0240.

Male or female employees who use parental leave may use up to 12 additional weeks in the same leave year for sick child leave. OR. REV. STAT. § 659A.162; OR. ADMIN. RULE 839-009-0240.

OFLA is to be construed in a manner consistent with the FMLA. OR. REV. STAT. § 659A.186(2). The employee is entitled to be restored to the same position upon return. OR. REV. STAT. § 659A.171(1).

OFLA leave must be taken concurrently with FMLA leave. OR. REV. STAT. § 659A.186(2). However, FMLA leave does not count as OFLA leave if the employee is not eligible for OFLA leave. OR. ADMIN. R. § 839-009-0220(1). Likewise, OFLA leave does not count as FMLA leave if the employee is not eligible for FMLA leave.

OFLA prohibits the use of medical leave concurrently with workers' compensation leave. Also, an employee with a compensable injury who has been released to, but rejected, light duty is automatically on medical leave under OFLA and is not required to make a formal request for leave or to provide additional documentation.

Eligible employees are entitled to take up to 2 weeks of OFLA leave, up to a maximum of 12 weeks per leave year, to (1) attend the funeral (or funeral alternative) of a family member; (2) make arrangements necessitated by the death of a family member; or (3) grieve the death of a family member. The bereavement leave must be completed within 60 days after the employee receives notice of the death of the family member. The bereavement leave counts towards the employees 12 weeks of OFLA leave. Employees may take separate blocks of bereavement leave for each family member when multiple family members die at the same time. Employers cannot prohibit employees who lose a shared family member from taking bereavement leave at the same time. An employee is allowed to commence leave without prior notice to the employer, but is required to provide oral notice within 24 hours of taking leave. An employee may have someone else provide oral notice on the employee's behalf. However, the employee must provide written notice within three days of returning to work. Unlike other types of OFLA leave, an employer may not shorten the length of bereavement leave when an employee fails to provide notice.

D. Pregnancy/Maternity/Parental Leave

See Section XVI.C. (Family/Medical Leave) above.

E. Day of Rest Statutes

There are no pertinent Oregon statutes.

F. Military Leave

Under OR. REV. STAT. §§ 659A.090 to 659A.099, Oregon employers who are subject to OFLA, must provide an employee who is a spouse of a member of the armed forces, national guard, or reserves with up to 14 days of unpaid leave per deployment during a period of military conflict. The employee must provide notice of intent to take leave within 5 business days of receiving notice of the impending deployment. OR. REV. STAT. § 659A.093 (3). The employee is entitled to be restored to the same position upon return. OR. REV. STAT. § 659A.093 (2). Leave taken under this section qualifies as and can be counted towards available OFLA leave time. OR. REV. STAT. § 659A.093(5).

Under OR. REV. STAT. § 408.240, public employees who leave their positions for military duty may not be terminated as a result of their absence. Such employees are deemed absent on leave until released from active service, for up to five years.

In general, Oregon employers must also comply with the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), which provides for continuation of benefits while in active duty, and reinstatement upon return.

G. Sick Leave

OR. REV. STAT. § 653.601 to 653.661 requires all employers in Oregon to provide employees with at least 40 hours of protected sick leave per year. The leave is unpaid unless the employer has 10 or more employees (6 or more employees if located in a city with a population exceeding 500,000). Number of employees is determined by looking at the average number of employees employed each day during each of 20 or more workweeks in the "calendar or fiscal year" when leave is taken, or in the previous year.

Sick leave accrues at a rate of 1 hour of leave for every 30 hours worked. Salary-exempt employees are presumed to work 40 hours per week unless regularly scheduled to work more or less hours. Employers can opt to front-load sick leave instead of using an accrual method.

Employees are allowed to "roll-over" up to 40 hours of unused leave to the next leave year. Employers can cap accrual at 80 hours, and limit use to 40 hours per leave year. Roll-over is not required (1) if the employer front-loads sick leave and the employee receives at least 40 hours to start the leave year, or (2) if the employer pays out accrued unused sick leave at the end of the leave year.

Employees begin accruing sick leave on the first day of work, but cannot use accrued sick leave until they have been employed for 90 days.

Employers cannot require employees to use accrued sick leave in greater than 1 hour increments, unless (1) allowing the employee to use sick leave in increments of 1 hour or less would impose an undue hardship on the employer, *and* (2) the employer has a policy or combination of policies that allows the employee to accrue up to 56 hours of *paid leave* per year that may be taken in minimum increments of 4 hours.

Employees can use protected sick leave:

(a) for an employee's mental or physical illness, injury or health condition, need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or need for preventive medical care;

(b) For care of a family member with a mental or physical illness, injury or health condition, care of a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition or care of a family member who needs preventive medical care;

(c) for a purpose specified under the Oregon Family Leave Act ("OFLA"), OR. REV. STAT. §§ 659A.150 to 659A.186;

(d) for a purpose specified under OR. REV. STAT. § 659A.270 (leave to address domestic violence and sexual assault);

(e) in the event of a public health emergency; or

(f) to donate accrued sick leave to another employee if the employer has a policy that allows employees to donate sick leave to a coworker.

Employees can be required to comply with the employer's usual and customary notice requirements for absences or for requesting time off if those requirements do not interfere with the ability to use sick leave. Employers can require notice of foreseeable sick leave no more than 10 days before the leave is needed. Employees need to reasonably attempt to schedule foreseeable leave in a manner that does not unduly disrupt operations.

Employers can only require a doctor's note or other form of verification if (a) the employee takes more than 3 consecutive work days off, or (b) the employer suspects a "pattern of abuse." A "pattern of abuse" is defined by example, and includes, but is not limited to, repeated use of unscheduled sick time on or adjacent to weekends, holidays, vacation days or paydays.

Employers are not required to pay out unused accrued sick leave at termination of employment.

An employer with a sick leave policy, paid vacation policy, paid personal time off policy or other paid time off program that is substantially equivalent to or more generous to the employee than the minimum requirements of OR. REV. STAT. § 653.601 to 653.661 shall be deemed to be in compliance with the law.

Also refer to OR. ADMIN. R. 839-007-0000 et seq. for rules interpreting Oregon's sick leave law.

H. Leave to Address Domestic Violence and Sexual Assault

OR. REV. STAT. § 659A.270 requires employers of six or more employees for 20 or more workweeks in a year to permit unpaid leave to address domestic violence, harassment, sexual assault or stalking of the employee or their minor child. Employees are entitled to take leave to seek legal or law enforcement assistance or remedies, to seek medical treatment, to obtain counseling or other victim services, or to relocate or take other steps to obtain a safe home. Employees may choose to use any accrued paid leave.

Employers are required to post a summary of the law in a conspicuous and accessible place in or about the workplace.

I. Other Leave Laws

Leave to Attend Criminal Proceedings

OR. REV. STAT. §§ 659A.190 to 659A.198 requires employers of six or more employees to permit employee who are crime victims unpaid leave to attend criminal proceedings. To be eligible for leave, the employee must have 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. OR. REV. STAT. § 659A.190(4)(a).

Leave to Donate Bone Marrow

OR. REV. STAT. § 659A.312 prohibits employers from denying employees use of already accrued paid leave to donate bone marrow. The total length of leave need not exceed the total amount of accrued paid leave or 40 hours, whichever is less.

Leave for Veterans Day

OR. REV. STAT. § 408.495 provides that employees who served on active duty in the Armed Forces for at least 6 months and received a discharge under honorable conditions may take Veterans Day off upon request. Military service in a reserve or National Guard qualifies if the employee was deployed or served on active duty for at least 6 months. The employer may request documents establishing the employee's veteran status.

Eligible employees seeking Veterans Day off must make the request at least 21 days before Veterans Day. Employers must then respond to the request at least 14 days prior to Veterans Day. The response must inform the employee whether he or she will receive time off on Veterans Day, and whether the time off will be paid or unpaid. Whether the time off is paid or unpaid is at the discretion of the employer.

Employers may deny a request only if they can demonstrate that granting the request would cause a significant economic or operational disruption or an undue hardship to the company. In those circumstances, the employer must allow the employee a day off before the next Veterans Day. That day off must be in addition to time off to which the employee is already entitled.

XV. STATE WAGE AND HOUR LAWS

OR. REV. STAT. CH. 652 and 653 regulates overtime, recordkeeping, minimum wage, child labor, and other wage an hour issues. See also OR. ADMIN. R. 839-001-0100 et seq.; OR. ADMIN. R. 839-020-0000 et seq.

Oregon has wage and hour rules specific to employees working in mills, factories, and manufacturing establishments (OR. REV. STAT. § 652.020; OR. ADMIN. R. 839-001-0100 to 0130), employees working in mines (OR. REV. STAT. § 652.040), firefighters (OR. REV. STAT. § 652.050 to 652.080), and child labor (OR. ADMIN. R. 839-021-0006 to 0500.

A. Current Minimum Wage in State

In 2016, Oregon changed its minimum wage structure to create a three-tiered system that sets the minimum wage based on where the employer is located. The minimum wage rate increases annually on July 1. The following chart sets forth the three tiers and schedule of annual increases.

Date of Increase	**Tier 1. Base Rate**	**Tier 2. Rate within the Urban Growth Boundary**	**Tier 3. Rate within Nonurban Counties**
July 1, 2016	$9.75	$9.75	$9.50
July 1, 2017	$10.25	$11.25	$10.00
July 1, 2018	$10.75	$12.00	$10.50
July 1, 2019	$11.25	$12.50	$11.00
July 1, 2020	$12.00	$13.25	$11.50
July 1, 2021	$12.75	$14.00	$12.00
July 1, 2022	$13.50	$14.75	$12.50

Employees are paid the base rate unless the employer is located within the Urban Growth Boundary or a "nonurban county." Employers located within the Urban Growth Boundary – an area encompassing the City of Portland and much of the greater tri-county area (Multnomah, Washington, and Clackamas counties) – need to pay the rate under Tier 2. Employers located in the "nonurban counties" of Baker, Coos, Crook, Curry, Douglas, Gilliam, Grant, Harney, Jefferson, Klamath, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa, and Wheeler will pay the rate under Tier 3.

Starting July 1, 2023, the base rate will be adjusted annually for inflation. Tier 2 will be set at $1.25 above the adjusted base rate, and Tier 3 will be set at $1.00 below the adjusted base rate.

Exemptions from minimum wage are detailed at OR. REV. STAT. § 653.020 and OR. ADMIN. R. 839-020-150.

Employers may count towards the minimum wage to be paid employees (1) the fair market value of lodging, meals or other facilities or services furnished by the employer for the private benefit of the employee, and (2) any commissions earned. Tips cannot be counted towards minimum wage. OR. REV. STAT. § 653.035.

OR. REV. STAT. § 653.070 allows employers to pay "student learners," as defined in the statute, 75 percent of minimum wage.

B. Deductions From Pay

OR. REV. STAT. § 652.610 governs deductions from employee pay. Deductions from pay are generally prohibited unless an exception in the statute applies. See also OR. ADMIN. R. 839-001-0200, 839-001-0250.

An employee can bring a civil action for an unlawful deduction to recover the amount unlawfully deducted or $200, whichever is greater. The court may award the prevailing party costs and attorney fees. OR. REV. STAT. § 652.615.

C. Overtime Rules

Salary-exempt classifications and outside salesperson requirements are detailed in OR. ADMIN. R. 839-020-0005.

Overtime exemptions are detailed at OR. REV. STAT. § 653.020 and OR. ADMIN. R. 839-020-125 to 839-020-150.

Oregon's general overtime rule is that non-exempt employees are required to be paid time-and-a-half for time worked over 40 hours in a workweek. There are two exceptions.

First, when employed in canneries or driers or packing plants, excluding canneries or driers or packing plants located on farms and primarily processing products produced on such farms, employees shall be paid time and a half for time over 10 hours per day and piece workers shall be paid one and a half the regular prices for all work done during the time they are employed over 10 hours per day. OR. REV. STAT. § 653.265.

Second, OR. REV. STAT. § 653.020 requires that employees working in a mill, factory or "manufacturing establishment" must be paid overtime for any time worked over 10 hours in a 24-hour period. The term "manufacturing establishment" is broadly defined as "any place where machinery is used for * * * the process of making goods or any material produced by machinery; anything made from raw materials by machinery; the production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations, by the use of machinery." OR. ADMIN. R. 839-001-100(11)(a).

OR. REV. STAT. § 652.020 exempts the following categories of employees from its daily overtime requirements:

- Watchmen/women,
- Boiler operators,
- Employees who as one of their regular duties are engaged in the transportation of other employees to and from work,

- Employees whose primary duty is that of making necessary repairs. This includes employees conducting maintenance on buildings, equipment or machinery,

- Employees whose primary duty is that of supervising and directing work. This includes supervisors, managers, foremen/women and persons who are temporarily acting in these capacities in the absence of supervisory employees,

- Employees whose primary duty is the loading and removal of finished forest products, and

- Employees engaged in emergency work.

When an employee is subject to more than one overtime law, the employer should calculate overtime for the pay period under each applicable law and pay the amount that is most favorable to the employee.

D. Time For Payment Upon Termination

Generally, if an employer terminates an employee, or the termination is by mutual agreement, an employee is entitled to all wages and payments due no later than one business day after termination, or the employer is subject to penalties. OR. REV. STAT. § 652.140(1). If the employee terminates employment after giving the employer at least 48 hours' notice, all wages and payments are due immediately at the time of termination. Id. § 652.140(2). If the employee terminates employment with less than 48 hours' notice, all wages and payments are due within five business days or the next scheduled payday, whichever occurs first. Id. See also OR. ADMIN. R. 839-001-410 to 839-0011-465. “Business day” does not include weekends or recognized state holidays. OR. ADMIN. R. 839-001-0410(1).

See OR. REV. STAT. § 652.140 and OR. ADMIN. R. 839-001-0410 to 839-001-0460 for limited exceptions to final paycheck rule and other requirements.

When workforce is terminated at the time of a sale, but employees are rehired by the buyer without work interruption, employees are "terminated" for purposes of the wage payment statute, and entitled to payment of wages at end of the first business day after termination. Wilson v. Smurfit Newsprint Corp., 107 P.3d 61, 197 Or. App. 648 (2005).

In Olson v. Eclectic Inst., Inc., 119 P.3d 791, 201 Or. App. 155 (2005), the employer agreed to pay an employee a fixed monthly amount for use of his personal automobile for work travel. When the employee resigned, the employer refused to pay the employee's unpaid automobile allowance. The employee sued under OR. REV. STAT. § 652.150, Oregon's wage payment statute. The court held that the allowance was compensation for services because it was a fixed amount as opposed to an expense reimbursement, therefore, the employer's refusal to pay it was actionable. Olson, 119

P.3d at 792.

Under an "economic reality test," a person who sells cars and does other miscellaneous tasks at a car lot was an employee, not an independent contractor, and was therefore entitled to unpaid wages. Because the employer did not keep accurate time records, the employee's evidence of hours worked was given a rebuttable inference of credibility. Presley v. BOLI, 112 P.3d 485, 200 Or. App. 113 (2005).

E. Breaks and Meal Periods

OR. ADMIN. RULE 839-020-0050 sets forth the requirements for breaks and meal periods for non-exempt adult employees. Generally, rest breaks must be at least 10 minutes and are paid time. Meal periods must be at least 30 minutes and do not need to be paid. The employee must be relieved of all job duties during rest and meal breaks.

OR. ADMIN. RULE 839-021-0072 sets forth the requirements for breaks and meal periods for minor employees (i.e., under the age of 18).

There is no private right of action for missed breaks. Gafur v. Legacy Good Samaritan Hosp. & Med. Ctr., 185 P.3d 446, 344 Or. 525 (2008). Jurisdiction over missed breaks rests solely with the Oregon Bureau of Labor & Industries. Id.

Employers employing at least 25 employees in Oregon must provide reasonable rest breaks to accommodate an employee who needs to express breast milk for her child 18 months of age or younger. OR. REV. STAT. § 653.077; OR. ADMIN. RULE 839-020-0051.

F. Employee Scheduling Laws

Oregon's Predictive Scheduling Law, OR. REV. STAT. § 653.412 to § 653.490, established requirements and restrictions for employee scheduling for retail, hospitality, and food service establishments that employ 500 or more employees worldwide, including but not limited to a chain or an integrated enterprise. The requirements apply only to non-exempt hourly employees whose primary duties relate to retail, hospitality, and food service operations. Requirements include, but are not limited to, providing employees with their work schedule at least seven (7) days in advance, restrictions on when the work schedule can be changed, and minimum hours of rest between shifts. Failure to comply with the law's requirements can result in the employer owing the employee additional wages as a penalty. Subject employers should review the law and associated regulations, OR. ADMIN. R. § 839-026-0000 to OR. ADMIN. R. § 839-026-0140, in detail to ensure compliance.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking In The Workplace

OR. REV. STAT. §§ 433.835 to 433.875 prohibits smoking in the workplace.

Designated smoking areas must by at least 10 feet from any entrance, exit, windows that open, or ventilation intakes that serve an enclosed area. The law expressly includes electronic cigarettes and "vaping."

The only limitation is OR. REV. STAT. § 659A.315, which makes it an unlawful employment practice for any employer to require, as a condition of employment, that any employee or prospective employee refrain from using lawful tobacco products during nonworking hours, except when the restriction relates to a bona fide occupational requirement.

B. Health Benefit Mandates For Employers

Oregon does not require employers to provide health insurance benefits.

C. Immigration Laws

Oregon does not have laws governing employee immigration status.

D. Right to Work Laws

Oregon is not a right to work state.

E. Lawful Off-Duty Conduct (including lawful marijuana use)

See Section XII.B. regarding marijuana use. Generally, an employer has no obligation to accommodate an employee's marijuana use, lawful or otherwise.

See Section XV.A. regarding lawful off-work tobacco use.

Other protected lawful off-duty conduct includes testifying before the legislature or legislative committee (OR. REV. STAT. § 659A.236); taking leave to donate bone marrow (OR. REV. STAT. § 659A.312); participating in an athletic event sanctioned by the U.S. Olympic Committee (OR. REV. STAT. § 659.865); testifying in a civil or criminal proceeding (OR. REV. STAT. § 659A.230); and testifying in an unemployment compensation hearing (OR. REV. STAT. § 659A.233).

F. Gender/Transgender Expression

OR. REV. STAT. § 659A.030 prohibits discrimination based on "sexual orientation," which includes an individual's "perceived or actual" hetero- or homosexuality, gender identity, and gender expression. See OR. ADMIN. R. 839-005-0003; OR. ADMIN. R. 839-009-0210.

G. Other Key State Statutes

Under OR. REV. STAT. § 659A.300, no employee may be forced to take a breathalyzer test, polygraph examination or any other kind of lie detector examination. An employer may require a breathalyzer test administered by a third party as a condition of employment or continued employment only if the employer has reasonable grounds to believe the employee is under the influence of intoxicating liquor. The employer must

pay the cost of the test.

OR. REV. STAT. § 435.485 prohibits employers from requiring medical staff employees to participate in performing an abortion.

Under OR. REV. STAT. §§ 653.060 and 653.991, it is a misdemeanor to discharge an employee for filing a complaint or participating in proceedings alleging failure to pay minimum wage and/or failure to pay overtime wages. Contacting the Bureau of Labor & Industries to inquire about wage and hour laws, or to file a wage claim, is a "whistleblowing" act. OR. REV. STAT. § 659A.230; OR. ADMIN. R. 839-010-0140.

OR. REV. STAT. § 654.062 prohibits an employer from discharging an employee for filing a complaint or participating in proceedings under the Oregon Safe Employment Act. The statute provides a 90-day statute of limitations for a claim of retaliation under this law.

OR. REV. STAT. § 659A.040 prohibits an employer from discharging an employee for "invoking" the workers' compensation system. "Invoke" does not require an employee to file a workers' compensation claim; rather "invoke" includes, but is not limited to, a worker's reporting of an on-the-job injury or a perception by the employer that the worker has been injured on the job or will report an injury. OR. ADMIN. R. 839-006-0105(6).

In 2017, the scope of Oregon's Equal Pay Law, OR. REV. STAT. § 652.210 to OR. REV. STAT. § 652.235, was expanded to cover the following protected classes: race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age. The law makes it an unlawful employment practice for any employer, other than the federal government, to: "(a) In any manner discriminate between employees on the basis of a protected class in the payment of wages or other compensation for work of comparable character;" and "(b) Pay wages or other compensation to any employee at a rate greater than that at which the employer pays wages or other compensation to employees of a protected class for work of comparable character." OR. REV. STAT. § 652.220(1).

"Compensation" includes wages, salary, bonuses, benefits, fringe benefits and equity-based compensation. OR. REV. STAT. § ORS 652.210(1). "Work of comparable character" means work that requires substantially similar knowledge, skill, effort, responsibility and working conditions in the performance of work, regardless of job description or job title. OR. REV. STAT. § 652.210(12).

The employer may pay employees for work of comparable character at different compensation if all of the difference is based on one or more of the following bona fide factors related to the position: 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; and experience. OR. REV. STAT. § 652.220(2)

The employer may not reduce an employee's compensation to comply with the law. OR. REV. STAT. § 652.220(4).

An aggrieved employee can currently bring a private right of action to recover the difference in wages they should have been paid going back one year, an equal amount as liquidated damages, costs and attorney fees. OR. REV. STAT. § ORS 652.230.

Starting January 1, 2014, the available remedies are expanded to include back pay for one year from date of filing, front pay, compensatory damages, punitive damages, costs and attorney fees. The employer can move to disallow compensatory and punitive damages if: (1) the employer has completed a good faith equal pay analysis within three years before the lawsuit was filed that is reasonable in scope and related to the protected class at issue; and (2) the employer has eliminated the wage differentials for the plaintiff and has made reasonable and substantial progress toward eliminating wage differentials for the protected class asserted by the plaintiff. OR. REV. STAT. § 652.235.