Take note of Oregon employment laws that take effect next year

COMPLIANCE CORNER

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COMMENTARY

As the Oregon Legislature frequently does, it made significant changes to employment laws this past session. To assist employers in reviewing their hiring practices and policies, following is a look at key bills that all employers should note before they take effect on Jan. 1, 2022.

New hiring best practices

First, starting Jan. 1, employers can require employees to provide a copy of their driver's licenses in only limited circumstances. Although employees remain free to provide copies for their I-9 forms, employers may not make a driver's license a requirement for a position, unless the ability to drive legally is an essential function of the job or is related to a legitimate business purpose.

Second, with additional restrictions placed on noncompetition agreements entered into on or after Jan. 1, 2022, employers should review and update their agreements for new employees. (These changes do not affect agreements in place before Jan. 1, 2022.) Employers may also want to take this opportunity to consider supplementing their agreements or exchanging them for well-crafted non-solicitation and nondisclosure agreements that are exempt from many of the restrictions placed on noncompetition agreements. Because emerging litigation trends indicate courts are more readily voiding non-solicitation agreements as improper noncompetition agreements in disguise, employers would be wise to review their non-solicitation agreements as well.

Finally, from a pay equity standpoint, employers that provide hiring or retention bonuses should note the Legislature's one-time, narrow exemption expires on March 1, 2022. As of May 25, 2021, hiring bonuses and retention bonuses were excluded from the definition of "compensation" and did not have to be considered when evaluating pay parity under the Oregon Equal Pay Act. (The intent behind this change was to assist employers in using all of the tools at their disposal to navigate the current labor shortages and incentivize employment.) Employers that choose to continue offering these bonuses should consult their favorite employment attorney on the best ways to assess what preventive measures can be taken to reduce the risk of a pay equity claim.

Updates to job-protected medical leave

There are three important amendments to the Oregon Family Leave Act (OFLA) that will require employers to revise their handbooks. First, Oregon will allow employees who have a break in service due to termination, temporary furlough, or layoff of 180 days or less, to retain their OFLA eligibility and count time prior to the break in service. Employers already have similar obligations under Oregon's Sick Leave Law.

In response to COVID-19, the Legislature also expanded OFLA eligibility during a public health emergency to employees who have worked at least 30 days immediately prior to taking leave (reduced from 180 days) and an average of 25 hours or more per week during those 30 days.

Finally, BOLI's temporary rule on sick child leave has been adopted permanently, so employers must continue to provide sick child leave when an employee must take leave due to the closure of the child's school or child care provider as a result of a public health emergency. As a reminder, employers may request only the following information to certify sick child leave: (a) the name of the child requiring home care; (b) the name of the school or child care provider that is subject to closure; (c) a statement from the employee that no other family member of the child is willing and able to care for the child; and (d) a statement that special circumstances exist that require the employee to provide home care for the child during the day, if the child is older than 14 years.

Dress code policy

With the passage of the CROWN Act ("Create a Respectful and Open World for Natural hair"), Oregon joined 11 other states in providing statutory protections to physical characteristics historically associated with race.

These new protections were passed in response to courts that held Title VII and antidiscrimination statutes only narrowly protect "immutable characteristics" associated with race and not "mutable characteristics" such as personal appearance. These courts had,

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for example, permitted employers to terminate employees for having dreadlocks. In affirming the broad protections afforded by Title VII, the CROWN Act targets dress code policies that may appear to some as neutral but have a disproportionate and adverse impact on employees because of their race and hair textures, hair types and protective hairstyles such as braids, locs and twists.

Dress code policies should be reviewed to ensure they do not prohibit these hairstyles. Employers should also consider training managers so that they're aware comments about certain hairstyles and hair textures may now be the basis of a racial discrimination claim and that religious exemptions should be permitted. Employers can also consider a number of policy revisions to foster compliance, including requiring a second opinion from Human Resources before disciplining an employee for an infraction.

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