

Electronic Alert

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Big Changes for Oregon Discrimination Claims

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The Oregon Workplace Fairness Act (“SB 726”), currently awaiting signature from the Governor’s Office, involves several significant changes aimed to address workplace discrimination and harassment. These changes will require most Oregon employers to adjust policies and practices moving forward.

While the impetus of these changes was to crack down on sexual harassment in the workplace, these changes ultimately apply to conduct that constitutes sexual assault as well as discrimination based on race, color, religion, sex, sexual orientation, national origin, marital status, age, expunged juvenile records, uniformed service, or disability. Below are highlights of the key changes:

1. Five Year Statute of Limitations

Most significantly, SB 726 expands the statute of limitations for the above employment discrimination claims from one year to five years. While this is an improvement from earlier versions of the bill which included a seven-year statute of limitations, this expansion will be a hardship for employers.

The new five-year statute of limitations applies only to prohibited conduct that occurs on or after the effective date of SB 726, which will likely be no later than October 1, 2019, but depends on when the legislative session adjourns.

2. Restrictions on Nondisclosure, Nondisparagement, & No-Rehire Provisions

Effective October 1, 2020, SB 726 prohibits employers from entering into agreements with employees or prospective employees that contain a nondisclosure, nondisparagement, or other provision that prevents the employee from disclosing or discussing conduct that constitutes covered discrimination.

However, an employer may enter into a settlement, separation, or severance agreement that includes a nondisclosure, nondisparagement, or no-rehire provision only when an employee claiming to be aggrieved by discrimination requests to enter into the agreement. Any such agreement must provide the employee at least seven days (after executing the agreement) to revoke the agreement, and the agreement may not become effective until after the revocation period has expired.

If an employer makes a good faith determination that an employee has engaged in covered discrimination, the employer may enter into a settlement, separation, or severance agreement that includes a nondisclosure, nondisparagement, or no-rehire provision.

3. Written Policy Requirements

All Oregon employers are required to adopt a written policy containing procedures and practices to reduce and prevent covered discrimination and sexual assault. The policy must:

- Provide a process for employees to report prohibited conduct.
- Identify an individual designated by the employer (and an alternate) who is responsible for receiving reports of prohibited conduct.
- Include the applicable statute of limitations period to an employee's right of action for alleging unlawful conduct.
- Include a statement that an employer may not require or coerce an employee to enter into a nondisclosure or nondisparagement agreement, including a description of the meaning of those terms.
- Include an explanation that an employee claiming to be aggrieved by covered discrimination may voluntarily request to enter into an agreement that contains a nondisclosure, nondisparagement, or no-rehire provision and that the employee would have at least seven days to revoke the agreement.
- Include a statement advising employers and employees to document any incidents involving covered discrimination or sexual assault.

The written policy requirements are also effective October 1, 2020, after which employers must make the above policy available to employees within the workplace, provide a copy of the policy to each employee at the time of hire, and require any individual who is designated by the employer to receive complaints to provide a copy of the policy to any employee who discloses information regarding prohibited discrimination or harassment at the time that such disclosure is made.

The Bureau of Labor and Industries will publish model procedures or policies that employers may use as guidance to establish their own policy.

Employer Action Items

1. Ensure all employment decisions and any concerns raised by employees are well-documented, as claims will now encompass events long after they have occurred, such that witnesses and decision-makers may no longer be available nor even remember the events at issue.
2. Update form settlement, severance, and separation agreements to eliminate nondisclosure, nondisparagement, and no-rehire provisions, except when requested by an aggrieved employee or for those in good faith found to have engaged in prohibited conduct.
3. Update discrimination policies to include the additional information required by SB 726 and create procedures to properly respond to employee concerns.

For questions or assistance regarding the changes mandated by SB 726, contact Heather Fossity at hfossity@barran.com or (503) 276-2151, or Amy Angel at aangel@barran.com or (503) 276-2195.