

August 16, 2005

EMPLOYMENT ALERT!

**HIGHLIGHTS AND LOWLIGHTS FOR OREGON EMPLOYERS
FROM THE 2005 LEGISLATIVE SESSION**

Oregon's 2005 Legislative Session was a busy and lengthy one, and the lawyer-lobbyists at Harrang Long Gary Rudnick P.C. have been right in the thick of it. The firm's presence in Salem and our legislative practice give clients an unmatched opportunity to participate in legislative deliberations that affect their economic and professional interests.

Below is a summary of selected labor and employment law changes that received legislative approval in 2005. With legislative adjournment on August 5, the Governor has until mid-September to complete his review and to sign or veto legislation. Unless otherwise specified, the effective date of the legislation is January 1, 2006.

BREASTFEEDING IN THE WORKPLACE

Oregon legislators considered requiring employers of 25 or more employees to provide an area, other than a public restroom or toilet stall, where an employee who is breastfeeding could express milk in private, but decided against it. The bill ultimately passed – Senate Bill 618 – only encourages employers to provide a private area for expressing milk and allows employers to provide reasonable unpaid rest periods for doing so.

BUSINESS REORGANIZATION

UNEMPLOYMENT INSURANCE, CONTRIBUTION BY EMPLOYERS – TRANSFER OF EXPERIENCE RATING FOR UNEMPLOYMENT TAXES (“SUTA DUMPING”)

“SUTA dumping” is the illusory transfer of a trade or business for the primary purpose of obtaining a lower unemployment experience rating, and thus, lower unemployment tax rates. House Bill 2124¹ codifies a list of objective factors to allow the Employment Department to determine whether a purportedly legitimate transfer of a trade or business is actually improper SUTA dumping. This act also provides that SUTA dumping is a Class C felony. Any individual found to have knowingly advised another person or business entity to commit SUTA dumping is subject to a \$10,000.00 fine.

TRANSFER OF TAX LIABILITY TO REORGANIZED BUSINESS ENTITIES

Senate Bill 37² provides that any unemployment insurance taxes owed by an employer may be collected from its reorganized business entity. A “reorganized business entity,” is a business entity operating substantially the same business as a particular employer, except that the reorganized business entity has been converted to a different form of business entity, or has

¹ HB 2124 creates new provisions; and amends ORS 657.430, 657.480, and 657.990.

² SB 37 amends ORS 657.683 and 657.875.

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come under different ownership than the employer. Factors the Employment Department may consider when evaluating whether a business entity is operating substantially the same business as the employer that created it include: 1) whether the reorganized business entity operates from the same physical location as the employer did; 2) whether the reorganized business entity manufactures the same products or provides the same services that the employer did; and 3) whether the reorganized business entity has one or more of the same corporate directors, officers, or owners as the employer did. A reorganized business entity may appeal a tax assessment by filing an application for a hearing with the Employment Department within 20 days of the mailing of a notice of assessment.

CIVIL RIGHTS

ONE YEAR STATUTE OF LIMITATIONS FOR CLAIMS OF DISCRIMINATION IN PUBLIC ACCOMMODATIONS

Senate Bill 236³ requires that a civil action for discrimination in a place of public accommodation be commenced within one year of the discriminatory incident, unless the complainant has timely filed an administrative complaint with the Bureau of Labor and Industries. This bill does not change the notice requirements of the Oregon Tort Claims Act, which requires that a notice of claim be given a public body within 180 days of injury.

ONE YEAR STATUTE OF LIMITATIONS FOR CLAIMS OF DISCRIMINATION BASED ON EXERCISE OF RIGHT TO WORKPLACE SAFETY

Senate Bill 237⁴ requires that any civil action for discrimination against an employee where the discrimination results from the employee's choice to exercise his or her right to workplace safety, be commenced within one year of the date the employee had reasonable cause to believe a violation occurred, unless the complainant has timely filed an administrative complaint with the Bureau of Labor and Industries. This bill became law June 9, 2005.

EXPANSION OF CIVIL ACTIONS FOR CERTAIN UNLAWFUL EMPLOYMENT PRACTICES

Senate Bill 238⁵ allows an employee to bring a civil action for 1) an employer's refusal to grant the employee leave if the employee is a volunteer firefighter, 2) negative employment consequences due to membership in the State Legislature, and 3) an employer's restriction of the employee's use of lawful tobacco products during non-working hours, except when an applicable collective bargaining agreement prohibits off-duty use of tobacco products.

³ SB 236 amends ORS 659A.875.

⁴ SB 237 amends ORS 654.062.

⁵ SB 238 amends ORS 171.010, 659A.315 and 659A.885.

HEALTH INSURANCE

MENTAL HEALTH PARITY REQUIRED IN 2007

SB 1⁶ which requires parity for mental health insurance benefits, was hailed by mental health advocacy groups as a major victory in a long-fought battle to obtain equal coverage for mental health benefits, and represented a disappointing government-mandate to health insurers and some businesses. Significantly, the law takes effect on January 1, 2007, and applies to policies issued or renewed on or after that date.

Under the new law, group health insurance policies issued or renewed on or after January 1, 2007 must cover expenses for mental health and chemical dependency services, including alcoholism, at the same level as provided for other medical conditions. The coverage that must be provided may not be made subject to treatment limitations, limits on total payments or duration of treatment unless similar limitations are imposed on coverage of other medical conditions. The law does not require coverage for a long-term residential mental health program lasting longer than 45 days, or for correctional services or sheltered living provided by a school or half-way house, though an insured may receive covered outpatient services while living temporarily in a sheltered living situation.

The new law only applies to group health benefits provided under an insurance policy, and to self-insured plans of state and local governments that are subject to the Oregon Insurance Code. The law does not apply to self-insured group health plans of non-governmental employers.

INDEPENDENT CONTRACTORS

CLARIFICATION OF INDEPENDENT CONTRACTOR STATUS UNDER STATE LAW

Senate Bill 323⁷ provides a single, unitary definition of “independent contractor” under Oregon law which will ensure a consistent approach to worker classification across a wide variety of contexts. For many years, Oregon employers have been required to interpret and apply different statutory definitions of the term independent contractor, resulting in discrepancies that made worker classification unduly complicated.

The new uniform definition is substantially similar to the previous definitions, but is simplified. It provides that a worker classified as an independent contractor be free from direction, and control and operate an independently established business. Although Senate Bill 323 provides some much-needed uniformity for state law purposes, it should be noted that federal laws (e.g., Internal Revenue Code and the Fair Labor Standards Act) still maintain separate classification standards. In addition, the bill does not substantially affect who is covered under Workers’ Compensation. As a result, employers should seek legal counsel when in doubt about whether they may lawfully classify a worker as an independent contractor.

⁶ SB 1 amends ORS 743.556 and repeals ORS 430.065.

⁷ SB 323 creates new provisions; amends ORS 310.800, 316.162, 657.040, 670.600 and 670.605; and repeals ORS 314.013.

MILITARY SERVICE

GRANT OF LEAVE OF ABSENCE TO EMPLOYEES FOR DUTY IN OTHER STATE'S MILITIA

House Bill 2133⁸ requires that an employer grant an employee a leave of absence if the employee is a member of *another* state's militia and is called to active service by that state's governor. The leave of absence must continue until the employee is released from active service. Current law already provides leave and reemployment rights for members of the Oregon National Guard. This bill supplements those rights, by ensuring that Oregon workers called to military service in another state have jobs to return to once their service is complete. This bill became law May 25, 2005.

SUPPLEMENTAL UNEMPLOYMENT BENEFITS FOR DISLOCATED WORKERS

Senate Bill 690⁹ makes supplemental benefits for the continuation or completion of professional technical training available to employees who return to service in the Oregon National Guard or the United States Military Reserve on active status during a period of combatant activities.

OREGON FAMILY LEAVE ACT

OREGON FAMILY LEAVE ACT – HEALTH CARE PROVIDERS

As of January 1, 2006, Oregon's Family Leave Act will include an expanded list of health care providers. Senate Bill 576¹⁰ extends the definition of health care provider under OFLA to include licensed registered nurses and individuals primarily responsible for treatment solely through spiritual means.

PUBLIC CONTRACTS

PUBLIC WORKS BONDS AND PREVAILING WAGE REQUIREMENTS

Senate Bill 477¹¹ requires that a contractor or subcontractor on a public works project file a \$30,000.00 public works bond with the Construction Contractors Board. Contractors must verify that subcontractors have filed public works bonds before permitting the subcontractors to begin work on a public works project. Contractors and subcontractors are not required to file separate public works bonds for every public works project they are involved with.

The contractor and every subcontractor on a public works project subject to prevailing wage rates must pay at least either the state or federal prevailing wage, whichever is higher. Projects with a contract price of less than \$50,000.00 are exempt from prevailing wage requirements.

⁸ HB 2133 amends ORS 399.230.

⁹ SB 690 amends ORS 657.335, 657.337 and 657.340.

¹⁰ SB 576 amends ORS 659A.150.

¹¹ SB 477 amends ORS 279A.010, 279C.600, 279C.605, 279C.610, 279C.815 and 279C.845.

UNEMPLOYMENT COMPENSATION

UNEMPLOYMENT BENEFITS FOR VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING

House Bill 2662¹² provides that a victim of domestic violence, stalking or sexual assault may not be disqualified from receiving unemployment benefits if that person leaves work, does not apply for work, or does not accept work in order to protect him or herself from further violence. This bill became law June 20, 2005.

EMERGENCY UNEMPLOYMENT BENEFITS

House Bill 3305¹³ establishes an emergency benefit period that takes effect between May 1, 2005 and August 13, 2005. During the emergency benefit period, a person may receive emergency unemployment benefits if they exhausted their regular unemployment benefits no earlier than the week ending December 4, 2004. This bill became law April 21, 2005.

WAGE AND HOUR

CALCULATING WAGES WHEN EMPLOYEE QUILTS WITHOUT A COMPLETED TIME CARD

Current law provides that when an employee quits with less than 48 hours' notice, all wages are due to that employee within five working days or on the next scheduled payday, whichever comes first. From time to time employers have asked about the best way to calculate the wages owed an employee who fails to submit a final time card and it is unclear how much time the employee worked. With the passage of House Bill 3319, there is now a clear answer to that question.

House Bill 3319¹⁴ provides that if an employee is regularly required to submit time records to enable the employer to determine the wages due the employee and has not done so prior to quitting with less than 48 hours' notice, the employer must estimate the amount the employee has earned and pay the employee within five working days. An employer may not be penalized for paying estimated wages that are less than the amount actually earned by the employee, as long as the employer pays the balance of the employee's earned wages within five working days of the date the employee submits his or her time records.

WORKPLACE SAFETY

IMMUNITY FROM SUIT FOR USE OF AUTOMATED EXTERNAL DEFIBRILLATORS

House Bill 3482 provides that individuals who use or attempt to use an automated external defibrillator (AED) in public setting may not be sued as long as certain conditions are met. First, the AED must be properly maintained and serviced. Second, a sufficient number of

¹² HB 2662 amends ORS 657.176.

¹³ HB 3305 amends Section 1, Chapter 34, Oregon Laws 2003 as amended by section 1, chapter 536 Oregon Laws 2003.

¹⁴ HB 3319 amends ORS 652.140 and 652.150.

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employees must be trained to use the AED so that at least one AED trained employee is always on site during regular business hours. Third, the location of each AED must be clearly indicated, and finally, the employer must have an established policy of contacting emergency services by calling 9-1-1 as soon as practicable after the need for the AED is recognized. HB 3482 also requires that health clubs have at least one AED on the premises at all times. This bill became law July 20, 2005.

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