



February 2, 2010

EMPLOYMENT ALERT

2009 OREGON EMPLOYMENT LEGISLATION UPDATE

At HARRANG LONG, our Labor and Employment Practice Group makes a point of identifying new legislation that may impact our clients and their businesses. The 2009 Oregon Legislature enacted many new labor and employment laws that affect Oregon employers. Unless otherwise specified, the effective date of new legislation is January 1, 2010.

We will soon be sending out registration information for breakfast meetings in Eugene and Portland to discuss these new laws. In the interim, if you have questions about how these new laws impact your business, please contact us and we will be happy to assist you.

Employee Rights and Protections

Religious Accommodation in the Workplace:

"Oregon Workplace Religious Freedom Act" (SB 786)

This new law requires employers to provide reasonable accommodation to employees for religious observance or practice, including wearing religious clothing, unless doing so would cause undue hardship to the employer. It also requires employers to allow employees to use vacation leave and other leave that is not restricted in its use for religious observance or practice.

BOLI plans to promulgate future regulations that will further define and explain employers' obligations under this bill.

Americans with Disabilities Act Amendments:

Oregon Adopts Recent Federal ADA Amendments (SB 874)

This bill adopts the federal amendments to the Americans with Disabilities Act (ADAAA). For more information on the ADAAA, see the October 7, 2008 Employment Alert on our website http://www.harrang.com/Newsroom/client_alerts.htm.

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Domestic Violence Victims:

Reasonable Safety Accommodation and Non-Discrimination Against Victims of Domestic Violence, Sexual Assault, or Stalking (SB 928)

Employers are now prohibited from refusing to hire, discharging, demoting, suspending, discriminating or retaliating against an otherwise qualified person or employee who is a victim of domestic violence, sexual assault or stalking. Employers must make "reasonable safety accommodation" for such persons, including transfer, reassignment, modified work schedules, unpaid leave, modification of the work area (such as the installation of locks) or the implementation of other safety procedures or adjustments.

Prior to making the accommodation, the employer *may* require the employee to provide certification that he or she is a victim of domestic violence, sexual assault or stalking.

Oregon Military Family Leave Act of 2008:

Unpaid Leave for Military Spouse Before/During Deployment (HB 2744)

Effective upon passage on June 25, 2009

This new law requires employers with 25 or more employees to provide employees who are military spouses 14 days of unpaid leave, to be taken before the spouse's deployment or when the spouse is on leave from deployment. For more information, see the July 21, 2009 Employment Alert on our website at

http://www.harrang.com/Newsroom/client_alerts.htm.

New Whistleblower Protections for Private Employees:

Prohibits Discrimination Against Whistleblowers (HB 3162)

This law prohibits a private employer from discriminating or retaliating against an employee who in good faith reports a violation of state or federal laws, rules or regulations. Aggrieved employees may file a complaint with BOLI or in civil court. Previously, these whistleblower protections only applied to public employment.

Protected Classes: Military Status

Prohibits Discrimination by Reason of "Military Status" (HB 3256)

Oregon law now includes "military status" in the list of protected classes in ORS 659A. The law makes an exception if the employer acts based on a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business,

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and the employer's actions could not be avoided by making a reasonable accommodation of the person's military status.

Other Miscellaneous Updates

Deletes Limit on Veteran's Preference (HB 2510)

This legislation deletes the 15-year limit on a veteran's use of preference for civil service positions.

Disciplinary Actions for Public Safety Officers (HB 2713)

This law makes current state statutes regarding police discipline applicable to public safety officers. It requires safeguards for investigations of public safety officers, including when interviews may take place and deadlines by which investigations must be completed. The Act and current statutes regarding discipline do not apply to public safety officers who are covered by collective bargaining agreements so long as the collective bargaining agreement provides for the procedures and safeguards provided by the Act and statutes.

Child Labor – Working Hours (HB 2826)

Previously, under Oregon law, minors under the age of 16 were only allowed to work between the hours of 7 a.m. and 6 p.m. This new law expands permissible work hours, allowing minors to work until 7 p.m., with an additional expansion until 9 p.m. between June 1 and Labor Day.

General Employment Law Updates

Prohibition on Cell Phone Use While Driving:

Amendments to Cell Phone Law (HB 2377)

This bill expands the prohibition on use of cell phones and text messaging devices to all drivers (not just those under 18). An exception excludes use by a person "operating a motor vehicle in the scope of the person's employment if operation of the motor vehicle is necessary for the person's job." This should be viewed as a rather narrow exception.

One of the most significant changes to existing law elevates cell phone usage while driving to a primary violation, allowing an officer to stop a person solely for being on the

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phone while driving. Previously, cell phone usage was a secondary violation and officers were required to have another primary reason to stop the driver.

For employers that already have policies prohibiting cell phone usage while driving for work purposes, now is a good time to remind employees of such policies. If you do not have a policy in place, we can assist you in drafting a policy appropriately tailored to your business operations.

“Employer Gag Bill” (SB 519)

This law effectively prohibits employers from holding mandatory meetings with employees to discuss religious or political matters, including the effect of unionization. It also provides an employee with a civil cause of action against an employer for violation of this law; the prevailing employee would be awarded treble damages, attorney fees and costs.

Increased Liability for Employers with Regard to Child Support Payments

Child Support Payments; Damages; Attorney’s Fees (SB 373)

ORS 25.372-.473 currently requires employers to withhold from wages any amounts specified in a child support order. Prior to SB 373, if an employer failed to withhold, withheld too much, or failed to send the money to the state, damages were limited to the amount withheld or which the employer failed to withhold, and a fine of \$250 if the violation was willful or grossly negligent.

Effective January 1, 2010, a supported parent may now sue an employer for the amount the employer failed to withhold or pay, *plus all* damages resulting from the failure to withhold or pay. The employee obligated to pay the support may also sue the employer for all damages resulting from excess withholding, for all damages resulting from the employer’s failure to timely pay withheld amounts, and for any other damages suffered by the employee.

A successful plaintiff is also entitled to recover his/her attorney fees from the employer.

Increased Fees for Garnishing Wages (HB 3474)

This bill increases the fee an employer may withhold from wages for processing a garnishment from \$1.00 per week to \$2.00 per week for each week that wages are garnished.

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Insurance: Coverage of Services by Marriage and Family Therapists (HB 2506)

This house bill requires insurers to cover services provided by marriage and family therapists if the plan already covers services provided by clinical social workers and nurse practitioners. Because many employer-provided plans currently exclude coverage for marriage counseling, this bill may result in new costs for employers.

Collection of Fees by BOLI (SB 60)

The Oregon Bureau of Labor and Industries (BOLI) has jurisdiction over wage claims and certain civil rights violations, which can result in judgments for wages or penalties owed to a complainant. Current law allows BOLI to refer an unpaid judgment against a respondent to the Department of Revenue or a private collection agency, but only permits recovery of collection fees charged to the respondent if a private collection agency is used. SB 60 amends ORS 652.390 to allow BOLI to recover from the respondent all collection fees incurred if BOLI refers collection to the Department of Revenue.

Eviction of Live-In Employees (HB 2962)

Current state law provides no clear procedure for the eviction employees who occupy a dwelling unit as a condition of employment. Section 1 of HB 2962 requires an employer to provide at least 24 hours' written notice of the termination of employment prior to evicting a live-in employee and the employee's dependents, unless a longer notice period is specified in a written employment contract. Section 2 of HB 2962 amends ORS 105.115 to make possession of the premises by the employee *after* expiration of the notice grounds for eviction. This bill does not, however, create a landlord/tenant relationship between the employer and employee.

Unemployment Compensation and Related Areas

Alternate Base Year Calculation (SB 462) (effective July 1, 2009)

This bill creates an alternate base year for the purposes of determining eligibility for unemployment insurance (UI) benefits for individuals who are not eligible for benefits under the current definition of "base year" in ORS 657.010(1). Under prior law, the base year was defined as the first four of the last five completed calendar quarters preceding the benefit year. The new law creates an alternative base year: the last four completed calendar quarters preceding the benefit year.

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This bill is estimated to result in more than 6,000 additional claimants per year being eligible for benefits in the 2009-2011 biennium. By passing this bill, Oregon unlocked access to federal stimulus funds that will finance the measure.

Maximum Benefit Extension (HB 3140) (effective June 18, 2009)

House Bill 3140 extends the maximum amount of time in which qualified workers can receive Oregon Workshare unemployment compensation benefits from 26 weeks to 52 weeks. The Workshare program offers an alternative to layoffs by allowing employers to reduce an employee's weekly hours of work while the employee receives a percentage of UI benefits equal to the percentage of the reduction in weekly hours of work.

Expanded Eligibility for Economically Distressed Workers (HB 3483) (effective July 28, 2009)

This bill allows workers who are eligible for unemployment, and who have been working at less than 110 percent of the state minimum wage during their entire base year, to remain eligible for UI benefits while receiving "economically distressed worker training" (as defined in the Act). Benefits may not be denied for refusing to accept work offered that is part-time or temporary and interferes with the training, if the work pays less than 110 percent of minimum wage.

Reopening Record of Appeals Hearing (HB 2202)

HB 2202 was passed to address a concern of conflict between state and federal law. To avoid loss of federal funds and potential federal unemployment taxes, the bill amends ORS 652.270 to allow the ALJ to reopen a hearing at the request of either party so long as (a) the party did not attend the hearing; (b) the non-appearance was beyond the control of the requesting party; and (c) the request is filed within 20 days after the issuance of the written decision.

Collective Bargaining

Retiree Medical Trusts, VEBAs, Health Reimbursement Arrangements (SB 821)

Effective upon passage on June 23, 2009

This law allows unions and public employers to agree to establish retiree medical trusts, voluntary employees' beneficiary associations, health reimbursement agreements and other similar agreements regarding health care expenses.

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Employee Rights Including Overtime in Donated Leave (HB 2298)

This law requires public employers that allow employees to donate paid leave to other employees that are members of the military (and have been activated for active duty) to include overtime (based on the average number of overtime hours work for the employee's job class) in the "total compensation the employee would have received." Because the donated leave plus the employee's military salary may not exceed the "total compensation" the employee would have received in their civilian employment, inclusion of reasonably forecasted overtime hours in the "total compensation" allows such employees to receive a greater amount of donated leave.

Because military pay scales are often much lower than public employee salaries, members of the National Guard frequently experience financial hardships when called to active duty – this bill is designed to alleviate some of the hardship.

Public Employee Retirement System (PERS)

PERS Rollover Contributions (SB 399)

This bill allows an eligible member of PERS who participates in a deferred compensation plan to request, within 60 days of effective date of Act, that payment of all or part of deferred amount be paid to Public Employees Retirement Board for purpose of restoring forfeited creditable service, or acquiring retirement credit for probationary period of employment, or both. Previously, eligible PERS members could fill gaps in their PERS service by paying directly into the system. SB 399 permits such members to do so with pre-tax dollars from a deferred compensation plan or tax-sheltered annuity. *However, this law does not become operative until September 1, 2011.*

PERS Side Account Excess (HB 3401) (effective August 4, 2009)

This bill directs the PERS Board to seek a ruling from the IRS on whether the use of excess amounts in an employer's side account established under ORS 238.229(2) to offset employer-paid contributions to the IAP would cause the PERS Plan to lose its tax qualified status under the Internal Revenue Code. If the IRS finds that practice acceptable, and the PERS Board determines that the employer's side account exceeds what is necessary to fund the employer's actuarial liabilities, then the employer can request the Board to apply the excess amounts to offset employer-paid contributions.

Reemployment of PERS Employees (SB 112) (effective June 18, 2009)

Senate Bill 112 allows members of PERS who have been retired for more than six months, and who elected to receive a lump sum payment or installment payments, to be

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reemployed by a public employer without repayment of a lump sum or installment amounts received by the member.

Notable Bills that Did Not Pass this Legislative Session:

Use of Accrued Vacation for OFLA Leave/Written Policy and Notice of Employee's Intent to Use Accrued Vacation (HB 2821)

In committee upon adjournment of Legislature

This bill would have amended ORS 659A.174 to prohibit a covered employer, subject to the terms of an agreement or collective bargaining agreement between the employer and employee, from requiring an employee to use accrued vacation time when taking family leave. Covered employers would have been required to provide employees with a policy regarding the procedures for taking family leave and for use of accrued vacation leave during a period of family leave. The bill would also have required employees to communicate their intent to use accrued vacation leave in conjunction with family leave.

Notice of Arbitration Agreement (HB 2903)

In committee upon adjournment of Legislature

This bill would have amended ORS 36.620 to shorten the time period by which an employer must notify an employee in writing that an arbitration agreement is required as a condition of employment. The bill would have required that employers provide this notice at least 72 hours prior to the first day of employment. However, because the bill did not pass, the law remains the same and employers are still required to provide this notice at least 2 weeks before the first day of employment.

Proposed Limit on Definition of "Supervisory Employees" (HB 2633)

In committee upon adjournment of Legislature

This law would have modified the definition of "supervisory employee" for purposes of PECBA, ORS 243.650, adding that a public employee who is prohibited from striking, "who merely assigns, transfers or directs the work of other employees but does not have the authority to impose economic discipline on those employees is not a supervisory employee."

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Omnibus Bill on Collective Bargaining (HB 2831)

Third reading failed on June 27, 2009

This bill would have modified the definition of “appropriate bargaining unit” to allow inclusion of temporary and seasonal employees; would have modified the definition of “supervisory employee” by providing that exercise of supervisory authority does not require the conclusion that an employee is a supervisory employee; would have prohibited a public employer from hiring permanent replacements for public employees engaging in a lawful strike; and would have allowed temporary replacements during a strike but would have required they be terminated when the union makes an unconditional offer on behalf of striking workers to return to work.

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