Updates
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Oregon Workplace Fairness Act: What Employers Need to Know

The major elements of Oregon's Workplace Fairness Act (OWFA) come into effect on October 1, 2020. Employers should review their workplace discrimination and harassment policies, employment agreements, and settlement agreements to ensure compliance.

Review Nondiscrimination and Harassment Policies

Effective October 1, 2020, all Oregon employers must have a written harassment and discrimination policy containing procedures and practices for the reduction and prevention of discrimination under Oregon's protected categories, which include race, color, religion, sex, sexual orientation, national origin, marital status, age, expunged juvenile record, performance of duty in a uniformed service, or physical or mental disability. While most Oregon employers already have such policies in place, even those with well-developed policies will need to revise their policies to include the following specific elements established by OWFA:

1. Provide a process for reporting prohibited conduct and identify who in the organization is responsible, including at least one alternate, for intaking complaints
2. Describe the new five-year statute of limitations applicable to employee claims of prohibited conduct
3. State that the employer "may not require or coerce an employee to enter into a nondisclosure or nondisparagement agreement" and include an explanation of those terms as described under the OWFA
4. Explain that an employee claiming discrimination, harassment, or sexual assault may voluntarily request an agreement that provides for nondisparagement and nondisclosure language, and a no rehire provision, otherwise prohibited by the OWFA
5. Advise employers and employees to document any incidents involving conduct prohibited by Oregon discrimination law

The Oregon Bureau of Labor and Industries (BOLI) has provided a model policy available at: https://www.oregon.gov/boli/workers/Pages/sexual-harassment.aspx.

The employer's policy must be made available to every employee in the workplace. Presumably this can be done through posting or handing out the policy. In addition, all new employees must be given a copy of the policy at the time of hire and any employee who complains of discrimination, harassment, or sexual assault must be given a copy of the policy.

Review Employment Agreements for Compliance

OWFA attempts to remedy one of the problems emphasized by the #MeToo movement. Employees who had been subject to or made a claim of harassment were silenced in return for a settlement payment, allowing harassment to continue in the shadows. OWFA provides that Oregon employers cannot require employees to sign nondisclosure, nondisparagement, or settlement agreements that have the "purpose or effect" of preventing employees from discussing or disclosing discriminatory conduct, including sexual harassment or sexual assault. Further, settlement agreements cannot have a provision that prevents the disclosure of factual information

relating to a claim of discrimination, harassment or sexual assault.

OWFA also prohibits the use of no-rehire language except in limited circumstances. Such language has been standard in settlement agreements and provides that the individual signing the agreement cannot apply for rehire. One purpose of these no-rehire provisions is to prevent a former employee from unsuccessfully seeking rehire and then making a claim of retaliation.

There are two exceptions for settlement agreements. First, an employee claiming harassment, discrimination, or sexual assault may ask to have nondisclosure, nondisparagement and no-rehire language included in an agreement. The employee has seven days to rescind the agreement if the language is included and it does not become effective until this revocation period is expired.

In addition, where an employer makes a good faith determination that an employee has engaged in discriminatory conduct, harassment, or sexual assault, the employer may include nondisclosure and nondisparagement language in the settlement agreement to prevent disclosure of factual information relating to the claim along with a no-rehire provision.

Lastly, these limitations on employment agreements are not applicable to those employees who are tasked by law to receive confidential or privileged reports of discrimination, sexual assault, or harassment.

Voiding of Severance Payments

The OWFA gives employers the right to void an agreement, such as an executive contract, that provides for payment of severance or separation payments in certain circumstances. The employer must have (1) conducted a good faith investigation and concluded that the employee violated the employer's written policy on discrimination, harassment, or sexual assault, or (2) violated the provisions of OWFA relating to employment agreements and that this was a substantial contributing factor to the termination from employment. The employer then has no obligation to make the separation or severance payment.

Steps for Employers

Failure to comply with the provisions of the OWFA may result in liability. In addition, the new five-year statute of limitations applies to violations of the OWFA. All employers should consider taking the following steps:

1. Review and revise any harassment and discrimination policy to ensure compliance with the new requirements (or prepare such policy for employers without existing written policies)
2. Circulate the new policy to all current employees, including employees who are on leave or furloughed upon their return
3. Review all existing employment agreements, including any template severance or settlement agreements used with current or prospective employees, for overbroad nondisparagement or nondisclosure provisions and revise accordingly
4. Identify an individual, and an alternate, to whom reports of prohibited conduct can be made (for example, the floor manager or HR director)
5. Review document retention policies to ensure they retain relevant employment records for at least five years in accordance with the new five-year statute of limitations (many employers already use a minimum six-year retention period because the statute of limitations in Oregon for bringing a breach of employment contract is six years)
6. Provide adequate training on the new requirements of the OWFA for all appropriate personnel

Employers with questions or concerns about OWFA should seek advice from experienced counsel.

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