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OP-ED: Take note that Oregon Workplace Fairness Act is now fully effective

Most Oregon employers are aware that in response to the #MeToo movement, the Legislature made changes to the state's discrimination law through the Workplace Fairness Act (SB 726). It included two effective dates: Sept. 29, 2019, and Oct. 1, 2020. As of Sept. 29, 2019, the deadline to bring claims for discrimination on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, age, military service and disability, was extended from one year to five years from the occurrence of the alleged unlawful employment practice.

As of Oct. 1, 2020, employer obligations under the Workplace Fairness Act went into effect requiring changes in employment agreements and employer harassment policies. With respect to employment agreements, as of Oct. 1, 2020, employers cannot require an employee or prospective employee, as a condition of employment, continued employment, raise or promotion, to sign an agreement that has the "purpose or effect" of preventing an employee from disclosing or discussing discrimination prohibited by ORS 659A.030, including conduct that constitutes sexual assault, or discrimination prohibited by ORS 659A.082 (military service discrimination) or 659A.112 (disability discrimination).

Restrictions on nondisclosure and nondisparagement, as well as no-hire provisions and other confidentiality restrictions, can be included in an agreement when requested by an employee who claims to have been the victim of discrimination or sexual assault, provided that the employee is provided with seven days to revoke acceptance of the agreement. Examples include a separation, severance or settlement agreement. Employers can also include these restrictions, as well as no-hire provisions, in an agreement to be entered into with an employee who has, based on an employer's good faith determination, engaged in discrimination or conduct that constitutes sexual assault.

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With respect to harassment policies, as of Oct. 1, 2020, Oregon employers are required to adopt a written discrimination and workplace harassment policy (or revise existing policies) to include specific language and information. Policies must:

- Provide a process for employees to report prohibited conduct;
- Identify the individual or position as well as an alternate individual or position to whom an employee can report of prohibited conduct;
- Include a statement that notifies employees of the five-year statute of limitations to bring claims for harassment or discrimination;
- 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 unlawful discrimination or sexual assault may voluntarily request to enter into a settlement, separation or severance agreement that contains a nondisclosure, nondisparagement, or no-rehire provision only if the employee has at least seven days to revoke the agreement after signing; and
- Include a statement that advises employers and employees to document any incidents involving unlawful discrimination and sexual assault.

Employers must make the discrimination and workplace harassment policy available to employees, provide a copy of the policy to each employee at the time of hire, and require whomever is designated to receive complaints to provide a copy of the policy to an employee who discloses information about prohibited discrimination or harassment.

A sample policy is available at: https://www.oregon.gov/boli/workers/Pages/discrimination-at-work.aspx.

The Workplace Fairness Act does not affect agreements entered into prior to Oct. 1, 2020, and its requirements with respect to restrictions on disclosure and nondisparagement do not apply to agreements where discrimination and/or sexual assault are not at issue.

Employers should review hiring documents and handbooks to ensure compliance with the Workplace Fairness Act. And they should work with counsel when negotiating a severance, separation and/or settlement agreement with an employee who claims to be aggrieved by conduct addressed by the Workplace Fairness Act if the employer is interested in including nondisclosure, nondisparagement or no-hire provisions in such agreements.

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Note: This article is intended to provide readers with general information and not legal advice. For specific situations, consult with competent counsel.

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