

## Oregon

### Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

## Topics

### **I. Discrimination**

#### **A. Oregon Final Rule to Conform Language to Anti-Retaliation Statute**

Oregon law prohibits any person from unlawfully retaliating against any other person who has engaged in protected activity, including:

- Explicitly or implicitly opposing an unlawful practice or what the person reasonably believes to be an unlawful practice.
- Filing a charge, testifying, or assisting in an investigation, proceeding or lawsuit.

The statute defines “person” as including one or more individuals, partnerships, associations, labor organizations, limited liability companies, joint stock companies, corporations, legal representatives, trustees, trustees in bankruptcy or receivers.

The state Bureau of Labor and Industries’ administrative rule likewise prohibits retaliation against whistleblowers, but the rule had used the term “employer” rather than “person.” The new final rule amends the language to conform with the statute.

OAR 839-005-0125 (Effective Date 11/06/2015).

#### **B. Wage Discussion / Disclosure Retaliation**

Under a new law, it is an unlawful employment practice for an employer to discharge, demote, suspend, or otherwise discriminate or retaliate against an employee who has:

- Inquired about, discussed or disclosed in any manner the wages of the employee or of another employee; or
- Made a charge, filed a complaint or instituted, or caused to be instituted, an investigation, proceeding, hearing or action based on the disclosure of wage information by the employee.

However, the law does not apply to employees who have access to employees’ wage information as part of their job functions and who disclose the employees’ wages to individuals not authorized access to the information, unless the disclosure is in response to a charge or complaint or is in furtherance of an investigation, proceeding, hearing or action, including but not limited to an investigation conducted by the employer.

ORS § 69A (Effective Date 01/01/2016).

### **II. Pre-Employment Inquiry Guidelines**

Oregon has passed a law prohibiting most employers from asking questions about criminal history on job applications or at any other point in the hiring process before the initial interview.

The statute expressly prohibits:

- the use of a job application form that asks about an applicant's conviction history;
- asking about or considering an applicant's conviction history prior to interviewing the applicant; or
- asking about or considering an applicant's conviction history before a making any offer of employment without an interview.

Oregon employers should assume they are covered under the statute unless they fall under one of the following exempted categories:

- law enforcement agencies;
- employers in the criminal justice system (not defined in the new law);
- employers seeking nonemployee volunteers; and
- other employers who are required by federal, state or local law to consider an applicant's criminal history.

The law creates a right of civil action for a violation.

### **III. Family and Medical Leave**

#### **A. Oregon: Final Rule on the Family Leave Act**

The Oregon Family Leave Act (OFLA) requires covered employers to provide a leave of absence to employees for parental leave, pregnancy disability leave, bereavement leave, or time off to care for a sick child or to care for the employee's or a family member's serious health condition. With respect to maintaining health benefits during the leave of absence, the OFLA was recently amended to provide that if the employee is provided group health insurance, the employee is entitled to the continuation of group health insurance coverage during the period of family leave on the same terms as if the employee had continued to work. If family member coverage is provided to the employee, family member coverage must be maintained during the period of family leave.

The final rule likewise amends the continuation of benefits provision in the OFLA administrative rules to match the language in the OFLA statute regarding continuation of coverage during leave. The employee must continue to make any regular contributions to the cost of the health insurance premiums during leave that s/he was making pursuant to the health insurance policy prior to the leave.

The rule also provides that if coverage lapses because an employee failed to pay the premiums, an employer must restore the employee's benefits when the employee returns. In addition, the employee is not required to meet any qualification requirements imposed by the plan including any new preexisting condition waiting period, waiting for an open season, or passing a medical examination to obtain reinstatement coverage. If an employer terminates an employee's insurance or fails to restore the employee's health insurance in violation of the new law, the employer may be liable for benefits lost by reason of the violation, actual monetary losses sustained as a direct result of the violation, and for equitable relief tailored to the harm suffered. However, the rule clarifies that an employer is not required to restore an

employee's benefits if such benefits have been eliminated or changed for similarly situated employees.

OAR 839-009-0270 (Effective Date 11/06/2015).

## **B. Oregon Rule on Mandatory Provision of Sick Time**

The Oregon Bureau of Labor and Industries (BOLI) has published administrative rules to implement the Oregon Sick Leave Law, which takes effect January 1, 2016. Under the new law, nearly all employers with employees working in Oregon must provide up to 40 hours per year of leave for a variety of purposes.

### **Definition of Family Members Expanded**

The new law permits the use of sick time to care for and/or to seek diagnosis and treatment (including preventative treatment) of a family member with a mental or physical illness, injury or health condition. In addition, sick leave may be used to deal with the death of a family member. The regulations provide a definition for "spouse," and expand the definitions of "child" and "parent."

### **Regular Rate of Pay Further Defined**

Employees must be compensated during sick leave at their regular rate of pay. The rules further define "regular rate of pay" and provide clarity for employees with multiple hourly rates and those paid on commission.

### **Consequences for Failure to Provide Notice**

Employers may require employees to provide advance notice of the need for sick time. However, an employer may not deny sick time based on an employee's failure to provide notice unless the employee has been provided a copy of the employer's written policy regarding notice. An employer may discipline an employee for violating workplace policies and procedures if:

- the employee fails to provide notice as required by the new rules, or
- the employee fails to make a reasonable effort to schedule leave in a manner that does not unduly disrupt the operations of the employer.

The employer may not discipline the employee for the use of sick time.

### **Consequences for Failure to Provide Verification**

The statute permits employers to require verification of the need for sick time. If an employer chooses to require written documentation or verification of the use of sick time, the employer must include such a requirement in its written sick time policies, as well as the consequences for delay or failure to comply with the requirement.

Under the rules, employers are not required to pay sick time until the employee has provided documentation or verification as required by the statute. Additionally, the employer may discipline the employee for violating policy and procedures with regard to certification requirements, but not for using sick time. Employers that require certification must pay any reasonable cost for the certification, including lost wages that are not covered by a health benefit plan.

## **Exemption for Certain Employees Covered by Collective Bargaining Agreements**

The rules require most union employees to accrue sick leave at the statutory rate regardless of the terms of their collective bargaining agreement, with the exception of employees:

1. Whose terms and conditions of employment are covered by a collective bargaining agreement; and
2. Who are employed through a hiring hall or similar referral system operated by the labor organization or third party; and
3. Whose employment-related benefits are provided by a joint multi-employer-employee trust or benefit plan.

The regulations state that the existence of a collective bargaining agreement alone is not sufficient to meet the requirements of this limited exemption.

## **Sick Leave and PTO Policies that are Substantially Equivalent**

The statute provides that an employer's sick leave policy that is "substantially equivalent" or more generous to the employee than the minimum requirements of the statute is deemed to be in compliance. The rules clarify that a substantially equivalent policy must provide for at least the same number of sick time hours an employee would earn under the statute, and comply with all other minimum requirements listed in the statute.

## **Employer Notice to Employees**

Employers must provide written notice of the new law to all of their employees no later than the end of the first pay period after January 1, 2016, or, for employees hired after January 1, the end of the first pay period for those employees. BOLI provides a Template for Quarterly Notification of Sick Time Accrual available [here](#)(link is external).

## **Other Relevant Provisions**

Some other issues clarified by the rules include:

- The method for determining the amount of sick time to be used for shifts of indeterminate length.
- Whether on-call employees are entitled to use sick time for hours they have been scheduled to work.
- How to administer and track use of sick time for employees with both paid and unpaid sick time.
- How to determine accrual for employees whose hours are not tracked.
- Conversion from accrual of sick time to frontloading.
- Application of sick time provisions to new businesses.
- Exclusions from an employee's regular rate of pay.

OAR 839-007-0000 – 839-007-0120 (Effective Date 01/01/2016).

### **C. Paid Sick & Safe Time**

Oregon has implemented a mandatory paid sick leave law for private employers. Importantly for employers with Oregon operations and/or employees, the new state law generally preempts local sick leave laws (e.g., Portland, Eugene).

Below we generally summarize some of the law's more important provisions.

#### **Coverage**

The law applies to employers with 1 or more employees working anywhere in Oregon. Generally only an employer with 10 or more employees has an obligation to provide paid leave; employers with fewer than 10 employees must provide unpaid leave. However, the paid / unpaid leave threshold is lower for employers located in Portland: 6 employees anywhere in Oregon (which is the standard under that city's law). A covered employee is an individual who renders personal services at a fixed rate to an employer if the employer either pays or agrees to pay for personal services or permits the individual to perform personal services. However, exceptions apply generally and to certain unionized workers.

#### **Accrual, Use, Notification & Documentation, Cash Value & Cash-Out**

On the first day of employment, employees begin to accrue sick time at a rate of at least 1 hour of sick time for every 30 hours the employee works or 1 1/3 hours for every 40 hours the employee works. Employees are eligible to use sick time beginning on the 91st calendar day of employment and may use sick time as it accrues. Employers must implement a sick time policy that allows an employee to earn and use up to 40 hours of sick time per year. An employer can adopt a policy that limits an employee to accruing no more than 80 hours of sick time. An employee may carry over up to 40 hours of unused sick time from one year to a subsequent year.

Oregon's law allows employees to use accrued sick time for more purposes than is allowed under most similar laws. Upon the request of an employee with accrued sick time available, an employer must allow the employee to use sick time for the following purposes:

- Employee's (or to care for a family member with a) mental or physical illness, injury or health condition; medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; preventive medical care.
- For any other purposes specified in the Oregon Family Leave Act.
- For a purpose specified under state law concerning leave for victims of domestic violence, sexual assault, or stalking.
- In the event of a public health emergency, which includes but is not limited to:
  - Closure of the employee's place of business by order of a public official due to a public health emergency;
- Closure of the school or place of care of the employee's child by order of a public official due to a public health emergency;

- A determination by a lawful public health authority or by a health care provider that the presence of the employee or the family member in the community would jeopardize the health of others, such that the employee must provide self care or care for the family member; or
- The exclusion of the employee from the workplace under any law or rule that requires the employer to exclude the employee from the workplace for health reasons.

If possible, the employee must include the anticipated duration of the sick time requested. An employer can require the employee to comply with the employer's usual and customary notice and procedural requirements for absences or for requesting time off if those requirements do not interfere with the ability of the employee to use sick time. Generally, an employer can require documentation to substantiate the need for leave if the absence is more than 3 consecutive scheduled workdays. But, if an employer suspects an employee is abusing sick time, including engaging in a pattern of abuse, it can require documentation regardless of whether the employee has used sick time for more than 3 consecutive days. However, an employer cannot require documentation to explain the nature of the illness, or details related to the domestic violence, sexual assault, harassment, or stalking, that necessitates leave use.

Paid sick time must be paid at the regular rate of pay and without reductions in benefits, including but not limited to health care benefits, that the employee earns at the time s/he uses paid sick time. An employer is not required to compensate an employee for accrued unused sick time upon the employee's termination, resignation, retirement or other separation from employment.

### **Notice to Employees**

An employer must provide written notice of the law's requirements to each employee in accordance with rules adopted by the state labor department. The notice must be in the language the employer typically uses to communicate with the employee. Additionally, an employer must provide written notification at least quarterly to each employee of the amount of accrued and unused sick time available for use by the employee. Inclusion of the amount of accrued and used sick time on a required wage statement meets the requirements. The notice must be in the language the employer typically uses to communicate with the employee.

### **Prohibitions, Penalties & Enforcement**

It is an unlawful practice for an employer or any other person to deny, interfere with, restrain or fail to pay for sick time to which an employee is entitled under the law, or to apply an absence control policy that includes sick time absences covered under the law as an absence that may lead to or result in an adverse employment action against the employee. An employer cannot require an employee to search for or find a replacement worker as a condition of using accrued sick time, or work an alternate shift to make up for the use of sick time. Additionally, an employer cannot require an employee to work additional hours or shifts authorized by the sick leave law (i.e., those an employee may work if s/he and the employer mutually consent). It is an unlawful practice for an employer or any other person to retaliate or in any way discriminate against an employee with respect to any term or condition of employment because the employee has inquired about the provisions of the law, submitted a request for sick time, taken sick time, participated in any manner in an investigation, proceeding or hearing related to the law, or invoked any provision of the law.

In addition to any other penalty provided by law, the state labor department can assess a civil penalty not to exceed \$1,000 against any person that willfully violates various portions of the law. Moreover, except for penalties assessed for a “Retaliation” or “Absence Control Policy” violation, the state labor department can assess civil penalties against an employer only for violations of the law occurring on or after January 1, 2017. An employee asserting a “Retaliation” or “Absence Control Policy” violation can file a civil action. Moreover, any person claiming to be aggrieved by an unlawful practice specified in the law can file a civil action in circuit court. The court may order injunctive relief and any other equitable relief that may be appropriate, including but not limited to reinstatement or the hiring of employees with or without back pay. A court may order back pay only for the 2-year period immediately preceding the filing of a complaint with the state labor department or, if a complaint was not filed before the action was commenced, the 2-year period immediately preceding the lawsuit’s filing. The court may allow the prevailing party costs and reasonable attorney fees at trial and on appeal.

### **Employers with Existing / PTO Policies**

An employer with a sick leave policy, paid vacation policy, paid personal time off policy or other paid time off program that is substantially equivalent to, or more generous to the employee than, the minimum requirements of the law is deemed to be in compliance with the requirements of the law. If an employee of such an employer has exhausted all paid and unpaid leave available to him or her, an employer is not obligated to provide additional leave for paid or unpaid sick time as required by the law, although the employer may be obligated to provide paid or unpaid sick time by federal or state law that provides for paid or unpaid leave for similar purposes.

ORS § 653 (Effective Date 01/01/2016).

### **D. Compensation During Domestic Violence Leave**

Oregon law entitles an employee who is the victim of harassment, domestic violence, sexual assault or stalking to take a leave of absence to obtain medical, legal, law enforcement, and social services related to the incident. The statute does not require an employer to provide paid leave, but permits an employee to use available accrued paid vacation or other paid time off during the leave period. The new law amends the statute to provide that an employee may also use available accrued paid sick leave or personal business leave during a period of leave under the statute. The employer retains the discretion to determine the order in which paid accrued leave is to be used when more than one type of paid accrued leave is available to the employee.

ORS § 659A.285 (Effective Date 01/01/2016).

### **E. Continuation of Benefits During Family Leave**

The Oregon Family Leave Act (OFLA) requires covered employers to provide a leave of absence to employees for parental leave, pregnancy disability leave, bereavement leave, or time off to care for a sick child or to care for the employee's or a family member's serious health condition. With respect to maintaining health benefits during the leave of absence, the OFLA provides that benefits are not required to continue to accrue during a period of family leave unless continuation or accrual is required under an agreement between the employer and the employee, a collective bargaining agreement or an employer policy.

The new law amends the OFLA's continuation of benefits provision and requires that if an employee is provided group health insurance, the employee is entitled to the continuation of group health insurance coverage during the period of family leave on the same terms as if the employee had continued to work. If family member coverage is provided to the employee,

family member coverage must be maintained during the period of family leave. The employee must continue to make any regular contributions to the cost of the health insurance premiums during leave that s/he was making pursuant to the health insurance policy prior to the leave.

ORS § 659A.171(5) (Effective Date 01/01/2016).

## **F. Leave of Absence Regulatory Amendments**

The Oregon Bureau of Labor and Industries has issued a series of amendments to the regulations implementing the state's labor and employment laws.

With respect to Oregon's law providing leave for victims of domestic violence, sexual assault, and stalking, the amendments:

- Clarify that a "reasonable" duration for the leave means any amount of leave that does not cause an undue hardship on the employer's business.
- Define "protective order" as an order authorized under certain sections of the Oregon Revised Statutes or any other order that restrains an individual from contact with an eligible employee or the employee's minor child or dependent.
- Define "health care professional" as a physician or other health care practitioner who is licensed, certified or otherwise authorized by law to provide health care services.
- Define "law enforcement officer" as all police, corrections, and parole and probation officers who are included in the state Public Safety Standards and Training Act.

The amendments also make several changes to and clarifications of the rules implementing the Oregon Family Leave Act (OFLA), including:

- Amending the definition of "spouse" to include individuals in a marriage validly performed in a foreign jurisdiction.
- Clarifying that the definition of "child" applies only to parental and sick child leave, not to serious health condition leave or bereavement leave. Sick child leave applies only to children under the age of 18 or an adult dependent child limited by a physical or mental impairment.
- Clarifying that parental leave is leave taken for the birth of the employee's child, in addition to leave taken to care for the employee's newborn, newly adopted or newly placed foster child.
- Adding a provision that an employee unable to work for an employer because of a disabling compensable injury arising out of and in the course of employment for that employer, but who is also employed by and able to work for another employer, may be eligible and qualify to use OFLA leave under the other employer.

In addition, the amendments set forth a new procedure for requesting certification of the need for leave. Except in the case of sick child leave and bereavement leave, when an employee requests OFLA leave, or when the employer acquires knowledge that an employee's leave may be for an OFLA-qualifying reason, the employer must, within five business days, issue to the employee a written request for information to verify whether the leave is OFLA-qualifying.



Within five business days of receiving the requested information from the employee, the employer must notify the employee whether s/he is eligible and qualifies to take OFLA leave.

The amended OFLA regulations also clarify how an employee may be penalized for failing to give proper notice of leave when the leave qualifies under both the OFLA and the federal FMLA. In that situation, the employer may:

- Delay FMLA coverage for up to 30 days after notice was received as permitted under the FMLA regulations (this applies only to leave to which the employee is entitled under FMLA);
- Reduce the total period of unused OFLA leave by an amount no greater than the number of days of leave the employee has taken without providing timely notice of leave. This reduction of leave may not exceed three weeks in a one-year leave period. This applies only to leave to which the employee is entitled under OFLA; and
- Subject the employee to disciplinary action under a uniformly applied employer policy or practice.

OAR 839 (Effective Date 05/18/2015).

#### **IV. Wage and Hour Laws**

##### **A. Minimum Wage Final Rule**

In March 2016, Oregon enacted a minimum wage increase that provides for a three-tiered schedule of minimum wage rates based on whether an employer is located within an urban growth boundary of a metropolitan service district, a nonurban county, or neither. The minimum wage increase bill is summarized here.

The Bureau of Labor and Industries issued administrative rules to implement these changes, which offer guidance to employers with employees who provide services in multiple Oregon geographic regions during any pay period. The rule provides three key rules to follow:

If an employee performs more than 50% of his/her work during a pay period at a fixed business location, the minimum wage rate for the region encompassing that business location applies to all hours worked during the pay period.

Delivery workers who start and end their work at the same fixed business location should be paid at least the minimum wage rate for the region encompassing that business location, notwithstanding deliveries made outside that region.

For those employees who do not perform more than 50% of their work during a pay period at a fixed business location, the employer must either (a) track (and maintain record of) where the employee performs his/her work and pay at least the applicable wage rate for each region where the work was performed, or (b) for all hours worked during the pay period, pay the highest wage rate required for any region in which the employee worked.

OAR 839-020-004, OAR 839-020-0010, and OAR 839-020-001 (Effective Date 07/01/2016).

##### **B. Wage Statement Information and Prevailing Wage**

Oregon requires employers that take wage deductions for any purpose to provide a wage statement to employees with their pay. Under the amendments to this law, all employers, not

just those who take wage deductions, must provide employees with an itemized statement on regular paydays and at other times when wages, salaries, or commissions are paid. The statement must include the following information:

- date of payment and dates of work covered by the payment;
- employee name;
- name, business registry number or business identification number, and address and telephone number of employer;
- rate or rates of pay and whether employee is paid by the hour, shift, day or week or on a salary, piece or commission basis;
- gross and net wages;
- the amount and purpose of each deduction made during the pay period;
- allowances, if any, claimed as part of minimum wage;
- for non-exempt employees, the regular hourly rate or rates of pay, overtime rate or rates of pay, number of regular and overtime hours worked, and the pay for those hours;
- for piece-rate employees, the applicable piece rate or rates of pay, number of pieces completed at each piece rate, and the total pay for each rate.

An employer may provide this information electronically (as provided in Oregon's Uniform Electronic Transactions Act) if the employee expressly agrees to receive it electronically and can print or store the statement at the time of receipt.

The amendments clarify that any wage deduction must be voluntarily authorized by the employee in writing.

In addition, the amendments modify Oregon's personnel file access law to require employers to allow employees access to their time and pay records for three years as required under the federal Fair Labor Standards Act (FLSA). Employers must also keep a terminated employee's time and pay records for not less than the three years required by the FLSA. Additionally, while employers must keep a terminated employee's personnel records for not less than 60 days (and time and pay records for not less than the period required by the FLSA), the employer is no longer required to provide a former employee with a copy of those records after termination.

Under the amendments, contractors and subcontractors may not intentionally:

- fail to pay their employees the prevailing wage;
- reduce the wage rate an employee would ordinarily receive for work not subject to the prevailing wage rate statutes to recoup the wages that the contractor or subcontractor paid under the prevailing wage rate statutes;
- withhold, deduct, or divert any portion of an employee's wages except as provided by statute;

- enter into an agreement with an employee under which the employee performs work on a public works project at less than the prevailing wage rate; or
- otherwise deprive an employee of wages due to him or her under the prevailing wage rate statutes in an amount that equals or exceeds 25% of wages due to the employee under the prevailing wage rate or \$1,000 in a single pay period, whichever is greater.

ORS § 652.610, ORS § 652.750, and ORS § 652.409 (Effective Date 04/04/2016).

### **C. Minimum Wage Increases**

Oregon enacted amendments to the state's minimum wage law that provide a three-tiered schedule of minimum wage rates based on whether an employer is located within an urban growth boundary of a metropolitan service district, a nonurban county, or neither. The current state minimum wage is \$9.75 per hour for urban and general (mid-sized communities), and \$9.50 for nonurban counties, and these rates will be operative until July 1, 2017. The minimum wage rate will then increase as follows:

For employers located within the urban boundary of a metropolitan service district:

- \$11.25 from July 1, 2017 to June 30, 2018
- \$12.00 from July 1, 2018 to June 30, 2019
- \$12.50 from July 1, 2019 to June 30, 2020
- \$13.25 from July 1, 2020 to June 30, 2021
- \$14.00 from July 1, 2021 to June 30, 2022
- \$14.75 from July 1, 2022 to June 30, 2023
- After June 30, 2023, the rate must be at least \$1.25 per hour more than the standard minimum wage for employers located neither in an urban growth boundary nor a nonurban county.

For employers located within a nonurban county:

- \$10.00 from July 1, 2017 to June 30, 2018
- \$10.50 from July 1, 2018 to June 30, 2019
- \$11.00 from July 1, 2019 to June 30, 2020
- \$11.50 from July 1, 2020 to June 30, 2021
- \$12.00 from July 1, 2021 to June 30, 2022
- \$12.50 from July 1, 2022 to June 30, 2023

- After June 30, 2023, the rate must be no less than \$1.00 per hour less than the standard minimum wage for employers located neither in an urban growth boundary nor a nonurban county.

For employers located in mid-sized communities (neither in an urban growth boundary nor a nonurban county):

- \$10.25 from July 1, 2017 to June 30, 2018
- \$10.75 from July 1, 2018 to June 30, 2019
- \$11.25 from July 1, 2019 to June 30, 2020
- \$12.00 from July 1, 2020 to June 30, 2021
- \$12.75 from July 1, 2021 to June 30, 2022
- \$13.50 from July 1, 2022 to June 30, 2023
- After June 30, 2023, the rate will be adjusted annually for inflation.

ORS § 653.025 (Effective Date 03/02/2016).

#### **D. Preempting Local Scheduling Laws**

Until August 31, 2017, local governments cannot enact, adopt, refer, or pass with a delayed operative or effective date, a law relating to work schedules, i.e., the days and times employees are required to work. However, local governments can set work schedule requirements for public employees and for public contracts or subcontracts into which they enter.

Uncodified provisions can be found at ORS § 652.080 (Effective Date 06/25/2015).

#### **V. Drug Testing**

No new laws or regulations enacted in 2015 or 2016.

#### **VI. Noncompete and Other Employment Agreements**

Oregon law concerning non-competition agreements has been amended. Under the amendments, the maximum duration of an agreement has decreased from 2 years to 18 months, and the remaining duration of any agreement that exceeds 18 months is void and cannot be enforced by a court. The amendments apply to non-competition agreements entered into on or after January 1, 2016.

ORS § 653.295 (Effective Date 01/01/2016).

#### **VII. Workplace Safety**

The Oregon Clean Indoor Air Act prohibits smoking or carrying a lighted smoking instrument in a place of employment, including company vehicles used by one or more employees. Smoking is prohibited 10 feet from any window that opens, ventilation intake, or entrance or exit to a workplace. The new law amends the Clean Indoor Air Act to require employers to provide

employees with a workplace free of all smoke, aerosols and vapors containing inhalants. Employees are prohibited from aerosolizing or vaporizing inhalants in their place of employment or within 10 feet from any window that opens, ventilation intake, or entrance or exit to a workplace. "Inhalant" means nicotine, a cannabinoid or any other substance that:

- Is in a form that allows the nicotine, cannabinoid or substance to be delivered into a person's respiratory system;
- Is inhaled for the purpose of delivering the nicotine, cannabinoid or other substance into a person's respiratory system; and
- Is not approved by, or emitted by a device approved by, the United States Food and Drug Administration for a therapeutic purpose; or, if approved by, or emitted by a device approved by, the FDA for a therapeutic purpose, is not marketed and sold solely for that purpose.

"Place of employment" means an enclosed area under the control of a public or private employer including, but not limited to, work areas, employee lounges, vehicles that are operated in the course of an employer's business and that are not operated exclusively by one employee, rest rooms, conference rooms, classrooms, cafeterias, hallways, meeting rooms, elevators and stairways.

ORS § 433.835 to ORS § 433.875 (Effective Date 01/01/2016).

## **VIII. Workers' Compensation**

No new laws or regulations enacted in 2015 or 2016.

## **IX. Miscellaneous**

### **A. Employee Social Media Accounts**

Oregon recently amended its statute governing employer access to employee social media accounts. The amendments, which take effect January 1, 2016, prohibit an employer from (a) requiring or requesting an employee or applicant to establish or maintain a personal social media account; (b) requiring an employee or applicant to authorize the employer to advertise on their personal social media accounts; and (c) refusing to hire an applicant or taking action or threatening to take action against an employee for refusing to establish or maintain a personal social media account.

Due to these statutory amendments, the state Bureau of Labor and Industries has issued amended administrative rules to incorporate such language into existing implementing regulations.

OAR 839-005-0400 (Effective Date 01/01/2016).

### **B. Gender Neutral Language**

This amendment removes all of the instances of the terms "husband" and "wife" within the Oregon Revised Statutes and substitutes the terms "spouse" or "spouses" to achieve gender neutrality of statutory language relating to marital or familial relationships. The amendment affects a significant number of statutes, including but not limited to provisions covering income taxation, marriage, workers' compensation, and health insurance.

ORS § 25.280, ORS § 59.350, ORS § 93.180, ORS § 105.920, ORS § 106.020, ORS § 106.041, ORS § 106.150, ORS § 106.315, ORS § 107.005, ORS § 107.025, ORS § 107.485, ORS § 108.010, ORS § 108.020, ORS § 108.030, ORS § 108.040, ORS § 108.045, ORS § 108.050, ORS § 108.060, ORS § 108.080, ORS § 108.090, ORS § 108.100, ORS § 108.110, ORS § 108.510, ORS § 108.530, ORS § 108.550, ORS § 110.384, ORS § 136.655, ORS § 163.565, ORS § 164.035, ORS § 164.164, ORS § 174.100, ORS § 215.705, ORS § 314.105, ORS § 315.465, ORS § 315.469, ORS § 315.610, ORS § 315.675, ORS § 316.042, ORS § 316.116, ORS § 316.122, ORS § 316.367, ORS § 316.567, ORS § 316.690, ORS § 316.695, ORS § 408.730, ORS § 418.210, ORS § 419B.040, ORS § 432.088, ORS § 496.146, ORS § 656.005, ORS § 656.204, ORS § 656.226, ORS § 659A.309, ORS § 677.365, ORS § 726.990, ORS § 742.504, ORS § 743.027 and ORS § 743A.084 (Effective Date 01/01/2016).

### **C. Automatic Retirement Savings Plan**

Oregon has passed a bill that requires employers that do not offer a retirement savings plan to automatically enroll employees at a default contribution rate in the Oregon Retirement Savings Plan. This new savings plan is intended to increase savings for retirement by requiring businesses to deduct contributions from employees' paychecks into individual retirement accounts. The bill creates the Oregon Retirement Savings Board within the State Treasury, comprising seven members (including an employer representative) that will set the contribution rate. The Board must, among other requirements, allow eligible individuals to contribute to an account through payroll deduction, and require employers to offer their employees the opportunity to contribute to the plan through payroll deductions. If possible, employers will be able to use their existing system to facilitate the plan; however, a process for employers to withhold employee contributions from wages and send to the investment administrator will be established.

#### **Exemptions**

Employers that currently offer a qualified alternative retirement plan do not have to enroll in the plan. An employer offers a qualified retirement plan if it qualifies as a benefit under federal law. Generally, the plan will qualify under sections 401(a), 401(k), 403(a), 403 (b), 408 (k), 408(p), or 457(b) of the Internal Revenue Code. However, an employer's plan may still be qualified even if it does not qualify under one of these sections. The Oregon Retirement Savings Board will establish the process and requirements for an employer to obtain an exemption.

#### **Not Employer Sponsored**

The bill clarifies that employers are not financial advisors and do not have duties under the Employee Retirement Income Security Act (ERISA) of 1974. The Board, not employers, is responsible for mandating the contents and frequency of required disclosures to employees. Employers do not have to contribute to employees' accounts, have no interest in the accounts, and are not liable for decisions made by employees including any loss to accounts.

The Board will adopt regulations to govern this new law. Notably, the rules will provide a method for employees to opt out of enrollment in the plan. Additional procedural rules are expected in the regulations such as the process by which an employee may obtain an exemption, required notices, and instructions on how to contribute to the plan.

The new law provides a confidentiality provision requiring that all information such as names, addresses, telephone numbers, personal identification information, amounts contributed and earnings must remain confidential.

The bill takes effect June 25, 2015. However, the Board is required to establish a retirement plan so that employees can make contributions by June 16, 2017.

ORS § 178.200, et. seq. (Effective Date 06/25/2015).

#### **D. Health Care Reform**

House Bill 2240 was enacted in 2013 to amend Oregon health insurance laws to align them with the The Patient Protection and Affordable Care Act (ACA). Oregon enacted a new bill that further aligns Oregon health insurance laws with the ACA. Beginning in January 2016, under the ACA, the number of employees defining a small group employer will increase from 1-50 employees to 1-100 employees. House Bill 2466 allows transitional insurance plans to continue for employer groups with 51-100 employee into 2016, whereas originally and under the ACA, transitional plans were intended to end at the end of 2015.

House Bill 2466:

- Defines a transitional grandfathered health benefit plan as a grandfathered health plan issued or renewed by an employer with 51 to 100 employees.
- Defines a transitional health benefit plan as a health benefit plan, other than a transitional grandfathered health plan, that is issued or renewed by an employer with 51 to 100 employees before January 1, 2016, in effect on December 31, 2015, and not subject to certain federal requirements.
- Specifies the differences between the requirements for each plan. For example, group plans, individual plans, grandfathered, and transitional plans have to follow different requirements.
- Specifies which requirements of the ACA that transitional health benefit plans and large transitional grandfathered health benefit plans do not have to follow.
- Allows transitional health benefit plans to be renewed on and after January 1, 2016.
- Allows transitional health benefit plans that are discontinued and meet certain requirements to be guaranteed renewal.
- Requires that carriers offer all health benefit plans to small employers for which they are eligible.
- Directs the Department of Consumer and Business Services to determine if an employer qualifies as a small employer.
- Defines “eligible employees” to include employees who are eligible for coverage under their employer’s group plan, which can include employees who have been employed for less than 90 days.
- Preexisting conditions exclusions still apply to grandfathered health benefit plans but cannot apply to group plans.

This law will amend various provisions of Oregon Revised Statutes related to health care, and section 66, chapter 681 of Oregon Laws 2013 (Effective Date 06/22/2015).

## **E. Data Security Breach Notification Amendments**

The Oregon Consumer Identity Theft Protection Act requires covered entities to notify affected individuals when the entity discovers or is notified of a data security breach involving consumers' personal information. The new law makes several amendments to the Act.

### **Covered Entities**

Under the Act, a covered entity is a person that owns, maintains or otherwise possesses data that includes personal information. The amendments expand this definition to include a person that licenses personal information that the person uses in the course of the person's business, vocation, occupation or volunteer activities.

Certain types of entities are excluded from the data security breach notification requirements. Among others, the statute excludes entities that comply with the notification requirements or security breach procedures of their primary or functional federal regulator, and entities subject to the Graham-Leach-Bliley Act. The amendments provide that certain entities that are subject to the federal Health Insurance Portability and Availability Act (HIPAA) and that are required to comply with HIPAA's security breach notification provisions are also excluded.

### **Definition of Personal Information**

The Act defines "personal information" as an individual's first name or first initial and last name in combination with any one or more of the following:

- Social Security Number;
- Drivers license number or state identification card number issued by the Department of Transportation;
- Passport number or other United States-issued identification number;
- Financial account number or credit or debit card number in combination with any required security code, access code or password that would permit access to the account; or
- Any data elements or any combination of data elements listed above that would be sufficient to permit a person to commit identity theft against the individual.

The amendments add new categories of data to the definition. The following will be included in the list above:

- Health insurance policy number or identification number;
- A consumer's medical history, condition, diagnosis, or treatment; or
- Data from automatic measurements of a consumer's physical characteristics, such as an image of a fingerprint, retina or iris, that are used to authenticate the consumer's identity in the course of a financial transaction or other transaction.

### **Notification to Attorney General**



The amendment adds a new requirement that a covered entity must also provide notice of a data security breach to the state attorney general in addition to notifying affected consumers. If notice must be provided to more than 250 Oregon residents as a result of a single breach, the covered entity must also submit a copy of the security breach notification to the state attorney general. The notice to the attorney general may be made in writing or electronically.

ORS § 646.607, ORS § 646A.602, ORS § 646A.604 and ORS § 646A.622 (Effective Date 01/01/2016).

#### **F. Employer Access to Social Media Amendments**

Oregon has made amendments to its employer access to social media law that notably distinguishes it from all similar laws. Specially, under the amendments, an employer commits an unlawful employment practice if it:

- Requires or requests that an employee or applicant establish or maintain a person social media account.
- Requires an employee or applicant to authorize the employer to advertise on the individual's personal social media account;
- Threatens to or actually takes any action to discharge, discipline or otherwise penalize an employee for his or her refusal to establish or maintain a personal social media account.
- Fails or refuses to hire an applicant because s/he refused to establish or maintain a personal social media account.

ORS § 659A.330 (Effective Date 01/01/2016).