LANE POWELL

July 8, 2019 Publication

Oregon Employers Required to Update Anti-Discrimination Policies and Agreements After Legislature Tilts the Playing Field for Employees

Topics

Employment
#MeToo Movement

Related People

Paul M. Ostroff
ostroffp@lanepowell.com

Christine Thelen
thelenc@lanepowell.com

Related Practices & Industries

Business
Labor, Employment & Benefits
Litigation

Labor, Employment & Benefits Update

On June 11, the Oregon Governor signed legislation (SB 726) that drastically expands employment protections related to discrimination, harassment, sexual assault, and retaliation. Oregon employers should prepare for a five year statute of limitations for discrimination, harassment, and retaliation claims, and they should revise their employment agreements and anti-discrimination and harassment policies. The law also will influence how employers approach settlement and severance agreements in some cases. Oregon joins many other states — including Washington, California, New York, Maryland, Vermont, and Delaware — that have recently passed similar legislation in response to the #MeToo movement.

Key Features

Below is a summary of the key features of this new law. The law generally becomes effective on October 29, 2019. But the restrictions related to employment agreements and requirements for written policies do not apply until October 1, 2020. The Bureau of Labor and Industries (BOLI) is expected to issue regulations in the future that may provide some interpretive guidance to employers on this law.

Longer Statute of Limitations. The legislation expands the statute of limitations from one year to five years for many discrimination, harassment, and retaliation claims. The categories of discrimination, harassment, and retaliation claims covered by the new statute of limitations are race, color, religion, sex, sexual orientation, national origin, marital status, age, expunged juvenile record, uniformed service, and disability. The new statute of limitations also applies to actions to set aside nondisclosure, nondisparagement, and other agreements that violate this new law.

Nondisclosure and Nondisparagement Agreements. With limited exceptions, the legislation prohibits any agreement with an employee or prospective employee that contains a nondisclosure provision, a nondisparagement provision, or any other provision that has the purpose or effect of preventing an employee from disclosing or discussing conduct that constitutes unlawful discrimination, harassment, or retaliation concerning race, color, religion, sex, sexual orientation, national origin, marital status, age, expunged juvenile record, uniformed service, or disability. These prohibitions apply to conduct that occurred between employees or between an employer and an employee in the workplace or at a work-related event that is off the employment premises and coordinated by or through the employer; or that occurred between an employer and an employee off the employment premises.

Limited Exceptions for Settlement, Severance, or Separation Agreements. The legislation provides exceptions to the prohibition against nondisclosure and nondisparagement provisions for settlement, severance, or separation agreements when the employee: 1) requests a nondisclosure, nondisparagement, or no-rehire provision; and 2) the employee is provided with a seven day revocation period after execution. Also, if the employer has made a good faith determination that an employee has engaged in discrimination, harassment, or retaliation, these

agreements may include a nondisclosure, nondisparagement, and no-rehire provision.

Mandatory Employer Written Policies and Procedures to Address Discrimination. The legislation imposes detailed requirements for written employment policies related to discrimination, harassment, and retaliation. At a minimum, all employers must have policies that include the following:

- Provide a process for employees to report incidents of discrimination, harassment, or retaliation;
- Identify individuals designated by the employer responsible for receiving reports;
- Recite the new five-year statute of limitations for civil actions;
- State 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 these terms and the limited exception discussed above; and
- Advise employees and the employer to document any incidents involving unlawful discrimination, harassment, or retaliation.

Employers must provide a copy of these written policies and procedures to employees at the time of hire and upon receipt of a discrimination, harassment, or retaliation complaint. Employers must also make the policies available to employees within the workplace.

Voidability of Severance Agreements With Bad Actors. Employers may void a severance agreement with a managerial level employee or above when the employee is terminated for discrimination, harassment, or retaliation following a good faith investigation.

Key Takeaways for Employers

In light of this new legislation, employers should take the following steps:

- Adopt or amend existing policies and complaint procedures related to discrimination, harassment, and retaliation that comply with the new law;

- Review and revise the employee onboarding process to ensure that new employees receive a copy of your workplace harassment and discrimination policies;

- Start or continue to provide regular workplace training to employees and managers regarding harassment and discrimination;

- Ensure those responsible for conducting investigations concerning workplace discrimination, harassment, and retaliation are well trained to do so and fully aware of the importance of conducting timely, thorough, and well-documented investigations;

- Review and revise existing confidentiality policies and agreements for compliance;

- Review and revise severance and separation agreements for compliance;

- Consider using severance plans covered by ERISA to possibly preempt provisions of this law related to employee agreements; and

- Review and revise retention policies for documents and electronically stored information to accommodate the extended statute of limitations.

If you have questions about complying with this new law, Lane Powell's Lawyers for Employers™ are available to help.