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# **Employment Law Hot Topics**

**September 19, 2017**

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# Important Notice

This presentation provides general information and updates regarding rights and obligations under Oregon law. These materials are not intended to provide legal advice. You should consult with your attorney to determine how to comply with the applicable federal and state laws and regulations.

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# New State Laws

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**HB 2005**  
**Equal Pay Act**  
**(Effective January 1, 2019,**  
**except at noted)**

# HB 2005

- Prohibits employers (except federal government) from:
  - Seeking an applicant's or employee's salary history from the applicant, employee or prior employer (effective October 6, 2017)
  - Paying employees different compensation amounts for work of “comparable character” based on their membership in a protected class
    - Applies to all forms of compensation
    - Protected class = race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, age
    - Work of “comparable character” is work that requires substantially similar knowledge, skill, effort, responsibility and working conditions

# HB 2005

- Prohibits employers (except federal government) from:
  - Screening applicants based on current or past compensation
  - Determining compensation based on the employee's current or past compensation



# HB 2005

- Requires employers to post a notice of the law's requirements in every work establishment
- Cannot reduce an employee's compensation to comply with this law

# HB 2005

- Different compensation levels for work of a “comparable character” are permitted if the differences are based on the following “bona fide” factors:
  - A seniority system;
  - A merit system;
  - Pay systems that measure productivity;
  - Workplace locations;
  - Travel; Education;
  - Training;
  - Experience; or
  - Any combination of the above.



# HB 2005

## ■ HB 2005 does not:

- Prevent employers from considering current compensation of a current employee being hired into another internal position
- Prevent employers from asking applicants their compensation requirements/expectations
- Prohibit employers from requesting permission from applicant to confirm prior compensation, but only after an offer that includes a compensation amount has been made

# HB 2005

- Wage differentials in violation of the statute constitute unpaid wages
- Employees can file complaints with BOLI or file a court action for unpaid wages or discrimination
  - One year statute of limitations
- Employers are subject to two years of unpaid wages, plus punitive damages and attorney's fees

# HB 2005

- What employers should do:
  - Revise job applications to eliminate salary history inquiries
  - Develop and document salary ranges for each job classification
  - Develop and maintain documentation to support individual salary decisions
  - Conduct an equal-pay analysis to ensure compliance at least every three years
    - May reduce employer's exposure to damages

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**SB 299**  
**Paid Sick Leave**  
**(Effective January 1, 2018)**



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# SB 299

- Clarifies ambiguous portions of the OSL as originally drafted

# SB 299

- Employers can cap *accrual* at 40 hours
  - The original bill gave employees the right to “earn and use up to 40 hours of paid sick time” each year
  - The original bill also entitled employees to one hour of sick leave for every 30 hours worked, which meant employees could actually earn *more* than 40 hours per year
  - This bill clarifies that employers may cap accrual at 40 hours per year, regardless of how many hours an employee works

# SB 299

- Employers can cap *usage* at 40 hours
  - Under the original bill, employees could carry over up to 40 hours of sick leave each year (unless the employee receives front-loaded sick leave), but could be capped at 80 hours of accrued sick leave
  - This bill clarifies that employers can cap usage at 40 hours, regardless of how many accrued hours the employee may have

# SB 299

- PTO Policies must comply with the OSLL only for the first 40 hours
  - BOLI's position under the OSLL was that employers who offered PTO must track the reasons for all employee absences to ensure that employees received at least 40 hours of protected leave
  - The amendment clarifies that only the first 40 hours of accrued PTO in any year must comply with the OSLL



# SB 299

- The definition of “employee” has been narrowed
  - Under this bill, corporate directors, LLC members, LLP partners and sole proprietors are not considered employees so long as they have a “substantial ownership interest” in the company
    - “Substantial” is defined as an ownership interest of at least 15%
  - Family members of the foregoing are also exempt from the OSLL

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**HB 3008**  
**Payroll Practices**  
**(Effective January 1, 2018)**

# HB 3008

- This bill prohibits employers from compelling employees to create, file or sign documents that the employer knows are false relating to hours worked or compensation received by the employee
- Violations could result in civil penalties, damages of not less than \$1000 per violation, and attorney's fees

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**SB 398**  
**Payroll Practices**  
**(Effective October 6, 2017)**

# SB 398

- Requires BOLI to adopt rules requiring employers to provide written notice to employees about the availability of state and federal earned income tax credits
- No deadline for issuance of those rules

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**SB 828**  
**Fair Work Week Act**  
**(Effective July 1, 2018,**  
**except where indicated)**

# SB 828

- Applies to retail, hospitality and food service establishments that employ 500 or more employees worldwide (i.e., retail trade, hotels and motels, casinos and restaurants)
  - Includes chains and “integrated enterprises”
  - Does not include franchises that do not have 500 or more employees
- Eligible employees do not include exempt administrative, executive and professional employees

# SB 828

## ■ Employers must:

- Provide new employees with a written good faith estimate of the employee's work schedule at the time of hire
  - Estimate must include the median number of hours per month
  - Estimate must explain how employees can voluntarily agree to be added to or removed from a stand-by list to fill in for absences or additional work needs



# SB 828

## ■ Employers must:

- Give employees at least ten hours off between shifts, unless the employee waives that right
  - Employer must pay 1.5 times' the employee's regular rate of pay for hours worked in violation of this requirement
    - "Regular rate" does not include tips, bonuses, holiday pay, overtime pay or other premium pay

# SB 828

## ■ Employers must:

- Provide employees with a written (including electronic) work schedule at least seven calendar days before the first day of the scheduled work week
  - Increases to 14 days on July 1, 2020
- Post the written work schedule in a conspicuous and accessible work location in the language the employer uses to communicate with the employee

# SB 828

- Work schedule changes must be “timely” communicated to the employee
- Employers may not retaliate against employees who exercise their work schedule rights, or discriminate against employees who inquire about their scheduling rights.
  - Enforcement rights become effective on January 1, 2019

# SB 828

## ■ Employee Rights

- Employees may decline work shifts not previously included in the written schedule.
- Employees are entitled to one hour of pay (in addition to earned wages) if the employer **unilaterally**:
  - Adds more than 30 minutes of work to a work shift
  - Changes the date, start time or end time of the employee's work shift with no loss of hours
  - Schedules the employee for an additional work shift or on-call shift

# SB 828

## ■ Employee Rights

□ Employees are entitled to one-half their regular rate of pay per hour for each scheduled hour the employee does not work when the employer

### **unilaterally:**

- Subtracts hours from employee's work shift
- Changes the date, start time or end time of the employee's work shift resulting in a loss of work hours
- Cancels the employee's shift
- Does not ask the employee to perform work during an on-call shift

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# HB 3458

## Manufacturing Overtime

### (Effective August 8, 2017)

# HB 3458

## ■ Old Law:

- Mills, factories and manufacturers must pay their employees daily overtime for hours in excess of ten in a work day, and weekly overtime for hours in excess of 40 in a work week
- Existing law did not address situations where employees are entitled to both daily and weekly overtime – do they receive both, or the greater of the two amounts

# HB 3458

## ■ Old Law:

- BOLI's position for years was that employers should pay the greater of daily and weekly overtime
- BOLI changed that position abruptly in order to support a lawsuit by bakery workers, and claimed that employers were required to pay both daily and weekly overtime
- A court rejected BOLI's changed interpretation. Now the legislature has stepped in to clarify the law



# HB 3458

## ■ New Law:

- Clarifies that employers should calculate both daily and weekly overtime, and pay the greater amount (effective upon passage, Aug. 8, 2017)
- Provides long-awaited clarity on various manufacturing definitions:
  - “Manufacturing” means the process of using “machinery” to transform materials, substances or components into new products
  - “Machinery” means material handling equipment and other machines powered by a power source other than the human hand, foot or breath

# HB 3458

- New Law:

- Imposes new caps on work hours (effective January 1, 2018)

# HB 3458

## ■ Old Rule:

Mills, factories and manufacturing establishments:

■ No more than 13 hours per day (hours 11-13 must be paid at overtime rate)

Sawmills, planing mills, shingle mills and logging camps

■ No more than 11 hours per day (hours 9-11 must be paid at overtime rate) and 48 hours per week

# HB 3458

## ■ New Rule:

- Sawmills, planing mills, shingle mills and logging camps
  - Same as old rule
- Seafood canneries, driers and packing plants
  - No more than 10 hours per day (unless employee receives overtime pay for hours 11 on)
  - Employer suffering undue hardship (see below)

# HB 3458

## ■ New Rule:

- Canneries, driers and packing plants not located on farms
  - No more than 10 hours per day (unless employee receives overtime pay for hours 11 on)
  - No more than 55 hours per week, except:
    - Employee may work up to 60 hours if the employee requests or consents in writing
    - Employer suffering undue hardship (see below)

# HB 3458

## ■ New Rule:

### □ Mills, factories and manufacturing establishments:

- No more than 13 hours per day (hours 11-13 must be paid at overtime rate)
- No more than 55 hours per work week, except:
- Employee may work up to 60 hours if the employee requests or consents in writing
- Employer suffering undue hardship may require employees to work:
  - Up to 84 hours per work week for four weeks; and
  - Up to 80 hours per work week for the remainder of the hardship period

# HB 3458

## ■ New Rule:

- “Undue hardship” applies only to manufacturing establishments that regularly process perishable products (e.g., fruits, vegetables, meat and fish)
  - Capped at 21 weeks per calendar year
  - Requires employer to provide written notice to BOLI
  - Requires employer to obtain written consent of each employee required to work more than 55 hours per work week
  - Written notice and written consent must conform to BOLI requirements

# HB 3458

## ■ Other Aspects of New Rule:

- Employees in mills, factories and manufacturing establishments are entitled to ten hours off between shifts (exceptions apply)
- Rules do not apply to employees in mills, factories and manufacturing establishments whose employees are:
  - Engaged primarily in administrative duties and who are not regularly engaged in the direct processing of goods (e.g., supervisors, managers, fore-persons)
  - Physically separated from the manufacturing process and not involved in production machinery (e.g., receptionists, back office staff)
- Rules do not apply to represented employees



# HB 3458

## ■ Anti-Retaliation Provisions

- Employers may not discriminate or retaliate against an employee who has:
  - Made a wage claim or discussed a wage claim with BOLI or an attorney
  - Initiated a wage claim
  - Participated in a wage claim proceeding
  - Asked about the manufacturing overtime rules or reported a violation
  - Declined consent to work more than 55 hours in a work week

# HB 3458

- Wage claim for unpaid overtime
- Penalties for Non-Compliance
  - The greater of actual damages or \$3,000 per claim
  - Two times' the employee's overtime wages
  - Discretionary attorney's fees
  - BOLI fines (\$2,000 - \$3,000 per violation)

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# Oregon SAVES

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- New mandatory retirement program for employees of non-exempt employers
- Similar to employee-funded 401(k) plan
- Exempt employers offer employer-sponsored retirement plans include 401(k); 403(b); 457(b); SIMPLE IRA plans

# Oregon SAVES

- All employers must register with the state:

- |                                     |            |
|-------------------------------------|------------|
| <input type="checkbox"/> 100+ EES   | 11/15/2017 |
| <input type="checkbox"/> 50-99      | 5/15/2018  |
| <input type="checkbox"/> 20-49      | 12/15/2018 |
| <input type="checkbox"/> 10-19      | 5/15/2019  |
| <input type="checkbox"/> 5-9        | 11/15/2019 |
| <input type="checkbox"/> 4 or fewer | 5/15/2020  |

# Oregon SAVES

- Employees will be automatically enrolled with option to opt-out within deadline
- Initial automatic deduction rate of 5%, will automatically increase; employee can modify within deadline
- No fees or costs to employers; employers not allowed to contribute

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# Federal Changes

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# The End of DACA?



# Deferred Action for Childhood Arrivals Program

- Granted temporary reprieve from deportation and temporary work permits to people who were:
  - Brought to the U.S. as children without authorization
  - Graduated from high school or were in school; and
  - Had not committed crimes
- Over 800,000 two-year work permits (Employment Authorization Documents – EADs) were issued
- No new EADs will be issued unless Congress extends the program
- Existing EADs will expire on their regular expiration date
- DACA recipients (“Dreamers”) are subject to deportation



# Deferred Action for Childhood Arrivals Program

- What does this mean for employers?
  - Employers are required to re-verify an employee's eligibility to work when an EAD expires
  - Employees with expired EADs will not be eligible to work, unless they have another authorization option (e.g., green card)
  - Employees are not required to discuss whether they are DACA recipients, and employers may not ask

# Deferred Action for Childhood Arrivals Program

- What does this mean for employers?
  - If an employee voluntarily discloses Dreamer status, the employer may discuss their status
  - Otherwise, when authorization expires require employee to provide new basis for work authorization
    - You may not require a specific form of authorization document
  - You are not required to inform the government that Dreamer status has expired
  - Penalties for non-compliance: Civil fine between \$374 and \$14,050 for knowingly employing unauthorized worker

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# EEO-1 Reports

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- Employers with 100 or more employees are required to file yearly EEO-1 reports
- In 2016, President Obama signed an executive order requiring employers to include pay data (to help the government identify discriminatory pay practices)
  - Obama rule required employers to include data beginning September 30, 2017
- The Trump administration has eliminated that requirement
- The Trump administration also extended the September 30, 2017 reporting deadline to March 31, 2018

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# White Collar Exemptions

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- In 2016, the Department of Labor issued revised regulations increasing the minimum salary for white collar exempt employees from \$23,660 per year to \$47,476 per year
- The rule was set to take effect on December 1, 2016, but was suspended by the courts
- More recently, a Texas court invalidated the rule altogether



# White Collar Exemptions

- Meanwhile, the Trump administration has abandoned the rule and is soliciting new input on modifications to the white collar exemptions, including:
  - Should the salary threshold be tied to inflation
  - Should the salary threshold be different for the different white collar categories, or by region
  - How did the Obama rule impact employers
  - Should the salary test be eliminated altogether



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# Other Administration Actions

# Other Administrative Actions

- 20% reduction in the Department of Labor's budget (mostly to workforce training programs)
- Merger of the OFCCP into the EEOC
- Pursuit of a paid family leave program beginning in 2020 (six weeks of paid parental leave)
- Rollback of OSHA rules affecting workplace safety (e.g., chemical exposure limits, hearing protection requirements, vehicle backing hazards)
- Possible extension of OSHA 300A reporting deadline for electronic submissions (currently December 1, 2017)
- Possible limitations on the amount of injury-related information required to be reported
- Department of Labor has reinstated opinion letters



*Thank You*