



New and Pending Legislation Impacts Oregon and Washington Employers

Insights

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Recent legislation in Oregon and Washington will have a major impact on all Northwest employers, and there are likely more changes on the immediate horizon. This Legal Alert will point out the most significant changes to the law in both states.

OREGON

Sexual Orientation Discrimination Prohibited

On May 9, 2007, Oregon Governor Ted Kulongoski signed into law legislation prohibiting discrimination based upon sexual orientation in employment, housing and public accommodation. The law is slated to go into effect January 1, 2008, but the legislation is likely to be brought to a public vote through a referendum in the upcoming November election. That would delay implementation and could lead to voters striking down the law altogether.

The new law prohibits sexual orientation discrimination similar to current Oregon law that prohibits discrimination based on race, color, sex, marital status, age, national origin or religion. Although most Oregon employers have recognized the importance of treating employees of all sexual orientations equally since the 1998 Oregon Court of Appeals opinion, *Tanner v. OHSU*, this law will now ensure such protection and will likely lead to increased litigation.

The statute defines "sexual orientation" as including "actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth." The "gender identity" component of this new law protects those employees who more closely identify as members of the opposite sex, and is not simply limited to pre and/or post operative transgendered persons.

What this law means for employers

Now is a good time for employers in Oregon to examine their employment applications, job descriptions, handbooks, policies and other documents which reference equal employment opportunity. You should extend harassment protections to include sexual orientation and gender identity, or ensure that sufficient "catch all" language is included. Updating human resources training sessions to include a discussion of sexual orientation discrimination is also imperative.

Since the law includes protections for transgendered individuals, you must make sure that such employees have appropriate bathroom access. The law allows employers to enforce valid dress codes and policies if they provide reasonable accommodation to an individual based on the individual's health and safety needs. Also of note, a church or religious institution is not prohibited from taking action with respect to employment, housing or the use of facilities based on a bona fide religious belief about sexual orientation.

Other Key Legislative Initiatives in Oregon

- *Domestic Partnership:* At the same time the sexual orientation law was passed, the Governor signed a bill establishing a Declaration of Domestic Partnership and Certificate of Registered Domestic Partnership. It grants same-sex partners many of the privileges, rights and benefits granted to married couples under Oregon state law, and it may impact benefits decisions. The law may be subject to the same referendum vote in November mentioned above, so stay tuned for possible implementation.
- *Breast Pumping Breaks:* Awaiting the Governor's signature is a bill requiring employers of 25 employees or more to provide unpaid rest periods for employees to express milk where undue hardship would not result. It also requires that you make a reasonable effort to provide a private location.
- *Medical Marijuana:* The Senate approved legislation allowing employers to enforce their drug and alcohol policies even if a worker possesses a medical marijuana card. This bill has yet to receive approval from the House.
- *Family Leave:* There are various bills pending before the legislature regarding the Oregon Family Leave Act. One bill would expand purposes for which an employee on OFLA leave could use accrued paid sick leave. Another bill would create a wage replacement program for employees taking family or medical leave under OFLA. The last piece of legislation would expand the "family member" definition to include grandparents or grandchildren for purposes of OFLA.
- *Non-Competition Agreements:* Pending legislation in the Oregon Senate and House would drastically alter the enforcement of non-competition agreements. One piece of legislation would prohibit employers from enforcing such agreements unless the employee quits or is terminated for misconduct (following the same high standard as applied in unemployment claims); another would require employers to present the terms of the non-competition agreements to prospective employees at the time of the "initial offer" of employment.

WASHINGTON

Disability Discrimination Law Amended

The Washington legislature recently revised its Law Against Discrimination to expand the definition

of "disability." The new law now requires employers to treat nearly all diagnosable medical conditions as a disability whether or not they impact a major life activity. Disability has been redefined as a sensory, mental or physical impairment that 1) is medically cognizable or diagnosable; 2) exists as a record or history; or 3) is perceived to exist whether or not it exists in fact.

Unlike federal law, the revised statute also makes clear that the decision about whether an employee has a disability needs to be made *without regard to any mitigating measures*, such as medications, prosthetics, assistive devices, or even eyeglasses. In short, the new definition is more extensive than almost any similar law in the country, and will cover many more medical conditions than before.

This new law makes it more important that you grant reasonable accommodations for those employees with medical conditions. Moreover, it will likely lead to an increase of both accommodation requests and subsequent litigation when an accommodation is denied. Employers should be careful to keep the new law in mind when evaluating an employee's medical condition.

Other New Washington Laws of Note

- *Credit Reports*: Employers are now prohibited from using credit reports for employment purposes unless the information is substantially related to the job in question or required by law. This bill was signed into law by Governor Christine Gregoire on April 18, 2007. The new law goes even further than the federal Fair Credit Reporting Act by not only restricting the manner of collection but ultimately the usage of credit information.
- *Paid Family Leave*: Employers with 25 or more employees are now required to provide up to five weeks' paid family leave "because of the birth of a child of the employee and in order to care for the child," or "because of the placement of a child with the employee for adoption." The new law takes effect October 1, 2009. No state agency has yet been designated to establish and administer the family leave insurance program.

For more information about any of the laws discussed in this Legal Alert, contact any attorney in the Portland office of Fisher Phillips.

This Legal Alert is aimed at providing educational information about particular bills and laws. It is not intended to be, and should not be construed as, legal advice for any specific fact situation.