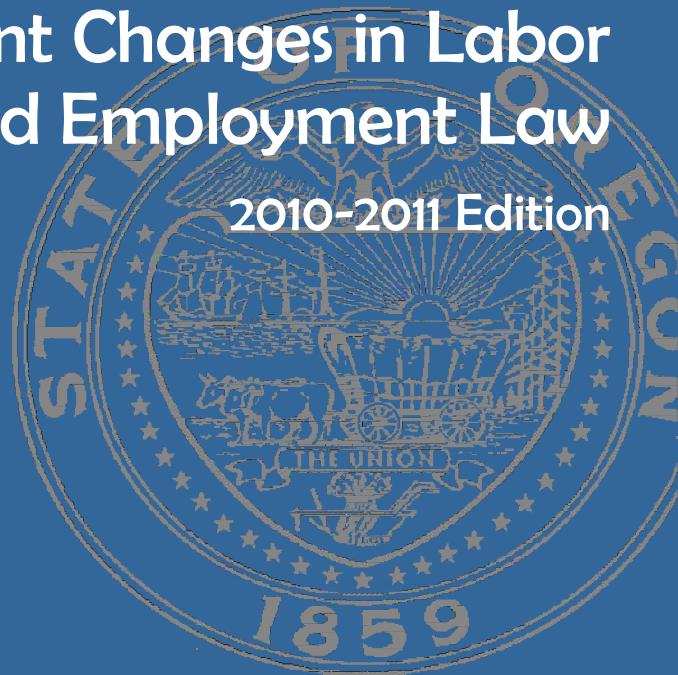


Bureau of Labor
and Industries



Recent Changes in Labor and Employment Law

2010-2011 Edition



Oregon Bureau of Labor and Industries
Technical Assistance for Employers Program

Technical Assistance for Employers Program
Recent Changes to Oregon Labor and Employment Law
A Handbook For Oregon Employers



2010-2011 Edition
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Oregon Bureau of Labor and Industries
Technical Assistance for Employers Program

Brad Avakian
Commissioner
Bureau of Labor and Industries

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Commissioner Brad Avakian

Bureau of Labor and Industries

Dear Supporter of Technical Assistance:

Welcome to the Bureau of Labor and Industries' (BOLI) new *Recent Changes in Labor and Employment Law, 2010-2011* publication. Thank you for investing in this handy manual for human resources professionals, attorneys, managers and employers at all levels.



BOLI is committed to helping Oregon's businesses and employers stay strong and successful. Since employment laws change frequently, we want to ensure employers stay up to date on new and amended state and federal laws as well as the administrative rules enforced by BOLI and our federal counterparts. Our goal through the Technical Assistance for Employers (TA) Program generally, and this book in particular, is to help employers and businesses stay in compliance with the law by following new developments—as well as being able to separate out the rumor and confusion that can be created by bills that are introduced but not enacted by the legislature.

Throughout the year, TA provides a variety of services to support Oregon employers. These services are funded almost entirely through the sales of publications like this one and attendance at public seminars on various employment law topics. Customized, on-site seminars for employers are also an important part of TA's work. Through your support, our TA program continues to answer more than 20,000 employer questions via phone and email each year, conduct more than 150 public and private seminars annually, and host an intensive two-day employment law conference each December.

I hope you find this book to be a helpful tool for understanding and complying with state and federal employment laws. Any feedback you may have should be directed to TA, and be sure to visit <http://www.oregon.gov/boli/ta> to learn more about the resources and services that TA has to offer.

Please do not hesitate to contact our offices if you have questions or thoughts to share.

Sincerely,

A handwritten signature in blue ink that reads "B. Avakian".

Brad Avakian, Commissioner
Oregon Bureau of Labor and Industries

To Our Readers:

This book was prepared as a general summary and teaching guide. It is not intended as legal advice. Those seeking legal advice should contact an attorney.

All the statutes and regulations referred to in this handbook are easily accessible on the internet. To find copies of recent legislation, please visit www.leg.state.or.us.

Proceeds from the sale of this handbook support the Technical Assistance for Employers Program, BOLI's dedicated education and employer resource effort. This program is sustained by revenues earned through the sales of publications like this and attendance fees for public and private seminars for employers.

OREGON BUREAU OF LABOR AND INDUSTRIES

**Civil Rights
Division**

**Wage & Hour
Division**

**Apprenticeship &
Training Division**

Technical Assistance For Employers Program

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Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Newly Enacted Legislation

BOLI's Technical Assistance for Employers Program provides educational seminars and other services to Oregon employers to help them comply with state and federal laws. When employers have up-to-date information about changes in the law, they may avoid unnecessary complaints, benefiting both employers and employees.

This list highlights changes made to Oregon labor and employment laws by the 76th Legislative Assembly. Wherever possible, effective dates have been included. Bills with an emergency clause will become effective the day they are signed by the Governor and are listed here as "effective upon enrollment." In the coming months, TA will be offering guidance on its website (www.oregon.gov/boli/ta) and, as always, our expert staff will be available to answer questions via telephone (971-673-0824).

Bill	Description
HB 2034	<p>Amends state apprenticeship statutes to maintain required conformance with revised regulations adopted by the USDOL, Employment and Training Administration. The new regulations update labor standards, policies and procedures for the registration, cancellation and deregistration of apprenticeship programs, apprenticeship agreements, and administration of the National Apprenticeship System.</p> <p>i Passed House 58-1; passed Senate 30-0</p> <p>i Effective May 27, 2011</p>
HB 2036	<p>Makes five technical corrections to civil rights law: 1) Corrects references in ORS 659A.106 that relate to employment to refer only to employment-related disability statutes (ORS 659A.112 to 659A.139); 2) Allows BOLI to enforce law providing protected leave to attend a criminal proceeding (ORS 659A.194 (2)); 3) Changes "socializing" back to "socialization" in ORS 659A.104 (2); 4) Deletes unnecessary or conflicting provisions in ORS 659A.303 and 659A.855; and 5) Clarifies that an employer may consider the credit history of applicants for public safety officer employment.</p> <p>i Passed House 58-0; passed Senate 29-0</p> <p>i Effective June 1, 2011</p>

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Newly Enacted Legislation

Bill	Description
HB 2039	<p>Subjects employer that issues dishonored check for payment of wages to statutory damages equal to those in ORS 30.701 and limited to the greater of \$100 or triple the amount for which the check is drawn (and capped at check amount + \$500). Damages are payable to the employee, if awarded by a BOLI administrative proceeding.</p> <p> <i>i Passed House 58-0; passed Senate 28-2</i> <i>i Effective January 1, 2012</i> </p>
HB 2040	<p>Makes four technical changes to wage and hour laws that: 1) maintain conformity with the unclaimed property act; 2) allow for the electronic provision of required posters; 3) require that wage demand notices include amount being claimed; and 4) update outdated terms related to manufacturing personnel.</p> <p> <i>i Passed House 58-0; passed Senate 29-0</i> <i>i Effective January 1, 2012</i> </p>
HB 2091	<p>Authorizes Director of Department of Consumer and Business Services (DCBS) to determine languages other than English and Spanish in which certain safety rights information is made available to agricultural employers for required dissemination to employees. (Existing statute specifies Russian, Thai, Japanese, Chinese, Laotian, Vietnamese, Korean and Cambodian as well as English and Spanish.)</p> <p> <i>i Passed House 45-10; passed Senate 26-0</i> <i>i Effective January 1, 2012</i> </p>
HB 2117	<p>Corrects references to deleted provision relating to schools that offer certain religious degrees that, on specified date, had obtained religious exemption adopted by rule by the Oregon Student Assistance Commission.</p> <p> <i>i Passed House 58-0; passed Senate 29-0</i> <i>i Effective January 1, 2012</i> </p>
HB 2240	<p>Repeals sunset on provisions permitting employee who serves food or beverages, receives tips and reports tips to employer, to waive meal period, and prohibiting employer from coercing employee into waiving meal periods.</p> <p> <i>i Passed House 60-0; passed Senate 27-2</i> <i>i Effective January 1, 2012</i> </p>
HB 2241	<p>Expands definition of term “uniformed service” for purpose of employment protections for members of uniformed service to match federal definition.</p> <p> <i>i Passed House 60-0; passed Senate 29-0</i> <i>i Effective April 14, 2011</i> </p>

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Newly Enacted Legislation

Bill	Description
HB 2270	<p>Directs Oregon Business Development Department to explore feasibility of establishing Business Ombudsman position and related website.</p> <p>i Passed House 46-12; passed Senate 20-8</p> <p>i Effective January 1, 2012</p>
HB 2335	<p>Clarifies that requirement that federal funds received by Department of Transportation to be used for increasing diversity in highway construction workforce applies to federal funds received each biennium.</p> <p>i Passed House 55-2; passed Senate 25-5</p> <p>i Effective January 1, 2012</p>
HB 2347	<p>Excludes officiating services at amateur sporting events from definition of “employment” for purposes of unemployment insurance taxation.</p> <p>i Passed House 60-0; passed Senate 26-0</p> <p>i Effective January 1, 2012</p>
HB 2353	<p>Clarifies requirements for obtaining services from Oregon Career Readiness Certification Program.</p> <p>i Passed House 60-0; passed Senate 30-0</p> <p>i Effective May 27, 2011</p>
HB 2403	<p>Directs certain state agencies to partner with Oregon Military Department to provide reintegration services for veterans.</p> <p>i Passed House 59-0; passed Senate 29-0</p> <p>i Effective April 14, 2011</p>
HB 2470	<p>Exempts meetings of Interagency Compliance Network and of member agencies for Interagency Compliance Network purposes from public meetings law.</p> <p>i Passed House 49-10; passed Senate 26-4</p> <p>i Effective June 9, 2011</p>
HB 2828	<p>Creates unlawful employment practice if employer who employs 10 or more persons ceases to provide health, disability, life or other insurance during period employee is serving or is scheduled to serve as juror and employee notified employer of election to have coverage continue.</p> <p>i Passed House 60-0; passed Senate 30-0</p> <p>i Effective January 1, 2012</p>
HB 3030	<p>Exempts certain individuals providing volunteer golf course marshal services from minimum wage standards.</p> <p>i Passed House 59-1; passed Senate 26-0</p> <p>i Effective January 1, 2012</p>

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Newly Enacted Legislation

Bill	Description
HB 3034	Provides that judge or clerk of court may defer jury service for person more than once only for good cause. Provides that employer may not require that employee use vacation leave, sick leave or annual leave for time spent by employee in responding to summons for jury duty and that employer must allow employee to take leave without pay for time spent by employee in responding to summons for jury duty. i Passed House 56-0; passed Senate 26-0 i Effective January 1, 2012
HB 3207	Requires public employer to interview each veteran who applies for civil service position or eligibility list and who has obtained through military education or experience skills that substantially relate to civil service position. i Passed House 55-2; passed Senate 30-0 i Effective January 1, 2012
HB 3362	Creates \$2 million grant program within the Department of Education to restore Career and Technical Education in middle and high schools. i Passed House 58-0; passed Senate 29-0 i Effective upon enrollment
HB 3450	Reduces to 72 hours minimum time before first day of employment that employer is required to notify employee in written employment offer that arbitration agreement is required as condition of employment. i Passed House 59-0; passed Senate 29-1 i Effective January 1, 2012
HB 3482	Requires certain employers to allow eligible employees to take unpaid leave to address issues arising from criminal harassment. i Passed House 45-15; passed Senate 28-0 i Effective upon enrollment
SB 72	Clarifies definition of "disabled veteran" for purposes of statutes relating to veterans' preferences in public employment. Passed House 58-0; passed Senate 29-0 Effective May 16, 2011
SB 110	Allows Employment Department to notify agent of employing unit of unemployment insurance benefits claim or denial of claim. i Passed House 58-0; passed Senate 29-0 i Effective May 5, 2011

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Newly Enacted Legislation

Bill	Description
SB 175	<p>Creates Oregon Employer Workforce Training Program and Oregon Youth Employment Program in Department of Community Colleges and Workforce Development.</p> <p>i Passed House 52-3; passed Senate 30-0</p> <p>i Effective January 1, 2012</p>
SB 178	<p>Removes requirement for Commissioner of Bureau of Labor and Industries to compare state and federal prevailing rates of wage.</p> <p>i Passed House 56-3; passed Senate 28-2</p> <p>i Effective June 7, 2011</p>
SB 241	<p>Requires state agencies to ask if customer or client is a veteran and provide information from Department of Veterans' Affairs and reintegration team within Oregon Military Department to veterans.</p> <p>i Passed House 57-0; passed Senate 26-0</p> <p>i Effective January, 1 2012</p>
SB 277	<p>Clarifies that veteran or disabled veteran who applies for vacant civil service position or who seeks promotion to civil service position with higher maximum salary rate is entitled to veterans' preference.</p> <p>i Passed House 53-0; passed Senate 30-0</p> <p>i Effective May, 19 2011</p>
SB 637	<p>Provides for state "on" indicator for any week when rate of insured unemployment is at least 6.5 percent and average rate of total unemployment in Oregon for most recent three-month period is at least 110 percent of average for any corresponding three-month period ending in three preceding years.</p> <p>i Passed House 57-0; passed Senate 30-0</p> <p>i Effective March 24, 2011</p>
SB 638	<p>Provides for payment of Oregon emergency benefits to qualifying individuals during emergency benefit period.</p> <p>i Passed House 49-9; passed Senate 26-4</p> <p>i Effective March 24, 2011</p>
SB 725	<p>Authorizes Director of the Employment Department to waive recovery of benefits paid due to nonclaimant error if director finds recovery of benefits would be against equity and good conscience.</p> <p>i Passed House 34-24; passed Senate 30-0</p> <p>i Effective June 23, 2011</p>

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Newly Enacted Legislation

Bill	Description
SB 898	<p>Allows Oregon Liquor Control Commission to request proof that person performing work at OLCC-licensed premises meets applicable minimum age requirements. Allows OLCC to order person to immediately cease activity if proof of age is not supplied.</p> <p> <i>i Passed Senate 28-0; passed House 59-0</i> <i>i Effective January 1, 2012</i> </p>
SJM 17	<p>Urges Wage and Hour Division of United States Department of Labor to lessen restrictions on youth employment in forestry-related jobs.</p> <p> <i>i Passed House 53-0; passed Senate 30-0</i> <i>i Filed with the Secretary of State May 13, 2011</i> </p>

2010 Legislative Summary: Newly Enacted Legislation

Bill	Description
HB 1045	<p>Limits use of credit history for employment purposes to certain circumstances.</p> <p> <i>i Passed House 33-26; passed Senate 17-13</i> <i>i Effective July 1, 2010</i> </p>

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Unsuccessful Legislation

Bill	Description
HB 2033	Establishes Career and Technical Education Revitalization Grant Program for purpose of awarding grants to school districts to provide career and technical education. <i>Died in House Education Committee</i>
HB 2035	Standardizes time limitations for filing civil actions for unlawful discrimination. <i>Died in House Judiciary Committee</i>
HB 2037	Requires Commissioner of Bureau of Labor and Industries to award costs and reasonable attorney fees when complainant prevails for cease and desist order. <i>Died in House Judiciary Committee</i>
HB 2038	Conforms Oregon law related to expression of milk in workplace to federal law. <i>Died in House Human Services Committee</i>
HB 2041	Authorizes Commissioner of Bureau of Labor and Industries to issue temporary cease and desist order under certain circumstances. <i>Died in House Business & Labor Committee</i>
HB 2230	Requires employer to offer first payment of wages to employee within 14 days of first day of employment. <i>Died in House Business & Labor Committee</i>
HB 2243	Allows Attorney General or Commissioner of the Bureau of Labor and Industries to file civil action in relation to discrimination against person for service in uniformed service. <i>Died in House Veterans' Affairs Committee</i>
HB 2258	Requires Secretary of State to establish Initiative and Referendum Hotline for reports of election law or rule violations. Specifies that chief petitioners, contractors and subcontractors must submit accounts to Secretary of State for inspection every six months or upon ceasing to obtain more signatures on petition or prospective petition, whichever is sooner. <i>Died in Senate Rules Committee</i>
HB 2313	Instructs Bureau of Labor and Industries to study development of definition of "independent contractor" by rule for purpose of determination of independent contractor status. <i>Died in House Business & Labor Committee</i>
HB 2355	Establishes Short-Term Disability Insurance Program. <i>Died in House Business & Labor Committee</i>

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Unsuccessful Legislation

Bill	Description
HB 2356	Creates Commercial Driver Development Fund and continuously appropriates moneys in fund to Department of Community Colleges and Workforce Development to finance loans to students and to pay administrative expenses of Trucking Solutions Consortium. <i>Died in Joint Committee on Ways & Means</i>
HB 2358	Prohibits contracting agency from awarding contract for public improvement or public works unless iron, steel, wood products and manufactured goods, including equipment, used in public improvement or public works are produced within United States. <i>Died in House Gen. Gov. & Consumer Protection Committee</i>
HB 2360	Provides that employer who discloses information about current or former employee's job performance to prospective employer of employee is presumed to be acting in good faith and immune from civil liability <i>unless presumption is rebutted by clear and convincing evidence.</i> (Existing law sets <i>preponderance of evidence</i> standard.) <i>Died in Senate Rules Committee</i>
HB 2408	Clarifies that veteran or disabled veteran who applies for vacant civil service position or who seeks promotion to civil service position with higher maximum salary rate is entitled to veterans' preference. <i>Died in House Veterans' Affairs Committee</i>
HB 2446	Modifies certain definitions and exceptions applicable to prohibition against employer taking adverse employment action against employee who declines to attend meeting or participate in communication concerning employer's opinion about religious or political matters. <i>Died in House Business & Labor Committee</i>
HB 2469	Establishes review processes for certain employer determinations made by Department of Revenue and Employment Department based on finding that one or more workers are employees and not independent contractors. <i>Died in House Business & Labor Committee</i>
HB 2515	Allows person to teach courses in career and technical education without being licensed by or registered with Teacher Standards and Practices Commission if certain requirements are met. <i>Died in House Education Committee</i>
HB 2585	Applies provisions of Public Contracting Code to legislative and judicial departments and to Oregon University System. <i>Died in House Gen. Gov. & Consumer Protection Committee</i>
HB 2586	Classifies exemption from ad valorem property taxation as funds of public agency for purpose of requiring payment of prevailing rate of wage. <i>Died in House Business & Labor Committee</i>

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Unsuccessful Legislation

Bill	Description
HB 2604	Permits worker with claim to unpaid wages and fringe benefits under prevailing wage law to commence and maintain independent action to recover wages and fringe benefits in circuit court of state and to obtain award of attorney fees and costs if worker prevails in action. <i>Died in House Business & Labor Committee</i>
HB 2619	Permits contracting agency to consider bidder's record of relations with subcontractors in evaluating bidder's responsibility for purposes of awarding public contract. <i>Died in House Gen. Gov. & Consumer Protection Committee</i>
HB 2623	Requires contracting agency to base determination of contractor's responsibility for public improvement contract on contractor demonstrating that contractor has provided health insurance to contractor's employees for period of two years before contractor submitted bid for public improvement contract. <i>Died in House Gen. Gov. & Consumer Protection Committee</i>
HB 2624	Modifies definition of "public works." Classifies exemption from ad valorem property taxation as funds of public agency for purpose of requiring payment of prevailing wage. <i>Died in House Revenue Committee</i>
HB 2628	Defines "funds of a public agency," for purposes of applying prevailing rate of wage to projects for public works, to include tax credits or tax abatements that contractor engaged in project for public works receives from state in connection with project. <i>Died in House Business & Labor Committee</i>
HB 2629	Changes definition of "public works" to include construction, reconstruction, painting or major renovation of road, highway, building, structure or improvement that occurs, with or without using funds of a public agency, on land that Oregon University System or institution of Oregon University System owns or will use, occupy and ultimately own under lease-purchase agreement. <i>Died in House Business & Labor Committee</i>
HB 2656	Suspends adjustment to Oregon minimum wage rate if Oregon unemployment rate exceeds national unemployment rate. <i>Died in House Business & Labor Committee</i>
HB 2732	Requires student to complete and submit application for apprenticeship program or post-secondary education institution or for enlistment in branch of Armed Forces or National Guard, or to attend orientation related to apprenticeship or training opportunity, in order to receive high school diploma. <i>Died in Senate Education & Workforce Development Committee</i>

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Unsuccessful Legislation

Bill	Description
HB 2771	Repeals statutes related to mandatory workplace communication of employer's opinions about religious and political matters. <i>Died in House Business & Labor Committee</i>
HB 2833	Requires day labor service agencies to register with Commissioner of Bureau of Labor and Industries. <i>Died in House Business & Labor Committee</i>
HB 2834	Standardizes definitions of "employ," "employee," "employer" and "wages" for purposes of statutes relating to hours, wages, wage claims, employment conditions, employment agencies, farm labor contractors and construction contractors. <i>Died in House Business & Labor Committee</i>
HB 2835	Requires construction labor contractors to be licensed by Commissioner of Bureau of Labor and Industries. <i>Died in House Business & Labor Committee</i>
HB 2836	Requires Construction Contractors Board to investigate and process complaints for unpaid wages if certain conditions met. <i>Died in House Business & Labor Committee</i>
HB 2837	Establishes right of employee for civil action based on unpaid wages. <i>Died in House Judiciary Committee</i>
HB 2844	Makes violation by employer of statute providing for leave of absence by employee who is search and rescue volunteer an unlawful employment practice. <i>Died in House Business & Labor Committee</i>
HB 2846	Prohibits contracting agency from entering into public contract for services with contractor that uses contact center located outside United States to perform all or part of services that are basis of public contract. <i>Died in House Gen. Gov. & Consumer Protection Committee</i>
HB 2850	Includes siblings as family members for purposes of family leave. <i>Died in House Human Services Committee</i>
HB 2861	Prohibits discrimination against members of certain protected classes in payment of wages for work of comparable character that requires comparable skills to perform. <i>Died in House Business & Labor Committee</i>
HB 2862	Extends certain employee protections to persons working for educational purposes and persons performing services without compensation. <i>Died in House Business & Labor Committee</i>

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Unsuccessful Legislation

Bill	Description
HB 2863	Expands definition of “place of public accommodation” to include places owned or maintained by public body and services provided by public body. <i>Died in House Judiciary Committee</i>
HB 2905	Requires granting family leave to employee for academic activities of employee’s child in manner provided for other family leave. <i>Died in House Business & Labor Committee</i>
HB 2923	Establishes State Apprenticeship and Training Education Fund and continuously appropriates moneys in fund to State Apprenticeship and Training Council for specified purposes. <i>Died in House Business & Labor Committee</i>
HB 2933	Declares agreements between employers and customers that prohibit utilizing services of former employee of employer by customer unless customer pays employer penalty or moneys void and unenforceable if prohibition exceeds two years. <i>Died in House Business & Labor Committee</i>
HB 2942	Authorizes issuance of protective order for certain persons who are victims of conduct constituting sex crime or unwanted sexual contact. <i>Died in Joint Ways & Means Committee</i>
HB 2956	Appropriates moneys from General Fund to Oregon Department of Administrative Services to be disbursed to Independent Development Enterprise Alliance. Directs alliance to develop and execute plan to support community-based programs that assist underserved individuals in removing legal impediments to employment. <i>Died in House Transportation and Economic Development Committee</i>
HB 2958	Requires Department of Consumer and Business Services to compile and submit report to Legislative Assembly that identifies funds disbursed or distributed in this state under American Recovery and Reinvestment Act of 2009. <i>Died in House Rules Committee</i>
HB 2966	Prohibits contracting agency from awarding public contract for services to bidder or proposer that performs services outside United States. <i>Died in House Business & Labor Committee</i>
HB 3012	Includes Oregon Liquor Control Commission as a member of the Interagency Compliance Network. <i>Died in House Gen. Gov. & Consumer Protection Committee</i>
HB 3014	Includes electronic cigarettes in application of certain statutes regulating cigarettes and smoking. <i>Died in House Human Services Committee</i>

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Unsuccessful Legislation

Bill	Description
HB 3018	Prohibits contracting agency from awarding public contract to prospective contractor that discriminates in providing employee benefits for employees that have domestic partners and employees that have spouses. <i>Died in House Business & Labor Committee</i>
HB 3122	Establishes that employee who returns to work after taking family leave is entitled to be restored to available equivalent position instead of being restored to same position of employment held by employee before taking leave. <i>Died in House Business & Labor Committee</i>
HB 3134	Limits use of personality tests when education employer is making employment decisions related to person who will provide educational services. Allows person who took personality test to review results, provide mitigating evidence and retake test. <i>Died in House Education Committee</i>
HB 3159	Permits contracting agency that uses public funds to procure goods or services under Public Contracting Code to give preference to bidder or proposer that is headquartered or owned locally, will obtain equipment, material and supplies locally or will employ workers locally. <i>Died in House Business & Labor Committee</i>
HB 3161	Establishes that owner or operator of business where live entertainment is provided who requires performers to remit portion of tips received while performing is employer of performer. <i>Died in House Business & Labor Committee</i>
HB 3254	Requires bidder or proposer for public contract to demonstrate that bidder or proposer complied in previous contracts with applicable state and federal health and safety standards and applicable building codes. <i>Died in House Business & Labor Committee</i>
HB 3266	Removes persons performing construction, electrical or plumbing work for more than two employers at same time from coverage of employee exemption in construction contractor, electrical and plumbing laws. <i>Died in House Business & Labor Committee</i>
HB 3279	Authorizes employers to pay employees under 18 years of age an hourly wage consistent with the federal minimum wage for period of 90 days from date employee begins work. <i>Died in House Business & Labor Committee</i>
HB 3302	Requires sergeants employed by Oregon State Police to be paid overtime in accordance with overtime provisions of federal Fair Labor Standards Act. <i>Died in House Business & Labor Committee</i>

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Unsuccessful Legislation

Bill	Description
HB 3318	Clarifies meaning of “firefighter” for purposes of maximum working hours and overtime wages paid to employees in certain occupations. <i>Died in House Business & Labor Committee</i>
HB 3349	Prohibits contracting agency from awarding contract for public improvement or public works unless iron, steel, wood products and manufactured goods, including equipment, used in public improvement or public works are produced within United States. <i>Died in House Business & Labor Committee</i>
HB 3382	Requires long term care facilities and residential facilities to provide same-gender care if required by physician order. <i>Died in House Human Services Committee</i>
HB 3401	Establishes Work and Family Life Task Force. <i>Died in House Business & Labor Committee</i>
HB 3402	Requires each school district, education service district and public charter school to adopt policy related to employees wearing religious clothing while performing official duties. <i>Died in House Education Committee</i>
HB 3412	Prohibits contracting agency from using alternative contracting method to award public improvement contract in which single contractor provides services as construction manager and general contractor unless value of contract is \$5 million or more. <i>Died in House Gen. Gov. & Consumer Protection Committee</i>
HB 3415	Requires contracting agency to pay fee to Secretary of State in amount of one-tenth of one percent of contract price for public improvement contract. <i>Died in Joint Committee on Ways & Means</i>
HB 3497	Provides that state laws related to prevailing rates of wage are not operative on and after January 1, 2012, and until January 1, 2016. <i>Died in House Business & Labor Committee</i>
HB 3526	Codifies Staley settlement agreement pertaining to provision of developmental disability services to eligible adults. <i>Died in House Human Services Committee</i>
HB 3554	Eliminates inclusion of moneys received for purpose of paying for costs incurred in providing career and technical education from calculations made to distribute certain state funds to school districts, education service districts, community college districts and community college service districts. <i>Died in House Revenue Committee</i>

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Unsuccessful Legislation

Bill	Description
HB 3556	Permits assignee of person that submitted bid or proposal for, but did not obtain, certain public contracts to commence action against successful bidder or proposer if assignee can prove certain violations of Public Contracting Code by preponderance of evidence. <i>Died in House Business & Labor Committee</i>
HB 3578	Establishes Task Force on Oversight of Large Public Improvement Projects and specifies membership. <i>Died in House Gen. Gov. & Consumer Protection Committee</i>
HB 3608	Establishes State Apprenticeship Education and Training Fund and continuously appropriates moneys in fund to State Apprenticeship and Training Council for specified purposes. <i>Died in House Rules Committee</i>
HB 3630	Limits provisions of employment agreement that requires employee to assign or offer to assign rights in invention to employer. Makes certain provisions of employment agreements related to assignment of employee's rights in invention void and unenforceable, when no equipment, supplies, facilities or trade secret information of the employer was used and when invention was developed entirely on the employee's own time, unless the invention relates directly to the business of the employer; relates to the actual research or development of the employer; or results from any work performed by the employee for the employer. <i>Died in House Rules Committee</i>
HB 3635	Amends overtime exemption for certain persons employed on farms who are exempt from payment of overtime wages. <i>Died in House Rules Committee</i>
HB 3647	Expands definition of "place of public accommodation" to include places owned or maintained by public body and services provided by public body. <i>Died in House Rules Committee</i>
HB 3648	Extends certain employee protections to persons performing work for educational purposes. <i>Died in House Rules Committee</i>
HB 3668	Requires Commissioner of Bureau of Labor and Industries to inform Director of Veterans' Affairs of receipt of written information from or filing of complaint by member or veteran of uniformed service under certain circumstances. <i>Died in Senate Veterans' & Military Affairs Committee</i>
HJM 11	Urges Congress to allow apprenticeship training and on-the-job training as a benefit in Post 9/11 GI Bill. <i>Died in House Veterans' Affairs Committee</i>

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Unsuccessful Legislation

Bill	Description
SB 2	Requires employer to provide paid or unpaid time off for Veterans Day to employees who are veterans. <i>Died in House Veterans' Affairs Committee</i>
SB 44	Renames "crime of intimidation" as "hate crime." Expands hate crime definition to include assault motivated by perception of victim's ethnicity, gender or disability (in addition to race, color, religion, national origin, or sexual orientation). Modifies authority of certain law enforcement officials to bring civil action based on commission of hate crime. <i>Died in Senate Judiciary Committee</i>
SB 159	Prohibits payment for signature gathering for initiative or referendum petition based on number of signatures obtained under wage and hour law. <i>Died in House Rules Committee</i>
SB 209	Amends ORS Chapter 442. Requires hospitals to annually report executive compensation of hospital administrator and to annually report financial relationships between hospital and members of board of directors of hospital. <i>Died in the Senate Rules Committee</i>
SB 237	Extends whistleblower protection for hospital nursing staff to additional hospital staff including not only nursing staff but also individuals employed by or contracting with a hospital to provide health services, and licensed or certified health professionals employed by or affiliated with a hospital. <i>Died in House Business and Labor Committee</i>
SB 267	Requires chief petitioner of initiative or referendum petition to disclose system of bonuses, incentives or payment or minimum expectation of signatures to be obtained. <i>Died in the Senate Rules Committee</i>
SB 497	Modifies laws regarding recoverable attorney fees and costs in certain antitrust and wage claim proceedings brought by the Attorney General and in general wage claims. <i>Died in the Senate Judiciary Committee</i>
SB 506	Allows eligible employees to take family leave to deal with the death of family member. <i>Died in House Business & Labor Committee</i>
SB 515	Prohibits city or local service districts from entering into employment contracts for employment of principal administrators that provide for term of employment that is longer than four years or for automatic renewal of contract. <i>Died in Senate Gen. Gov., Consumer & Small Business Protection Committee</i>

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Unsuccessful Legislation

Bill	Description
SB 586	Requires public agency to include amount in contract for construction, reconstruction or major renovation of public building equivalent to 1.5 percent of total contract price for inclusion of appropriate green energy technology. <i>Died in House Gen. Gov. & Consumer Protection Committee</i>
SB 593	Authorizes administration of polygraph examination to applicants for positions as police officer or reserve officer. <i>Died in Senate Judiciary Committee</i>
SB 605	Includes siblings as family members for purposes of family leave. <i>Died in Senate Business, Transportation & Eco. Dev. Committee</i>
SB 610	Requires day labor service agencies to register with Commissioner of Bureau of Labor and Industries. <i>Died in Senate Gen. Gov., Consumer & Small Business Protection Committee</i>
SB 611	Standardizes definitions of "employ," "employee," "employer" and "wages" for purposes of statutes relating to hours, wages, wage claims, employment conditions, employment agencies, farm labor contractors and construction contractors. <i>Died in Senate Gen. Gov., Consumer & Small Business Protection Committee</i>
SB 612	Requires construction labor contractors to be licensed by Commissioner of Bureau of Labor and Industries. <i>Died in House Business & Labor Committee</i>
SB 624	Establishes right of employee for civil action based on unpaid wages. <i>Died in Senate Gen. Gov., Consumer & Small Business Protection Committee</i>
SB 645	Allows employer to adopt comprehensive drug-free workplace program, including drug and alcohol testing policies. <i>Died in Senate Judiciary Committee</i>
SB 646	Expands ability of employer to prohibit use of medical marijuana in the workplace. <i>Died in Senate Judiciary Committee</i>
SB 727	Changes process for Construction Contractors Board resolution of certain complaints for unpaid wages. <i>Died in Joint Committee on Ways & Means</i>
SB 750	Authorizes imposition of civil penalty for certain unlawful deductions from compensation paid to employees. <i>Died in Senate Gen. Gov., Consumer & Small Business Protection Committee</i>

Oregon Legislative Summary

Recent Changes in State Labor and Employment Law

2011 Legislative Summary: Unsuccessful Legislation

Bill	Description
SB 770	Requires contracting agency in certain circumstances to give preference to Oregon residents that bid on public contracts. <i>Died in Senate Business, Transportation & Eco. Dev. Committee</i>
SB 772	Requires contracting agency to pay fee to Secretary of State in amount of one-tenth of one percent of contract price for public improvement contracts. <i>Died in Joint Committee on Ways & Means</i>
SB 825	Establishes Work and Family Life Task Force. <i>Died in Senate Gen. Gov., Consumer & Small Business Protection Committee</i>
SB 844	Requires bidder or proposer for public contract to make certain disclosures concerning minimum number of local workers and workers elsewhere in this state that bidder or proposer and bidder's or proposer's first-tier subcontractors plan to employ to perform work described in invitation to bid or request for proposals. <i>Died in Senate Business, Transportation & Eco. Dev. Committee</i>
SB 886	Modifies definition of "public works." Requires payment of prevailing rate of wage in connection with public works for which funds of public agency are used, including funds received in form of tax credit or abatement. <i>Died in Senate Business, Transportation & Eco. Dev. Committee</i>
SB 887	Includes certain types of apartment housing in definition of "residential construction" for purposes of determining whether prevailing rates of wage in public works contracts apply. <i>Died in Senate Business, Transportation & Eco. Dev. Committee</i>
SB 986	Requires contractor to include clauses in public improvement contract with first-tier subcontractors under which contractor provides first-tier subcontractors with forms first-tier subcontractors may use as an invoice or other method to claim payment due from contractor. <i>Died in Senate Gen. Gov., Consumer & Small Business Protection Committee</i>
SJR 14	Proposes amendment to Oregon Constitution to allow person serving as judge to be employed by Oregon National Guard for purpose of performing military service or by State Board of Higher Education or school board for purpose of teaching, if the employment does not prevent the person from serving as a judge. Refers proposed amendment to people for their approval or rejection at next regular general election. <i>Died in House Rules Committee</i>





Recent Changes to Civil Rights Law

The laws covered in the following section are regulated and enforced by BOLI's Civil Rights Division. The Civil Rights Division enforces laws granting individuals equal access to jobs, career schools, promotions, and a work environment free from discrimination and harassment.

These laws also ensure that workers' jobs are protected when they report worksite safety violations, use family leave or invoke the workers' compensation system. Civil rights laws also provide protection for those seeking housing or using public facilities such as retail establishments or transportation.

Website: <http://www.oregon.gov/boli/crd>



Civil Rights Law

2011 Oregon Legislature

HB 2036 – Technical Corrections to Civil Rights Law

HB 2036 was a technical fix bill for several unrelated issues in Oregon civil rights statutes. The bill addressed five inconsistencies found in ORS chapter 659A. The changes brought about by HB 2036 were technical fixes rather than substantive changes to the law to address the following:

ORS 659A.106 provides that ORS 659A.103 to 659A.145 apply only to employers of six or more persons and do not apply to the Oregon National Guard. Some of these statutes are not related to employment discrimination but rather public accommodations, state government services, transient lodging and real property transactions, which created confusion.

ORS 659A.109-659A.198 provide protected leave for employees to attend criminal proceedings. The statutes included a private right of action but did not also provide for BOLI enforcement, which was in conflict with ORS 659A.001(11).

Employment protections related to genetic testing are enforceable by BOLI and there is also a private right of action. However, ORS 659A.303, which prohibits employers from obtaining, seeking or using genetic information, unnecessarily referenced the civil remedies in 659A.885.

ORS 659A.885(3) and 183.745(7) were in conflict regarding whether or not certain civil penalties are to be imposed in the manner provided by ORS 183.745 and the Office of Administrative Hearings.

When the 2010 legislature passed SB 1045, which prohibited the use of credit histories for employment purposes, the clear intent was to provide an exemption for public safety officer applicants. However, the statute only referenced public safety officers and made no direct mention of applicants.

Impact of HB 2036: HB 2036 addressed the five issues mentioned previously as follows:

Amended ORS 659A.106 so that it now applies only to the employment-related disability statutes of ORS 659A.112-139.

(continues)

Civil Rights Law

2011 Oregon Legislature

HB 2036 – Technical Corrections to Civil Rights Law (cont.)

Deleted ORS 659A.194(2) and in so doing, affirmed that BOLI has enforcement power against employers who do not allow protected leave for qualified employees to attend criminal proceedings.

Deleted ORS 659A.303(2) so that the section on employment protections related to genetic testing does not unnecessarily reference the civil remedies in 659A.885

Deleted ORS 659A.885(3). BOLI does not need to rely on the process of imposing certain civil penalties as provided in ORS 183.745.

Amended Section 2, chapter 2, of Oregon Laws 2010 to include public safety officer applicants in the exemption. The public safety officer exemption to the prohibited use of credit histories for employment purposes now extends to applicants for public safety officer jobs.

Effective Date: June 1, 2011

Civil Rights Law

2011 Oregon Legislature

HB 2241 - Uniformed Service Employment Protections

Employment protections for uniformed service men and women, originally passed by the 2009 legislature (HB 3256), protect these employees from employment discrimination based on their service obligations. These provisions apply to both public and private employers (ORS 659A.082-659A.086).

These protections make it an unlawful employment practice for an employer to discriminate during the initial employment decision, reemployment following a leave from employment taken to serve in uniformed service, retention in employment, promotion, or any other term, condition or privilege of employment, including but not limited to compensation. This statute is consistent with similar provisions of the federal Uniformed Services Employment and Reemployment Rights Act of 1994. The definitions of “uniformed service” in the two laws vary slightly and, prior to HB 2241, federal law (§ 4303(16)) had a more expansive definition.

In addition, ORS 408.290 provides state employees with two weeks of paid leave for active duty training, but does not also include paid leave for *initial* active duty training (like basic training). This appears to conflict with the employment protections for uniformed service members as it may have discriminated against newly enrolled military personnel who, prior to HB 2241, could not be compensated for their initial active duty training.

Impact of HB 2241: HB 2241 expanded the definition of “uniformed service” in ORS 659A.082(1)(b) to conform with the federal definition. Now, “uniformed service” includes “the Armed Forces of the United States, the Army National Guard, and the Air National Guard when engaged in active duty for training, inactive duty training or full-time National Guard duty, the commissioned corps of the United States Public Health Service and any other category of persons designated by the President of the United States in time of war or national emergency.”

HB 2241 also modified ORS 408.290 so that state employees receive two weeks of paid leave each year for *either* “initial active duty training” or “active duty training,” not just the active duty training.

Effective Date: April 14, 2011

Civil Rights Law

2011 Oregon Legislature

HB 2828 - Employee Jury Service and Continued Health Care

State law prevents employers from discharging or threatening to discharge, intimidating or coercing employees who are summoned for jury service. When an employee is called for jury service, there is no statutory requirement that an employer pay the employee's wages while the employee performs their jury service. Likewise, employers who provide health, disability, life or other insurance coverage to their employees have not had any previous obligation to continue these benefits when an employee's jury service takes the employee away from work for a prolonged period.

Impact of HB 2828: HB 2828 amended ORS 10.090 to make it an unlawful employment practice for employers of 10 or more employees to cease to provide health, disability, life or other insurance coverage for an employee when the employee serves or is scheduled to serve as a juror if the employee elects to have coverage continued while the employee serves or is scheduled to serve as a juror, and the employee provided notice of that decision to the employer. While an employer may not discontinue paying for benefits for the employee if the employee has elected for the benefits to continue, the employer *may* deduct from the employee's pay such amounts upon the employee's return to work until the amount the employer advanced toward the payments is paid, so long as the total amount deducted for insurance does not exceed 10 percent of the employee's gross pay each pay period.

If the employer pays any portion of the cost of providing insurance benefits with the intention of being repaid and the employee stops working for the employer before the total amount the employer advanced is repaid, the employer may deduct the remaining amounts from any amounts owed by the employer to the employee or may seek to recover those amounts by any other legal means.

An employee who alleges a violation of ORS 10.090 may bring a civil action under ORS 659A.885 or may file a complaint with BOLI's Civil Rights Division as provided in ORS 659A.820.

Effective Date: January 1, 2012

Civil Rights Laws 2011 Oregon Legislature

HB 3034 – Prohibits Employers from Requiring an Employee to Use Paid Leave for Jury Duty

Pursuant to ORS 10.055, a court may allow a person summoned to serve as a juror to defer jury services to any other term beginning within one year after the end of the term for which the person was summoned.

Under ORS 10.090, an employer may not discharge or threaten to discharge, intimidate, or coerce any employee due to their service or scheduled service as a juror.

Impact of HB 3034: HB 3034 amends ORS 10.090 to prohibit an employer from requiring an employee who has been summoned for jury service to use vacation leave, sick leave, or annual leave during the time of jury service. The employer must allow the summoned employee to take leave without pay for the time spent by the employee responding to a summons for jury duty.

HB 3034 also amends ORS 10.055 to specify that only one deferral of jury duty will be allowed except upon a finding of good cause by the court. A person requesting an additional deferral must provide a list of no fewer than ten dates within the six-month period following the date of the second request on which the person will be able to serve as a juror.

Effective Date: January 1, 2012

Civil Rights Law

2011 Oregon Legislature

HB 3207 - Required Interviews for Qualified Veterans

State law requires public employers to give preference to veterans or disabled veterans in hiring and promotion decisions related to civil service positions (ORS 408.230). The statute provides a framework for giving veterans and disabled veterans additional points in scoring during the hiring and promotion process, but the preference does not guarantee that a veteran will be hired, promoted or even interviewed for the position.

Impact of HB 3207: HB 3207 requires public employers to interview each veteran who applies for a civil service position or eligibility list *and* who has obtained, through military education or experience, skills that substantially relate to the civil service position. A public employer is not required to interview *every* veteran who applies for a particular civil service position, only those who have the “transferable skills” necessary for the position or are otherwise qualified.

A “transferable skill” means a skill that a veteran has obtained through military education or experience that substantially relates, directly or indirectly, to the civil service position for which the veteran is applying. Public employers are free to consult with the Oregon Military Department and Department of Veterans Affairs to determine whether certain military education or experience produces a transferable skill.

When a public employer uses “eligibility pools” to create a pool of qualified applicants before a position may become available, the provisions of HB 3207 do not apply. HB 3207 provides that a public employer is not required to comply with HB 3207 “if the employer conducts interviews only as part of the process of selecting a candidate for a civil service position from an eligibility list.” An “eligibility list” means a list of ranked eligible candidates for a civil service position who have become eligible for the position through a test or series of tests and who will be considered for the civil service position in ranked order.

An employee who alleges a violation of these new provisions may bring a civil action under ORS 659A.885 or may file a complaint with the BOLI’s Civil Rights Division as provided in ORS 659A.820.

Effective Date: January 1, 2012

Civil Rights Law

2011 Oregon Legislature

HB 3482 - Expansion of Crime Victims Leave Protections

Oregon law grants certain crime victims and immediate family members employment protections, including the right to protected leave from work to attend criminal proceedings and reasonable safety accommodations (ORS 659A.270-659A.290). Protected leave provisions in this law apply to an employer of six or more persons in Oregon for 20 or more weeks in the calendar year in which the employee takes leave or in the immediately preceding year. An employee must have worked an average of more than 25 hours per week for at least 180 days immediately before the leave begins. Reasonable accommodations provisions apply to all employers. Note: Protected leave could also be a reasonable safety accommodation.

The employment protections provided in 659A.270-659A.290 are specifically for victims of domestic violence, sexual assault or stalking. An employee is also covered if they are the parent or guardian of a minor child or dependent who is a victim of domestic violence, sexual assault or stalking. Denial of leave and/or failure to make reasonable accommodations is an unlawful employment practice and an employee may file a complaint with BOLI's Civil Rights Division.

Impact of HB 3482: HB 3482 requires a covered employer to also allow an eligible employee to take reasonable leave from employment if they are the victim of harassment, as defined in ORS 166.065, or if they are a parent or guardian of a minor child or dependent who is a victim of harassment, to address the harassment. HB 3482 also requires employers to make reasonable safety accommodations for victims of harassment.

Effective Date: (measure will become effective upon signature by the Governor)

Civil Rights Law

2011 Oregon Legislature

SB 72 - Amends definition of “Disabled” for Purposes of Veteran Hiring Preference Law

Public employers covered by the definitions in ORS 408.225 are required to apply preference points to qualified veterans in hiring for civil service positions. Current law defines a “disabled veteran” as, among other things, a person entitled to disability compensation from the United States Department of Veterans Affairs (USDVA).

Impact of SB 72: SB 72 revises the definition from a person “entitled to disability compensation” to a person “who has a disability rating from the United States Department of Veterans Affairs.” Under the USDVA rating schedule, a disabled veteran may have a disability rating identifying the person as disabled, but the rating may not be high enough to entitle the person to compensation. Under the federal system, a disabled veteran does not receive compensation until reaching a ten percent disability rating. SB 72 removes the compensation determination from the definition of “disabled veteran,” aligning the state definition with the federal rating determination.

Effective Date: May 16, 2011

Civil Rights Law

2011 Oregon Legislature

SB 277 - Clarifies Veterans' Hiring Preference and Extends Hiring Preference to all Promotions

Pursuant to ORS 408.230, public employers are required to give preference to veterans or disabled veterans in hiring and promotion decisions related to civil service positions. The statute provides a framework for giving veterans and disabled veterans additional points in scoring during the hiring and promotion process. The preference does not guarantee that a veteran will be hired or promoted.

In 2009, The Oregon Legislature amended ORS 408.230, clarifying the definition of civil service and removing a provision limiting the veteran preference to positions for which application was made within 15 years of discharge or release from service.

SB 277 was requested by the Oregon Department of Veterans Affairs to clarify the existing veterans preference law and to extend veterans preference requirements to all promotions with a higher maximum salary in civil service positions.

Impact of SB 277: SB 277 clarifies existing preference law and provides that veterans preference requirements apply to all hiring decisions and all promotion decisions with an increased maximum salary in civil service positions.

Effective Date: May 19, 2011

Civil Rights Law

2010 Oregon Legislature

SB 1045 (2010) - Limits Use of Credit Histories for Employment Purposes

In the past, some employers have used credit histories as a surrogate measure of trustworthiness and/or verification of application information. However, the information maintained by consumer reporting agencies is often said to contain inaccuracies and credit histories may not be an accurate indicator of trustworthiness. Additionally, the EEOC has filed charges against employers using credit histories for employment purposes when it can be shown to have a discriminatory impact on one of more of the protected classes.

Impact of SB 1045: SB 1045 prohibits the use of a credit history for employment purposes including hiring, discharge, promotion, and compensation. “Credit history” is defined as any communication of information by a consumer reporting agency that bears on a consumer’s creditworthiness, credit standing or credit capacity.

SB 1045 provides three exceptions to the law and allows the use of credit histories by: 1) financial institutions; 2) public safety offices; and 3) other employers if the credit history is “substantially job-related” and its use is disclosed to the applicant or employee.

Credit history information is substantially job-related by definition if: (1) an essential function of the job requires access to financial information not customarily required in a retail transaction other than a loan or extension of credit (i.e., beyond check information, credit card numbers or debit card numbers); or (2) the employer is required to obtain credit history information as a condition of bonding or insuring the employee (OAR 839-005-0060).

Employers should use the substantially job-related exception with care. For many positions, such as mechanics, cashiers, receptionists, housekeepers and wait-staff, a credit history is not going to be substantially job-related. On the other hand, if an essential job function of an employee requires that employee to obtain such information as financial institution account numbers and amounts and sources of income, the employer could make an argument that obtaining the applicant’s is, or employee’s credit history information, is “substantially job-related” and therefore permissible.

Effective Date: July 1, 2010

Civil Rights Law

Federal Law

Updated ADAAA Regulations - 29 C.F.R. § 1630 (2011) *Interpretation of “Disability” is to be Construed More Broadly than Before*

Background: In 2008, the federal ADA Amendments Act of 2008 (ADAAA) was enacted into law, which made significant changes to the definition of “disability” under the Americans with Disabilities Act (ADA). These changes mandated a broader interpretation of “disability” and effectively overturned several Supreme Court decisions which interpreted the term more narrowly. Congress sought to expand the definition to include epilepsy, diabetes, multiple sclerosis, major depression, bipolar disorder, and other impairments to provide an avenue for individuals affected by these and other conditions to bring claims under the ADA. Generally speaking, the ADAAA called for an interpretation in favor of broad coverage for individuals. These changes do not apply retroactively.

The ADAAA retained the ADA’s definition of “disability” as *(1) a physical or mental impairment that substantially limits one or more major life activities (“actual disability”); (2) a record (or past history) of such an impairment (“record of”); or (3) being regarded as having a disability (“regarded as”)* (29 C.F.R. §1630.2(g)(1)). Although Congress did not change the definition itself, significant changes were made in how the definition is to be interpreted. In contrast with the original federal ADA and the ADAAA and their regulations, which apply to employers with fifteen or more employees, Oregon disability law, under ORS 659A.106, continues to provide that the employment provisions of the Oregon disability law and rules apply to employers with six or more employees.

The ADAAA directed the U.S. Equal Employment Opportunity Commission (EEOC) to promulgate regulations which amend the ADA and implement the ADAAA.

Impact of 29 C.F.R. §1630 changes: The changes to the interpretation of “disability” under 29 C.F.R. §1630.2(g)(1) are best explained when broken down by the three prongs of the definition:

(1) “Actual Disability”

“Physical or mental impairment” is defined as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive,
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Civil Rights Law

Federal Law

Updated ADAAA Regulations - 29 C.F.R. § 1630 (2011) (cont.) *Interpretation of “Disability” is to be Construed More Broadly than Before*

digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine. Any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities is also covered. 29 C.F.R. §1630.2(h)(1)-(2). This is essentially the same definition as the original ADA regulations.

“Major life activities” includes but is not limited to caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. 29 C.F.R. §1630.2(i)(1)(i).

Key change: “The operation of a major bodily function” is now included as a “major life activity.” This includes functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system. 29 C.F.R. §1630.2(i)(1)(ii).

Key change: “Substantially limits” is interpreted by nine rules of construction which do not provide a definition of the term “substantially limits,” but rather tell us what the term will NOT require. These rules of construction include, but are not limited to the following:

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. With one exception (“ordinary eyeglasses or contact lenses”), the determination of whether an impairment substantially limits a major life activity shall be made **without regard to the ameliorative effects of mitigating measures**, such as medication or hearing aids. **The term “substantially limits” requires a lower degree of functional limitation** than the standard previously applied by the courts; and

The term “substantially limits” is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADAAA.

In keeping with Congress’s direction that the primary focus of the
(continues)

Civil Rights Law

Federal Law

Updated ADAAA Regulations - 29 C.F.R. § 1630 (2011)(cont.) *Interpretation of “Disability” is to be Construed More Broadly than Before*

ADA is on whether discrimination occurred, **the determination of disability should not require extensive analysis.**

A temporary impairment that will last or is expected to last fewer than six months can be substantially limiting.

(2) “Record of”

An individual who does not currently have a substantially limiting impairment but who has had one *in the past* meets this definition of “disability.” An individual also can meet the “record of” definition of disability if they were once misclassified as having a substantially limiting impairment (e.g., someone erroneously deemed to have had a learning disability but who did not).

All of the changes to the first definition of disability discussed in the questions above—including the nine rules of construction, which include the expanded list of major life activities, the lower threshold for finding a substantial limitation, the clarification that episodic impairments or those in remission may be disabilities, and the requirement to disregard the positive effects of mitigating measures—will apply to evaluating whether an individual meets the “record of” definition of disability.

(3) “Regarded as”

Under these new regulations, an employer “regards” an individual as having a disability if it takes an action prohibited by the ADA (e.g. failure to hire, termination, or demotion) based on an individual’s impairment or on an impairment the employer believes the individual has, unless the impairment is both transitory (lasting or expected to last for six months or less) and minor. This new formulation of “regarded as” having a disability is different from, and is easier to meet, than the previous standard.

An employer may challenge a claim under the “regarded as” prong by showing that the impairment in question, whether actual or perceived, is both transitory and minor. However, an employer may not defeat a claim by asserting it believed an impairment was transitory and minor when objectively this is not the case. For example, an employer who fires an employee because he has bipolar disorder cannot assert that it believed the impairment was transitory and minor because bipolar disorder is not objectively transitory and minor.

Effective Date: May 24, 2011

Civil Rights Law

Case Law

Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries (2010)¹

Background: In 2003, Emerald Steel hired a temporary employee as a drill press operator. The employee, as a holder of a registry identification card under the Oregon Medical Marijuana Act, used medical marijuana one to three times daily while working for Emerald Steel, although not at work. Due to his satisfactory work, the employee was under consideration for permanent employment. Knowing he would need to pass a drug screening as a condition of permanent employment, the employee consulted with his supervisor and disclosed his marijuana use, his registry identification card, and documentation from his physician. The employee was discharged one week later.

Following termination, the employee filed a complaint with the Oregon Bureau of Labor and Industries alleging discrimination under ORS 659A.112, which prohibits discrimination on the basis of disability and requires an employer to make reasonable accommodations for a disabled job applicant or employee unless the employer can demonstrate that doing so would impose an undue hardship. After a subsequent investigation, BOLI filed charges against the employer after determining the employer had violated ORS 659A.112 by firing an employee without engaging in the “interactive process” to determine a reasonable accommodation for the employee’s disability.

Emerald Steel defended its decision and argued that Oregon law requires that interpretation of ORS 659A.112 be consistent with the federal Americans with Disabilities Act (ADA), and that the ADA does not apply to those currently engaged in the use of illegal drugs. Moreover, the employer maintained that the federal Controlled Substances Act prohibits the possession of marijuana, regardless of whether its use is recreational or medicinal, and therefore, neither the ADA nor ORS 659A.112 apply to individuals currently engaged in medical marijuana use.

An administrative law judge found in favor of BOLI, and the Oregon Court of Appeals affirmed. Emerald Steel petitioned the Oregon Supreme Court for review.

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¹*Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518 (Or. 2010).

Civil Rights Law

Case Law

Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries (2010) (cont.)

Issue on appeal: Is an employer required to accommodate a disabled employee's use of medical marijuana?

Holding and Reasoning: On April 14, 2010, the Oregon Supreme Court reversed the decision of the Court of Appeals and ruled that an employer is not obligated to accommodate an employee's medicinal use of marijuana in the workplace. The court ruled that the federal Controlled Substances Act preempts the Oregon Medical Marijuana Act's authorization of the use of medical marijuana, and the protections of ORS 659A.112 do not apply to an employee's use of medical marijuana.

NOTE: *In May of 2011, the Oregon Supreme Court clarified the Emerald Steel decision with regard to federal preemption. See Willis v. Winters, 253 P.3d 1058 (Or. 2011). "Emerald Steel should not be construed as announcing a stand-alone rule that any state law that can be viewed as 'affirmatively authorizing' what federal law prohibits is preempted. Rather, it reflects this court's attempt to apply the federal rule and the logic of the most relevant federal cases to the particular preemption problem that was before it. And particularly where, as here, the issue of whether the statute contains an affirmative authorization is not straightforward, the analysis in Emerald Steel cannot operate as a simple stand-in for the more general federal rule." Id. at 18-19 n. 6.*





Recent Changes to Wage and Hour Law

The laws covered in the following section are regulated and enforced by BOLI's Wage and Hour Division. The Wage and Hour Division serves Oregon's wage earners by enforcing laws covering state minimum wage and overtime requirements, wage collection, working conditions, child labor, farm and forest labor contracting, and private employment agencies. The division also regulates the employment of workers on public works projects.



Website: <http://www.oregon.gov/boli/whd>





Wage and Hour Law

2011 Oregon Legislature

HB 2039 - Insufficient Fund Paychecks

ORS 30.701 provides that when an individual is issued a check for which there are insufficient funds, the person may recover from the maker of the dishonored check statutory damages in an amount equal to \$100 or triple the amount for which the check is drawn, but this amount may not exceed \$500 more than the value of the check.

When an employee is issued an insufficient funds check for wages, the employee may file a wage claim with BOLI to recover the unpaid wages owed. Employees issued insufficient funds checks for their wages may be subject to overdraft charges and bank fees through no fault of their own, but in order to recover the damages provided in ORS 30.701, the employee must initiate a separate, private legal action.

Impact of HB 2039: HB 2039 amends ORS chapter 652 to authorize the Commissioner of the Bureau of Labor and Industries to assess civil penalties payable to the employee equal to the damages provided in ORS 30.701, without requiring the employee to initiate a separate legal action.

The assessment of civil penalties against an employer by BOLI are prohibited against an employer if the employee has already commenced a civil action against the employer for the same dishonored check. In addition, the legislation prohibits an employee from bringing an action against an employer if the commissioner has assessed a civil penalty for the same dishonored check.

This penalty would be different from other civil penalties assessed by the Bureau in that they would be payable directly to the employee (to defer the costs of fees and charges incurred by the employee). Like all civil penalties assessed by the Bureau, this penalty would be subject to the provisions of the Administrative Procedures Act, beginning with the issuance of a “Notice of Intent to Assess Civil Penalties” by the Bureau. As part of this process, employer respondents have the right to request a contested case hearing or may attempt to settle the matter with the Bureau for less than the amount of civil penalties proposed.

Effective Date: January 1, 2012

Wage and Hour Law

2011 Oregon Legislature

HB 2040 – Administration of Wage and Hour Law

HB 2040 contains four technical corrections related to the administration of wage and hour law:

Creates Conformity with the Unclaimed Property Act: When the Bureau collects wages and other compensation on behalf of claimants and is then unable to locate them and turn over the collected monies, ORS 652.405 requires the Bureau to attempt to return the recovered compensation for a period of seven years. The Unclaimed Property Act (UPA), however, requires that any unclaimed property which has remained unclaimed by the owner for more than three years be turned over to the Department of State Lands (held in the Common School Fund).

HB 2040 amends ORS 652.405 so that the Bureau will only be required to attempt to return money collected for three years and then remit the funds to the Department of State Lands as required by the Uniform Disposition of Unclaimed Property Act.

Allows for the Electronic Provision of Required Posters: Employers are required to post summaries provided by BOLI of certain wage and hour laws. Traditionally, BOLI has produced an annual poster and mailed it to every employer in the state. The posters are now available for all employers to download from BOLI's website on the internet, with hard copies still available by mail upon request.

HB 2040 amends ORS 653.050 to allow employers to obtain required wage and hour law summaries from BOLI's website and by mail upon request to BOLI (the first copy free of charge).

Requires Wage Demand Notices to Include Amount Claimed: When employees allege that wages are owed to them by an employer, either by filing a wage claim with the Bureau or through private action, the first step is to send a written notice of non-payment to the employer.

HB 2040 amends wage claim statutes to require that written notices to employers of non-payment of wages include the estimated amount of wages or compensation alleged to be owed (or an allegation of facts sufficient to estimate the amount owed). This is consistent with existing practice at BOLI.

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Wage and Hour Law

2011 Oregon Legislature

HB 2040 – Administration of Wage and Hour Law (cont.)

Updates Outdated Terms: In statutes related to the overtime and maximum daily hours for workers in manufacturing establishments, the term “fireman” was used many years ago to refer to present day “boiler operators.” When the laws were amended several years ago by the legislature to be sex neutral, the term “fireman” was erroneously replaced with the word “firefighter,” unintentionally giving it another meaning.

HB 2040 changes the term “firefighters” to “boiler operators” in ORS 652.020 to be consistent with common usage and BOLI’s existing administrative rule (OAR 839-001-0125), which defines “fireman” as “a person whose primary duty is to operate and clean boilers or to maintain fuel systems and stem pressure levels in these boilers”

Effective Date: January 1, 2012

Wage and Hour Law

2011 Oregon Legislature

HB 2240 - Makes Permanent Provisions Allowing Tipped Employees to Waive Meal Periods

Under ORS 653.261, Oregon law requires employers to provide rest and meal periods for employees unless otherwise explicitly exempted under ORS 653.020. The meal period is to be taken in the middle of the work period, which is defined as the time frame between when an employee begins and ends their work. For tipped restaurant employees, this meal period often coincides with their biggest opportunity to earn tips.

Passed in 2007, SB 403 revised ORS 653.261 and directed the Bureau of Labor and Industries to adopt rules which allow tipped restaurant employees to voluntarily waive their meal periods and prohibit an employer from coercing affected employees into waiving a meal period. The measure also established a penalty of up to \$2,000 for violations. In the case of a continuing violation, each day's continuance is considered a separate and distinct violation. SB 403 contained a sunset date of January 2, 2012.

Impact of HB 2240: HB 2240 repeals the sunset date of January 2, 2012 and makes permanent the revisions of ORS 653.261 by SB 403.

Effective Date: January 1, 2012

Wage and Hour Law

2011 Oregon Legislature

HB 2470 - Interagency Compliance Network and Public Meetings Law

The Interagency Compliance Network (ICN) was created in 2009 with the passage of HB 2815. The purpose of the ICN is to facilitate the sharing of information that will improve compliance with tax and employment law, especially information regarding the classification of workers as independent contractors and cash (“under the table”) payments to workers.

The ICN was directed to establish consistency in agency determinations, gather and share information, develop investigative methods for audits, conduct joint audits, create a coordinated enforcement process, and engage in public outreach efforts to educate the public.

The ICN is comprised of seven state agencies: the Employment Department, the Department of Revenue, the Department of Consumer and Business Services, the Department of Justice, the Bureau of Labor and Industries, the Construction Contractors Board and the Landscape Contractors Board.

Impact of HB 2470: HB 2470 exempts meetings held by the ICN from Oregon’s public meeting law (ORS 192.690). Due to the enforcement nature of the ICN meetings and the confidential information being shared, holding open meetings could compromise the ability of the ICN to function effectively. Reports on enforcement actions, effectiveness and decisions made are readily available to the public.

Effective Date: June 9, 2011

Wage and Hour Law

2011 Oregon Legislature

HB 3030 - Golf Course Marshals

Current wage and hour law provides that the majority of workers are subject to minimum wage standards, unless explicitly exempt under ORS 653.020. Examples of some of the exemptions provided in ORS 653.020 include, but are not limited to, certain executives or professionals paid on a salary basis, certain agricultural workers, employees of the United States, enrolled students working for a primary or secondary educational institution, outside salespeople, taxicab operators, seasonal employees of certain organized camps, volunteer firefighters, and certain golf course caddies.

Impact of HB 3030: In amending ORS 653.020, HB 3030 creates an additional exemption from minimum wage standards for volunteer golf course marshals, so long as the volunteer does not provide marshal services in excess of 30 hours per week, receives no wage other than golf passes, and the volunteer's duties are limited to monitoring starting times and speed of play and informing golfers of golf course etiquette.

Effective Date: January 1, 2012

Wage and Hour Law

2011 Oregon Legislature

SB 178 - Cutting Confusion on Projects Subject to Both State and Federal PWR Laws

BOLI enforces Oregon's Prevailing Wage Rate (PWR) law, which can apply concurrently with the federal Davis-Bacon Act to a single public works project. Since 2005, state law has required the contract specifications for such "double-covered" projects to include both the applicable state and federal wage rates; the higher wage rate must be paid to each occupation on the job. Additionally, BOLI was required to compare state and federal prevailing rates of wage and make results of comparison available when the Commissioner determined the state prevailing rate of wage.

Due to the volatility of federal wage rates, which change on average 20 times each year, the comparison publication is sometimes out of date even before it arrives from the printer and contractors cannot use it with any degree of confidence. State prevailing wage rates are comparatively simple, with about half as many classifications varying over just 14 regions instead of 36 counties. While current federal rates can be verified online, state statute still required BOLI to print hard copies of the comparison book.

Impact of SB 178: SB 178 abolished the requirement for BOLI to compare state and federal wage rates and issue a publication showing which wage rates are higher. SB 178 also amended ORS 279C.830 and created a new requirement that if a public works project is subject to both ORS 279C.800 to 279C.870 and to the Davis-Bacon Act (i.e., subject to both state and federal prevailing wage laws), then every applicable public works contract and subcontract must contain a provision that workers must be paid no less than the higher of the applicable state or federal prevailing rate of wage as required under ORS 279C.830(1)(d).

Effective Date: June 7, 2011

Wage and Hour Law

Federal Law

Changes to State and Federal Child Labor Regulations 29 C.F.R. §§ 570, 579 (2010)

Federal youth employment provisions, authorized by the Fair Labor Standards Act (FLSA), were enacted to ensure that when young people work, the work is safe and does not jeopardize their health, well-being or educational opportunities. One way that the US Department of Labor (USDOL) regulates youth employment is by enforcing a list of seventeen hazardous occupations that minors under the age of 18 are prohibited from performing. Oregon also has a state law, enforced by BOLI, in which the federal hazardous occupations have been adopted. Employers in Oregon are also required to obtain Annual Employment Certificates to employ minors between 14 and 18 years of age, which are issued by the Child Labor Unit of BOLI. Special employment permits for minors under the age of 14 may be issued in very limited circumstances.

In July of 2010, the USDOL updated its list of hazardous occupations and created new child labor restrictions. In response to the federal changes, BOLI revised its rules accordingly and sent amended Employment Certificates to employers who may have been affected that reflected the new federal child labor restrictions.

Impact of Final Rule: The revised federal and state regulations strengthen the child labor laws to protect against workplace hazards. Examples of new prohibitions impacting the employment of youth under the age of 18 years include: Working at poultry slaughtering and packaging plants; riding on a forklift as a passenger; working in forest fire fighting, forestry services and timber tract management; operating certain power-driven hoists and work assist vehicles; operating balers and compacters designed or used for non-paper products; and operating power-driven chain saws, wood chippers, reciprocating saws, and abrasive cutting discs.

The revised USDOL regulations also expand youth workplace opportunities that have been judged to be safe for young workers, such as allowing 14- and 15-year-olds to perform work of an intellectual or artistic nature in establishments that were previously prohibited, including computer programming, drawing, and teaching. The amended rules also allow 16- and 17-year-olds to operate, under specified conditions, power-driven pizza-dough rollers and portable, countertop food mixers. A complete list of USDOL regulations and a side by side comparison of the previous and new child labor restrictions are available at: <http://www.dol.gov/whd/childlabor.htm>.

Effective Date: July 19, 2010

Wage and Hour Law

Federal Law

Expression of Milk in the Workplace and Amendments to the FLSA - 29 U.S.C. § 207 (2010)

In 2007, the Oregon legislature enacted HB 2372, requiring employers of 25 or more employees to provide unpaid rest periods of up to 30 minutes to employees to express breast milk in the workplace. BOLI was charged with the enforcement of this new law, which took effect January 1, 2008. In 2010, federal legislation was passed to extend this protection to women nationwide and the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. § 207) was amended to require rest periods for the expression of breast milk in the workplace.

Impact of FLSA amendment: Both state and federal law now require that nursing mothers be given additional rest periods for the expression of breast milk. Both laws also require that employers provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

However, there are a number of inconsistencies between state and federal law, and Oregon employers covered by the FLSA must comply with both, adhering to the stronger of the two standards. The state and federal laws are inconsistent in the following areas:

1. **Subject employers and covered employees:** State law applies to employers of 25 or more employees. All employees of a covered employer are entitled to breaks to express milk. Federal law applies to all employers covered by the FLSA, but not employees who are exempt from section 7 of the FLSA, which includes overtime pay requirements.
2. **Frequency and timing of breaks:** Oregon law provides for a 30 minute break to express milk for every four hour period worked (unless otherwise agreed to by the employer and employee), whereas federal law provides a break “each time an employee has need to express milk,” and allows for “a reasonable time,” which could exceed the 30 minutes provided in state law.
3. **Undue hardship exemption:** Under state law, an employer (of any size) is not required to provide rest periods for the expression of milk if doing so would impose an undue hardship on the operation of the employer’s business. Under federal law, this exemption is available only to employers of less than 50 employees.

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Wage and Hour Law

Federal Law

Expression of Milk in the Workplace and Amendments to the FLSA - 29 U.S.C. § 207 (2010)

4. Age of the Child: State law provides for rest periods to express milk for a child 18 months of age or younger, whereas the federal law only provides these rest periods for a child one year of age or younger.

The USDOL is in the process of soliciting comments and drafting final guidance to implement these new provisions. Until the Department issues final guidance, federal enforcement will be based on the statutory language (Section 7 of the FLSA, 29 U.S.C. § 207) and the guidance provided in the the USDOL's WHD Fact Sheet #73 and the associated FAQs.

Effective Date: March 23, 2010

Wage and Hour Law

Case Law

*Bobadilla-German v. Bear Creek Orchards, Inc. (2011)*¹

Background: Bear Creek Orchards, an operator of peach and pear orchards in Medford, typically recruits a majority of its workers to pick fruit from Arizona. The harvest period is approximately one month, and these workers, once recruited, travel from their permanent homes in Arizona to Oregon.

Farmworkers from out of state were given the option of receiving on-site housing and meals as part of their compensation package. If the worker chose to opt in, between five and seven dollars per day were deducted from the workers' paycheck for housing, and the employer credited that amount toward its minimum wage obligation. At the conclusion of the month-long harvest, the workers were provided their final paychecks on the morning after their last day of work.

In a class-action lawsuit, the farmworkers alleged violations of both the federal Migrant and Seasonal Agricultural Worker Protection Act and Oregon minimum wage law. *See* ORS 653.035(1) and OAR 839-020-0025(7)(d). Additionally, several plaintiffs also sued individually and argued that the employer's practice of paying its employees the morning after the last day of work is a violation of Oregon law under ORS 652.145 and OAR 839-001-0440 (1), which requires the payment of final wages due to seasonal farmworkers "immediately" upon termination.

The district court agreed in part with Bear Creek Orchards and ruled that its practice of crediting housing costs toward its minimum wage obligation was lawful because the on-site housing was optional, was provided for the workers' private benefit. The court further concluded that OAR 839-020-0025(7)(d) only applies to "situations where an 'on call' employee must reside at employer furnished housing" and was therefore inapplicable here. However, the district court found Bear Creek Orchards' practice of paying its seasonal farmworkers the day after the workers' last workday to be unlawful and inconsistent with ORS 652.145 and OAR 839-001-0440(1).

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¹*Bobadilla-German v. Bear Creek Orchards, Inc.*, 641 F.3d 391 (9th Cir. 2011).

Wage and Hour Law

Case Law

Bobadilla-German v. Bear Creek Orchards, Inc. (2011) (cont.)

Both the plaintiff farmworkers and the defendant Bear Creek Orchards appealed, and the Ninth Circuit reviewed the district court's decisions on both issues on appeal.

Issues on appeal: May certain on-site housing costs of seasonal farmworkers be credited toward the state minimum wage? Additionally, when a farm worker's employment is terminated due to either discharge or mutual consent, is the employer required to provide payment to the farmworker for all wages earned and unpaid on the last day the employee works?

Holding and reasoning: The Ninth Circuit reversed the district court's decision in part and held that OAR 839-020-0025(7)(d) provides that when furnished housing is required for the employer to maintain an adequate work force at the times and locations the employer needs them, a private benefit is not conferred upon the employee and, therefore, the housing costs may not be deducted from a worker's minimum wage.

The district court's finding that Bear Creek Orchards' practice of providing its workers their final paychecks the morning after their last day of work is unlawful was upheld by the Ninth Circuit. Thus, BOLI's interpretation of ORS 652.145 requiring all earned and unpaid wages to be paid on the last day the seasonal farmworker or reforestation worker works is valid.² See OAR 839-001-0440.

² If the worker quits and does not provide the employer with at least 48 hours' notice of an intent to quit, then the wages are due within 48 hours after the employee quits or on the next regularly scheduled payday, whichever comes first. See OAR 839-001-0440(3).

Wage and Hour Law

Case Law

*Cumbie v. Woody Woo, Inc. (2010)*¹

Background: Misty Cumbie, the plaintiff, worked as a server at a restaurant owned by the defendant, Woody Woo, Inc. The restaurant paid its servers a wage equal to or exceeding Oregon’s minimum wage, which was and currently remains greater than the federal minimum wage. The restaurant required its servers to contribute their tips to a “tip pool,” of which 30% to 45% were distributed back to the server. The remaining 55% to 70% was distributed to the kitchen staff, who are not customarily tipped in the restaurant industry. Neither the defendant owner nor the management participated in the tip pool.

Cumbie filed a collective and class action suit against the defendant, alleging that the tip-pooling requirement was in violation of the Fair Labor Standards Act of 1938 (FLSA). Specifically, Cumbie maintained that because the tip pool included the kitchen staff, who are employees who do not customarily receive tips, the restaurant was required to pay her minimum wage in addition to all tips she earned.

The district court in Portland dismissed the complaint, and Cumbie appealed to the Ninth Circuit Court of Appeals.

The defendant argued that Cumbie’s interpretation of the FLSA only applied to restaurants which claim a tip credit toward their minimum wage obligation. Consistent with Oregon’s minimum wage law, the defendant restaurant did not claim a tip credit, and the defendant argued that its tip pooling arrangement was permissible because it paid its employees the minimum wage.

Issue on appeal: Is a restaurant in violation of the Fair Labor Standards Act, when, despite paying its wait staff more than the federal minimum wage (and an amount equal to or in excess of the state minimum wage), it requires its wait staff to participate in a “tip pool” that redistributes a portion of their tips to other employees who that do not customarily receive tips, such as the kitchen staff?

Reasoning: Relying on United States Supreme Court precedent, the Ninth Circuit noted that in businesses where tipping is customary, the tips

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¹ *Cumbie v. Woody Woo, Inc. d/b/a Vita Café*, 596 F.3d 577 (9th Cir. 2010).

Wage and Hour Law

Case Law

Cumbie v. Woody Woo, Inc. (2010) (cont.)

are the property of the recipient, so long as there is not an explicit agreement to the contrary.² If such an agreement does exist, however, in the absence of “statutory interference” the agreement is presumptively valid. The question is, therefore, whether or not the FLSA imposes statutory interference invalidating the tip-pooling arrangement. Moreover, the court noted that the purpose of the FLSA is to protect workers from substandard wages and oppressive working hours.

Holding: Because an employment practice does not violate the FLSA unless the FLSA prohibits it,³ and because nothing in the text of the FLSA restricts tip-pooling arrangements where a tip credit is not claimed, there is no “statutory interference” with the defendant’s tip-pooling practice.

In the case of a tip pooling arrangement where a tip credit is not taken by the restaurant, the tips received by the employee do not become the property of the employee until after redistribution from the tip pool. The Ninth Circuit affirmed the district court’s ruling.

NOTE: *Following the Cumbie decision, the United States Department of Labor (USDOL) amended its regulations, effective May 5, 2011, and stated that tips are the property of the employee and an employer may only use tips as a tip credit or in furtherance of a valid tip pool (76 Fed. Reg. 18838; April 5, 2011). In other words, under federal law, an employer is not permitted to retain any portion of an employee’s tips. At the time of publication of this handbook, application of this area of law, particularly in the Ninth Circuit region, is unclear. Please consult an attorney for further guidance if needed.*

² *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 397 (1942).

³ *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).



Recent Changes to Apprenticeship and Training Law

The laws covered in the following section relate to the Apprenticeship and Training Division of BOLI. The Apprenticeship and Training Division promotes apprenticeship in a variety of occupations and trades and works with business, labor, governmental and educational partners to increase training and employment opportunities in apprenticeable occupations. The division registers occupational skill standards and agreements between apprentices and employers and works with local apprenticeship committees across the state to ensure that apprenticeship programs provide quality training and equal employment opportunities, particularly for women and minorities, in technical and craft occupations.

Website: <http://www.oregon.gov/boli/atd>



Apprenticeship and Training

2011 Oregon Legislature

HB 2034 – Conforming to Federal Regulations for Registered Apprenticeship Programs

States that administer apprenticeship programs, such as Oregon, do so under an agreement with the United States Department of Labor, Employment and Training Administration (USDOL, ETA).

In December 2008, the ETA implemented revised apprenticeship regulations to update labor standards, policies and procedures for the registration, cancellation and deregistration of apprenticeship programs, apprenticeship agreements, and administration of the National Apprenticeship System.

Some of the new federal regulations require conforming changes in state law to maintain Oregon's recognition from the USDOL as an apprenticeship registration agency. HB 2034 makes the following amendments to Oregon apprenticeship law (ORS chapter 660) to comply with the revised federal regulations:

Reduces timeline for registering new apprenticeship agreements. The revised regulations require a 45-day timeframe for sponsors to notify registration agencies regarding apprenticeship agreement changes (instead of the previous 90-day timeframe). *Revising ORS 660.020.*

Creates a specific timeline for probationary periods for all apprentices. Federal regulations now specify that an apprentice's initial probationary period may not last longer than one year or 25% of the program length, whichever is shorter. During the probationary period, an apprentice or the apprenticeship committee may terminate the apprenticeship agreement by notifying BOLI. *Revising ORS 660.060.*

Allows transfers of apprentices between programs. Apprentices may now transfer between programs in order to provide flexibility for an apprentice to continue their apprenticeship in changing circumstances, such as the need for geographic relocation for personal reasons. Transfers will be permitted provided that all parties agree to the transfer. *Revising ORS 660.060.*

Redefines the roles and responsibilities of the apprenticeship agency and the State Apprenticeship Council. Under the revised regulations, the USDOL

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Apprenticeship and Training

2011 Oregon Legislature

HB 2034 - Conforming to Federal Regulations for Registered Apprenticeship Programs (cont.)

will only recognize an apprenticeship agency as a state's registration agency, with a State Apprenticeship Council acting at the direction of the agency. In order to maintain the Oregon State Apprenticeship and Training Council's (OSATC) oversight authority and decision-making role, HB 2034 grants authority currently vested in the council to both the council and BOLI's Apprenticeship and Training Division. *Revising ORS 660.120.*

Clarifies reciprocal programs. Previously, states were not required to give reciprocal recognition or approval to out-of-state building and construction programs. Federal regulations now require reciprocal approval of apprentices and apprenticeship programs and standards that are registered in other states for all industries and occupations. Apprenticeship program sponsors seeking reciprocal approval must meet the wage and hour standards and apprentice ratio standards of the reciprocal state. *Revising ORS 660.158.*

Implements program performance standards. The revised federal regulations include a new section relating to performance standards that emphasizes quality performance by establishing the following requirements, which have been added to and made a part of ORS chapter 660:

- i Every apprenticeship program must have at least one apprentice, with limited exceptions.
- i State apprenticeship agencies must evaluate program performance based on considerations such as compliance with Equal Employment Opportunity Commission regulations and completion rates compared to the national average.
- i Programs with below average performance must be given technical assistance to improve program performance and quality.

Effective Date: May 27, 2011

Apprenticeship and Training

2011 Oregon Legislature

HB 2335 – Increasing Highway Construction Workforce Diversity

Senate Bill 894 (2009) directed the Oregon Department of Transportation to use 1.5% of all federal funds, up to a maximum of \$1.5 million, to increase diversity in the highway construction workforce and to prepare individuals interested in entering the highway construction workforce. In order to utilize BOLI's close relationship with apprenticeship programs, heavy highway contractors and community-based organizations that seek to bring diversity to the construction workforce, ODOT and BOLI entered into an interagency agreement in 2010 to accomplish the obligations set forth in SB 894.

The primary goal of the BOLI-ODOT partnership is to manage and strengthen ODOT's supportive services programs by encouraging successful participation in these programs and seeking additional avenues to increase training opportunities for minorities and women. BOLI has worked with partners currently providing pre-apprenticeship training, employment counseling, basic skills orientation, remedial training, mentoring and supportive services, and has developed a menu of services to offer potential apprentices and on-the-job program participants. Under the direction of ODOT, BOLI is contracting with partners to expand or modify their services to meet the needs of the heavy highway industry and will attempt to replicate their services in regions where comparable programs do not currently exist.

Impact of HB 2335: HB 2335 clarifies the original intent of SB 894 (2009) and specifies that federal funding received each biennium is to be used as the basis for funding initiatives outlined in the original statute.

Effective date: January 1, 2012

Apprenticeship and Training

2011 Oregon Legislature

HB 2353 – Career Readiness Certificate

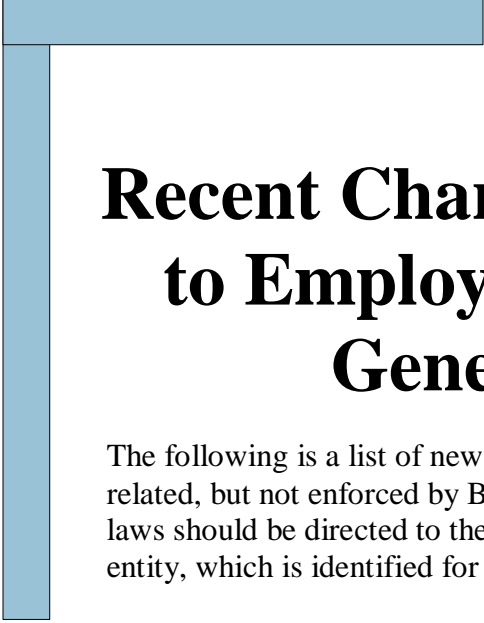
Administered by the Oregon Department of Community Colleges and Workforce Development (CCWD), the Oregon Career Readiness Certification Program verifies the foundational skills of potential job applicants. After taking a proctored assessment at a WorkSource Oregon center or at a community college, individuals are awarded the certificate based on their performance on the assessment. The assessment examines an individual's career readiness by testing in three areas found to be highly important to the majority of jobs in the workplace: applied mathematics, reading for information, and locating information. The certification data is used by employers, employees and job applicants as a uniform measure of key workplace skills. An individual's performance on the assessments determines the level at which the certificate is awarded. Higher levels signify readiness for a wider range of jobs.

Impact of HB 2353: Broadly, HB 2353 amends ORS 660.343 and clarifies requirements for obtaining services from the Oregon Career Readiness Certification program. Current statutes limit the scope of the CCWD administrative rules and restricts the program to Oregon residents. HB 2353 authorizes CCWD to make accommodations for students commuting to Oregon for employment.

The measure also adds a service of providing information to school districts, community colleges and education service districts about the National Career Readiness Certificate, assessments, targeted instruction and remedial skills training available through the program. By September 1st of each year, these educational entities are required to report to CCWD on the rate of participation and total number of students enrolled who utilize the services. CCWD's report to the appropriate interim legislative committee will include a summary of the information required by this act.

HB 2353 changes the name of the program from Oregon Career Readiness Certification Program to Oregon National Career Readiness Certification.

Effective date: May 27, 2011



Recent Changes Related to Employment Law Generally

The following is a list of new laws that are employment related, but not enforced by BOLI. Questions about these laws should be directed to the appropriate regulatory entity, which is identified for each issue.





Employment Related Laws

2011 Oregon Legislature

HB 2091 - Eliminates Requirements that OR-OSHA Publish Certain Information in Specified Languages

The Department of Consumer and Business Services (DCBS) produces a number of publications in languages other than English. For most of its divisions, the DCBS may use its discretion to determine which languages are the most appropriate for translating and printing these publications. However, the Occupational Safety and Health Division (OR-OSHA), which is responsible for providing safety and health information to agriculture employers, is directed by statute under ORS 654.770 on which languages must be made available.

Besides English, the law requires basic information must be published in Spanish, Russian, Thai, Japanese, Chinese, Laotian, Vietnamese, Korean, and Cambodian. Currently, OR-OSHA receives virtually no requests for agriculture publications in languages other than English and Spanish.

Impact of HB 2091: HB 2901 amends the specific statutory language requirements and provides that the DCBS may determine what languages, in addition to English and Spanish, are appropriate for translation. Russian, Thai, Japanese, Chinese, Laotian, Vietnamese, Korean, and Cambodian will no longer be required under Oregon law.

Effective Date: January 1, 2012

NOTE: OR-OSHA is part of the Department of Consumer and Business Services (DCBS). Questions regarding implementation of this HB 2091 should be directed to the DCBS.

Employment Related Laws

2011 Oregon Legislature

HB 2347 – Amateur Sports Officials

Background: Oregon law provides that the majority of workers are subject to minimum wage standards, mandatory workers' compensation coverage, and unemployment compensation taxation requirements, unless explicitly exempt.

Impact of HB 2347: HB 2347 clarifies that individuals who perform officiating services (such as a referee or umpire) for recreational, interscholastic, or intercollegiate sporting events or contests, in which the participants are not professional athletes and contestants are not remunerated for their participation, are exempt from the Federal Unemployment Tax Act. The measure does not apply to officiating services performed for a non-profit organization, the state or any of its political subdivisions, or a tribe.

Effective Date: May 19, 2011

NOTE: Unemployment insurance is administered by the Oregon Employment Department. Questions regarding implementation of this HB 2347 should be directed to the Oregon Employment Department.

Employment Related Laws

2011 Oregon Legislature

HB 3450 - Arbitration Agreements

In 2007, the Oregon legislature passed SB 248, which established that employment arbitration and non-competition agreements are voidable unless the employer informs the employee of the agreement's requirements in a written employment offer received by the employee at least two weeks before the first day of employment, or the agreement is entered into upon a bona fide advancement of the employee. Additionally, an employer must have an interest to protect, such as trade secrets; sensitive, confidential business or professional information; product development plans; launch plans; marketing strategy or sales plans (ORS 653.295).

Non-competition agreements are increasingly used as a means to protect sensitive information or protect the investment in key employees. Prior to the enactment of SB 248, non-competition agreements were entered into either on the employee's initial employment or upon a promotion. Current law requires an agreement to be entered into prior to accepting an employment offer.

Impact of HB 3450: HB 3450 amends ORS 36.620 and reduces the timeframe for notifying an employee about an arbitration agreement from two weeks to 72 hours before their first day on the job. Additionally, the employer is now required to provide the employee with the arbitration agreement containing an acknowledgement including the following, printed in boldfaced type, and signed by the employee:

I acknowledge that I have received and read or have had the opportunity to read this arbitration agreement. I understand that this arbitration agreement requires that disputes that involve the matters subject to the agreement be submitted to mediation or arbitration pursuant to the arbitration agreement rather than to a judge and jury in court.

HB 3450 does not change the time frame for non-competition agreements. Non-competition agreements and the regulations governing them remain unchanged since the passage of SB 248 in 2007 and continue to be enforceable only through the courts.

Effective date: January 1, 2012

NOTE: Arbitration agreements are not enforced by any agency and violations of the provisions could lead a court to nullify either an arbitration agreement or a non-compete agreement.

Employment Related Laws

2011 Oregon Legislature

SB 110 - Notification of Unemployment Insurance Benefits or Denials of Claims

Approximately 4,500 Oregon-based employers use the services of employer agents, also referred to as third-party administrators, to handle unemployment insurance (UI) claims. Current statute requires the Employment Department to provide direct notice to the most recent employer when an individual files for UI benefits. However, in cases where an employer uses an agent, the Department sends the notice to the employer, who then forwards the notice to the agent, which completes the form and returns it back to the Department. This two-step procedure can result in a delay of the claims process.

Impact of SB 110: Senate Bill 110 amends ORS 657.265, 657.267 and 657.269 to specify that the Employment Department may provide the notice of a filed claim for UI benefits with either the most recent employer or that employer's agent, with the notice then being provided to the next most recent employer or agent as provided under current law.

Effective Date: May 5, 2011

NOTE: Unemployment insurance is administered by the Oregon Employment Department. Questions regarding implementation of this SB 110 should be directed to the Oregon Employment Department.

Employment Related Laws

2011 Oregon Legislature

SB 637 – Changes to Unemployment Insurance “Extended Benefits” Formula

Extended Benefits are additional federally funded weeks of unemployment benefits paid during periods of high unemployment as provided by Congress. Currently, the Extended Benefits formula compares the current unemployment rate to the prior two years. The formula requires the current insured unemployment rate to exceed 5% and to exceed 120% of the average rates for the corresponding period in the last two years. In December 2010, Congress authorized states to modify their formulas to avoid dropping out of Extended Benefits and agreed to continue paying 100% of the cost of Extended Benefits through the 2011 calendar year.

Impact of SB 110: SB 637 amends ORS 657.321 and changes the formula for Extended Benefits to require the current insured unemployment rate to exceed 6.5% and to exceed 110% of the average rates for the corresponding period in the last three years.

Recent federal legislation provides for 100% federal funding for Extended Benefits. However, those employers that reimburse the Unemployment Insurance Trust Fund when an employee makes an unemployment insurance claim, rather than paying unemployment insurance tax, are liable for 100% of Extended Benefits costs.

Effective Date: March 24, 2011

NOTE: Unemployment insurance is administered by the Oregon Employment Department. Questions regarding implementation of this SB 637 should be directed to the Oregon Employment Department.

Employment Related Laws

2011 Oregon Legislature

SB 638 - Emergency Extension for Unemployment Insurance Benefits

Through HB 3483 enacted in 2009 and HB 3655 in 2010, the Oregon Legislative Assembly passed unemployment benefit extensions for unemployed workers who have exhausted their unemployment insurance benefits. SB 638 offers a similar extension for unemployed workers in 2011.

Impact of SB 638: SB 638 amends Sections 8 and 9, chapter 857, Oregon Laws 2009 and provides for payment of Oregon emergency benefits to qualifying individuals during the emergency benefit period. SB 638 defines the emergency benefit period as beginning after April 15, 2011, and ending on July 2, 2011, or on the date that the total amount of Oregon Emergency Benefit payments for the following week would exceed \$30 million. The measure requires the Director of the Employment Department to stop payments of Oregon emergency benefits when the total amount of payments would exceed the specified amount if paid for the succeeding week.

Due to the high number of applicants, payments ended on May 14, 2011, and are no longer available to new applicants.

Effective Date: March 24, 2011

NOTE: Unemployment insurance is administered by the Oregon Employment Department. Questions regarding implementation of this SB 638 should be directed to the Oregon Employment Department.

Employment Related Laws

2011 Oregon Legislature

SB 725 - Increased Authority to Waive Recovery of Overpaid Unemployment Benefits

Under ORS 657.317, recovery of overpaid unemployment insurance benefits may only be waived if the Director of the Employment Department finds that the benefits are unrecoverable due to a change in either federal or state law and that the change caused the disqualification of benefits previously paid.

Additionally, ORS 657.270 limits when a hearing related to unemployment insurance benefits may be reopened by an administrative law judge to only when the reason for missing the hearing is “beyond the control” of the requester.

Impact of SB 725: SB 725 amends 657.317 to expand the Director’s ability to waive recovery of unemployment insurance benefits if doing so would be against equity and good conscience. This could include instances in which the overpayment is not due to making a false statement, misrepresentation or failure to disclose a material fact. At least 34 other states currently have some form of waiver provision for non-claimant-caused overpayments.

SB 725 also amends ORS 657.270 to change when the Department can reopen a hearing related to unemployment insurance benefits from “beyond the control” to “good cause.” The “good cause” standard is consistent with current law for showing a reason for being late in requesting a hearing.

Effective Date: June 23, 2011

NOTE: Unemployment insurance is administered by the Oregon Employment Department. Questions regarding implementation of this SB 725 should be directed to the Oregon Employment Department.

Employment Related Laws

2011 Oregon Legislature

SB 838 - Allows OLCC to Request Proof That Worker at Premises Licensed by Commission Meets Age Requirements

Employees of Oregon Liquor Control Commission (OLCC) licensees who hold an off-premises sales license and sell or serve alcohol, or who hold a wholesale malt beverage and wine license who deliver alcohol, must be at least 18 years of age. Employees who mix, pour, or draw liquor generally must be 21 years of age.

Impact of SB 898: SB 898 amends ORS 471.480 and 471.482 and allows the OLCC to request proof that a person who is serving or selling alcohol meets minimum age requirements during any inspection of a licensed premises. If acceptable proof of age cannot be produced upon request, the OLCC may either require the person to immediately cease any activities that are subject to the minimum age requirement until the acceptable proof of age is accepted, or have the person leave the premises if the activity is the sole lawful basis for the person to be present. The OLCC may also request that the premises' licensee or a manager provide proof that the person meets the applicable minimum age requirement. Failure of the licensee or manager to respond to a request to provide acceptable proof of age of the employee is prima facie evidence that the licensee has allowed the person to work at the licensed premises in violation of a minimum age requirement.

SB 898 does not apply to persons who are temporarily at the premises for purposes independent of the premises' operations, such as deliveries or maintenance calls.

Effective Date: January 1, 2012

