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Via email
Chairman Michael Dembrow and
Senate Committee on Workforce and General Government members
swgg.exhibits@state.or.us

Re: SB 1587 as introduced

Dear Mr. Chairman and Committee Members:

I write to express my support for SB 1587, and to suggest two additions to further the bill's goals.

I am an attorney who has represented employees in wage-and-hour matters for over a decade now. In working with members of the coalition behind a similar bill last session, I suggested several specific statutory amendments that have now been incorporated into SB 1587. [1] I write to give the Committee my view from the trenches on how the specific changes that I had a role in drafting can improve the lives of working people in Oregon.

Itemized pay stubs

Under current law, employers only need to provide pay stubs when making deductions, and there are no specific requirements as to what such pay stubs must contain. SB 1587 requires pay stubs on regular paydays or whenever a payment is made, and it specifies what the pay stubs must contain. Most employers already do this, and the pay stubs provided by the major payroll services conform with these requirements already. One item in the proposed bill is worthy of note, and that is the requirement that the pay stubs show the date of the payment. In practice, many employers pay employees late. But the pay stubs often show only the regular payday, or the date the check was printed, instead of the actual date the payment was given to the employee. This causes problems of proof when enforcing statutes that measure violations by referencing the date of actual payment (for example, ORS 652.120, 652.140, 652.145 and 652.150). SB 1587 plugs this hole by requiring the pay stub to show the actual date of payment.

Paycheck deductions must be voluntary

Under current law, employers are allowed to make deductions from employees' paychecks that "are authorized in writing by the employee, are for the employee's benefit and are recorded in the employer's books." ORS 652.610(3)(b). In practice, we have seen employers require employees to sign authorizations for deductions for uniforms, safety equipment and other items, which the employer then claims are for the employee's benefit. Employers deciding what is and is not for the employee's benefit is extremely patronizing, when the section was obviously intended to apply to voluntary deductions. It also results in costly litigation over who benefits more from a particular item, even when other statutes (the minimum wage law and OSHA, for example) require employers to bear the cost of those items. SB 1587 plugs this hole by requiring that any employee authorization for payroll deductions be voluntary.

[1] The views and experience expressed in this letter are mine alone, however.

Production of time and pay records

Under current law, ORS 652.750 requires employers to produce employee personnel files upon request. SB 1587 extends that requirement to time and pay records. State and federal law already require employers to keep the time and pay records specified in the bill. But currently there is no requirement that employers produce those time and pay records to their employees (as there is for personnel files). SB 1587 plugs that hole, which will allow many more employee pay complaints to be resolved out of court. Employees will be able to request and review their own time and pay records and work directly with their employers to fix any problems they see. And employment attorneys will be able to present a more complete picture to an employer of their potential liability, which will help us settle more cases without litigation.

Also under current law, there is no way to compel compliance with even the personnel files that employers *are* required to produce. BOLI can assess civil penalties, but BOLI's resources are limited, and practice has shown that there are few if any consequences for noncomplying employers. SB 1587 plugs this hole by giving an employee the right to enforce this transparency requirement directly.

Tolling the statute of limitations for paystub or time and pay record violations

Under current law, an employee's statute of limitations continues to run until (s)he files a lawsuit. For the typical employee, this means that every two weeks or half-month that goes by, they lose the ability to recover unpaid wages from one of their paychecks. That ticking clock encourages early filing of litigation, and discourages attempts to resolve disputes through informal records requests and prelitigation negotiation. SB 1587 fixes this by tolling employees' statutes of limitations for violations that are apparent on pay stubs and other time and pay records, when an employer refuses to produce those records. This will allow employees to try to resolve disputes with their employers amicably, before having to rush to court to protect their rights.

Proposed addition: amendment to ORS 652.150(2)(c)

Under current law, employers are subject to a penalty if they withhold wages upon an employee's termination. That penalty is reduced if the employee does not send an employer a written notice of nonpayment. ORS 652.150(2)(c). That written notice has to include the estimated amount of wages or compensation alleged to be owed, except when an employer has violated "ORS 652.610, 652.640 or 653.045" (the paystub and other recordkeeping requirements). I propose that the newly amended ORS 652.750 be added to this list of statutes, so that the end of ORS 652.150(2)(c) will read "ORS 652.610, 652.640, 653.045 **or 652.750.**" If an employer refuses to produce an employee's time and pay records when an employee asks for them, the employee cannot very well include any violations from those records in his written notice of nonpayment. It is not fair to penalize the employee for an employer's refusal to follow the law.

Proposed addition: amendment to ORS 652.200(2)

Under current law, an employee is not entitled to attorney fees in an action for the collection of wages if their attorney "unreasonably failed to give written notice of the wage claim to the employer before filing the action." ORS 652.200(2). For the same reasons as the penalty wage limitation in ORS 652.150(2)(c), I propose adding a similar exception to the attorney fee

provision in ORS 652.200(2). This could be accomplished by adding the following sentence to the end of that section: "**An attorney's failure to give prelitigation written notice of a wage claim is not unreasonable if the employer has failed or refused to keep, maintain or provide records in violation of ORS 652.610, 652.640, 653.045 or 652.750 that support the wage claim**."

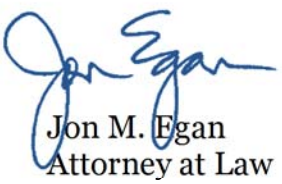
The reason that Oregon allows attorney fees in employee wage claims is that we want employees to be able to obtain complete redress without reduction for payment to their attorneys. As a practical matter, most wage-and-hour plaintiffs are minimum-wage workers (or close to it), many of whom have recently lost their jobs. A meaningful wage-and-hour attorney fee provision allows an attorney to take these workers' cases on contingency; without that, they would not have any access to justice at all. It seems generally fair to require attorneys to make an effort to resolve disputes before filing a lawsuit. But in practice, some judges have denied attorney fees under this section, even when violations did not come to light until the time and pay records were produced in litigation discovery. If an employer refuses to produce an employee's time and pay records when the employee requests them, the employee's attorney cannot very well include any violations from those records in a prelitigation written notice of a wage claim. It is not fair to penalize the employee for an employer's refusal to follow the law.

Conclusion

Last year's Paycheck Fairness Act supported increased transparency in employee pay, by prohibiting employer retaliation for employees discussing their pay with one another. SB 1587 provides another important step towards transparency, giving employees prelitigation access to their time and pay records and the information used to calculate their pay. It also prevents noncomplying employers from profiting when they refuse to produce this information to a requesting employee. The amendments to ORS 652.150(2)(c) and 652.200(2) proposed in this letter further support those goals. By giving employees more and better tools to recognize when they have been cheated out of their pay, and to resolve any pay disputes without involving BOLI or the courts, we encourage employers to both follow the underlying laws and to cooperate with prelitigation attempts to resolve wage claims. This would reduce BOLI's workload and place the cost of compliance squarely where it belongs—on the shoulders of the few noncomplying employers. In my experience, the vast majority of employers follow the law and do their best to act as good corporate citizens. Allowing employees to access their time and pay records will increase transparency. The free market can then reward complying employers, and punish noncomplying employers, by letting employees vote with their feet.

Thank you.

Sincerely,



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