Committee Members:

Thank you for the opportunity to provide testimony today.

I co-chair the employment section of OTLA. The most common call I get by far is people asserting that they were discriminated based on age.

Calls from a gentleman who worked for same company for 35 years. He climbed Mt. Everest with his company flag on his back. When part of his company was being divested, they added him into the sale at the last minute. Why? To avoid offering him a severance package that he would have gotten if he had stayed just a few months later. The company then bragged about how doing this saved the company a few bucks because they didn't need to offer him the severance.

Calls from a woman who retired after 20 years with an employer where she won awards for innovative practices. Then, three few years later, she decided she was too young to retire and applied for her old position over and over. She was told she wouldn't get the position because they thought the job would be to tough for her "at this time in her life"; even though she was in her early 60s. She was essentially told they saw her past experience as a negative factor.

These cases are a dime a dozen. But the thing about these calls and these cases is that even the most egregious age discrimination case are nearly impossible to win. I need far better evidence to even consider take one of these cases, then I do a sex harassment case, or race case.

The reasons why are clear. The law is stacked against you. Federal law defines age discrimination very very narrowly. And, in the absence of guidance from the Oregon legislature, Oregon courts in interpreting state law often follow this federal law. Under federal law, employers can make decisions based on characteristics associated with age, and even factors that only apply to older workers, such retirement status or eligibility, pension status, and things associated with age and get away with it. Also, under federal law, if the employer admits that age was a factor in the decision, if they can point to some other reasonable basis other than age, it is not discrimination. As a result, the federal law is stacked against you.

The law is stacked against you because judges and juries are stacked against you because they have strong negative bias based on age. They view with suspicion even the most overwhelming cases against the worker, because on some level, they don't really think it should be illegal. Age is still the only protected class that is still ok to make fun of.

Employers know this, too. They know that there are large numbers of lawyer, good lawyers, who will take a middling gender case over a great age case, any day. Some just refuse all age cases. Employers know they can say "no one with more than 7 years of experience need apply" and get away with it. They know they can fire the older workers—sometimes all even on the same day - and replace them with kids out of college, and the law will protect them, and so will society. So, they roll the dice and discriminate and they assume that no one will care and they are usually right.

In Oregon, that should not stand. Here is what the Bill does to fix some of these problems. The bill clarifies what “because of age” means and clarifies that you can’t use criteria that are closely associated with age or that are a proxy for age, such as length of service, pension or retirement status, cost of insurance, as a basis for an adverse employment decision. This is not progressive. This language is merely putting Oregon law with the position of the federal EEOC under Ronald Reagan. I know this because I requested their briefing from the 80s, before the US SCT started taking a hatchet to age cases, and that was their position back then. If it seems progressive, that may just be a testament to how bad things have gotten in this area of the law since that time.

The legislation "bans the age box." Ot says you can’t get age related information from an employee before the first interview. AARP hears this all the time: people aren’t even getting the first interview. This bill requires employers to make employment decisions based on the merits of the applicants, not their age.

The bill also expressly recognizes disparate impact as a theory for all claims under 659A. Most people already assume it is a valid theory, but it should be in the law, not just in the BOLI administrative rules. It also authorizes an award of liquidated damages, similar to what you get under the ADEA, anyway. Further, it sets a minimum floor for those damages, so that employers won't de-value the claims and to ensure that there is some teeth to the law for employers, even if the economic loss is small.

Here is what the law does not to. It doesn’t prevent an employer from observing the terms of a bona fide seniority system. It doesn’t require employee to retire, or prevent an employer from having such a requirement, if that is required under the law. It also doesn’t prevent employers from enforcing seniority systems or benefits plans or from offering optional early retirement as a benefit. It doesn't prevent an employer from getting information about age prior to making a conditional job offer.

Thank you for this opportunity.