

SB 726 A STAFF MEASURE SUMMARY**Carrier:** Sen. Taylor, Sen. Knopp**Senate Committee On Workforce**

Action Date: 04/09/19
Action: Do pass with amendments. (Printed A-Eng.)
Vote: 4-0-1-0
Yeas: 4 - Golden, Knopp, Monnes Anderson, Taylor
Exc: 1 - Hansell
Fiscal: Fiscal impact issued
Revenue: No revenue impact
Prepared By: Ellen Osoinach, LPRO Analyst
Meeting Dates: 2/12, 3/21, 4/2, 4/4, 4/9

WHAT THE MEASURE DOES:

Requires public and private employers to adopt written policies with specified minimum standards to reduce and prevent certain unlawful employment discrimination. Requires Bureau of Labor and Industries (BOLI) to create model policies and procedures for use by employers. Makes it an unlawful employment practice for employer to enter into nondisclosure agreement with employee or prospective employee containing provisions preventing employee from disclosing in specified circumstances certain unlawful employment discrimination. Expressly allows nondisclosure provisions, disclosures of factual information, and no-rehire provisions in settlement, separation, or severance agreement in two circumstances: (1) upon request of employee claiming to be aggrieved by unlawful employment discrimination, and (2) when employer determines employee engaged in certain unlawful employment discrimination. Allows employer to void payment of severance to supervisory employee when employer determines supervisory employee's violation of written anti-discrimination policies substantially contributed to separation from employment. Extends statute of limitations for filing civil action or BOLI complaint from one year to five years for certain existing unlawful employment practices. For violation of new unlawful employment practice created by measure, statute of limitations is also five years but provisions do not become operative until October 2020. Requires BOLI to adopt rules necessary to administer and enforce no later than 90 days after effective date. Takes effect 91st day following adjournment sine die.

ISSUES DISCUSSED:

- Reasons for underreporting of employment discrimination, particularly sexual harassment
- Circumstances under which settlement agreements include nondisclosure and no-rehire clauses
- Interplay of discrimination investigations conducted by employer and union
- Current statute of limitations for employment discrimination claims

EFFECT OF AMENDMENT:

Replaces the measure.

BACKGROUND:

Oregon law makes it an unlawful employment practice for an employer to discriminate in wages or in the terms, conditions, or privileges of employment based on race, color, religion, sex, sexual orientation, national origin, marital status, age, expunged juvenile criminal record, person's service in a uniformed service, or disability (ORS 659A.030, 659A.082, and 659A.112). An aggrieved employee or applicant may file a complaint with the Bureau of Labor and Industries (BOLI) or may file a civil action in court. The remedy in either case can include recovery of back pay for the prior two-year period as well as compensatory and punitive damages.

Senate Bill 726-A creates a new unlawful employment practice. An employer is prohibited from entering into a nondisclosure or nondisparagement agreement (NDA) with an employee or prospective employee containing

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provisions that prevent an employee from disclosing unlawful employment discrimination: (a) between employees; (b) between an employer and employee in the workplace or at off-site work-related events coordinated by the employer; or (c) between an employer and employee off-site. Senate Bill 726-A also clarifies that unwanted conduct of a sexual nature inflicted upon a person or compelled through force or intimidation constitutes unlawful employment discrimination that an employee may not be prohibited from disclosing via a NDA.

Senate Bill 726-A provides two exceptions for employers wishing to enter into a NDA having the effect of preventing an employee from disclosing unlawful employment discrimination. First, an employer may enter into a NDA if an employee claiming to be aggrieved by employment discrimination requests it as part of a settlement, separation, or severance agreement, provided the employee has seven days to revoke. Second, an employer may enter into a NDA with an employee whom the employer determines has engaged in employment discrimination. The employer may include a no-rehire provision in a settlement, separation, or severance agreement under the same circumstances.

Senate Bill 726-A requires private and public employers to adopt written policies to reduce and prevent the types of unlawful employment practices described above. At a minimum, the policies must include a process for employees to report prohibited conduct; the identity of the person tasked with receiving reports; a description of the applicable statute of limitations; and the prohibition regarding NDAs and its exceptions. The measure directs BOLI to make available model procedures and policies that employers may use as guidance.

Currently, the statute of limitations (SOL) for filing a BOLI complaint or civil action alleging discrimination based on race, color, religion, sex, sexual orientation, national origin, marital status, age, expunged juvenile criminal record, person's service in a uniformed service, or disability is one year. Senate Bill 726-A extends the SOL for those claims to five years by requiring a complaint be filed no later than five years after the occurrence of the alleged unlawful employment practice and applying to conduct occurring on or after the 91st day following adjournment sine die.

Senate Bill 726-A requires a complaint regarding a NDA be filed with BOLI or in circuit court no later than five years after the occurrence of the alleged unlawful employment practice and applies to conduct occurring on or after October 1, 2020. The remedy in either case can include recovery of back pay for the prior two-year period as well as compensatory and punitive damages.