

D R A F T

SUMMARY

Clarifies prohibitions regarding provisions that may not be included in agreements between employers and former, current or prospective employees.

Provides that mediation communications relating to certain allegations of misconduct are not confidential and may be admitted as evidence.

Requires employers to provide copy of employer's written policies against unlawful discrimination and harassment to person with whom employer seeks to enter into certain agreements.

A BILL FOR AN ACT

1
2 Relating to unlawful employment practices; amending ORS 243.319, 243.323,
3 659A.370 and 659A.375.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 659A.370 is amended to read:

6 659A.370. (1) Except as provided in subsections (2) or (4) of this section,
7 it is an unlawful employment practice for an employer to enter into an
8 agreement with **a former, current** [*an employee*] or prospective employee,
9 as a condition of employment, continued employment, promotion, compen-
10 sation or the receipt of benefits, that contains a nondisclosure provision, a
11 nondisparagement provision or any other provision that has the purpose or
12 effect of preventing the employee from disclosing or discussing conduct:

13 (a)(A) That constitutes discrimination prohibited by ORS 659A.030, in-
14 cluding conduct that constitutes sexual assault; or

15 (B) That constitutes discrimination prohibited by ORS 659A.082 or
16 659A.112; and

17 (b)(A) That occurred between employees or between an employer and an
18 employee in the workplace or at a work-related event that is off the em-

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 ployment premises and coordinated by or through the employer; or

2 (B) That occurred between an employer and an employee off the employ-
3 ment premises.

4 [(2)] **(2)(a)** [*An employer may*] **It is an unlawful employment practice**
5 **for an employer or former employer to** enter into a settlement, separation
6 or severance agreement that includes one or more of the following provisions
7 [*only when an employee*] **unless the inclusion of such provisions in the**
8 **agreement is made at the request of the person** claiming or alleging to
9 be aggrieved, **at least in part**, by conduct described under subsection (1) of
10 this section [*requests to enter into the agreement*]:

11 [(a)] **(A)** A provision described in subsection (1) of this section;

12 [(b)] **(B)** A provision that prevents the disclosure of factual information
13 relating to a claim of discrimination or conduct that constitutes sexual as-
14 sult; [*or*]

15 **(C) A provision that prevents the disclosure of the amount of or**
16 **fact of any settlement; or**

17 [(c)] **(D)** A no-rehire provision that prohibits the employee from seeking
18 reemployment with the employer as a term or condition of the agreement.

19 **(b) It is a violation of this subsection for an employer or former**
20 **employer to:**

21 **(A) Request a person alleging to be aggrieved by conduct described**
22 **under subsection (1) of this section to make a request to enter into**
23 **an agreement described in paragraph (a) of this subsection.**

24 **(B) Make an offer of settlement conditional upon a request to enter**
25 **into an agreement described in paragraph (a) of this subsection.**

26 **(C) Fail to provide a person with whom the employer seeks to enter**
27 **a settlement, separation or severance agreement a copy of the policy**
28 **described in ORS 659A.375.**

29 (3)(a) An agreement entered into under subsection (2) of this section must
30 provide that the employee has at least seven days after executing the agree-
31 ment to revoke the agreement.

1 (b) The agreement may not become effective until after the revocation
2 period has expired.

3 (4) If an employer makes a good faith determination that an employee has
4 engaged in conduct prohibited by ORS 659A.030, including sexual assault,
5 conduct prohibited by ORS 659A.082 or 659A.112 or conduct prohibited by
6 this section, the employer may enter into a settlement, separation or
7 severance agreement that includes one or more of the following provisions:

8 (a) A provision described in subsection (1) of this section;

9 (b) A provision that prevents the disclosure of factual information that
10 relates to a claim of discrimination or conduct that conduct that constitutes
11 sexual assault; or

12 (c) A no-rehire provision that prohibits the employee from seeking reem-
13 ployment with the employer as a term or condition of the agreement.

14 [(5)] **(5)(a)** An employee may file a complaint under ORS 659A.820 for vi-
15 olations of this section **by any person acting on behalf of an employer**
16 **or former employer** and may bring a civil action under ORS 659A.885 and
17 recover **liquidated damages in the amount of \$5,000 and** relief as provided
18 by ORS 659A.885 (1) to (3).

19 **(b) Notwithstanding any provision of ORS 36.220 to 36.238, mediation**
20 **communications relating to an alleged violation of this section or to**
21 **conduct prohibited by ORS 659A.030 (1)(g), with respect to an alleged**
22 **violation of this section, are not confidential and are admissible as**
23 **evidence in any judicial or administrative proceeding relating to the**
24 **violation.**

25 (6) This section does not apply to an employee who is tasked by law to
26 receive confidential or privileged reports of discrimination, sexual assault
27 or harassment.

28 (7) As used in this section, “sexual assault” means unwanted conduct of
29 a sexual nature that is inflicted upon a person or compelled through the use
30 of physical force, manipulation, threat or intimidation.

31 **(8) Except to the extent provided under subsections (2) and (4) of**

1 **this section, an agreement that otherwise contains a provision pro-**
2 **hibited by this section is void and unenforceable.**

3 **SECTION 2.** ORS 659A.375 is amended to read:

4 659A.375. (1) Every employer in this state shall adopt a written policy
5 containing procedures and practices for the reduction and prevention of dis-
6 crimination prohibited by ORS 659A.030, including sexual assault, as defined
7 in ORS 659A.370, and discrimination prohibited by ORS 659A.082 and
8 659A.112.

9 (2) At a minimum, the policy must:

10 (a) Provide a process for an employee to report prohibited conduct;

11 (b) Identify the individual designated by the employer who is responsible
12 for receiving reports of prohibited conduct, including an individual desig-
13 nated as an alternate to receive such reports;

14 (c) Include the statute of limitations period applicable to an employee's
15 right of action for alleging unlawful conduct described in subsection (1) of
16 this section;

17 (d) Include a statement that an employer may not require or coerce an
18 employee to enter into a nondisclosure or nondisparagement agreement, in-
19 cluding a description of the meaning of those terms;

20 (e) Include an explanation that an employee claiming to be aggrieved by
21 conduct described in subsection (1) of this section may voluntarily request
22 to enter into an agreement described in ORS 659A.370 (2), including a state-
23 ment that explains that the employee has at least seven days to revoke the
24 agreement; and

25 (f) Include a statement that advises employers and employees to document
26 any incidents involving conduct prohibited by ORS 659A.030, including sex-
27 ual assault as defined in ORS 659A.370, or conduct prohibited by ORS
28 659A.082 and 659A.112.

29 (3) An employer shall:

30 (a) Make the policy available to employees within the workplace;

31 (b) Provide a copy of the policy to each employee at the time of hire;

1 [and]

2 (c) Provide to each person with whom the employer seeks to enter
3 into a settlement, separation or severance agreement a copy of the
4 policy in the language the employer typically uses to communicate
5 with the person; and

6 [(c)] (d) Require any individual who is designated by the employer to re-
7 ceive complaints to provide a copy of the policy to an employee at the time
8 that the employee discloses information regarding prohibited discrimination
9 or harassment.

10 (4) The Bureau of Labor and Industries shall make available on the
11 bureau's website model procedures or policies that employers may use as
12 guidance to establish the policy described in this section.

13 (5) Nothing in this section is intended to relieve an employer of liability
14 for engaging in conduct that is prohibited under ORS chapter 659A.

15 **SECTION 3.** ORS 243.323 is amended to read:

16 243.323. (1) Except as provided in subsection (2) or (4) of this section, it
17 is an unlawful employment practice under ORS chapter 659A for a public
18 employer to enter into an agreement with **a former, current** [*an employee*]
19 or prospective employee, as a condition of employment, continued employ-
20 ment, promotion, compensation or the receipt of benefits, that contains a
21 nondisclosure provision, a nondisparagement provision or any other pro-
22 vision that has the purpose or effect of preventing the employee from dis-
23 closing or discussing workplace harassment:

24 (a) That occurred between employees or between an employer and an
25 employee in the workplace or at a work-related event that is off the em-
26 ployment premises and coordinated by or through the employer; or

27 (b) That occurred between an employer and an employee off the employ-
28 ment premises.

29 [(2)] (2)(a) [*A public employer may*] **It is an unlawful employment**
30 **practice for a public employer to** enter into a settlement, separation or
31 severance agreement that includes one or more of the following provisions

1 *[only when an employee]* **unless the inclusion of such provisions in the**
2 **agreement is made at the request of the person** claiming or alleging to
3 be aggrieved by workplace harassment described under subsection (1) of this
4 section *[requests to enter into the agreement]*:

5 [(a)] **(A)** A provision described in subsection (1) of this section;

6 [(b)] **(B)** A provision that prevents the disclosure of factual information
7 relating to the claim of *[discrimination or conduct that constitutes sexual as-*
8 *sault]* **workplace harassment; [or]**

9 **(C) A provision that prevents the disclosure of the amount of or**
10 **fact of any settlement; or**

11 [(c)] **(D)** A no-rehire provision that prohibits the employee from seeking
12 reemployment with the employer as a term or condition of the agreement.

13 **(b) It is a violation of this subsection for a public employer to:**

14 **(A) Request a person alleging to be aggrieved by conduct described**
15 **under subsection (1) of this section to make a request to enter into**
16 **an agreement described in paragraph (a) of this subsection.**

17 **(B) Make an offer of settlement conditional upon a request to enter**
18 **into an agreement described in paragraph (a) of this subsection.**

19 **(C) Fail to provide to each person with whom the employer seeks**
20 **to enter into a settlement, separation or severance agreement a copy**
21 **of the policy described in ORS 243.319.**

22 (3)(a) An agreement entered into under subsection (2) of this section must
23 provide that the employee has at least seven days after executing the agree-
24 ment to revoke the agreement.

25 (b) The agreement may not become effective until after the revocation
26 period has expired.

27 (4) If an employer makes a good faith determination that an employee has
28 engaged in workplace harassment described under subsection (1) of this sec-
29 tion, the employer may enter into a settlement, separation or severance
30 agreement that includes one or more of the following provisions:

31 (a) A provision described in subsection (1) of this section;

1 (b) A provision that prevents the disclosure of factual information that
2 relates to the workplace harassment; or

3 (c) A no-rehire provision that prohibits the employee from seeking reem-
4 ployment with the employer as a term or condition of the agreement.

5 [(5)] **(5)(a)** An employee may file a complaint under ORS 659A.820 for vi-
6 olations of this section **by any person acting on behalf of an employer**
7 and may bring a civil action under ORS 659A.885 and recover **liquidated**
8 **damages in the amount of \$5,000 and** relief as provided by ORS 659A.885
9 (1) to (3).

10 **(b) Notwithstanding any provision of ORS 36.220 to 36.238, mediation**
11 **communications relating to an alleged violation of this section or to**
12 **the aiding or abetting of a violation of this section are not confidential**
13 **and are admissible as evidence in any judicial or administrative pro-**
14 **ceeding relating to the violation.**

15 (6) This section does not apply to an employee who is tasked by law to
16 receive confidential or privileged reports of discrimination, sexual assault
17 or harassment.

18 **(7) Except to the extent provided under subsections (2) and (4) of**
19 **this section, an agreement that otherwise contains a provision pro-**
20 **hibited by this section is void and unenforceable.**

21 **SECTION 4.** ORS 243.319 is amended to read:

22 243.319. (1) A public employer shall establish and adopt a written policy
23 that seeks to prevent workplace harassment that occurs between employees
24 or between an employer and an employee in the workplace or at a work-
25 related event that is off the employment premises and coordinated by or
26 through the employer, or between an employer and an employee off the em-
27 ployment premises.

28 (2) The policy must include:

29 (a) A statement prohibiting workplace harassment;

30 (b) Information explaining that a victim of workplace harassment has a
31 right to seek redress through the employer's internal process provided under

1 ORS 243.321, through the Bureau of Labor and Industries' complaint resolu-
2 tion process under ORS 659A.820 to 659A.865 or under any other available
3 law, whether civil or criminal, including:

4 (A) The timeline under which relief may be sought;

5 (B) Any available administrative or judicial remedies; and

6 (C) The advance notice of claim against a public body that a claimant
7 must provide as required under ORS 30.275;

8 (c) A statement that a person who reports workplace harassment has the
9 right to be protected from retaliation;

10 (d) A statement of the scope of the policy, including that the policy ap-
11 plies to elected public officials, volunteers and interns;

12 (e) An explanation that a victim of workplace harassment may voluntarily
13 disclose information regarding an incident of workplace harassment that in-
14 volves the victim;

15 (f) Information to connect a victim of workplace harassment with legal
16 resources and counseling and support services, including any available em-
17 ployee assistance services;

18 (g) A statement that an employer may not require or coerce an employee
19 to enter into a nondisclosure or nondisparagement agreement, including a
20 description of the meaning of those terms;

21 (h) An explanation that an employee claiming to be aggrieved by
22 workplace harassment may voluntarily request to enter into an agreement
23 described in ORS 243.323 (2), including a statement that explains that the
24 employee has at least seven days to revoke the agreement; and

25 (i) A statement that advises employers and employees to document any
26 incidents of workplace harassment.

27 (3) A public employer shall provide a copy of the policies described in this
28 section to each employee and shall include a copy of the policies in any
29 orientation materials that are provided to new employees at the time of hire.

30 (4) If an employee discloses any concerns about workplace harassment to
31 a supervisor of the employer, or to a designated individual as described in

1 ORS 243.321 (3), the supervisor or designated individual shall, at the time
2 of the disclosure, provide to the employee a copy of the policy described in
3 this section.

4 **(5) A public employer shall provide to each person with whom the**
5 **employer seeks to enter into a settlement, separation or severance**
6 **agreement a copy of the policies described in this section in the lan-**
7 **guage that the employer typically uses to communicate with the per-**
8 **son.**

9 ~~[(5)]~~ **(6)** A policy established under this section must comply with the re-
10 quirements for a written policy provided under ORS 659A.375.

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