

2017 Oregon Legislative Session

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Employment Practices

The 2017 Legislature focused their labor and employment work more narrowly than in 2015, spending time on a few key pieces of legislation instead of bills that were not major policy issues. The bills that took up the most time and energy were focused on broad social issues such as pay equity, worker scheduling, and overtime pay calculation requirements. Other issues, such as paid family leave and prohibitions against discrimination based on use of “legal substances”, were deferred. Unless otherwise noted, bills that passed will take effect on January 1, 2018.

Bills Passed

SB 299, Paid Sick Time Technical Changes

This bill clarified some aspects of the 2015 law that had caused problems for employers. It states that employers must comply with minimum requirements for Paid Sick Time law only for first 40 hours of a Paid Time Off policy and makes other fixes related to employee count and location of temporary farm stand or construction trailer.

SB 828, Scheduling

SB 828 requires employers to post schedules seven days in advance, and beginning in 2020, schedules must be posted 14 days in advance. Employers can develop a voluntary standby list for employees who agree to work on short notice. The bill applies to retail, food service and hospitality employers with more than 500 employees worldwide and includes a narrow private right of action against employers for retaliation with other enforcement left to Bureau of Labor and Industries (BOLI). Collective bargaining agreements are not exempt, and franchisees are not covered unless they have 500 employees of their own. Bill takes effect July 1, 2018; enforcement begins January 1, 2019.

SB 1040, Union Security Agreements

Preempts local jurisdictions from challenging union security agreements.

SB 1067, PEBB and OEGB

Disallows public employees to be covered by both PEBB and OEGB along with other provisions.

HB 3170, Higher Education Faculty

Extends the right to organize to certain higher-education faculty that had previously been excluded from PECBA.

HB 2005, Pay Equity

One of the signature bills of the Session, HB 2005 prohibits pay differentials based on protected class status. The bill provides a defense for employers who complete a pay equity analysis within three years of a complaint, allows for a pay differential based on bona fide factors related to the position in question, and prohibits employer from asking about salary history of job applicants. Various effective dates coincide with different components of the bill.

HB 2192, MLAC Terms

Extends Management-Labor Advisory Committee terms from two to three years.

HB 2335, Workers Compensation Medical Arbiter Panels

Allows appointment of two instead of three arbiters for medical arbiter panels in workers' compensation claims.

HB 2337, Workers Compensation PTD Benefits

Increases Permanent Total Disability (PTD) benefits for workers' compensation claims.

HB 2338, Workers Compensation Benefits for Children of Deceased Workers Sets

uniform monthly benefit rate and uniform duration of benefits for children of deceased workers.

HB 3458, Overtime

HB 3458 requires that manufacturing employers who owe daily and weekly overtime calculate the two amounts, and pay the greater of the two - but not both. It also: Caps weekly manufacturing hours at 55, with five more hours allowed if employee agrees or requests to work them. Adds civil penalties for unlawfully requiring employees to work more than allowable hours per week. Creates a stronger definition of workweek to ensure that the start of a workweek cannot be changed frequently. For manufacturers dealing with perishable products, the bill allows the cap to be raised to 80 hours per week for up to 21 weeks, upon filing of an undue hardship notice with BOLI. Within that 21-week period, it allows the cap to be raised to 84 hours per week for four weeks, upon filing of additional undue hardship notice. Emergency clause applies to calculation of overtime payments; weekly caps and civil penalties take effect January 1, 2018.

Bills Failed**SB 301, Marijuana in the Workplace**

The original bill sought to prevent employers from disqualifying workers from employment based on marijuana use. An amended version of the bill would have applied only to workers with a medical marijuana card.

SB 780, Workers' Compensation Examinations

This legislation would have required a random selection of an independent medical examiner in workers' compensation cases.

SB 970, Scheduling Preemption

SB 970 would have established a permanent state preemption of local government authority to adopt mandates regulating private employers' scheduling practices.

SB 977, Non-Competition Agreements

This bill would have repealed most of Oregon law regulating non-competition agreements, except for a clause preventing former employees from contacting former customers or clients, or providing similar products, processes or services, for six months after employee separation. Although the bill did not pass, Senate Judiciary Chair Floyd Prozanski (D-Eugene) said he plans to form an interim work group to study the issue.

SB 997, Healthcare

SB 997 would have required employers with workers on Oregon Health Plan to pay a penalty to state.

SB 559, 560, and 913, PERS Reform

The legislature considered various PERS reform bills and dozens of amendments that accompanied each, but did not take action on any of them.

HB 2169, Wage Theft

This bill would have allowed attorney fees for prevailing wage theft plaintiffs only, instead of allowing judge to award fees to prevailing party generally.

HB 2180, Unpaid Wages

This legislation would have created new right of action based on unpaid wages.

HB 2181, Wage Claims

HB 2181 would have created a rebuttable presumption against an employer that took certain adverse actions against an employee within 90 days of that employee's filing of a wage claim.

HB 2231, 2378, HB 2842, HB 2915: Minimum Wages for Youth

Several bills that would have allowed employers to pay a reduced minimum wage to youth workers did not advance this session. A related proposal (HB 2842) would have allowed a \$3 per hour youth worker income tax credit.

HB 2567, Layoff Notification

Similar to federal legislation, but without several components, this bill would have required employers with 75 or more employees to provide 60 days' notice to employees and local officials prior to ceasing operations, relocating, or ordering mass layoffs of 50 or more employees.

HB 2762, Worker Injury Treatment Rights

Under this legislation, employers would have been required to provide injured workers with a form explaining treatment rights, within 48 hours of injury.

HB 2167 / SB 292, Bully Bill

These bills would have created an unlawful employment practice AND a violation of the Oregon Safe Employment Act for creating or maintaining an abusive work environment. Opponents had concerns about the language and potential legal risk for employers, as well as exclusive remedy provisions of the Workers' Compensation Act.

HB 2856, Wage Enforcement Grant Program

This legislation would have created a grant program for private worker advocate organizations to use Wage Security Funds to inform workers of their rights.

HB 3087, Paid Family Medical Leave Would have required employers and employees to contribute up to .05% of wages to fund paid family and medical leave program. Would have created a self-sustaining model allowing for a cap on employer contributions and flexibility in rate depending on solvency of the fund.

Employment & Labor Law

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I. INTRODUCTION

Unlike years past, the 2017 legislative session in Oregon did not produce a great number of new employment and labor laws. However, several of them will have significant consequences for employers and employees in the state, including two massive new pieces of legislation that will have a meaningful impact on many workplaces. Specifically, with HB 2005 (Pay Equity), Oregon joins the growing numbers of states and local jurisdictions that are aiming to eradicate the pay disparity between the genders, and with SB 828 (Secured Scheduling), Oregon becomes the first state in the nation to mandate a predictive scheduling model for large retailers, food service, and hospitality businesses.

II. LEGISLATION AFFECTING EMPLOYERS

1. [HB 2005](#) (Ch. 197) Pay Equity Law

HB 2005 expands the protections of equal pay found in [ORS 652.220](#). HB 2005 will explicitly prohibit employers from paying people less based not only on gender, but also on race, color, religion, sexual orientation, national origin, marital status, disability, or age – in other words, it will aim to eradicate a number of alleged unfair pay practices.

Employers must ensure wage levels for comparable work are equivalent no matter the employee's protected class status. However, pay disparities can exist when there is a bona fide reason for such a disparity. These bona fide reasons include "seniority, merit, production-related metrics, workplace locations, travel needs, education, training, or experience."

HB 2005 provides a safe harbor for employers who have conducted a pay analysis within three years of any lawsuit, and can show a reasonable effort based on that analysis to eliminate wage disparities that violate HB 2005. Employers who trigger the safe harbor provision are able to file a motion to disallow an award of compensatory and punitive damages. However, employers are prohibited from cutting other workers' pay in order to even out the compensation levels.

HB 2005 also bars employers from using salary history when determining new workers' pay. Thus, job applications that ask for prior salary history are now prohibited by law.

Although a majority of HB 2005 goes into effect on January 1, 2019, the prohibition on inquiring into salary history goes into effect October 6, 2017.

2. [HB 3008](#) (Ch. 211) False Employment Records

HB 3008 prohibits employers from compelling, coercing, or otherwise inducing or attempting to induce an employee to create, file, or sign documents, which the employer

knows are false in regards to hours worked or compensation received. It provides a private cause of action for falsifying these time cards, and allows for either an award of actual damages or \$1,000 for each violation, including attorneys' fees and costs.

The bill goes into effect on January 1, 2018.

**3. [HB 3170](#) (Ch. 553) Collective Bargaining Rights for Public University
for Faculty Members**

HB 3170 extends collective bargaining rights to certain public university faculty members whose duties consist of an academic rather than administrative focus. Previously these faculty members were prevented from joining or forming a union.

The bill goes into effect on January 1, 2018.

4. [HB 3458](#) (Ch. 685) Manufacturing Employers Overtime Calculation

HB 3458 amends [ORS 652.020](#) and [653.265](#) to clarify an issue regarding how manufacturing employers calculate overtime. In doing so, the bill essentially rejects the Oregon Bureau of Labor and Industries' (BOLI's) interpretation concerning overtime entitlements. The new law requires manufacturing employers who owe daily and weekly overtime to calculate the two amounts and then pay out the greater of the two to their employees.

The law also caps weekly manufacturing hours at 55, although employees can voluntarily request or agree to up to five more hours as a permissible overage. For manufacturers dealing with perishable products, the bill allows the cap to be raised to 80 hours per week for up to 21 weeks so long as the employer files for and gets an undue hardship notice approved by BOLI. Within that 21-week period, the new law allows the cap to be raised to 84 hours per week for four weeks (again, upon approval of an additional undue hardship notice).

The punishment for violating this portion of the law will be a slate of possible civil penalties. Specifically, employees claiming they were required or coerced to work beyond 13 hours in a day, or 55 hours in a week, may recover \$3,000 for each violation, plus liquidated damages equal to twice the employee's overtime wages earned during the period of non-compliance.

Although the bill took effect on August 8, 2017, the portion of the law regarding the new private right of action becomes effective January 1, 2018.

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5. [SB 214](#) (Ch. 569) Public Employees' Retirement System Eligibility

SB 214 will exempt post-doctoral scholars for public universities and the Oregon Health and Science University from the Oregon Public Employees Retirement System and provide them with an alternative retirement plan after it takes effect.

The effective date of this bill is January 1, 2018.

6. [SB 299](#) (Ch. 520) Sick Leave Accrual

SB 299 amends [ORS 653.606](#) to expressly permit an accrual cap on sick leave. Starting January 1, 2018, employers can limit the accrual of both paid and unpaid sick time to 40 hours per year. As originally written, the law specifically allowed employers to limit the amount of carryover of sick hours from one year to the next, but it was unclear whether an employer could limit sick time accrual within a single year. Now, the legislature has clarified that employees can have a maximum sick leave bank of 80 hours, but only if they have 40 hours from a prior year and 40 hours from the current year.

The bill took effect on August 8, 2017.

7. [SB 398](#) (Ch. 333) Earned Income Tax Credit

SB 398 requires employers to provide employees written notice that they are able to receive both federal and state Earned Income Tax Credits. The notice must:

1. be in English and in the language the employer uses when speaking with employees;
2. be sent annually with the W-2 forms; and
3. provide website addresses for the Internal Revenue Service and the Department of Revenue where the employee can find information about state and federal earned income tax credits.

The bill also requires the Bureau of Labor and Industries to provide notice to employees in state minimum wage posters about the earned income tax credit. The legislature enacted this law because over 75% of Oregonians who qualify for this credit do not claim it.

SB 398 takes effect in October 2017.

8. [SB 416](#) (Ch. 334) Regulating Prevailing Rate of Wage

SB 416 modifies the prevailing wage rate for projects that are divided into multiple contracts. The new statutory language added to [ORS 279C.827](#) essentially closes a loophole that enabled contractors to avoid prevailing wage rate laws. It now prohibits anyone – not just

public agencies – from dividing public works projects into more than one contract in order to avoid prevailing wage rate laws.

Also, new statutory language added to [ORS 279C.836](#) provides that disadvantaged business enterprises, minority-owned businesses, woman-owned businesses, businesses owned by service-disabled veterans, and emerging small businesses must post bond if they fail to pay workers the prevailing wage rate. Further, the bill amended [ORS 279C.865](#) to establish that the failure to pay fringe benefits and the failure to pay prevailing wage rate are separate violations.

SB 416 took effect on June 14, 2017.

9. [SB 828](#) (Ch. 691) Predictive Scheduling

SB 828 creates new obligations for certain employers (those retail, food service, and hospitality businesses with 500 or more employees worldwide) to post schedules seven days in advance. Enforcement of this provision does not begin until January 1, 2019. Beginning January 1, 2020, however, schedules must be posted 14 days in advance. Employers with collective bargaining agreements are not exempt from SB 828's requirements.

SB 828 also requires employers to provide employees with a written, good faith estimate of the worker's schedule at the time of hire. Employers must be mindful when providing this estimate that they are no longer allowed to schedule employees within 10 hours of their last shift. This effectively eliminates the common practice of "clopenings" (scheduling employees to work a closing shift at the end of one day, and then the opening shift the following day).

If an employer needs to change the work schedule after the date that advance notice is required, the employer must meet several requirements to satisfy the new law and will likely have to pay a premium to the employee impacted by the change. Furthermore, an employer cannot require the employee to work shifts that were not on their written work schedules.

To alleviate some of the burden on employers, SB 828 allows for the creation of voluntary standby lists. This will help employers deal with unexpected absences or last-second changes to their work needs. This list includes employees who have requested or agreed in writing to be available to cover the business need or absence. An employer cannot require an employee on this list to take the shift. Further, if an employee does accept the extra hours, they are not eligible for the premium compensation that an employee is now entitled to when an employer makes a schedule change with inadequate notice.

Initially, the law includes a narrow private right of action against employers for retaliation. As of January 1, 2019, employees may pursue private, civil causes of action for discrimination and retaliation claims under this law. The Bureau of Labor and Industries will also have the power to seek penalties for each violation.

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SB 828 took effect on August 8, 2017.

10. [SB 949](#) (Ch. 360) Home Care Workers' Noncompetition Agreements

SB 949 makes noncompetition and non-solicitation agreements in employment contracts for home care workers voidable by the worker. Further, SB 949 makes these agreements unenforceable in Oregon courts.

The bill takes effect on January 1, 2018

11. [SB 1040](#) (Ch. 369) Union Security Agreements

SB 1040 is a response to the decision in [*United Automobile Workers v Hardin County \(KY\) 842 F.3d 407*](#), a recent decision by the Sixth Circuit Court of Appeals that appeared to recognize a right of some local governments to ban union security agreements. This bill establishes a statewide policy permitting an employer or labor organization in this state to have an agreement requiring membership in a labor organization as a condition of employment to the full extent allowed by federal law.

The bill took effect on June 14, 2017.