OREGON'S WORKPLACE FAIRNESS ACT BRINGS DRASTIC CHANGES TO DISCRIMINATION AND HARASSMENT CLAIMS

Date: 17 July 2019

Labor, Employment and Workplace Safety Alert

By: Stephanie E. McCleery, Samuel Hernandez

Oregon's Workplace Fairness Act (the "Act") (SB 726) was signed into law by Gov. Kate Brown on June 11, 2019. The Act, which grew out of the national #MeToo movement, significantly changes the playing field with respect to potential discrimination and harassment claims brought by employees. The Act amends current law making it easier for employees to bring claims against employers and, with a broad brush, makes it more difficult for employers to avoid such claims. Though the Act is focused on sexual harassment, its effects are wide reaching and encompass discrimination and harassment based on race, color, religion, sex, national origin, military service, and disability, among other protected classes.

KEY PROVISIONS OF THE ACT

- **Nondisclosure, Non-disparagement, and No-Rehire Provisions in Oregon Employment Agreements**

The Act makes it an unlawful employment practice to enter into an agreement with an employee or prospective employee that contains non-disclosure or non-disparagement provisions that have the purpose or effect of preventing employees from disclosing conduct that constitutes sexual assault or discrimination in the workplace.[1]

Employers may enter into confidentiality, non-disparagement, or no-rehire provisions as part of a settlement or severance agreement only if the employee claiming to be aggrieved by prohibited conduct requests to enter into the agreement and if the employee is given at least seven days to revoke the agreement after signing.

The Act does, however, permit employers to enter into confidentiality, non-disparagement, or no-rehire agreements with an employee who has engaged in prohibited conduct without a request from the employee and without a seven-day revocation period, provided the employer has made a good-faith determination that the employee engaged in prohibited conduct.

- **Written Discrimination Policies**

The Act mandates that every Oregon employer adopt written policies and provide a copy of the written policy to each employee at the time of hire. The policy must, at a minimum, include the following information:

1. The process for an employee to report prohibited conduct;
2. The identity of the individual designated by the employer as responsible for receiving reports of prohibited conduct, as well as an alternate;

3. The statute of limitations applicable to an employee's right of action for filing a claim of sexual harassment, sexual assault, prohibited discrimination, or violations of the law's prohibitions on certain terms in employment agreements (five years);
4. A statement that an employer may not require or coerce an employee to enter into non-disclosure or non-disparagement agreements;
5. A statement that an employee alleging to be aggrieved may voluntarily request to enter into non-disclosure or non-disparagement agreements and that an employee would have seven days to revoke such an agreement; and
6. A statement that advises employers and employees to document any incident involving prohibited conduct, including sexual assault as defined by the Act.

The employer must make the written policy generally available in the workplace and require any individuals designated to receive complaints to provide a copy of the written policy to any employee disclosing information regarding discrimination or harassment.

- **Statute of Limitations**

The Act drastically increases the statute of limitations to bring claims from one year to five years. The five-year statute runs from the date of occurrence of the alleged unlawful practice. As memories fade with time, it is especially important to emphasize to employers the importance of contemporaneous recordkeeping and retention regarding any alleged prohibited conduct.

The five-year statute of limitations to bring claims for discrimination or harassment based on an employee's protected class becomes effective September 29, 2019. The five-year statute of limitations for claims of unlawful employment practices based on non-disclosure or non-disparagement agreements becomes effective on October 1, 2020.

- **Effect on Golden Parachutes**

The Act provides that severance or separation pay agreements (e.g., golden parachutes) between employers and executives or managers (persons with the authority to hire and fire or with the discretion to exercise control over employees) may be voidable if, after a good-faith investigation, an employer determines that the executive employee violated the Act's provisions and that such violation substantially contributed to the employee's separation.

WHAT ARE THE NEXT STEPS FOR EMPLOYERS?

The key provisions of the Act take effect on October 1, 2020, except for the five-year statute of limitations referenced above. Employers should take this time to start preparing for the new law by:

- Reviewing and updating written discrimination and harassment policies, including identifying primary and alternate individuals to receive complaints.
- Updating employment agreements to ensure compliance with the Act's provisions going forward.
- Reviewing and updating company document retention policies given the new five-year statute of limitations.

- Consulting with legal counsel to review company policies and procedures for investigations of alleged misconduct by executives or managers with golden-parachute provisions.
- Consulting with your legal counsel at K&L Gates when drafting separation agreements with employees who have complained of harassment or discrimination.

Notes:

[1] The Act makes a distinction between conduct between employees, between an employer and employee, and conduct that occurs on or off company premises.

KEY CONTACTS

STEPHANIE E. MCCLEERY
PARTNER

PORTLAND
+1.503.226.5779
STEPHANIE.MCCLEERY@KLGATES.COM

