b alert

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OREGON LEGISLATIVE UPDATE

THE OREGON LEGISLATURE ADJOURNS FOR SUMMER AFTER PASSING A NUMBER OF LAWS OF IMPORTANCE FOR EMPLOYERS

With summer in full swing, the 2013 Oregon Legislative Session finally wrapped on July 8. Before ending the session, legislators passed a number of bills of importance to employers, which were subsequently signed into law by Governor Kitzhaber. While that might mean a vacation for state lawmakers, Oregon employers will want to study the requirements in the new labor and employment laws. In the paragraphs that follow, we summarize seven of these new laws that are now in effect or will go into effect by January 1, 2014.

Veterans To Receive Veterans Day Off Law

- SB 1, signed by Governor Kitzhaber on April 2, 2013.
- Effective immediately.

The new Veterans Day Off law requires employers to allow employees who are veterans to take leave on Veteran's Day, so long as the veteran/employee requests the day off 21 days in advance. A veteran is defined as an individual who has served on active duty for at least six months and received an honorable discharge, an individual who served on active duty and received a disability rating, or an individual who served on active duty in a combat zone. The employer has the option of granting paid or unpaid leave.

However, an employer is not required to grant leave on Veterans Day if it would create a "significant economic or operational disruption or undue hardship." If an employer determines that it cannot grant leave to all veterans who have requested it, the employer may choose to either (a) deny all of the requests or (b) deny leave only to the minimum number of veterans necessary to avoid disruption or hardship. Where an employer denies a veteran/employee request for leave on Veterans Day based on a disruption or hardship, during the year following Veterans Day the employer must allow the veteran/employee to choose another day to take off.

The first Veterans Day covered by this law is four months away (November 11, 2013)

Interns Protected from Discrimination

- HB 2669A, signed by Governor Kitzhaber on June 13, 2013.
- Effective immediately.

Oregon now extends statutory protections against employment discrimination to interns. The new law adopts the United States Department of Labor's six criteria definition for "intern" (see Wage and Hour Division Fact Sheet #71). Interns now enjoy the same protection from discrimination as employees.

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Note, however, that the statute expressly states that it does not create an employment relationship for purposes of Oregon's wage and hour laws. Thus, interns remain exempt from minimum wage and overtime laws so long as they meet the six-factor test for interns.

The statute creates a cause of action and interns may file suit seeking relief for alleged discrimination based on sex, race, color, religion, sexual orientation, marital status, national origin, age, military service, disability, whistleblowing, and participating in administrative, criminal, or civil proceedings. Laws against certain pre-employment screening and restricting tobacco also apply to interns under the new law.

We advise that employers treat interns the same as they would employees for the purposes of preventing discrimination. There are at least two steps for employers to consider taking. First, they should consider providing training (or adding to the training already being provided) to those employees who select, supervise or oversee the work of interns. Second, they also should review their intern selection processes to make sure intern candidates are afforded EIO (equal internship opportunities).

Employers Access To Personal Social Media Accounts Limited

- HB 2654B, signed by Governor Kitzhaber on May 22, 2013.
- Effective January 1, 2014.

HB 2654B goes into effect on January 1, 2014 and will limit an employer's ability to access the "social media" accounts of employees and applicants. "Social media" is a term commonly used to refer to forms of electronic communication through which users share information, ideas, personal messages, and other content. Popular social media examples include Facebook, Twitter and Instagram. The statute defines "social media" as:

> "… an electronic medium that allows users to create, share and view user-generated content, including, but not limited to, uploading or downloading videos, still photographs, blogs, video blogs, podcasts, instant messages, electronic mail or Internet website profiles or locations."

Beginning January 1, 2014, it will be an unlawful employment practice for employers to take a number of adverse actions against employees and applicants related to social media. Specifically, it will be unlawful for an employer to require or request an employee or applicant to provide access to a personal social media account through the employee's log-in or "other means." It also will be unlawful for an employer to compel an employee or applicant to add the employer to his/her list of contacts for a social media account or to access his/her personal social media account in the employer's presence.

The new law also makes it unlawful for an employer to take or threaten adverse employment action against an employee who refuses to comply with any employer request or directive prohibited by the new law. Similarly, the new law prohibits an employer from declining to hire an applicant because the applicant refuses to comply with any employer request or directive prohibited by the new law.

The protection for employee's social media privacy only applies to personal social media accounts. An employer may require an employee to provide the log-in information for the employer's social media account or for an account provided to the employee by the employer. The law also protects employers from any potential liability (for example, in a suit for negligent hiring) for failure to request or require an applicant or employee's log-in information for a personal social media account. Further, while an employer would not violate the law if it inadvertently obtained an employee's log-in information, the employer may not use that information to access an employee's personal social media account.

The new law also provides that a number of actions are not unlawful. For example, it permits an employer to conduct an investigation of misconduct based on receipt of specific information about employee activity on a personal social media account. While the employer may not compel employees to provide their log-in information, it may require an employee to share content from a personal social media account or site if the information was "reported" to the employer and is "necessary for the employer to make factual determination about the matter."

Additionally, it is not unlawful for an employer to access information available to the public, including information that is accessible through an online account on the social media site. Despite this permission, employers ought to proceed with caution until BOLI or the courts provide guidance.

Finally, it is not unlawful for an employer to act in compliance with other state and federal laws or regulations.

An employer has the right to protect its reputation, and in some cases has a duty to protect other employees from harassment. In so doing, though, the employer is increasingly likely to run into social media issues. Knowing when to investigate personal social media use and when to stay away is a complex subject with many competing interests. An awareness of the potential issues is critical, and careful planning is the best defense against liability.

OFLA Amended To Include Bereavement Leave

- HB 2950, signed by Governor Kitzhaber on June 13, 2013.
- Effective January 1, 2014.

HB 2950 adds bereavement to the list of reasons for which an eligible employee may take OFLA leave. Specifically, within 60 days of receiving notice that a "family member" (as defined ORS 659A.150) has died, an eligible employee may take up to two weeks off to:

- Attend the funeral or alternative to a funeral;
- Make arrangements necessitated by the death of a family member; or
- Grieve the death of the family member.

If an employee experiences the death of more than one family member in a year, the employee may take up to two weeks for each death; the employer may not require the leave to be taken in concurrent two-week periods.

Bereavement leave counts towards the twelve weeks of total leave permitted under OFLA (it does not add additional leave). Note, however, that the federal Family and Medical Leave Act (FMLA) does not provide for bereavement leave and employers should not count bereavement leave towards the total amount of leave permitted under FMLA.

The new legislation provides that employees do not have to give advance notice to take bereavement leave so long as the employee gives oral notice within 24 hours of taking leave and written notice within three days of returning to work. The bill also directs BOLI to adopt rules addressing the relationship between leave for the death of a family member under ORS 659A.159(1)(e) and federal laws, including the Fair Labor Standards Act.

Employers who already have policies permitting bereavement leave are encouraged to make sure their policies comply with the new law.

Direct Deposit of Paychecks Permitted Without Prior Employee Consent

- HB 2683B, signed by Governor Kitzhaber on June 13, 2013.
- Effective January 1, 2014.

Many employers want to pay employees by direct deposit because of the cost savings and efficiencies that may be realized. In addition, direct deposit makes the delivery of final paychecks easier and more certain. Current Oregon law permits direct deposit only where the employee agrees to that arrangement. That will change beginning January 1, 2014.

HB 2683B, which amends ORS 652.110(3), permits employers to use direct deposit without prior consent from the employee. However, upon request by an employee, the employer must provide the employee with payment by check.

The legislature did not amend the current statutory requirement that an employer provide a physical itemized statement of deductions unless the employer has received individual employee consent to provide the statement electronically. Technical assistance from BOLI indicates that an employer cannot make consent to provide this statement electronically a condition of employment for new hires. Further, a union or other exclusive representative also cannot provide consent on an individual employee's behalf.

Poster Requirement Regarding Employment Rights of Victims of Domestic Violence

- HB 2903, signed by Governor Kitzhaber on June 6, 2013.
- Effective January 1, 2014.

Since 2010, Oregon law has required employers to provide leave as a reasonable safety accommodation when requested by an employee who is a victim of domestic violence, harassment, sexual assault, or stalking. The law also makes it unlawful for an employer to discriminate or retaliate against an applicant or employee who takes leave under the law.

Effective January 1, 2014 Oregon employers will be required to post in a conspicuous and accessible location in the workplace a summary of the employment rights that are provided by

ORS 659.270A to ORS 659A.285 to victims of domestic violence, harassment, sexual assault, or stalking. BOLI must develop a compliant poster before the law takes effect.

Workers' Compensation Exclusive Remedy Provision Applies To LLCs and Partners

- SB 678, signed by Governor Kitzhaber on June 24, 2013.
- Effective immediately.

Oregon's workers' compensation laws provide the exclusive remedy for employees incurring a workplace injury or illness. Recently enacted SB 678 extends the exclusive remedy provision in found in ORS 656.018 to "partners, limited liability company members, general partners, limited liability partners, [and] limited partners".

The law is a direct response to the 2012 decision by the Oregon Court of Appeals in *Antonio Cortez v. Nacco Materials Handling Group, Inc*. The court concluded that the exclusive remedy provision in the workers' compensation laws do not apply to the conduct of members of an LLC acting as individuals ("Second, if the legislature had intended to include LLC members as one of the types of entities protected under the exclusive remedy provision, it knew how to do so expressly"). The legislature has now done just that.

The bill took effect immediately and applies to claims arising after June 24, 2013.

Bullard Law will continue to monitor developments under these new laws and to track other proposals not yet signed into law. Please feel free to contact us anytime with any questions about these matters or any other labor, employment, or benefits issues.

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