

Labor and Employment Alert: Oregon Enacts an Expansive Workplace Protection Act

Related Attorneys

Adam J. Rocco

Michael C. Griffaton

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Oregon recently enacted the Workplace Protection Act (WPA) to restrict the use of nondisclosure agreements in circumstances alleging employment discrimination and mandating the employers adopt written anti-discrimination policies. The WPA also increases the statute of limitations for discrimination claims from one year to five years, which highlights the need for effective workplace policies and practices.

NONDISCLOSURE PROVISIONS

The WPA 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 provisions that prevent an employee from disclosing unlawful employment discrimination: (1) between employees; (2) between an employer and employee in the workplace or at off-site work-related events coordinated by the employer; or (3) between an employer and employee off-site. This prohibition extends to any agreement entered into as a condition of employment, continued employment, compensation, promotion, or the receipt of benefits.

Under existing Oregon law, "discrimination" means discrimination based on race, color, religion, sex, sexual orientation, national origin, marital status, age (if over 18), expunged juvenile record, service in a uniformed service, or disability. The WPA further states 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 in a NDA.

The WPA 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

the agreement. 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

These provisions become effective on October 1, 2020.

VOIDING AGREEMENTS

The WPA permits an employer to void an existing agreement with an employee who has authority to hire and fire employees or the discretion to exercise control over employees (i.e., a supervisor) that requires severance or separation payments. An employer may void that agreement if, after conducting a good faith investigation, it determines (1) the employee violated the nondiscrimination law or the employer's nondiscrimination policy Act, and (2) the violation was a substantial contributing factor in causing the separation from employment. This provision becomes effective on October 1, 2020.

ENFORCEMENT

For claims of unlawful discrimination, the WPA extends the statute of limitations to five years (currently one year) after the occurrence of the alleged unlawful practice. This applies to conduct occurring on or after the 91st day following the date the current legislative session ends. For claims regarding a NDA, the WPA requires a complaint be filed 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.

NONDISCRIMINATION POLICY

The WPA requires that every employer adopt a written policy containing procedures and practices for the reduction and prevention of unlawful employment discrimination. This provision becomes effective on the 91st day after the current legislative session ends. The state's Bureau of Labor and Industries will make available model procedures or policies that employers may use as guidance to establish the policy. At a minimum, the policy must:

- Provide a process for an employee to report prohibited conduct;
- Identify the individual designated by the employer who is responsible for receiving reports of prohibited conduct, including an individual designated as an alternate to receive such reports;
- Include the statute of limitations period applicable to an employee's right of action for alleging unlawful conduct;
- Include a statement that an employer may not require or coerce an employee to enter into a nondisclosure or nondisparagement agreement, including a description of the meaning of those terms;
- Include an explanation that an employee claiming to be aggrieved by unlawful employment discrimination may voluntarily request to enter into a NDA, including a statement that explains that the employee has at least seven days to revoke the agreement; and
- Include a statement that advises employers and employees to document any incidents involving unlawful employment discrimination.

CONCLUSION

Employers should review and revise their current policies and practices to conform to the WPA's new requirements (including the state's model nondiscrimination policy once it's available). Contact your Vorys lawyer if you have questions about nondisclosure provisions or harassment/anti-discrimination policies and training.