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**Agenda**

- Guide to employee discipline in the public sector workplace
- New employment laws on the horizon

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**Guide to Discipline**

- Due Process
- Probies are People Too
- Dealing with Whistleblowers
- Name-Clearing Hearings

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### Due Process

The legal requirement established under U.S. Constitution and PECBA that the employer must respect all legal rights of the employee:

- It is the right thing to do
- Driven also by CBA, Employment Policy
- That other "F" word...



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### The Law Implicated

- The United States Constitution & Loudermill
  - Entitles employees with a property interest in their jobs to certain due process rights prior to loss of pay (suspension or demotion) or termination
  - Non-probationary public employees have a property right in continued employment



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### Property Interest

- Applies to public employees
  - Represented by a union
  - Even some who are not represented
  - Can also apply where employer's policies provide for "just cause" termination or discipline



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### The Law Implicated

- Due Process
  - Oral or written notice of the charges against the employee
  - An explanation of the employer's evidence, and
  - An opportunity to be heard by the decision maker before final determination



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### What About Probies?

*I don't need to give probationary employees a reason when I fire them.*

- OR -

*If I fire a probationary employee, I can leave it at, "You didn't pass probation" and say nothing more.*



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### Probationary Employees: The Truth

- Probationary employees need "love" too
  - This is a time to give an otherwise good person a 'heads up' regarding performance and an opportunity to succeed.



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### Probationary Employees: The Truth

- Remember, too, that jurors are more concerned with fairness than the “letter of the law”...
  - Firing a new employee without giving him or her an opportunity to fix the situation and do better may be perceived as **unfair by a jury**



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### Whistleblower Protection

- ORS 659A.203 protects employees who report in good faith:
  - A Violation of Law
  - Mismanagement
  - Gross Waste of Funds
  - Abuse of Authority
  - Substantial and Specific Danger to Public Health and Safety



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### Tips for Disciplining a “Whistleblowing” Employee

- Discipline (or termination) is retaliatory only if it occurs *because of* the employee’s protected activity
- Enforce your lawful policies and discipline for the violations



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## Tips for Disciplining a “Whistleblowing” Employee

- Make sure, however, that the discipline comes early (and, where appropriate, often)
- Make sure your documentation survives the “smell test”
  - Goal: Show reasons are unrelated to the protected activity!



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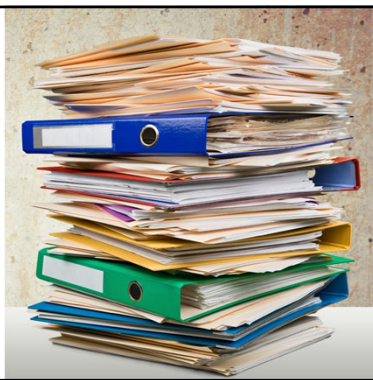
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## Documentation is Crucial!



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## Name-Clearing Hearings



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### Elements

1. A government employer
2. Makes a public disclosure of "stigmatizing" (i.e., really bad) information about an employee
3. The employee disputes that he or she did anything really bad
4. The public disclosure is made in connection with the termination of employment



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### What is "stigmatizing" or "really bad" information?

- In practical terms, the really bad information must have the effect of making it impossible for the employee to get another job.
  - But NOT just public employment in the position the former employee held at the time of the termination.



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### NCH in General

- **Sole purpose:** To permit the person the opportunity to publicly clear his/her name
- The hearing is the only remedy.
  - Not an opportunity to seek reinstatement or reconsideration of a termination decision
- The NCH is just that, a hear-ing.
  - The former employee speaks, you listen. They don't get to have a mini-trial.



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### Employer's Primary Goals

- Give the employee:
  - Notice of an impending "public disclosure"
  - An offer of a NCH
  - A reasonable time to prepare for the NCH
  - The opportunity to have counsel present
  - The opportunity to present witnesses and evidence
  - The opportunity to have the hearing in front of the applicable body or other representative of the decision-maker in a public forum.



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### New Laws

- Workplace Harassment Laws (2)
- Pay Equity Update

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**Oregon Workplace Fairness Act**  
(signed into law June 11)  
(SB 726)

**Oregon's unnamed harassment law that provides public sector employers with additional burdens**  
(signed into law June 20)  
(SB 479)



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## New Harassment Laws

### Key Provisions

- Extends the statute of limitations for certain claims **(five (!) years!)**
- Specifies what language may be used in separation/severance agreements with alleged "victims" and alleged bad actors
- Requires specific language in policies prohibiting harassment in the workplace



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## New Harassment Laws

New Statute of Limitations for discrimination, harassment, and retaliation claims under ORS 659A.030 (protected class), 659A.082 (military) or 659A.112 (disability):

**Five (!) Years**

Statute of limitations for bringing claims for violation of the separation/severance agreement provisions:

**Five (!) Years**



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## New Harassment Laws

- Applies to all Oregon employers, regardless of the number of employees employed.
- Effective dates:
  - Claims under ORS 659A.030, 659A.082, and 659A.112 is **September 30, 2019**.
  - Policy and procedures: **January 1, 2020**
  - Separation/settlement agreements: **October 1, 2020**.



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### New Harassment Laws

#### New Requirements for No-Harassment Policies (eff. 1/1/20)

- A statement prohibiting workplace harassment;
- Provide a complaint-reporting procedure;
- No-retaliation provision;
- Identify (at least) two people in the organization who can receive complaints;



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### New Harassment Laws

#### New Requirements for No-Harassment Policies (eff. 1/1/20)

A statement of the scope of the policy, including that the policy applies to elected public officials, volunteers and interns.



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### New Harassment Laws

#### New Requirements for No-Harassment Policies (eff. 1/1/20)

- Tell employees that they should document any incidents of harassment, discrimination or sexual assault; and
- Tell the "victim" that he/she may voluntarily disclose information regarding an incident of workplace harassment that involves him/her.



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### New Harassment Laws

#### New Requirements for No-Harassment Policies (eff. 1/1/20)

Include a statement that the employer can't require employees to enter into a nondisclosure or non-disparagement agreement ("including a description of the meaning of those terms").



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### New Harassment Laws

#### New Requirements for No-Harassment Policies (eff. 1/1/20)

- Educate employees that they have **five years** to file a BOLI complaint or civil lawsuit relating to harassment or discrimination;
- Advise that an employee claiming to have been harassed or discriminated against can request to enter into a separation agreement with the employer that has a seven-day revocation period.



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### New Harassment Laws

#### New Requirements for No-Harassment Policies (eff. 1/1/20)

"Information stating that a victim of workplace harassment has a right to seek redress through the employer's [complaint-reporting procedure], through the Bureau of Labor and Industries' complaint resolution process . . . or under any other available law, whether civil or criminal."



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### New Harassment Laws

#### New Requirements for No-Harassment Policies (eff. 1/1/20)

"Information to connect a victim of workplace harassment with legal resources and counseling and support services, including any available employee assistance services."



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### New Harassment Laws

#### New Requirements for No-Harassment Policies (eff. 1/1/20)

The policy must be in writing, and must be made available to employees within the workplace. The policy must be provided:

- To all current employees;
- To each new employee at time of hire; and
- To an employee "at the time that the employee discloses information regarding prohibited discrimination or harassment".



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### New Harassment Laws

#### But don't worry . . .

BOLI to provide:

- "Model procedures or policies" available for employers; and
- Regulations (must be adopted by October 1, 2019).



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### New Harassment Laws

#### “Written Policies and Procedures”

- Provide instruction for maintaining records of workplace harassment;
- Provide a complaint-reporting procedure that allows employees to file a complaint five years from the date the employee was harassed; and
- Follow-up with the complaining employee every three months in the calendar year following receipt of the complaint.



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### New Harassment Laws

#### New Requirements for Separation/Severance Agreements (employees who allege harassment, discrimination or sexual assault):

1. No non-disclosure provisions;
2. No non-disparagement provisions;

(Effective 10/1/20)



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### New Harassment Laws

#### New Requirements for Separation/Severance Agreements (employees who allege harassment, discrimination or sexual assault):

3. No provisions that have the “purpose or effect of preventing the employee from disclosing or discussing conduct;” and
4. No “no-rehire” provisions.

(Effective 10/1/20)



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### New Harassment Laws

But if the employee/alleged victim requests to enter into such an agreement:

- OK to have non-disclosure, non-disparagement, no-rehire, and confidentiality provisions.
- BUT: Must have a seven-day revocation period (no review period required).

(Effective 10/1/20)



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### New Harassment Laws

Separation/severance agreements for employees who are alleged to have engaged in harassment, discrimination or sexual assault:

- The employer can enter into the standard separation/severance agreement it's used for years. Non-disparagement, non-disclosure, no rehire provisions all acceptable.
- Employer doesn't have to wait for the employee to ask.



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### New Harassment Laws

#### Employer Action Items

- Review and update no-harassment/no-discrimination policy by January 1, 2020.
- Review record retention policies – Secretary of State schedules may not suffice.



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### New Harassment Laws

#### Employer Action Items

- Redoing training on harassment/discrimination is always a good idea.
  - Hot topic for managers/supervisors: Documenting events and conversations with sufficient detail so that you can recall them with little difficulty five years later!
- “Flag” October 1, 2020, when the new separation/severance agreements go into effect.



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### Pay Equity Law Updates

**Revised:** It is not unlawful to pay different levels of compensation when an employee is:

- Performing modified/light-duty work because of a workers' compensation injury; or
- Temporarily performing modified work because of a medical condition that is:
  - Authorized by a licensed medical professional; or
  - Requested by the employee and authorized by the employer in a non-discriminatory manner.



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### Pay Equity Law Updates

- BOLI Best Practice: Systemize your pay structures and conduct an equal pay analysis every three years (if not more).
- “System” is now defined as a consistent and verifiable method in use at the time that a violation of the equal pay law is alleged.
  - Not included: Ad hoc decisions; after-the-fact justifications for disparities.



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### Pay Equity Law Updates

- More information about an "equal pay analysis"?  
Sort of.
  - An equal pay analysis no longer requires a review of the protected class asserted by the plaintiff.
  - But an equal pay analysis must "include a review or practices designed to eliminate unlawful wage differentials."



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### Pay Equity Law Updates

- CBA exception? Sort of.
- The law now states that an employer can pay employees for work of comparable character at different compensation levels if the differential is based on a "bona fide" category that is contained in a CBA.



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