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For the Hearing regarding House Bill 2489

Held by the House Committee on Business and Labor

March 13, 2019

Thank you Mr. Chairman for the opportunity to testify before this committee on the issue of House Bill 2489, a bill that "establishes conditions of enforceability for certain employment contracts or agreements." I am an Associate Professor at the University of Oregon School of Law, where my research focuses on employment law, discrimination and human resources practices. I also teach negotiation and alternative dispute resolution. Before joining the faculty at the University of Oregon, I was a practicing employment lawyer.

First, I generally favor the idea of legislation that attempts to level the playing field between individual employees and employers when it comes to employment contracts. For the reasons I discuss below, I believe that Sections 1(b) and 1(e) effectuate that purpose reasonably well. I question how well Sections 1(a), (d) and (f) effectuate the public policy of protecting employees from the take-it-or-leave it contracts.

Below, I explain the adhesive nature of many employment contracts, raise some questions about the scope of the statute, and then assess each section of the bill individually.

## I. Contracts of Adhesion

Many employees are asked to sign contracts at the start of their employment that serve to limit the employee's substantive and procedural rights during and after employment. These might include non-compete provisions,[1] confidentiality provisions, non-solicitation provisions, class action waivers, or arbitration provisions.

These contracts can have important consequences for the employees who sign them. Confidentiality provisions affect whether an employee feels free to speak out about unlawful activity in the workplace. Class action waivers, arbitration provisions, and other dispute resolution provisions affect the remedies available to workers if the employer violates the law. Non-compete, non-solicitation provisions, and confidentiality provisions affect an employee's future job opportunities.

Employees may not have enough time to read or consider these provisions before deciding whether to accept employment. Indeed, employees may even be given such documents on their first day of work, or even after starting their employment. By that point, it may be too late to reconsider their employment or attempt to renegotiate their terms. They are known legally as contracts of adhesion – "take it or leave it" contracts with no meaningful bargaining opportunity.

Thus, I support the legislature's efforts to place limits on these contracts to ensure that employees don't surrender important legal rights.

## II. Scope of Statute.

It appears that the broad purpose of the statute is to limit an employer's ability to place restraints on workers. However, employers also enter into contracts with provisions that are favorable to workers, such as promises relating to compensation, benefits, severance, or termination. A statute that makes it easy to invalidate all types of employment contracts will also have the effect of invalidating promises that employees are often eager to enforce if breached.

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[1] Oregon regulates non-compete agreements through ORS 653.295.

The legislature might better effectuate its purpose by limiting the scope of the statute to contract provisions that place restrictions on employees.

Second, the legislature may also want to clarify whether the bill covers employment policies. At common law, employer policies, whether standalone or embedded in an employee handbook, can have quasi-contract status.[2] These policies sometimes include important employment terms, and also tend to be updated by employers with some regularity. They might include, for example, harassment and discrimination policies, but could also include policies that limit employer remedies, like arbitration "policies." In my opinion, it might make sense to clarify that policies governing workplace conduct should be exempt from House Bill 2489.

Third, the legislature may want to include an exception for employment contracts with executives or employees represented by counsel. Where contracts are individually negotiated, public policy concerns about take-it-or-leave it contracts do not apply.

Fourth, the legislature might want to consider clarifying that the bill does not apply to waivers in connection with the settlement of legal claims once a dispute has already arisen.

## III. Provisions that Help Address Contracts of Adhesion.

**Section 1(b).** Section 1(b) requires employers to provide employment agreements two weeks before an employee's start date. I generally support Section 1(b)'s requirement because the additional time might empower employees to negotiate changes in the terms of the agreement, or consider other job offers with more favorable contractual provisions.

However, it is worth considering whether the bill will delay an employee's start date where the employer and/or employee would prefer to start right away. Because the Oregon non-compete statute already requires non-compete agreements to be provided two weeks in advance, House Bill 2489 will not affect the timing of employment for contracts containing a non-compete. It also will not affect workers hired well in advance of their start date. It is also possible that employers may elect to forego contracts for employees engaged in short term work, or work that does not involve access to trade secrets, for the benefit of hiring workers right away. Nevertheless, the legislature may want to consider whether to include an exception to the two-week requirement in certain circumstances.

I also note that the bill does not permit the employer to enter into a contract after the inception of employment. The legislature may want to consider some sort of allowance for contracts after employment starts, perhaps with an additional requirement that the employer provide separate consideration, or that it be made in connection with the employee's advancement or contract renewal.

**Section 1(e).** Section 1(e) renders unenforceable any provision that reduces the employee's privileges or remedies available under federal or state law. I generally support this provision. It is not unduly burdensome for employers, because it is limited to what the law already prohibits.

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[2] See e.g. Yartzoff v. Democrat-Herald, 281 OR 651 (1978).

The provision prevents employers from using their bargaining power to extract waivers from employees at the inception of employment. Employees cannot meaningfully or knowingly waive their rights under federal or state law at the start of their employment, because any legal violations have not yet occurred, so they don't really know what they're giving up by accepting limitations on their rights and remedies. Furthermore, prospective waivers disincentivize employers to invest in legal compliance if they can successfully avoid liability through contract.

Although a number of employment-related laws are unwaivable, employees may not know that. Consequently, employers have an incentive to request waivers – or draft contracts that do not include clear carve outs for rights protected by laws – because it leaves employees with the impression that their rights have been waived. An employee who believes she has waived her legal rights is unlikely to pursue them.

Section 1(e) is useful because it will discourage employers from requesting waivers. It also forces employers to draft clearer contracts, which make clear that employees do not surrender their statutory rights by signing the contract.

## IV. Provisions that May Not Advance the Legislature's Goal

**Section 1(a).** Section (a) of House Bill 2489 attempts to regulate the form of employment agreements by requiring that they be reduced to writing. I question whether this provision offers meaningful protection to employees and expect that it will likely undermine employee interests.

In my experience, companies are generally diligent about reducing employer-favorable contracts and policies to writing. By contrast, it is employees that generally sue over oral promises made to them, typically about employment security or compensation.[3] Thus, Section (a) will primarily have the effect of cutting off employee claims based on oral promises from their employer. This may not be what the legislature intended to achieve through Section (a).

**Section 1(d).** Section 1(d) renders unenforceable any contract longer than two years. Section 1(d) is both problematic and ambiguous. First, it is unclear to me whether an indefinite contract would qualify as a contract that exceeds two years. In my experience, private sector employees are almost always employed on an at-will basis, meaning they can be terminated, or can quit, at any time. However, at-will contracts are indefinite, and employees can and do work for longer than two years on an at-will basis. Indeed, the median duration of employment relationships in the U.S. is 4.2 years.[4] Would at-will contracts signed near the start of employment run afoul of the two-year requirement? It is not at all clear. To the extent at-will contracts are covered, the employer would need to have employees sign a new agreement every two years. In my opinion, that would be wasteful. But it's also unclear whether signing agreements every two years would even be permissible, because the statute does not contain a mechanism for the employee to enter into an agreement during employment.

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[3] McPhail v. Milwaukie Lumber Co., 165 Or.App. 596 (2000); Slover v. Oregon State Bd. Of Clinica Social Workers, 144 Or.App. 565 (1996).

[4] Bureau of Labor Statistics, Employee Tenure Summary, https://www.bls.gov/news.release/tenure.nr0.htm (Sept. 20, 2018).

Even if the statute does not apply to at-will employment relationships, it has the effect of placing a cap on the duration of an employment contract. Employment for term – though rare in the private sector – is generally considered quite valuable. An employee with the good fortune to receive a contract for term longer than two years would likely be quite dismayed to find that Oregon placed a strict cap on the number of years of employment. I'm not sure why the state would want to limit such employer largess, however rare.

To the extent that the legislature is attempting to address the problem of employers strategically enforcing old contracts for competitive reasons, rather than based on a strong business justification, I would recommend that it do so more directly. For example, the legislature could take an approach similar to the non-compete statute in ORS 653.295 and require that employers persuade the court that their original business justifications for the restraint are as strong as they were when the contract was originally signed.

**Section 1(f).** House Bill 2489 requires that the employer be registered with the Secretary of State. However, it presumes that the employer is a "business," which excludes non-profit and educational employers, as well as individual employers.

The requirement to register with the Secretary of State would be feasible for non-profits. However, I'm uncertain whether there is a mechanism for individuals to register with the Secretary of State, and question the usefulness of such a requirement.

I also question whether Section 1(f) serves its intended purpose. My understanding is that employees sometimes have difficulty recovering wages from fraudulent fly-by-night operations that never register with the state, and leave town when wages come due. However, this bill would have the effect of invalidating any promises the business made to the worker regarding their compensation, because any such promise would be void due to the employer's unregistered status.