



STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

April 1, 2019

Senator Brian Boquist  
900 Court Street NE S311  
Salem OR 97301

Re: Senate Bill 726—Legislators and other state elected officials as “employer”

Dear Senator Boquist:

You asked four questions related to how Senate Bill 726 applies to members of the legislature and other state elected officials. Generally, SB 726 makes it an unlawful employment practice for an employer to enter into a nondisclosure or nondisparagement agreement with an employee or prospective employee as a condition of employment, continued employment, promotion, compensation or the receipt of benefits. Senate Bill 726, if enacted, would be added to and made a part of ORS chapter 659A.

Questions and answers

1. Does the definition of “employer” or “person” in ORS 659A.001 include the legislature?

Yes, the definition of “employer” or “person” in ORS 659A.001 includes the legislative department, which includes the Legislative Assembly. The definition of “employer” for purposes of Oregon’s unlawful discrimination laws is “any person who in this state, directly or through an agent, engages or uses the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed.”<sup>1</sup> “Person” includes, among other things, “[a] public body as defined in ORS 30.260.”<sup>2</sup>

In ORS 30.260, “public body” has the meaning given that term in ORS 174.109. This in turn includes “state government bodies,” “local government bodies” and “special government bodies.” State government bodies include the legislative department.<sup>3</sup> Explained in detail below at question 2, the legislative department includes the Legislative Assembly as a whole, but not individual members. Therefore, individual members are not employers. The Legislative Assembly is an employer.

2. Does the definition of “employer” or “person” in ORS 659A.001 include elected officials (including members of the legislative department)?

No. The definition of “employer” in ORS 659A.001 does not include individual legislators, judges, or local or specially elected officials. The definition of “state government body” does

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<sup>1</sup> ORS 659A.001 (4)(a).

<sup>2</sup> ORS 659A.001 (9)(b).

<sup>3</sup> ORS 174.111.

include Oregon's five statewide elected officers. These are the Governor, the Secretary of State, the State Treasurer, the Attorney General and the Commissioner of the Bureau of Labor and Industries.<sup>4</sup> This does not mean that these individuals are employers. Rather, they operate in a capacity akin to executive authority such that their actions are the actions of the state.

"Legislative department" means "the Legislative Assembly, the committees of the Legislative Assembly and all administrative divisions of the Legislative Assembly and its committees."<sup>5</sup> The definition does not include individual members of the assembly.

The definition of "legislative department" can be contrasted with the definition of "executive department" under ORS 174.112, which specifically includes "all statewide elected officers other than judges." As stated above, Oregon has five statewide elected officers that are considered "employers" under ORS 659A.001. Also included in the definition of "executive department" are "all boards, commissions, departments, divisions and other entities, without regard to the designation given to those entities, that are within the executive branch of government."<sup>6</sup>

"Judicial department" means "the Supreme Court, the Court of Appeals, the Oregon Tax Court, the circuit courts and all administrative divisions of those courts."<sup>7</sup> Oregon judges are elected officials but are not included with the definition of "judicial department." Therefore, the courts and administrative divisions of the judicial department are the "employer" for purposes of ORS 659A.001.

"Local government [bodies]" means "all cities, counties and local service districts located in this state, and all administrative subdivisions."<sup>8</sup> "Special government bodies" means in summary all other entities created by statute, resolution or ordinance.<sup>9</sup> Neither definition includes the individually elected officials.

3. If a member does not fall under the definition of an "employer," can an elected official have their staff sign a nondisclosure agreement or other documents as described in SB 726?

No, an elected official cannot have their staff sign a nondisclosure agreement or other documents as described in SB 726 without violating the bill's unlawful employment practice. Staff of individual legislators are employees of the legislative department.<sup>10</sup> If a legislator, or any supervisor or manager, has a staff member sign a nondisclosure agreement or other document that would be an unlawful employment practice under SB 726. The act of an agent, who acts within his or her scope of authority in a discriminatory fashion, constitutes the act of the employer.<sup>11</sup>

4. If a member has a staffer sign a nondisclosure agreement, who would be liable?

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<sup>4</sup> *Oregon Secretary of State*, <https://sos.oregon.gov/blue-book/Pages/state-executive.aspx> (last visited April 1, 2019).

<sup>5</sup> ORS 174.114.

<sup>6</sup> ORS 174.112.

<sup>7</sup> ORS 174.113.

<sup>8</sup> ORS 174.116.

<sup>9</sup> ORS 174.117.

<sup>10</sup> The staff of judges are employees of the judicial department. Staff of executive elected officials are employees of the executive department.

<sup>11</sup> *Schram v. Albertson's, Inc.*, 146 Or. App. 415 (1997), superseded on other grounds by statute as stated in, *Gaither v. John Q. Hammons Hotels Mgmt.*, No. CV09-629-MO, 2009 U.S. Dist. LEXIS 130491 (D. Or. September 3, 2009).

If a member was acting within the scope of their authority, liability would fall on the legislative department as the employer. If a member was acting outside the scope of their authority, the member may face liability for aiding or abetting an unlawful employment practice under ORS 659A.030 (1)(g) or under section 3 (1) of SB 726.<sup>12</sup> Arguably, under SB 726, a member of the legislature would be acting outside the scope of their authority if they require a staff member to sign a nondisclosure agreement and would be individually liable.

Please let us know if we can be of further assistance to you with this issue.

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Very truly yours,

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By  
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<sup>12</sup> *Higgins-Walsh v. Bend Storage & Transfer, Inc.*, No. 6:16-cv-02172-JR, 2018 U.S. Dist. LEXIS 169208, at 12-13 (D. Or. April 26, 2018), citing *Baker v. Maricle Indus., Inc.*, No. 6:16-cv-01793-AA, 2017 U.S. Dist. LEXIS 38668, at 5 (D. Or. March 17, 2017).