

Senate Bill 1586

Sponsored by Senator TAYLOR; Senators DEMBROW, JAMA, Representatives BYNUM, GRAYBER, POWER, PRUSAK (Pre-session filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Clarifies prohibitions regarding provisions that may not be included in agreements between employers and former, current or prospective employees.

Provides that mediation communications relating to certain allegations of misconduct are not confidential and may be admitted as evidence.

Requires employers to provide copy of employer's written policies against unlawful discrimination and harassment to person with whom employer seeks to enter into certain agreements.

A BILL FOR AN ACT

1
2 Relating to unlawful employment practices; amending ORS 243.319, 243.323, 659A.370 and 659A.375.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1.** ORS 659A.370 is amended to read:

5 659A.370. (1) Except as provided in subsections (2) or (4) of this section, it is an unlawful em-
6 ployment practice for an employer to enter into an agreement with **a former, current** [*an*
7 *employee*] or prospective employee, as a condition of employment, continued employment, promotion,
8 compensation or the receipt of benefits, that contains a nondisclosure provision, a nondisparagement
9 provision or any other provision that has the purpose or effect of preventing the employee from
10 disclosing or discussing conduct:

11 (a)(A) That constitutes discrimination prohibited by ORS 659A.030, including conduct that con-
12 stitutes sexual assault; or

13 (B) That constitutes discrimination prohibited by ORS 659A.082 or 659A.112; and

14 (b)(A) That occurred between employees or between an employer and an employee in the
15 workplace or at a work-related event that is off the employment premises and coordinated by or
16 through the employer; or

17 (B) That occurred between an employer and an employee off the employment premises.

18 [(2)] **(2)(a)** [*An employer may*] **It is an unlawful employment practice for an employer or**
19 **former employer to** enter into a settlement, separation or severance agreement that includes one
20 or more of the following provisions [*only when an employee*] **unless the inclusion of such pro-**
21 **visions in the agreement is made at the request of the person** claiming or alleging to be
22 aggrieved, **at least in part**, by conduct described under subsection (1) of this section [*requests to*
23 *enter into the agreement*]:

24 [(a)] **(A)** A provision described in subsection (1) of this section;

25 [(b)] **(B)** A provision that prevents the disclosure of factual information relating to a claim of
26 discrimination or conduct that constitutes sexual assault; [*or*]

27 **(C) A provision that prevents the disclosure of the amount of or fact of any settlement;**

28 **or**

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 [(c)] **(D)** A no-rehire provision that prohibits the employee from seeking reemployment with the
 2 employer as a term or condition of the agreement.

3 **(b) It is a violation of this subsection for an employer or former employer to:**

4 **(A) Request a person alleging to be aggrieved by conduct described under subsection (1)**
 5 **of this section to make a request to enter into an agreement described in paragraph (a) of**
 6 **this subsection.**

7 **(B) Make an offer of settlement conditional upon a request to enter into an agreement**
 8 **described in paragraph (a) of this subsection.**

9 **(C) Fail to provide a person with whom the employer seeks to enter a settlement, sepa-**
 10 **ration or severance agreement a copy of the policy described in ORS 659A.375.**

11 (3)(a) An agreement entered into under subsection (2) of this section must provide that the em-
 12 ployee has at least seven days after executing the agreement to revoke the agreement.

13 (b) The agreement may not become effective until after the revocation period has expired.

14 (4) If an employer makes a good faith determination that an employee has engaged in conduct
 15 prohibited by ORS 659A.030, including sexual assault, conduct prohibited by ORS 659A.082 or
 16 659A.112 or conduct prohibited by this section, the employer may enter into a settlement, separation
 17 or severance agreement that includes one or more of the following provisions:

18 (a) A provision described in subsection (1) of this section;

19 (b) A provision that prevents the disclosure of factual information that relates to a claim of
 20 discrimination or conduct that conduct that constitutes sexual assault; or

21 (c) A no-rehire provision that prohibits the employee from seeking reemployment with the em-
 22 ployer as a term or condition of the agreement.

23 [(5)] **(5)(a)** An employee may file a complaint under ORS 659A.820 for violations of this section
 24 **by any person acting on behalf of an employer or former employer** and may bring a civil action
 25 under ORS 659A.885 and recover **liquidated damages in the amount of \$5,000 and** relief as pro-
 26 vided by ORS 659A.885 (1) to (3).

27 **(b) Notwithstanding any provision of ORS 36.220 to 36.238, mediation communications**
 28 **relating to an alleged violation of this section or to conduct prohibited by ORS 659A.030**
 29 **(1)(g), with respect to an alleged violation of this section, are not confidential and are ad-**
 30 **missible as evidence in any judicial or administrative proceeding relating to the violation.**

31 (6) This section does not apply to an employee who is tasked by law to receive confidential or
 32 privileged reports of discrimination, sexual assault or harassment.

33 (7) As used in this section, "sexual assault" means unwanted conduct of a sexual nature that is
 34 inflicted upon a person or compelled through the use of physical force, manipulation, threat or in-
 35 timidation.

36 **(8) Except to the extent provided under subsections (2) and (4) of this section, an agree-**
 37 **ment that otherwise contains a provision prohibited by this section is void and**
 38 **unenforceable.**

39 **SECTION 2.** ORS 659A.375 is amended to read:

40 659A.375. (1) Every employer in this state shall adopt a written policy containing procedures
 41 and practices for the reduction and prevention of discrimination prohibited by ORS 659A.030, in-
 42 cluding sexual assault, as defined in ORS 659A.370, and discrimination prohibited by ORS 659A.082
 43 and 659A.112.

44 (2) At a minimum, the policy must:

45 (a) Provide a process for an employee to report prohibited conduct;

1 (b) Identify the individual designated by the employer who is responsible for receiving reports
2 of prohibited conduct, including an individual designated as an alternate to receive such reports;

3 (c) Include the statute of limitations period applicable to an employee's right of action for al-
4 leging unlawful conduct described in subsection (1) of this section;

5 (d) Include a statement that an employer may not require or coerce an employee to enter into
6 a nondisclosure or nondisparagement agreement, including a description of the meaning of those
7 terms;

8 (e) Include an explanation that an employee claiming to be aggrieved by conduct described in
9 subsection (1) of this section may voluntarily request to enter into an agreement described in ORS
10 659A.370 (2), including a statement that explains that the employee has at least seven days to revoke
11 the agreement; and

12 (f) Include a statement that advises employers and employees to document any incidents in-
13 volving conduct prohibited by ORS 659A.030, including sexual assault as defined in ORS 659A.370,
14 or conduct prohibited by ORS 659A.082 and 659A.112.

15 (3) An employer shall:

16 (a) Make the policy available to employees within the workplace;

17 (b) Provide a copy of the policy to each employee at the time of hire; *[and]*

18 (c) **Provide to each person with whom the employer seeks to enter into a settlement,**
19 **separation or severance agreement a copy of the policy in the language the employer typi-**
20 **cally uses to communicate with the person; and**

21 *[(c)]* (d) Require any individual who is designated by the employer to receive complaints to
22 provide a copy of the policy to an employee at the time that the employee discloses information
23 regarding prohibited discrimination or harassment.

24 (4) The Bureau of Labor and Industries shall make available on the bureau's website model
25 procedures or policies that employers may use as guidance to establish the policy described in this
26 section.

27 (5) Nothing in this section is intended to relieve an employer of liability for engaging in conduct
28 that is prohibited under ORS chapter 659A.

29 **SECTION 3.** ORS 243.323 is amended to read:

30 243.323. (1) Except as provided in subsection (2) or (4) of this section, it is an unlawful employ-
31 ment practice under ORS chapter 659A for a public employer to enter into an agreement with a
32 **former, current** *[an employee]* or prospective employee, as a condition of employment, continued
33 employment, promotion, compensation or the receipt of benefits, that contains a nondisclosure pro-
34 vision, a nondisparagement provision or any other provision that has the purpose or effect of pre-
35 venting the employee from disclosing or discussing workplace harassment:

36 (a) That occurred between employees or between an employer and an employee in the workplace
37 or at a work-related event that is off the employment premises and coordinated by or through the
38 employer; or

39 (b) That occurred between an employer and an employee off the employment premises.

40 *[(2)]* (2)(a) *[A public employer may]* **It is an unlawful employment practice for a public em-**
41 **ployer to enter into a settlement, separation or severance agreement that includes one or more of**
42 **the following provisions** *[only when an employee]* **unless the inclusion of such provisions in the**
43 **agreement is made at the request of the person claiming or alleging** to be aggrieved by
44 workplace harassment described under subsection (1) of this section *[requests to enter into the*
45 *agreement]*:

1 [(a)] (A) A provision described in subsection (1) of this section;

2 [(b)] (B) A provision that prevents the disclosure of factual information relating to the claim of
3 [*discrimination or conduct that constitutes sexual assault*] **workplace harassment**; [*or*]

4 (C) **A provision that prevents the disclosure of the amount of or fact of any settlement;**
5 **or**

6 [(c)] (D) A no-rehire provision that prohibits the employee from seeking reemployment with the
7 employer as a term or condition of the agreement.

8 (b) **It is a violation of this subsection for a public employer to:**

9 (A) **Request a person alleging to be aggrieved by conduct described under subsection (1)**
10 **of this section to make a request to enter into an agreement described in paragraph (a) of**
11 **this subsection.**

12 (B) **Make an offer of settlement conditional upon a request to enter into an agreement**
13 **described in paragraph (a) of this subsection.**

14 (C) **Fail to provide to each person with whom the employer seeks to enter into a settle-**
15 **ment, separation or severance agreement a copy of the policy described in ORS 243.319.**

16 (3)(a) An agreement entered into under subsection (2) of this section must provide that the em-
17 ployee has at least seven days after executing the agreement to revoke the agreement.

18 (b) The agreement may not become effective until after the revocation period has expired.

19 (4) If an employer makes a good faith determination that an employee has engaged in workplace
20 harassment described under subsection (1) of this section, the employer may enter into a settlement,
21 separation or severance agreement that includes one or more of the following provisions:

22 (a) A provision described in subsection (1) of this section;

23 (b) A provision that prevents the disclosure of factual information that relates to the workplace
24 harassment; or

25 (c) A no-rehire provision that prohibits the employee from seeking reemployment with the em-
26 ployer as a term or condition of the agreement.

27 [(5)] (5)(a) An employee may file a complaint under ORS 659A.820 for violations of this section
28 **by any person acting on behalf of an employer** and may bring a civil action under ORS 659A.885
29 and recover **liquidated damages in the amount of \$5,000 and** relief as provided by ORS 659A.885
30 (1) to (3).

31 (b) **Notwithstanding any provision of ORS 36.220 to 36.238, mediation communications**
32 **relating to an alleged violation of this section or to the aiding or abetting of a violation of**
33 **this section are not confidential and are admissible as evidence in any judicial or adminis-**
34 **trative proceeding relating to the violation.**

35 (6) This section does not apply to an employee who is tasked by law to receive confidential or
36 privileged reports of discrimination, sexual assault or harassment.

37 (7) **Except to the extent provided under subsections (2) and (4) of this section, an agree-**
38 **ment that otherwise contains a provision prohibited by this section is void and**
39 **unenforceable.**

40 **SECTION 4.** ORS 243.319 is amended to read:

41 243.319. (1) A public employer shall establish and adopt a written policy that seeks to prevent
42 workplace harassment that occurs between employees or between an employer and an employee in
43 the workplace or at a work-related event that is off the employment premises and coordinated by
44 or through the employer, or between an employer and an employee off the employment premises.

45 (2) The policy must include:

- 1 (a) A statement prohibiting workplace harassment;
- 2 (b) Information explaining that a victim of workplace harassment has a right to seek redress
3 through the employer's internal process provided under ORS 243.321, through the Bureau of Labor
4 and Industries' complaint resolution process under ORS 659A.820 to 659A.865 or under any other
5 available law, whether civil or criminal, including:
 - 6 (A) The timeline under which relief may be sought;
 - 7 (B) Any available administrative or judicial remedies; and
 - 8 (C) The advance notice of claim against a public body that a claimant must provide as required
9 under ORS 30.275;
- 10 (c) A statement that a person who reports workplace harassment has the right to be protected
11 from retaliation;
- 12 (d) A statement of the scope of the policy, including that the policy applies to elected public
13 officials, volunteers and interns;
- 14 (e) An explanation that a victim of workplace harassment may voluntarily disclose information
15 regarding an incident of workplace harassment that involves the victim;
- 16 (f) Information to connect a victim of workplace harassment with legal resources and counseling
17 and support services, including any available employee assistance services;
- 18 (g) A statement that an employer may not require or coerce an employee to enter into a
19 nondisclosure or nondisparagement agreement, including a description of the meaning of those
20 terms;
- 21 (h) An explanation that an employee claiming to be aggrieved by workplace harassment may
22 voluntarily request to enter into an agreement described in ORS 243.323 (2), including a statement
23 that explains that the employee has at least seven days to revoke the agreement; and
- 24 (i) A statement that advises employers and employees to document any incidents of workplace
25 harassment.
- 26 (3) A public employer shall provide a copy of the policies described in this section to each em-
27 ployee and shall include a copy of the policies in any orientation materials that are provided to new
28 employees at the time of hire.
- 29 (4) If an employee discloses any concerns about workplace harassment to a supervisor of the
30 employer, or to a designated individual as described in ORS 243.321 (3), the supervisor or designated
31 individual shall, at the time of the disclosure, provide to the employee a copy of the policy described
32 in this section.
- 33 **(5) A public employer shall provide to each person with whom the employer seeks to en-**
34 **ter into a settlement, separation or severance agreement a copy of the policies described in**
35 **this section in the language that the employer typically uses to communicate with the per-**
36 **son.**
- 37 [(5)] (6) A policy established under this section must comply with the requirements for a written
38 policy provided under ORS 659A.375.