

Representative Holvey, Vice-chairs Sosa and Elmer, and Member of the Committee:

My name is Matthew Ellis and I am an attorney and Oregon Trial Lawyers Association member who represents individuals in discrimination claims, including claims of age discrimination.

Oregon has a general policy against age discrimination. It says:

- It is declared to be the public policy of Oregon that the available workforce should be utilized to the fullest extent possible. To this end, the abilities of an individual, and not any arbitrary standards that discriminate against an individual solely because of age, should be the measure of the individual's fitness and qualification for employment. ORS 659A.009

HB 2800 makes the policy of state less aspirational and more practical in the following ways:

Section 2 of the bill clarifies what it means to discriminate because of age to ensure that this broad public policy is meaningful. Like we did with race, sex and other protected classes, we let courts know that we view what it means to discriminate based on age, broadly, and that it is not as narrow as the federal courts have decided.

Both state and federal law proscribe age discrimination. The trouble is that Courts, especially federal courts over the last twenty years, have continued to chip away at what it means to discriminate based on age. As a result, age discrimination is viewed much more narrowly than other protected classes and the federal law does a poor job protected employees from real world age discrimination. Oregon courts interpret our state law consistent with that federal law, which has gotten narrower and narrower over time in the absence of action by the Oregon legislature. This bill lets Courts, employers and employees know that in Oregon we are going take a real look at age-based and age biased decision-making in a way that strikes a balance between the rights of employees and employers to ensure fairness for all.

Section 2 of this bill makes it clear that if an employer uses characteristics that are often used as a proxy for age, or that are often characteristics closely associated with age, in making adverse

employment decision such as retirement eligibility, pension eligibility, salary or health care costs. The bill reminds courts that making decisions on this basis is often, though not always, pretext for age discrimination and can rise to the level of age discrimination in certain circumstances.

Here is what the bill does not do. The bill does not make those things automatically age discrimination. The bill does not stop any employer or union from relying on bona fide seniority systems or years of experience in making employment decisions. The bill provides guidance to employers on how to do that and a caution that if you make an adverse decision based on these sorts of suspicious factors that are often used to weed out older workers, that you need to make sure age is not a factor. This is something easy for employers to do when the decision is made in good faith. Thus, it seeks and achieve a workable balance for both employers and employees.

The bill does not impose some new form of “burden shifting.” Currently, employees have to show a *prima facie* case of discrimination as part of an age discrimination case, a low bar. From there, employers currently already have to show that age was not a factor in a challenged employment decision by pointing to a “legitimate, non-discriminatory reason” for the alleged discriminatory action. This bill does not change that process which already occurs in virtually every age case, nationwide.

The bill does not implicate the Oregon Equal Pay Act. Oregon's Equal Pay Act prohibits employers from discriminating between employees on the basis of a protected class in the payment of wages or other compensation for "work of comparable character." Employers cannot pay older people less (or more) because of their age and can differentiate between employees for work based on comparable character based on certain bona fide factors, including a seniority system, experience and more. This is already the law, and this bill does not change that fact. Thus, for example, an employer could hire an older person into a position and pay younger people in the same position more, based on their seniority with the company, since seniority is a *bona fide* factor under the law.

Section 3: “Ban the Age Box”

All too often highly qualified individuals are screened out from jobs before getting a foot in the door because the employer is allowed to glean information about their age before the

interview. Yet, one's age is no more relevant information before the initial interview than their gender, religion or race; and everyone knows you can't ask for that kind of information. So, Section three makes it unlawful before the interview for an employer to seek the age of the applicant, their date of birth or information about when they graduated from school; information that directly shows their age or tends to show their age.

Here is what it does not do: It does not prevent employers for asking about applicants work history, length of time working places, experience or education. It does not prevent employers from doing anything other than asking about this information in the interview or even before the interview. It just stops them from getting information about their age and the year that they finished school.

Discriminatory Advertisements: Lastly, the bill prohibits discriminatory advertisements that use age biased language, such advertisements giving preference for "college aged" applicants, or for "digital natives"; dog whistle language that lets older workers know they need not apply.

Let's make sure that Oregon's policy that one's abilities, not negative information about their age, are the measure one's fitness and qualifications employment. Please pass HB 2800 to create a more equitable workforce in Oregon that maximizes opportunities for older workers.

Dated this 6th Day of February, 2023

/s Matthew C. Ellis