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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

June 23, 2025

Senator Floyd Prozanski
900 Court Street NE S413
Salem OR 97301

Re: Extent of conflict between SB 174's addition of insurance to the UTPA and exclusivity of workers' compensation remedies

Dear Senator Prozanski:

You asked whether the removal in A-engrossed Senate Bill 174 of the exclusion that insurance transactions have had from potential liability under the Unlawful Trade Practices Act (UTPA), ORS 646.605 to 646.562, would necessarily subject workers' compensation claims or the practices of workers' compensation insurers or self-insured employers to liability under the UTPA or liability under both the UTPA and the workers' compensation laws in ORS chapter 656. The answer is no. The question, however, includes two implicit parts, which we address below.

The first question is whether by, enacting SB 174-A and subjecting insurance transactions to the UTPA, the Legislative Assembly would impliedly repeal or limit the provisions of ORS 656.018, which state that the liability of an employer that provides evidence of coverage under a workers' compensation policy, as provided in ORS 646.017, "**is exclusive and in place of all other liability** arising out of injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment that are sustained by subject workers, the workers' beneficiaries and anyone otherwise entitled to recover damages from the employer on account of such conditions or claims resulting therefrom . . . ."[1] Moreover, subsection (7) of ORS 656.018 provides that "[t]he exclusive remedy provisions and limitation on liability provisions of this chapter apply to all injuries and to diseases, symptom complexes or similar conditions of subject workers arising out of and in the course of employment whether or not they are determined to be compensable under this chapter."[2]

The contention that SB 174-A's amendments to the UTPA repeal or limit the exclusivity of the remedies available under ORS chapter 656 rests on an assumption that liability under the UTPA for unlawful practices in insurance transactions generally would necessarily include liability for unlawful practices in workers' compensation insurance. Courts in this state reject this assumption for three reasons. As an initial matter, the Legislative Assembly may enact more than one provision to address the same act and "enactment of a new statute on a subject does not automatically displace previous statutes governing the same conduct."[3] Courts also strongly disfavor repeals by implication, finding such an effect only "when both statutes cannot be reconciled with each other by any reasonable interpretation, or where there is a clear intent shown

[1] ORS 656.018 (1)(a) (emphasis added).
[2] ORS 656.018 (7).
[3] *State v. Stockert,* 303 Or. App. 314, 321 (2020).

by the terms of the later act that it shall supersede the other."[4] Lastly, ORS 174.020 (2) provides that "[w]hen a general provision and a particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent."[5]

Here, the exclusivity of the remedies under ORS chapter 656 stands in the face of broad enforcement authority the Department of Consumer and Business Services already has for the very provisions that SB 174-A brings under the purview of the UTPA: ORS 746.230, 746.650, 746.663, 746.686 and 746.687. Even though the department administers both the Insurance Code generally and the workers' compensation statutes, no suggestion has arisen—or can reasonably arise—that the department's authority under one body of law supersedes or interferes with the same department's authority under another, distinct body of law. Senate Bill 174-A, moreover, does not amend ORS 656.018 or ORS chapter 656 or in any way expressly repeal or limit the reach or exclusivity of the workers' compensation laws of this state and is therefore not "repugnant" to those laws, as is required for a court to find an implied repeal.[6] Both the UTPA, as amended, and ORS chapter 656 can easily be both in force and harmonized,[7] with each set of laws attending to its own domain—ORS chapter 656 as to claims arising out of injuries related to employment and the UTPA as to specified unlawful trade practices. Finally, the very specific language in ORS 656.018 as to the exclusivity of ORS chapter 656 for purposes of claims that arise in the employment context would under ORS 174.020 (2) control over the more general provisions related to all other insurance transactions that SB 174-A creates in an amended UTPA.

The second question concerns whether the exclusivity provisions of ORS 656.018 would apply not just to workers' claims for injuries or disease that arise from employment, but also to claims that workers' compensation insurers and self-insured employers engaged in unlawful claims settlement practices or other bad conduct related to workers' compensation insurance underwriting, policy cancellation or nonrenewal or failures to give required notices. ORS 656.018 (3) addresses these concerns:

> (3) The exemption from liability given an employer under this section is also extended to the employer's insurer, the self-insured employer's claims administrator, the Department of Consumer and Business Services, and to the contracted agents, employees, partners, limited liability company members, general partners, limited liability partners, limited partners, officers and directors of the employer, the employer's insurer, the self-insured employer's claims administrator and the department, except that the exemption from liability shall not apply:

[4] *State ex rel. Harvey v. County Court of Malheur County,* 54 Or. 225, 261 (1909).
[5] *See also State ex rel. Adams v. Powell*, 171 Or. App. 81, 87 (2000) ("[A] more specific statute generally controls over a general statute on the same subject … [and] under ORS 174.010, we are constrained from inserting into a statute that which the legislature has omitted ….").
[6] *Id. See also Messick v. Duby,* 86 Or. 366, 369-370 ("It is a universal rule that a later act does not by implication repeal a former, touching the same subject-matter, where there is no repugnancy between them, and both can be sustained and enforced. Repeals by implication are not favorites of the law, and if it is not perfectly manifest, either by repugnancy which cannot be reconciled, or by some other means clearly showing the intent of the lawmakers to abrogate the former statute, both must be held to be operative." (cited in *State v. Stockert,* 303 Or. App. 314, 321 (2020))).
[7] *Id.* at 95 ("[T]he court's function is to interpret constitutional language in a way that 'harmonizes' potentially conflicting provisions." Although the court addressed constitutional language in this instance, courts generally hold a similar view with respect to statutory language.).

> (a) If the willful and unprovoked aggression by a person otherwise exempt under this subsection is a substantial factor in causing the injury, disease, symptom complex, or similar condition;
>
> (b) If the worker and the person otherwise exempt under this subsection are not engaged in the furtherance of a common enterprise or the accomplishment of the same or related objectives;
>
> (c) If the failure of the employer to comply with a notice posted pursuant to ORS 654.082 is a substantial factor in causing the injury, disease, symptom complex or similar condition; or
>
> (d) If the negligence of a person otherwise exempt under this subsection is a substantial factor in causing the injury, disease, symptom complex or similar condition and the negligence occurs outside of the capacity that qualifies the person for exemption under this section.

ORS 656.018 (3) is expansive and is directed at the liabilities of particular entities with respect to those entities' duties under ORS chapter 656, which would necessarily include claim settlement practices, notice provisions, underwriting and much else besides. ORS 656.018 (3) also sets forth specific exclusions from the exclusivity of the remedies available under the chapter. Of these, the exclusion for negligent acts set forth in ORS 656.018 (3)(d) shows that although a person may be liable exclusively under ORS chapter 656 for injuries and actions the person undertakes as an employer or an employer's insurer or claims administrator, should the person take an action outside the person's role in the employment context, other laws can apply to that action. A court looking at this list of specific exclusions would likely conclude that adding specific bad acts to the UTPA that cover insurance transactions generally would do no more than allow liability for conduct that occurs outside the ambit of the workers' compensation laws in much the same way that ORS 656.018 (3) recognizes that a plaintiff can still bring a common-law negligence claim in specific circumstances without disturbing the exclusivity of remedies available for actions that occur within the employment context.

This is all the more likely given the very strong public policy reasons behind the workers' compensation laws and the conclusion of the courts of this state that the "exclusive liability provision forms an essential part of this state's workers' compensation system"—to the point where ORS 656.018 now voids private indemnity agreements that seek contribution from parties other than the parties that are liable for a claim under ORS chapter 656.[8] A court of this state is quite likely to continue to find that employers, self-insured employers, workers' compensation insurers and claims administrators are liable solely and exclusively under ORS chapter 656 for claims, practices and acts that arise in, or that are related to, employment in this state.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative

[8] *See Roberts v. Gray's Crane & Rigging, Inc.,* 73 Or. App. 29 (1985); *Young v. Mobil Oil Corp*., 85 Or. App. 64 (1987). The Legislative Assembly, in section 5, chapter 332, Oregon Laws 1995, removed the requirement that the exclusivity provisions would apply only to injuries that are "compensable" under ORS chapter 656 in response to a holding in *Errand v. Cascade Steel Rolling Mills, Inc.,* 320 Or. 509 (1995), a change that greatly expanded the reach of the exclusivity provisions of ORS 656.018 and correspondingly reduced the potential for negligence suits related to workplace injuries.

Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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