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To Chair Taylor, Vice Chair Bonham, and members of the Senate Business and Labor Committee:

Oregon Trial Lawyers writes today in support of House Bill 2957A but opposed to the proposed -5 amendment before the committee. We strongly support the overall goal of HB 2957 to protect the rights of workers who want to file a claim with BOLI. Choosing to seek redress through the state should not limit your ability to seek private representation and all workers should have the use of the full statute of limitations on their claims. We do not believe the -5 amendment supports that goal and that it would cause harm to employees who have experienced discrimination or harm in the workplace.

First, we are concerned that proposed changes would cause significant confusion, especially for unrepresented individuals. Specifically, it creates five different potential tracks for individuals, with different timelines or scenarios. There could be even more options – and therefore more confusion – in scenarios where BOLI makes a split decision, for example finding substantial evidence on one claim but not another. The confusion is made worse because BOLI is unlikely to be able to provide them specific advice or direction about their deadlines. If adopted, this amendment could exacerbate a problem that the base bills seeks to improve, likely confusing individuals, employers, and probably ensuring additional litigation as the parties fight over the confusion. This helps no one.

Second, this could put individuals in a worse position with regard to the statute of limitations simply because they sought assistance from the State through BOLI. People turn to BOLI for help, and they should not end up in a worse position for having filed. In essence, by filing with BOLI individuals are penalized with shorter statutes of limitation, different and hard to navigate outcomes, and uncertainty if the -5 is adopted.

Finally, it is problematic on a policy basis because it creates two distinct classes of people: those who get substantial evidence determinations from BOLI and those who do not. BOLI does not currently have the staffing support or funding to create an investigative process that is rigorous enough to trust that the outcomes from investigators are foolproof. The intake officers and investigators are overworked, undertrained, not supported, and underpaid. If we hoist upon these workers the possibility of seriously affecting people, it will only cause greater stress and greater risk of harm to Oregon workers, and it may even impact the outcomes. Workers will know that an outcome one direction or another will make a difference in the individual's likely ability to access the justice system, creating substantial risk of bias.

A substantial evidence determination is supposed to mean that there is some evidence of discrimination, but the standard BOLI applies is more like the criminal standard of beyond a reasonable doubt. An example of substantial evidence would be a worker testifying (a written

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complaint is sworn testimony) that an employer repeatedly used a racial slur against the employee. That is direct, explicit evidence of race discrimination. In the legal world, this is substantial evidence. In the BOLI world, this does not always play out the same. Even if the employer denies that the employee was subjected to race discrimination, the fact that a worker is testifying that it happened is substantial evidence, but BOLI could disregard that evidence.

This has happened. As one example, one of our members had a racial discrimination case that BOLI investigated. The allegations included that this worker was subjected to repeated use of the N-word. The worker had two coworkers who heard the comments and provided BOLI with statements of witnessing the racial discrimination against this worker. BOLI found that there was no substantial evidence in that case and dismissed it, issuing the 90-day right to sue letter. The worker did not have a lawyer throughout the BOLI process. This worker was lucky. One of our members took the case on with only 14 days left before the 90-days expired, which often could not happen because these cases require hours of investigation and research just to determine whether there is enough information to file a lawsuit. The matter was brought to a successful conclusion after many depositions, document production, and shortly before commencing trial.

The original legislation was aimed at rectifying the problem where this employee, who clearly did not receive a fair investigation from BOLI, would have enough time to find a lawyer who could properly vet the allegations before filing a lawsuit. The proposed legislation with the -5 amendment would not help all the people it is intended to help. While it may provide some assistance to some people, many individuals will remain with only 90 days to seek help, leaving their rights unchanged (and worse off overall for having filed with BOLI). In those circumstances, filing with BOLI could hurt them and harm their claims because it could still results in a shortened statute of limitations.

Passing HB 2957A could be a major victory for workers, building on this legislature's past efforts to level the playing field for workers who experience harm and unlawful behavior in the workplace. The -5 amendment would cause further harm for workers who likely have a valid claim but do not get a fair shake during the investigative process. We urge the committee to reject the -5 and support HB 2957A as drafted.

Thank you,
Talia Guerriero
Executive Board Member
Oregon Trial Lawyers Association