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Fourth Quarter 2018

Pay Equity is Here

By Therese Holmstrom

Although Oregon lawmakers passed the Equal Pay Act (*"Act"*) over 18 months ago, major portions of the law are just now taking effect. The Bureau of Labor and Industries (*"BOLI"*) finally released the administrative rules implementing the law and employers can begin to analyze whether their pay practices are compliant.

What is the Equal Pay Act?

The Act makes it an unlawful employment practice for an employer to: (1) differentiate employees' pay for comparable work on the basis of an employee's membership in a protected class; (2) pay any employee more than what is paid to an employee of a protected class for comparable work; (3) base a prospective employee's compensation on the prospective employee's current or past compensation; and (4) seek salary history information from an applicant or employee before making a job offer which includes compensation for the position.

The prohibition on seeking an applicant's salary history took effect October 6, 2017, but all of the other provisions listed above took effect on January 1, 2019. Employees may bring a private lawsuit or file a complaint with BOLI alleging violations of the Act, although employees cannot file suit alleging a violation against the prohibition on asking about salary history until 2024.

It has long been unlawful for Oregon employers to discriminate in compensation based on sex. The Act expands that prohibition to forbid any instance where employees of a protected class are earning less than other employees performing similar work. We sometimes joke that every employee is a member of at least one protected class—but this is in fact the case. The law defines "protected class" as "a group of persons distinguished by race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age." ORS 652.210(5) (Oregon courts have interpreted sexual orientation to include gender identity). Therefore, once the Act takes effect, any imbalances in pay among employees performing comparable work may result in liability if employees in a protected class are the ones earning less than others performing comparable work.

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The Act specifically prohibits pay differences among employees performing "work of a comparable character," which is work that "requires substantially similar knowledge, skill, effort, responsibility and working conditions, regardless of job description or job title." ORS 652.210 (12).

BOLI's administrative rules establish criteria that can be considered when analyzing whether work performed by different employees is of a comparable character. For instance, the ability, efficiency, and precision required can be considered in determining whether the skills needed for the work is comparable. Education, experience, and training can be considered in comparing the knowledge required. There are several specific factors outlined as valid considerations of comparable responsibility and working conditions. No single criteria may be determinative, however.

Employers may still implement seniority and merit systems that allow for employees performing comparable work to be paid differently. However, in order to rely on a seniority or merit system as a defense to a violation of the Act, the system must have been in place before the alleged violation. The system must also be consistent with BOLI's administrative rule regarding bona fide factors that may be considered in seniority and merit systems.

What Should Employers Do Next?

Determining whether jobs are comparable and implementing pay practices that will hold up in court is complicated. We can assist you in evaluating your pay practices and compliance steps. As a first step, you should take stock of current pay practices and address any obvious inequities. The law applies to all forms of compensation, so look at signing bonuses, discretionary bonuses, benefits, and equity-based compensation in addition to regular wages. Don't reduce any employee's wages as part of these compliance efforts. Consider developing salary ranges for comparable positions. If your job application still asks about salary history, delete those questions immediately. Finally, post the required Oregon Equal Pay Law notice developed by BOLI.

The law encourages employers to conduct an "equal pay analysis." An equal pay analysis is any process by which the employer's compensation practices are evaluated and any improper wage disparities for employees performing comparable work are corrected. An equal pay analysis can be used to limit the damages an employee is entitled to if a lawsuit is filed. Although the law does not require employers to conduct an equal pay analysis, it can be an effective way to ensure you are aware of and can correct any problematic discrepancies in compensation among your employees.

Employers conducting an equal pay analysis under the supervision of an attorney may be able to treat the analysis as privileged. Our employment attorneys are available to assist you in evaluating whether an equal pay analysis is recommended and to address any pay practices which may be inconsistent with the requirements of the Act.

Updates from the Business and Tax Group

By Caleb A. Williams

Opportunity Zones Provide Tax Incentive for Investment in the Mid-Valley

In the Tax Cut and Jobs Act (the *"Act"*) passed and signed into law at the end of 2017, Congress authorized "Opportunity Zones" to encourage long-term investments in low-income urban and rural communities nationwide. The Opportunity Zones program provides a tax incentive for investors to re-invest their capital gains, including gains resulting from the sale of stock, into eligible property located in Opportunity Zones.

The Act allows a taxpayer to invest gains into the development of property located in an Opportunity Zone and defer the payment of tax on those gains until 2026, under certain conditions. If the investment is liquidated more than 5 years after acquisition, there are additional tax savings on the proceeds, as well as an opportunity to avoid taxation of appreciation on investments held for at least 10 years. Clearly, Opportunity Zones can provide a significant benefit to investors that can meet the qualifications.

Governor Kate Brown has designated several Opportunity Zones in the mid-Willamette Valley. Salem's downtown core, a portion of West Salem and southeast Salem, Polk County between Dallas and Rickreall, Marion County near Woodburn and a large area north and east of Albany have all been designated Opportunity Zones. A map of the Opportunity Zones in Oregon can be found at Business Oregon's website, www.oregon4biz.com.

As with any tax benefit, there are fairly complex rules to follow. For example, investment in Opportunity Zones must be made through an "Opportunity Fund," which is an organization or entity meeting specific qualifications, and the investor must invest in development of the property. If you are interested in learning more about Opportunity Zones, please contact one of the attorneys in our Business and Tax Practice Group.

Supreme Court Decision Expands Sales Tax Obligation for Oregon Businesses

This past June, the U.S. Supreme Court in *South Dakota v. Wayfair* overturned precedent that had protected certain businesses from the burden of collecting and remitting sales and use taxes on sales to out-of-state customers.

Oregon businesses have historically relied on prior Supreme Court precedent requiring a business to have a physical presence in a state in order for that state to impose tax on the business' sales in the state. Due to that precedent and because Oregon does not have its own sales and use tax, many Oregon businesses have not implemented procedures to collect taxes from customers. *Wayfair* struck down the so-called "physical presence" rule, clearly subjecting Oregon businesses to an obligation to remit sales tax on sales in states in which they do not have any property or employees.

A business must still have a "substantial nexus" with a state in order for the business to be subject to the state's taxing authority. States have defined "substantial nexus" in a variety of ways in order to expand their tax base. But Oregon businesses should not assume that they do not have an obligation to collect and remit sales tax in other states.

Please contact one of our tax attorneys if you have questions about the impact of the *Wayfair* decision on your business' tax obligations.

Farm Bill Legalizes Hemp

The 2018 Farm Bill included a key clarification for Oregon's hemp farmers, the number of which grew significantly in 2018. Passed by Congress in early December, President Trump signed the Farm Bill on December 20, 2018. The Farm Bill allows the transfer of hemp-derived products across state lines, and also eliminates any restrictions on the sale, transfer or possession of hemp-derived products.

Hemp is the cannabis plant with no more than 0.3 % THC. If the plant contains more than 0.3% THC, it is considered marijuana under federal law and, therefore, is still illegal to sell or possess. Hemp will remain highly regulated, at both the state and federal level. However, the Farm Bill moves the regulation of hemp closer to that of a typical agriculture crop. For example, the Farm Bill makes crop insurance available to hemp farmers.

We will be evaluating the specific portions of the Farm Bill concerning hemp, and are available to discuss the new federal laws with our clients.

Congress/IRS Make Big Changes to Hardship Distribution Rules

By Randy Cook

Early last year Congress passed the Bipartisan Budget Act of 2018, which included changes to the rules regarding distributions from 401(k) and 403(b) plans taken on account of "financial hardship." Last November, the IRS issued its eagerly-awaited proposed regulations implementing the new rules. Although retirement plan sponsors are not yet required to amend their plan documents to reflect the new rules, they are required to operate in compliance with the rules, many of which go into effect on January 1, 2019. Accordingly, plan sponsors should consider modifying their hardship distribution policies to reflect the new rules and should also consider updating their summary plan descriptions so that plan participants are aware of the new rules.

BACKGROUND

Generally, 401(k) and 403(b) plans can permit plan participants who are still employed by their employer to withdraw elective deferrals on account of certain financial hardships if two requirements are met: (1) the distribution is made due to an immediate and heavy financial need; and (2) the distribution is necessary to satisfy that financial need. Hardship distribution policies can satisfy these requirements by meeting either the "safe-harbor" or "non-safe-harbor" standard set forth in the Treasury regulations.

Under the existing non-safe-harbor standard, a facts-and-circumstances analysis is used to determine whether a distribution is made on account of a financial need. For example, the need to pay funeral expenses would qualify as a financial need, whereas purchasing a boat generally would not. Plan administrators are permitted to allow a participant to self-certify that the distribution is necessary to satisfy the financial need.

Under the existing safe-harbor standard, a qualifying financial need is limited to one or more of the following:

- uninsured medical expenses for the plan participant or the participant's spouse, children or dependents;
- costs directly related to the purchase of a primary residence;
- payment of tuition and related educational fees for post-secondary education for the plan participant or the participant's spouse, children or dependents;
- payments necessary to prevent the eviction of the plan participant from his or her primary residence or to prevent foreclosure on that residence;
- payments for burial or funeral expenses for the plan participant's deceased parents, spouse, children or dependents; or
- expenses for the repair of damages to the plan participant's principal residence that would qualify for the casualty deduction under Section 165 of the Internal Revenue Code (the ***"Code"***).

A distribution is deemed necessary to satisfy the financial need if: (1) the participant has obtained all other currently available distributions and nontaxable loans under the plan; and (2) the participant is prohibited from making elective deferrals to the plan for at least six months after taking the hardship distribution.

LAW CHANGES

The Bipartisan Budget Act of 2018 directed the IRS to modify the hardship regulations to eliminate the requirement that elective deferrals be suspended for six months following receipt of a hardship distribution. It also modified the Code by adding to the list of available sources of funds for hardship distributions and providing that a distribution will not fail to qualify as being on account of hardship solely because the employee does not take available loans from the plan.

PROPOSED REGULATIONS

The proposed regulations issues by the IRS in November modify the hardship distribution rules:

- Expanded Sources. Currently, hardship distributions are permitted only from an employee's elective deferrals, excluding investment earnings. The new rules permit hardship distributions from elective deferrals, qualified non-elective contributions (***"QNECs"***) and qualified matching contributions (***"QMACs"***) (including "safe-harbor" contributions), as well as earnings on these amounts.
- Deemed Immediate and Heavy Financial Need. The list of expenses for which a distribution is deemed "on account of a financial need" under the safe-harbor standard is modified in two ways. First, the list is expanded to include

qualifying medical, educational and funeral expenses for a participant's primary beneficiary under the plan, even if that beneficiary is not the participant's spouse, child or dependent. Second, a new category is created for expenses and losses (including loss of income) incurred on account of certain federally declared disasters.

- Elimination of Suspension Requirement. Beginning January 1, 2020, plans are prohibited from suspending an employee's salary deferrals following receipt of a hardship distribution. Plan sponsors may choose to eliminate the suspension requirement now rather than wait until January 1, 2020.
- Elimination of Plan Loan Requirement. Participants will no longer be required under the safe-harbor standard to take a plan loan before receipt of a hardship distribution. Unlike the removal of the suspension requirement for the 2020 plan year, plans may, as an optional plan design feature, continue to require a participant to take a plan loan before taking a hardship distribution.
- Distributions Necessary to Satisfy Financial Need. To ease administration, the rules under the non-safe-harbor standard are amended to provide one general standard for determining whether a distribution is necessary to satisfy a financial need. Under this standard: (1) a hardship distribution may not exceed the amount of the need, including amounts for taxes and penalties; (2) the employee must have obtained other available distributions under the plan; and (3) beginning January 1, 2020, the employee must represent that he or she has insufficient cash or other liquid assets to satisfy the financial need.

NEXT STEPS

Plan sponsors are encouraged to take the following steps:

- Review hardship distribution provisions in your 401(k) or 403(b) plan documents.
- Determine which of the modifications described in the proposed regulations apply to the plan, and when or whether to implement any changes, including the adoption of related plan amendments.
- Review any operational changes (such as plan account sourcing or participant hardship self-certification forms) with third-party administrators.

If you have questions about the new hardship distribution rules, please feel free to contact a member of the Employee Benefits and Executive Compensation Group.

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5 Things You Need to Know About Quiet Title Actions

By Nathan Riemersma

Complications with property can be some of the most frustrating and stressful things we have to deal with in life. This is true whether the issues are unexpected repairs or problems with the title of your property. Title issues can hinder your ability to sell or transfer property and affect the marketability and value of the property. A quiet title action is an effective tool to ensure the title to your property is free from any defect or improper encumbrances. A competent attorney can act as a handyman, utilizing this tool to assist you in clearing your title and guiding you through the process.

1. What is a Quiet Title Action?

A quiet title action is a lawsuit to clear title or determine the rightful owner of a piece of property, a portion of a piece of property, or an ownership interest in a property. A judgment in a quiet title action is declaratory in nature, meaning the court resolves any uncertainty about the title and identifies the rightful owner of the property interest at issue. The judgment not only resolves the issue at the time of the suit but can be used in future challenges to the title. Since the judgment is declaratory, no money damages are awarded in quiet title actions. Quiet title actions are typically initiated by a party in possession of the property. If a party is attempting to both recover possession of a property and determine who owns the title to that property, an ejectment action is the proper remedy. Quiet title actions can be time-consuming, but they are the most effective remedy to clear up title issues.

2. Situations Where Quiet Title Actions Are Appropriate

Quiet title actions can be utilized in a variety of situations involving real property. They can be used to determine ownership when two different parties assert ownership over the same property due to unclear or multiple conveyances. The process can also resolve property line disputes and remedy surveying errors. Parties also utilize quiet title actions to obtain title to property via adverse possession—a process where someone who is in possession of a piece of property for a certain period of time (10 years in Oregon) becomes the lawful owner of that property. These suits can also be employed to remove improper easements or liens.

3. Get a Title Report, Title Insurance, and a Litigation Guarantee

Title companies offer several products that can assist you with identifying and remedying title defects. A chain of title report helps you and your attorney identify any issues with the title of your property or prospective property. To create a title report, the title company reviews the chain of title for your property and identifies any liens, encumbrances, and inconsistencies in the title. While useful, this report is primarily informational. It is also prudent to purchase an owner's policy, which is a title insurance policy insuring an owner against losses caused by title defects, liens and unmarketable title. A title insurance policy typically requires the title company to litigate a quiet title action on your behalf if such issues arise later. Finally, a litigation guarantee is a title insurance policy that requires the title company to research and report all parties who could claim an interest in the property at issue. As explained below, it is important to name and give notice to all indispensable parties in a quiet title action. A litigation guarantee not only identifies those parties but acts as insurance that you have named all the required parties.

4. Give Notice to All Proper Parties

Both state and federal law establish that all persons having an interest in the title of a property are "indispensable parties." Failure to properly join an indispensable party can result in the judgment being reversed and invalidated. Indispensable parties should be named in the suit and properly served according to Oregon law. The Oregon Rules of Civil Procedure (***"Rules"***) also allow a quiet title action to include unknown persons or parties claiming any right, title, interest, or estate in real property. While the Rules allow for inclusion of unknown parties, they are not a substitute for joining indispensable parties. This rule should only be utilized when the parties are truly unknown. Additionally, the service process for unknown parties usually involves publishing a notice in a local newspaper for a period of time, which increases costs and extends the timeframe to resolve the case. It is often better to give notice all known indispensable parties in addition to unknown parties. While this practice can increase costs and lengthen the process, it ensures no parties will emerge in the future claiming they did not receive notice. Consult with your attorney to determine the best method of notice in your case.

5. Be Aware of Related Claims/Record Your Judgment

Chances are that if you have a viable case to quiet title, you may have other potential claims available as well. Depending on the facts surrounding your case, such claims could include breach of contract, breach of warranty, and negligence. These claims may result in financial recovery. Such claims could be subject to more stringent statute of limitations timelines than a quiet tile action. If you suspect you have such a claim, contact an attorney as soon as possible.

Finally, when you obtain a judgment in your favor clearing your title, it is a best practice to record the judgment on the property. While the judgment alone is enforceable and sufficient to prove ownership, recording the judgment will ensure it will show up on any future title search for the property.
If you have questions or would like assistance with a quiet title action on your property, please contact someone in the Real Estate and Land Use Group.

Events, Announcements & Community Involvement

November 15 – Civil War Dinner & Auction

Randy Cook (resident Oregon super fan) and Jim Griggs (emeritus Oregon State super fan) hosted rival tables at the Boys & Girls Club's annual major fundraiser. Staff and attorneys attended and participated in the silent and live auction festivities.

November 16 – Denim & Diamonds

This year the firm's Agribusiness Industry Team sponsored the awards portion of Oregon Ag Link's Denim & Diamonds Dinner and Auction, a phenomenal opportunity to reflect on the successes of those most significantly steeped in agricultural business. The Ag Team enjoyed mingling with clients and community members from all throughout Oregon.

December 5 – Courthouse Connection Annual Holiday Social & Gift Drive

Jennifer Paul spearheaded the firm's participation in this year's Courthouse Connection Annual Holiday Social & Gift Drive. Attorneys and staff made contributions of all kinds to the gift drive, which helped to make for a brighter holiday season for foster children in our community.

December 6 – CASA We are for the Children Fundraising Luncheon

CASA of Marion County Board Member, Erin Milos hosted a table at the organization's annual fundraising luncheon. Attorneys across the firm's practice groups attended in support of the organization, which serves foster children throughout the county.

December 11 – Home Builders Association of Marion & Polk Counties' Annual Holiday & Installation Banquet

Alan Sorem was officially installed as the Home Builders Association of Marion & Polk Counties' Board of Directors' Associate Vice-President. The firm is pleased to continue its support of the HBA as a community-driven resource center for those in the residential construction industry.

December 14 – Holiday Party

On December 14th the firm celebrated the holiday season by gathering at Illahe Hills Country Club. The festivities commenced with a cocktail and appetizer hour and was directly followed by dinner and the first (and perhaps last) Saalfie Awards presentation. Staff members nominated their coworkers for ten different awards, and a panel of partners were assembled to vote on the winners. The night was full of laughs, as Jennifer Paul and Christine Moehl made a splash with their hosting abilities.

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