AVOIDING EMPLOYMENT LAWSUITS

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Agenda

Part I
1. Hiring Process
2. Disability Accommodations
3. Employee Complaints
4. Investigations, Discipline and Dismissal

Part II
1. Tort Claim Notices
2. Lawsuits
3. Subpoenas
Veterans’ Preference

• Must interview veteran candidates who meet the minimum qualifications, special qualifications, and/or possess the transferable skills required for the position.
Veterans’ Preference

• Ensure application process includes a way to give preference at each step of the application process.

• Failure to give a veteran preference is an unlawful employment practice and may result in legal liability.
Veterans’ Preference

• If you use a point based application system:
  o At each step in the application process, add 5 points for a veteran, 10 points for a disabled veteran

• If you do not use a point based application system:
  o Must devise a way to give preference to the veteran each step of the application process
  o Must be able to prove you gave preference
Veterans’ Preference

• When all qualifications are equal, the veteran applicant must be selected for the position.
• Veteran applicants not selected have the right to ask for written explanations as to why s/he was not chosen.
Equal Pay Act

Prohibits employers from paying wages or other compensation to any employee at a rate greater than that at which the employer pays wages or other compensation to an employee of a protected class for work of comparable character.
Equal Pay Act

• “Equal-pay analysis” means an evaluation process to assess and correct wage disparities among employees who perform work of comparable character.
Equal Pay Act

- “Compensation” includes wages, salary, bonuses, benefits, fringe benefits and equity-based compensation
- “Work of comparable character” means work that requires substantially similar knowledge, skill, effort, responsibility and working conditions in the performance of work, regardless of job description or job title
Equal Pay Act

- Prohibits screening applicants based on current or past compensation.
- Prohibits determining compensation for a position based on current or past compensation of a prospective employee.
- If your employment application requests information regarding prior or current salary, delete that from your form!
Equal Pay Act

• An employer may pay employees for work of comparable character at different compensation levels if all of the difference in compensation levels is based on a bona fide factor that is related to the position in question and is based on:
  o A seniority system;
  o A merit system;
  o A system that measures earnings by quantity or quality of production, including piece-rate work;
  o Workplace locations;
  o Travel, if travel is necessary and regular for the employee;
  o Education;
  o Experience; or
  o Any combination of the factors described above, if the combination of factors accounts for the entire compensation differential.
Equal Pay Act

- No retaliation for complaints made under the Act.
- An employer may not reduce an employee’s pay to comply with statute.
- You must post a notice of the Equal Pay Act requirements—BOLI has a poster.
# Oregon Equal Pay Law

## Pay History

Effective October 6, 2017, employers are prohibited from seeking the pay history of employment applicants and employees before the employer makes an offer of employment to the prospective employee that includes an amount of compensation.

### Unlawful Practices

**Effective January 1, 2015,** it is an unlawful employment practice under ORS chapter 659A (Unlawful Discrimination law) for an employer to:

- Discriminate in any manner between employees on the basis of an employee’s status as a member of a protected class in the payment of wages or other compensation for work of comparable character.
- Pay wages or other compensation to any employee at a rate greater than that at which the employer pays wages or other compensation to employees of a protected class for work of a comparable character.
- Screen job applicants based on current or past compensation.
- Determine compensation for a position based on current or past compensation of a prospective employee. (not including current employee of the employer during a transfer, move or hire of the employee to a new position with the same employer).
- Seek the pay history of an applicant or employee from the applicant or employee or a current or former employer of the applicant or employee before the employer makes an offer of employment to the prospective employee that includes an amount of compensation.

### ADDITIONAL PROVISIONS

Also effective January 1, 2019:

- Employers may not reduce the compensation of any employee in order to comply with the law.
- Amounts owed to an employee because of a failure of an employer to comply with the requirements of the Equal Pay Law are considered unpaid wages under the law.
- Employees who assert violations of the Equal Pay Law may file complaints with the Civil Rights Division of BOLI or a civil action within one year after the occurrence of the unlawful practice.
- An unlawful compensation practice is deemed to have occurred each time compensation is paid pursuant to a discriminatory compensation decision or other practice.
- Notice of claim against public bodies. (tort claim notices) must be given within 300 days of discovery of the alleged loss or injury.

### Other Provisions

See BOLI website for additional information regarding:

- Permitted circumstances for paying employees working of a comparable character at difference compensation levels;
- Legal remedies under the law; and
- Provisions for employer equal pay analyses as a defense in the award of compensatory and punitive damages.

For additional information, contact the Bureau of Labor and Industries:  
www.oregon.gov/boli  
Portland: 971-673-0761  
Eugene: 541-686-7623  
Salem: 503-378-3292  
TTY: 711  
Technical Assistance for Employers Program: 971-673-0824

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# Ley de Igualdad en Las Remuneraciones de Oregon

## Antecedentes de Remuneraciones

Con vigencia desde el 6 de octubre de 2017, se prohíbe a los empleadores intentar averiguar los antecedentes de remuneraciones de aspirantes a un empleo y de empleados antes de que el empleador haga una oferta de empleo al aspirante a empleo, que incluya el monto de compensación.

### Prácticas Ilegales

- Discriminar de cualquier manera entre empleados en función de la condición de un empleado como miembro de una clase protegida en el pago de salarios u otro tipo de compensación por trabajo de carácter comparable.
- Remunerar salarios u otro tipo de compensación a cualquier empleado a una tasa mayor que la que paga el empleador para remunerar salarios u otro tipo de compensación a empleados de una clase protegida por trabajo de carácter comparable.
- Seleccionar a aspirantes a un empleo en función de compensaciones actuales o anteriores. Determinar la compensación para un puesto en función de la compensación actual o anterior de un aspirante a empleo (sin incluir a un empleado actual del empleador durante una transcripción, mudanza o contratación del empleado a un nuevo puesto con el mismo empleador).
- Inquirir, averiguar los antecedentes de empleos del aspirante al empleo o empleado a través del aspirante a empleo o empleado de un empleado actual o anterior antes de que el empleador haga una oferta de empleo al aspirante a empleo, que incluya el monto de compensación.

## Disposiciones Adicionales

- Los empleadores no podrán reducir la compensación de ningún empleado para estar en cumplimiento con esta ley.
- Los montos que un empleador le dé a un empleado debido al incumplimiento con los requisitos de la Ley de Igualdad en las Remuneraciones (Equal Pay) se considerarán "salarios no remunerados" según esta ley.
- Los empleados que alegan infracciones a la Ley de Igualdad en las Remuneraciones podrán presentar sus quejas ante la División de Derechos Civiles del Departamento de Trabajo e Industrias de Oregón (Bureau of Labor and Industries, BOLI) o interponer un juicio civil dentro del plazo de un año después del incidente de la práctica ilegal.
- Se considera que un práctico de compensación legal ha ocurrido cada vez que se paga la compensación, de acuerdo con una decisión de compensación discriminatoria u otro tipo de práctica.
- El aviso de demanda contra los organismos públicos (aviso de demanda no contractual) se debe entregar dentro del plazo de 300 días de haber descubierto la pérdida o el daño que se alega.

### Otras Disposiciones

- Consulte el sitio web del BOLI para obtener más información sobre lo siguiente:
- Circunstancias en que se permiten remunerar a los empleados que realizan un trabajo de carácter comparable en diferentes niveles de compensación.
- Recursos de ayuda legales, según lo establecido por ley.
- Disposiciones para análisis de igualdad en las remuneraciones del empleado como defensa en la concesión de indemnización por daños y perjuicios y compensación puntual.

Para obtener más información, comuníquese con el Departamento de Trabajo e Industrias: www.oregon.gov/boli  
Portland: 971-673-0761  
Eugene: 541-686-7623  
Salem: 503-378-3292  
TTY: 711  
Programa de Asistencia Técnica para Empleadores: 971-673-0824

Este es un resumen de las disposiciones de la Ley de Igualdad en las Remuneraciones de Oregon.  
No es el texto completo de la ley.  
ESTA INFORMACIÓN SE DEBE PUBLICAR EN UN LUGAR VISIBLE.

2/2018 - Spanish
Equal Pay Act

• If a complaint is filed under this Act, some of the damages may be waived, if the employer can show it completed, within three years before the date the employee filed the action, an equal-pay analysis of the employer’s pay practices.

• Equal-pay analysis cannot be used against the employer in any other context.
Employees with Disabilities
Americans with Disabilities Act

Disability: a physical impairment or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such impairment, or a person who is perceived by others as having such an impairment.
Interactive Process

• Engage in a meaningful interactive process with the employee to determine whether a reasonable accommodation exists.

• Unpaid time off from work beyond what is required by OFLA/FMLA may be a reasonable accommodation.
Reasonable Accommodation

• You are required to provide reasonable accommodation when:
  o A qualified individual with a disability;
  o Is unable to perform an essential job function because of the disability; and
  o Accommodation is available that would not cause undue hardship to the employer.
Possible Accommodations:

- Ergonomic work stations
- Desk, chairs, office equipment, etc.
- Flexible schedule
- Open windows
- Unpaid leave
- Change of office location
- Service animals
Service Animals
Two Questions:

1. Is the animal required because of a disability?
2. What work or task has the animal been trained to perform?
Can you . . .

1. Ask for documentation?
   NO

2. Exclude a service animal?
   MAYBE
You can exclude a service animal when:

1. The animal is out of control;
2. When the animal is not housebroken;
3. Undue burden or direct threat
Undue Burden is . . .

When the accommodation requires “significant difficulty and expense.”
Direct Threat is . . .

- A significant risk of substantial harm to the health or safety of the individual or third parties that cannot be eliminated or reduced by reasonable accommodations.
Hypo:

Student emails Superintendent requesting to bring their dog to school with them. Email states that the dog is a service animal?

• What do you do?
Ask your two questions:

1. Is the animal required because of a disability?

YES
2. What task or job has the dog been trained to perform?

The dog makes me feel better.

No, this is not a specific trained task or job.
What about . . .

I have diabetes and the dog senses when my blood sugar is low and barks to alert me.

Yes. This is a specific trained task.
Employee Complaints

• Staff Complaint – GBM/KL-AR
• Sexual Harassment – GBN/JBA-AR
• Staff - Hazing, Harassment, Intimidation, Bullying, Menacing or Cyberbullying – GBNA-AR
• Whistleblower Complaints – GBMA/KL-AR
• Discrimination Complaints – AC/AC-AR
• Instructional Materials Selection – IIA/IIA-AR
Sexual Harassment

• Is . . .

• Unwelcomed advances;
• Requests for sexual favors;
• Conduct creating an intimidating, hostile or offensive work environment;
• Conduct which substantially interferes with work performance.
Sexual Harassment is not . . .

- Jokes without innuendo;
- Telling someone they look nice without innuendo;
- Asking someone to lunch without quid pro quo;
- Gentle pat on shoulder or upper back to get someone’s attention.
Legal Standard

• Legal standard for proving sexual harassment is high
• Even if the behavior is not “sexual harassment” the District may still prohibit it and discipline for it if it is inappropriate for a professional workplace
Common Misunderstandings

• Behavior has to be directed at an individual;
• Behavior has to be intentional;
• Men can’t be victims;
• Sexual harassment can only be between supervisor and subordinates;
• Sexual harassment can only be between opposite sexes.
District Board Policy

- Sexual Harassment (GBN/JBA)
- Sexual Harassment Complaint Procedure (GBN/JBA-AR)
- Policy now applies to third parties on or near school grounds
- New notice requirements
Notice to Complainant

- The rights of the student, student’s parents, staff member, person or person’s parents who filed the complaint;
- Information about the internal complaint processes available through the school or school district that the student, student’s parents, staff member, person or person’s parents who filed the complaint may pursue;
- Notice that civil and criminal remedies that are not provided by the school or school district may be available to the student, student’s parents, staff member, person or person’s parents through the legal system and that those remedies may be subject to statutes of limitation;
- Information about services available to the student or staff member through the school or school district, including any counseling services, nursing services or peer advising;
- Information about the privacy rights of the student, staff member or person and legally recognized exceptions to those rights for internal complaint processes and services available through the school or school district; and
- Information about, and contact information for, state and community-based services and resources that are available to persons who have experienced sexual harassment.
You receive a few emails from co-workers with dirty jokes and some explicit pictures. You think the jokes are hilarious and the pictures don’t offend you.

• What do you do?
A delivery person keeps asking your receptionist out, and brings candies. Your employee is not interested in dating this person.

• What do you do?
Discrimination

It is declared to be the public policy of Oregon that practices of unlawful discrimination against any of its inhabitants because of race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or familial status are a matter of state concern and that this discrimination not only threatens the rights and privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. ORS 659A.006
Discrimination

It is an unlawful employment practice under state and federal law to take an adverse action against an employee because they are in a protected class or because they engaged in protected activity.
Adverse Employment Actions:

- Termination
- Discipline
- Transfer
- Change in duties or hours
- Demotion
- Change in workspace
Protected Classes

- Race/color/national origin
- Religion
- Sex
- Sexual orientation
- Gender identity
- Disability
- Injured workers
- Marital status
- Pregnancy
- Family relationships
- Veterans Status
Protected Activity

- Use of worker’s compensation benefits
- Opposing unlawful employment practices or participating in employment proceedings
- Use of protected leave
- Opposition to safety/health hazards
- Military service
- Whistle-blowing

- Association with protected class
- Union activity
- Use of other employment rights (wage & hour, unemployment, etc.)
Protected Leave Laws

- FMLA/OFLA
- Sick Time
- ADA Leave
- Workers’ Comp Leave
Investigating Complaints
Establish Timeline
Gathering Physical Evidence
Interviewing Witnesses
Interviewing the Subject of the Investigation
Documentation
Concluding the Investigation
Due Process
Discipline or Dismissal

Should I stay?  Should I go?
Possible Repercussions
Tort Claim Notice

• Generally, individuals wanting to bring a lawsuit against a public body or public employee must give notice of their claim within 180 days of the loss or injury.
Formal Notice

Formal notice of a claim is satisfied by providing written notice to the public body, which includes the following:

• A statement that a claim for damages will be asserted;
• A description of the time, place and circumstances giving rise to the claim; and
• The name of the claimant and mailing address information.
Actual Notice

Actual notice of the claim may also satisfy the notice requirement. Actual notice consists of:

• Any communication about the claim to the public body’s governing body, attorney or risk manager;
• If the communication is such that a reasonable person would conclude that a particular person intended to assert a claim.
Lawsuits

- Personal service of the Summons and complaint at the District’s offices.
- The District has 30 days from the date of service to respond to the complaint by way of answer or motion.
Who Could be Sued?

- The School District
- Individual Board Members
- The Superintendent
- Supervisors or Other Involved Staff
Subpoenas

• Subpoena for Testimony
• Subpoena for Records
Subpoena for Testimony

• A subpoena for testimony is a court authorized order commanding your attendance as a witness in a judicial proceeding. You must comply with the requirements of the subpoena.

• Your testimony will either be required in person at a judicial proceeding, such as an administrative hearing or trial, or at a deposition, which is a statement given under oath.
Subpoena for Records

• A subpoena for records (subpoena duces tecum) is a court authorized order commanding the production of documents, materials, or other tangible evidence in the district’s possession, custody or control.

• In order to comply with the subpoena, you will likely have to locate and gather certain documents that are identified in the subpoena.
Subpoena for Records

- The subpoena will specify the deadline and location for the production, but you will have at least 14 days to comply.
- Records subpoenas can be served by mail as long as a personal appearance is not required.
QUESTIONS