

THE ALPHABET SOUP OF EMPLOYMENT LAW

STATE AND FEDERAL LAW UPDATES

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Oregon

TOPIC/BILL	SUMMARY
<p>Medical Marijuana</p>	<p>Oregon Supreme Court decided <i>Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries</i> on 4/15/10, holding that employers do not need to accommodate an employee's use of medical marijuana.</p> <p>Employee was hired as a steel press operator in a temporary capacity. After few months, told supervisor he had a medical marijuana card and inquired if this would impact ability to secure permanent employment. Employee terminated about a week later. BOLI determined employer failed to reasonably accommodate employee and failed to engage in interactive process. Court of Appeals upheld decision.</p> <p>Supreme Court reversed, finding that medical marijuana, although excluded from state criminal statutes, was still an illegal drug under federal law. Because state disability law provides that illegal drug users are not entitled to protection, an employer need not accommodate employee's use of medical marijuana nor engage in the interactive process because of the illegal nature of employee's activities.</p> <p>Following this decision, employee who uses illegal drugs, including medical marijuana, is not protected by Oregon's disability laws or the ADA. Employers can consistently apply zero-tolerance drug policies, disciplining those who violate the policy and refuse to hire applicants that fail drug screens, regardless of medical marijuana registry status. Recommended that such policies be issued in writing to applicants and employees and that employers clearly indicate that medical marijuana is prohibited as any other controlled substance.</p>
<p>Mandatory Employer Meetings <i>SB 519</i> <i>Worker Freedom Act</i></p>	<p>Prohibits employer from taking adverse action against employee who declines to attend meeting or participate in communication aimed at expressing the employer's opinion on religious or political matters, including anti-union meetings. Posting required. Effective 1/1/10. Lawsuit challenging constitutionality recently dismissed.</p>

TOPIC/BILL	SUMMARY
Use of Cell Phone While Driving <i>HB 2377</i>	Cell phone use while driving is prohibited except under certain circumstances (using hands-free device, operating in the scope of employment if operation of motor vehicle is necessary for the person’s job). Effective 1/1/10.
Automated External Defibrillators (AED) Required <i>SB 556, SB 1006</i>	Requires certain locations of public assembly to have an AED (single building [versus facility] with 50,000 square feet or more of indoor floor space where “business activities” are conducted and where at least 50 [versus 25] employees are present on a normal day). Also requires a certified employee be present during business hours. Effective 1/1/10.
Employment Credit Checks <i>SB 1045</i> <i>Job Applicant Fairness Act</i>	New Oregon law greatly restricts employers’ ability to perform credit checks on applicants and employees. Employers prohibited from obtaining or using credit report to make hiring decision about applicant or any decision about current employee. Exception if information is “substantially job-related” (i.e., cash handling positions, access to customer financial data). Must disclose in writing. Effective 7/1/10.
Religious Accommodation <i>SB 786</i>	Employers must provide reasonable accommodation for religious observance or practices of employee unless providing accommodation would impose undue hardship (significant cost or expense). Accommodations include shift changes, use of leave, permission to wear religious jewelry or clothing. Effective 1/1/10.
Disability Discrimination <i>SB 874</i>	Requires broad interpretation of “disability” definition. Requires Oregon statutes to be construed broadly to conform to the ADA Amendments Act of 2008 (ADAAA). State statutes apply to employers with six or more employees and protect individuals with disabilities, those regarded as disabled, and those with a record of impairment. Effective 1/1/10.
Domestic Violence <i>SB 928</i>	Prohibits employers from discriminating or retaliating against individual who is victim of domestic violence, sexual assault or stalking. Requires reasonable safety accommodation unless doing so imposes undue hardship. Accommodations may include transfer, reassignment, modified schedule, unpaid leave. Employer may request certification, including police report, protective order, note from attorney or health care provider. Effective 1/1/10.

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Leave for Military Call-Up of Spouse <i>HB 2744</i>	Allows eligible employee (working at least 20 hours per week) up to 14 days of protected unpaid leave per deployment of a spouse who has been notified of an impending call or order to active duty or who has been deployed during military conflict. Employee must provide notice within 5 business days of receiving call to duty or deployment. Allows reinstatement rights as provided under OFLA. Leave runs concurrently with OFLA and applies to employers with 25 or more employees in Oregon. Effective 6/25/09.
Military Leave Discrimination <i>HB 3256</i>	Prohibits employer from discriminating or retaliating against individual who serves in armed forces. Law to be construed consistently with federal USERRA. Effective 1/1/10.
Independent Contractor Classifications/Oversight <i>HB 2815</i>	Establishes interagency compliance network (DOJ, DOR, OED, BOLI, CCB and others) to prevent misclassification of workers to avoid compliance with tax or employment laws. Agencies charged with establishing consistency in classifications of workers; gather information about employers who pay in cash, misclassify workers, and fail to comply with tax and employment laws; and conduct joint audits. Effective 7/1/09.

Washington

TOPIC/BILL	SUMMARY
<p>Equal Treatment of Domestic Partners <i>SB 5688</i></p>	<p>State-registered domestic partners (same-sex and opposite-sex seniors) are treated the same as married spouses (to the extent this treatment does not conflict with federal law). Employers must afford domestic partners all the protections of spouses under state leave laws. Originally scheduled to become effective 7/26/09, the bill was put on hold pending a referendum approved by voters in November 2009. The law remains on hold pending a signature dispute. The case was heard by the US Supreme Court 4/28/10 and a decision is pending.</p> <p>Once effective, legislation affects the following employment-related laws:</p> <ul style="list-style-type: none"> • Washington Family Leave Act – Employees will have the right to take up to 12 weeks of unpaid leave in a 12-month period to care for a registered domestic partner with a serious health condition. This leave will not count under the federal Family and Medical Leave Act (FMLA) because FMLA does not include domestic partners in the definition of family members. • Washington Family Care Act – Employees can use accrued, paid leave to care for a registered domestic partner or the partner’s parent, if either has a serious health condition. • Military Family Leave – Employees may take up to 15 days of unpaid leave per deployment when a registered domestic partner has been notified of a call to active duty or is on leave from deployment. • Domestic Violence Leave – An employee is entitled to take leave to care for a registered domestic partner’s family member to the same extent that a married employee could use such leave to care for a family member. • Deceased Employee Wages – A surviving registered domestic partner is entitled to the final wages of a deceased employee to the same extent as surviving spouse. • Assignment of Wages – A registered domestic partner will need to consent in advance to an employee’s assignment of wages to a creditor; the same as an employee’s spouse.

TOPIC/BILL	SUMMARY
Use of Cell Phone While Driving <i>SB 6345</i>	Cell phone use while driving is prohibited (except with a hands-free device). Makes texting and talking without a headset a primary offense (allows officer to stop driver without another reason). Previously, law made talking and texting while driving only a secondary offense. Effective June 10, 2010.
Paid Parental Leave <i>SB 6158</i>	Provides eligible employee with wages of up to \$250 per week for five weeks while on leave. Originally enacted in 2007, the law was not scheduled to take effect until October 2009 in order to determine a funding mechanism. The effective date has subsequently been postponed for additional 3 years to provide additional time to determine funding source.

Federal

TOPIC/ACT	SUMMARY
Lilly Ledbetter Fair Pay Act	<p>Overturs US Supreme Court decision in <i>Ledbetter v. Goodyear Tire & Rubber Co.</i> (held the 180-day statute of limitations period begins with initial discriminatory decision). Applies to all claims of pay discrimination pending on or after 5/28/07. Resets the statute of limitations clock for pay discrimination claims to run from the date of each discriminatory act. Plaintiffs who do not immediately discover pay-related discrimination are more likely to be able to proceed with claims, since new harm occurs each time wages or benefits are paid. Employers should:</p> <ul style="list-style-type: none"> • Review current pay structures to uncover potential inequities. • Make pay changes for those employees that appear out of alignment with expected pay levels. • Review current performance and pay processes to prevent future discriminatory acts (annual review is recommended). • Ensure that legitimate, nondiscriminatory reasons for pay and employment decisions are well documented. • Revise document retention policies to ensure records supporting compensation decisions are available in future (minimum 2 years; Oregon wage and hour, 2 years; FLSA, 3 years; IRS, 4 years). Consider indefinite retention. <p>3rd Cir. case (<i>Mikula v. Allegheny County</i>) – Request for raise qualifies as a compensation decision.</p>
FMLA Military Leave Rights	<p>FMLA expansion grants 12 weeks of “exigency leave” to relatives of active-duty members of the military (not just National Guard, Reserves). Leave can include work absences necessitated by a broad range of activities relating to duty including short-notice deployments, military events, child care needs, school activities, counseling, financial/legal arrangements. In addition, military caregiver leave, which allows up to 26 weeks of leave when a relative incurs a serious illness or injury in the line of duty, now extends to families of veterans whose injury or illness occurred in the last five years. Effective 10/28/09.</p>
Employment Nondiscrimination Act (END)	<p>Would amend Title VII to make it unlawful to discriminate against employees on the basis of sexual orientation and gender identity. Add an accommodation requirement for employers (employee restrooms).</p>

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Healthy Families Act	Proposed legislation would amend FMLA to require employers of 15 or more employees to provide 7 days of paid sick leave annually. Leave could be used to care for self or family members.
Paycheck Fairness Act	Would modernize the Equal Pay Act by giving claimants access to “opt out” class actions and the compensatory and punitive damages available to Title VII plaintiffs. As written, bill proposes that an employer must prove a “business necessity” test to justify the challenged wage rate. Unlike Title VII, the Act provides for unlimited damages. Passed House in 1/09 as part of the Fair Pay Act but the Senate has yet to vote.
Americans with Disabilities Amendments Act (ADAAA)	ADAAA took effect 1/1/09. Loosened the “substantially limits” standard and now requires that disability be interpreted broadly. More plaintiffs will now get past the disability threshold and the merits of the case will be at issue (e.g., major life activity, episodic impairments, substantial limitation).
Independent Contractor Classifications/Enforcement	<p>Department of Labor (DOL) stepping up investigations and enforcement of independent contractor classifications. DOL claims misclassifications give employers unfair tax and financial advantages and deny employees protections of federal and state employment and labor laws.</p> <p>Employers should think carefully before classifying an individual as an independent contractor. There is no single legal test for determining whether an individual is an independent contractor, but courts and agencies focus on the following factors:</p> <ul style="list-style-type: none"> • Special skill required • Degree of permanence of the working relationship • Worker’s opportunity for profit and loss • Employer’s right to control <p>Employers should review their independent contractor arrangements carefully to determine whether the arrangement qualifies under all the applicable tests. The risks of misclassification are significant – claims for unpaid overtime, minimum wages due, and penalties.</p>

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Hiring Incentive to Restore Employment Act (HIRE Act)	<p>Two new tax benefits available for employers that hire “qualified employees.”</p> <ul style="list-style-type: none"> • Payroll tax exemption. Employers are relieved of its 6.2% share of social security tax on wages paid to qualified employees. For wages paid 3/19/10 through 12/31/10. • Tax credit. For each qualified employee hired and retained for 52 consecutive weeks, employers eligible for a tax credit of 6.2% of wages paid to qualified employees over 52-week period, up to \$1,000. <p>“Qualified employees” must be hired after 2/3/10 and before 12/31/10, and have been unemployed or employed less than 40 hours during the 60-day period preceding the employment. Qualified employees must sign affidavit (Form W-11). Rehired and replacement employees may qualify.</p> <p>http://www.irs.gov/businesses/small/article/0,,id=220745,00.html.</p>
COBRA Subsidy American Recovery and Reinvestment Act (ARRA)	<p>Provides premium assistance (subsidy) to individuals that qualify for COBRA coverage. Eligibility requires an involuntary termination between 9/1/08 and 5/31/10 or a reduction in hours between 9/1/08 and 5/31/10 plus an involuntary termination between 3/2/10 and 5/31/10. Subsidy period is 15 months. Individual cannot be eligible for other coverage or Medicare. Notices required. Extension until year-end passed the Senate and is pending in the House. Oregon’s mini-COBRA law mirrors federal law.</p>
FTC Red Flags Rule	<p>Law requires covered businesses to institute a written identity theft plan. In addition to financial institutions, the rule applies to businesses that have information or accounts with financial, personal, medical or training data, or information that creates a reasonable risk of identity theft. Scope of rule unclear, although appears to apply to any business that regularly extends credit to repeat customers. Rule effective 1/1/08 but not enforced yet against non-banking businesses. FTC’s How-To Guide: http://www.ftc.gov/bcp/edu/pubs/business/idtheft/bus23.pdf.</p>

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Genetic Information Nondiscrimination Act (GINA)	<ul style="list-style-type: none"> • Prohibits employers and insurance companies from using genetic information in hiring, discharge, compensation, job placement, benefits and promotion. • Prohibits collection of genetic information by employers and allows workplace testing in limited circumstances (monitoring effects of hazardous exposures). • Requires genetic information maintained by employers to be kept in confidential, restricted-access files apart from other personnel records. • Permits disclosure of genetic information in very limited circumstances (court order). • Genetic information includes genetic testing as well as family history of illness. • Act does not prevent employers from requesting or requiring family medical information to comply with leave laws. • Effective for employers 11/09. Posting required. <p>http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf.</p>
Patient Protection and Affordable Care Act	<p>Nursing employees must be allowed “reasonable” unpaid breaks to express milk for up to one year after the birth of a child (law does not define “reasonable”). Employers must also provide nursing employees with a private place (other than a restroom) in which to express milk.</p> <p>Applies to all employers. However, employers with fewer than 50 employees are excused if providing the breaks would impose an undue hardship. Applies to Washington employers and possibly small employers in Oregon (<25). Oregon’s parallel law applies to employers with 25 or more employees and where the benefits are greater for the employee. Effective immediately.</p>

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Patient Protection and Affordable Care Act and Health Care and Education Reconciliation Act (together PPACA)	<ul style="list-style-type: none"> • Small Employer Health Coverage Tax Credit. Employers that have no more than 25 FTEs and pay average annual wages of less than \$50,000 per employee may qualify for a tax credit of up to 35% of premiums paid for employee coverage in 2010. In 2014, maximum credit increases to 50%. http://www.irs.gov/newsroom/article/0,,id=220809,00.html. • Coverage for adult children to age 26. Available regardless of marital status. Not available if child has own coverage (limitation expires 2014). • Restrictions on lifetime and annual benefits. • Restrictions on preexisting conditions. Can no longer impose limitations on children under 19. Beginning in 2014, no preexisting conditions allowed. • Retroactive coverage cancellation prohibited unless individual engage in fraud or misrepresentation. • New summary of benefits and coverage. HHS prescribed standard format required by 3/22/12. • Limitation on reimbursement of over-the-counter items. Reimbursements from FSAs will be allowed for medications only if prescribed by a doctor or insulin. Effective for 2011 plan years. • Employer reporting of value of health coverage beginning with 2011 tax year. • Waiting periods. No waiting periods that exceed 90 days beginning in 2014. <p>Additional provisions of the acts will be effective in 2014/2018:</p> <ul style="list-style-type: none"> • Requirement that individuals obtain health coverage. • “Play or pay” rules for employers with 50 or more full-time employees, with penalty for those who do not offer “affordable coverage.” • Automatic enrollment rules for employers with 200+ employees. • Cap on annual FSA contributions at \$2,500. • Excise tax on high cost (“Cadillac”) health coverage (\$10,200 for individuals, \$27,500 for families). • Creation of state-based insurance exchanges. Beginning in 2014, small employers may purchase coverage through exchange. Certain individuals will be eligible for subsidies they can use to purchase coverage through exchange.

TOPIC/ACT	SUMMARY
<p>Contract Requirements for Federal Contractors and Subcontractors <i>Executive Order 13496</i></p>	<p>Federal contractors and subcontractors subject to the National Labor Relations Act (NLRA) will be required to include language in their contracts and post notices regarding employee rights under the NLRA. Federal contractors with contracts of \$100,000 or more and subcontractors with subcontracts of \$10,000 or more are affected by this requirement. Effective June 19, 2010. Posting required: http://www.dol.gov/olms/regs/compliance/EO13496.htm.</p>
<p>Employee Free Choice Act (EFCA), National Labor Relations Act (NLRA)</p>	<p>Potentially the biggest change to organized labor in more than 70 years, EFCA would amend the NLRA to facilitate workers' ability to organize. Law would eliminate the requirement of a secret ballot election and require mandatory arbitration if a first contract is not achieved 120 days from election. Legislation remains stalled in Senate.</p>
<p>National Labor Relations Board (NLRB)</p>	<p><i>New Process Steel v. NLRB</i> pending before US Supreme Court. Questions before court are (1) whether Section 3(b) of the National Labor Relations Act authorizes the NLRB to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that includes the two remaining members; (2) does the NLRB have authority to decide cases with only two sitting members, where 29 U.S.C. § 153(b) provides that "three members of the Board shall, at all times, constitute a quorum of the Board"? Approximately 80 (out of 600) rulings being challenged.</p> <p>Recess appointments of Craig Becker and Mark Pearce to NLRB. First Democratic majority since 2001. Strong opposition to Becker because he was counsel to SEIU and AFL-CIO and has voiced/written strong opinions on employer rights in the election process.</p>