

# New Oregon Law Restricts Nondisclosure, Nondisparagement Provisions in Workplace Agreements

July 10, 2019

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A new Oregon law limits employers' use of nondisclosure or nondisparagement agreements with their employees with respect to employment discrimination or sexual assault.

The Workplace Fairness Act (WFA), signed by Governor Kate Brown, also requires employers to adopt written anti-discrimination policies regarding internal employment discrimination and sexual assault reporting. In addition, the WFA extends the statute of limitations for filing employment-related claims from one year to five years.

### Nondisclosure Provisions

Under the WFA, an employer may not enter into an agreement with a current or prospective employee that contains a nondisclosure or nondisparagement provision regarding conduct that constitutes employment discrimination or sexual assault.

This prohibition applies to employment discrimination or sexual assault that occurred between employees or between an employer and an employee in the workplace or at an off-site work-related event, or between an employer and an employee off-site.

The WFA defines sexual assault as "unwanted conduct of a sexual nature that is inflicted upon a person or compelled through the use of physical force, manipulation, threat or intimidation." Under existing Oregon law, employment discrimination includes discrimination based on race, color, religion, sex, sexual orientation, national origin, marital status, age, expunged juvenile record, disability, or uniformed service.

The WFA offers two exceptions to the its bar on nondisclosure and nondisparagement provisions. First, settlement, separation, or severance agreements with an employee may contain nondisclosure, nondisparagement, or no-rehire provisions if the employee requests them, provided the employee has seven days after the parties have executed the agreement to revoke the agreement.

Second, where the employer makes a good faith determination that an employee has engaged in employment discrimination or sexual assault, the employer may enter into a settlement, separation, or severance agreement that contains nondisclosure, nondisparagement, or no-rehire provisions with that employee.

Beginning October 1, 2020, employees who claim violations of the WFA's bar against nondisclosure or nondisparagement provisions may sue their employer or file a complaint with the Oregon Bureau of Labor and Industries. The statute of limitations for claims arising under the WFA is five years.

### Notice to Employees

The WFA requires all employers in Oregon to adopt written anti-discrimination policies that, at a minimum, must:

- Specify a process for an employee to report prohibited conduct;
- Identify an individual, as well as an alternate individual, who the employer has designated to receive reports of prohibited conduct;
- Include the statute of limitations period for claims under the WFA;
- Include a statement that an employer may not require or coerce an employee to enter into a nondisclosure or nondisparagement agreement, along with a definition of those terms;
- Explain that an employee claiming employment discrimination or sexual assault may voluntarily request to enter into a nondisclosure, nondisparagement, or no-rehire agreement, and that the employee would have seven days after execution to revoke that agreement; and
- Include a statement that advises employers and employees to document any incidents of employment discrimination or sexual assault.

Employers must provide a copy of the policies to each employee at the time of hire and make the policies available to employees within the workplace. Further, the individual designated to receive reports must provide a copy of the policies to employees who disclose information regarding employment discrimination or harassment.

### Voidable Severance Pay

An employer may void an existing agreement for severance or separation pay with a person who has authority to hire and fire employees if the employer, after conducting a good faith investigation, determined the person has violated the anti-discrimination law or the employer's anti-discrimination policy and the violation was a substantial contributing factor to the separation from employment.

### Extension of Employment Discrimination Statute of Limitations

The WFA will extend the statute of limitations for employment discrimination claims from one year to five years. The new statute of limitations will apply to conduct occurring on or after September 29, 2019.

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Jackson Lewis attorneys are available to answer inquiries regarding this new law and assist employers in reviewing and revising their policies to achieve compliance with the WFA's requirements.

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