Labor and Employment Law Quick Hitters: Legislative, Regulatory, and Litigation Updates for Oregon Employers

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Oregon Labor Law Updates

HB 2058A – Ag Overtime Compliance Costs

Effective: March 27, 2023

Description: This bill directs the Oregon Business Development Department to develop and administer a repayable award program to help eligible employers mitigate the costs of complying with agricultural overtime compensation requirements under section 2, chapter 115, Oregon Laws 2022 (Enrolled House Bill 4002).

What this means: Tax credits may be available to help employers offset the cost of overtime expenses arising from new overtime laws.

Best practices: The first three rounds of payments under this new bill are already in process. Businesses that may be eligible can get more information here:

https://www.oregon.gov/biz/programs/ag_overtime_repayable/pages/default.aspx

The final round of applications closed on October 24, 2023. However, the department may extend the period if the funds are not fully disbursed.

HB 3471 – Unlawful Practices and Settlement Agreements

Effective: July 27, 2023

Description: This bill makes it unlawful to prohibit employers from entering into settlements or agreements disposing of workers' compensation claims that bar a worker from seeking further employment with an employer unless first requested by the worker.

What this means: As an employer, you cannot request a no-rehire provision in a workers' compensation settlement. The employee must request the provision.

Best practices: Update your templates and forms, if necessary. If you want to include a "no re-hire" provision, make sure to make the employee's request an "up front" requirement of the settlement and include language that confirms the employee/former employee requested that provision.

SB 592 – Comprehensive Workplace Inspections

Effective: May 24, 2023

Description: This bill authorizes the Department of Consumer and Business Services director to conduct a comprehensive inspection of any place of employment deemed necessary by the department based on prior violation of employment-related safety or health laws, regulations, or standards.

What this means: If an employer has had an employment-related violation, the department can investigate the workplace without prior notification to the owner, employer, management, or other agent.

Best practices: Make sure your workplace is always fully compliant. Double-check your required posters and postings, confirm that you have an active and engaged Safety Committee, and empower your employees and managers to monitor the workplace for health and safety issues.

SB 851 – Relating to Workplace Psychological Safety

Effective: No later than September 15, 2024

Description: This bill requires the Bureau of Labor and Industries to prepare a model respectful workplace policy that employers may adopt. The bureau is directed to create informational materials that identify the harm to employees and employers caused by workplace bullying and make the materials available to employers.

What this means: The department will create a policy that employers can follow to create safe and respectful workplaces.

Best practices: Update your policies to emphasize that you expect and require employees to treat each other with dignity and respect at all times, even when expressing disagreement. Provide periodic training and encourage your managers to model the behavior they expect from employees.

SB 907 – Right to Refuse Dangerous Work

Effective: January 1, 2024

Description: This bill amends existing law (ORS 654.062 - notice of violation to employer by workers) to include a provision that makes it an unlawful

employment practice for any person to bar or terminate from employment or discriminate against an employee or prospective employee because they have refused to expose themselves to serious injury or death from a hazardous condition at the place of employment, with no reasonable alternatives.

What this means: ORS 654.062 states that if employees are aware of any violation of law, regulation, or standard pertaining to safety and health in the workplace, they should notify the employer. The bill adds language to the law that employers cannot take any action against employees who refuse to work in said unsafe violations or safety hazards.

Best practices: Make sure your managers are empowered to respond to and address workplace complaints and escalate concerns as appropriate. Managers should understand your policy and next steps if/when an employee refuses to work for safety reasons.

SB 1052 – Crimes Related to Involuntary Servitude and Human Trafficking

Effective: January 2, 2024

Description: This bill amends ORS 163.263 to include a more robust definition of crimes related to involuntary servitude and human trafficking. It establishes an affirmative defense for human trafficking victims. It provides that certain evidence concerning victims of human trafficking involving involuntary servitude is not admissible. It extends the statute of limitations for civil action pertaining to involuntary servitude or human trafficking. This law requires alcohol service permittees to report suspected human trafficking on licensed premises. It directs the Oregon Criminal Justice Commission to use specified crime categories when a human trafficking victim is under 18 years of age at the time of the offense. Finally, it directs several state offices to require human trafficking training for basic police officer certification and develop training for certain state agencies concerning human trafficking awareness and prevention. It requires certain agency employees to complete annual training.

What this means: State and federal laws related to human trafficking are constantly being revised, and H-2A is heavily regulated in this arena.

Best practices: Employers should ensure that their human resources departments and personnel are aware of resources and information for human trafficking victims.

Federal Labor Law Updates

Pregnant Workers Fairness Act

Effective: June 23, 2023

Description: The Pregnant Workers Fairness Act (PWFA) is a new law that requires covered employers to provide "reasonable accommodations" to a worker's known limitations regarding pregnancy, childbirth, or related medical conditions unless the accommodation will cause the employer an "undue hardship." The PWFA applies only to accommodations. Existing laws enforced by the Equal Employment Opportunities Commission (EEOC) make it illegal to fire or otherwise discriminate against workers on the basis of pregnancy, childbirth, or related medical conditions. The PWFA does not replace federal, state, or local laws that are more protective of workers affected by pregnancy, childbirth, or related medical conditions. More than 30 states and cities have laws that provide accommodations for pregnant workers.

What this means: Covered employers (15 or more employees) must provide accommodations to employees with known limitations. For example, these employees could receive longer breaks, be excused from strenuous activities, be allowed to sit more frequently, or be given quick access to restrooms.

Best practices: Employers should ensure that managers refer pregnant employees to HR or a confidential resource and seek information from a health care provider regarding appropriate and necessary work restrictions. Do not make assumptions about whether and to what extent a pregnant employee can or cannot perform certain tasks. Accommodate pregnancy like any other medical condition – get the information you need to make an informed decision.

Federal Labor Regulatory Updates

U.S. Department of Labor – Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees

Comment deadline: November 7, 2023

Comment website:
https://www.federalregister.gov/documents/2023/09/08/2023-19032/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and

Description: In this proposal, the Department of Labor (DOL) is revising the regulations issued under the Fair Labor Standards Act that implement exemptions from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees. Significant proposed revisions include increasing the standard salary level to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South)—$1,059 per week ($55,068 annually for a full-year worker)—and increasing the highly compensated employee total annual compensation threshold to the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally ($143,988). DOL is also proposing to add to the regulations an automatic updating mechanism that would allow for the timely and efficient updating of all the earnings thresholds.

What this means for Oregon: Oregon follows federal law (minimum annual salaried threshold of $35,568). If these rules are adopted, Oregon employers who want salaried workers to be exempt from overtime requirements must pay them the new, increased wage of $55,068 annually.

U.S. Department of Labor (DOL) – Improving Protections for Workers in Temporary Agricultural Employment in the United States

Comment deadline: November 14, 2023

Comment website:
https://www.federalregister.gov/documents/2023/09/15/2023-19852/improving-protections-for-workers-in-temporary-agricultural-employment-in-the-united-states

Summary of significant changes:

- **Protections for workers who advocate for better working conditions and labor-organizing activities**
    - Expands protections against retaliation for any worker seeking better working conditions or attempting to self-organize (unionize workforce).
    - Overturns many farmworker exemptions under the National Labor Relations Act and puts them into H-2A rules.
    - The employer would be required to provide a list of H-2A and domestic employee contact information to a requesting labor organization (even if no organizing is occurring). Would permit workers to invite or accept guests to farmworker housing and provide labor organizations the right of access to worker housing up 10 hours per month per job order without an invitation.

- **Clarification of justifiable termination for cause**
    - Employers will have to meet a 6-factor test for termination for cause.
    - If termination (or reason not to rehire) is for failure to meet a productivity standard, the standard must be disclosed in the job offer.
    - Employers must implement a detailed, documented progressive discipline system before most terminations.

- **Immediate effective date for updated AEWRs**
    - Require immediate implementation of AEWR upon publication date. No more 15-day grace period to let payroll procedures catch up.

- **Enhanced transparency for job opportunities and foreign labor recruitment**
    - New disclosure of foreign worker recruitment. Employer will be required to provide a copy of all agreements with agents or recruiters and disclose the name, identification number, and geographic location of persons and entities hired by or working for foreign labor recruiters and any agents or employees who recruit or solicit prospective H-2A workers.
    - Will also require the employer to provide the name, DOB, address, telephone, and email for all owners of each employer, any operator of the farm where H-2A workers are

employed including fixed-site ag business with H-2ALC contracts), and any person who manages or supervises H-2A workers and workers in corresponding employment.

- **Enhanced transparency and protections for agricultural workers**
    - Disclosure of minimum productivity standards, applicable wage rates, and overtime opportunities.
        i. Will require disclosure of minimum productivity standards regardless of paid by piece rate or hourly rate. The minimum productivity standard will have to be bona fide and normal and accepted among non-H-2A employers in the same or comparable occupations and crops.
        ii. Will require the employer to offer and advertise any applicable prevailing piece rate, highest applicable hourly rate, and any other rate the employer intends to pay, and pay workers the highest of these wage rates, as calculated at the time work is performed.
        iii. Will require the employer to specify in the job order any applicable overtime premium wage rates for overtime hours worked and the circumstances under which the wage rate for overtime will be applied.
    - Enhanced protections for workers through the Employment Service system (ES system)
        i. In addition to employers, State Workforce Agencies (SWA) will have the ability to discontinue services for agents, farm labor contractors, joint employers, and successors in interest. Expands discontinuation of services for a refusal to correct or withdraw a job order with terms and conditions that are contrary to laws, failure to provide any required assurance, and for final and binding employment-related violations from any state, federal, or local enforcement agency. DOL will set minimum thresholds when SWAs must discontinue services. If services are discontinued in one state, they would be discontinued nationally.
    - Enhanced transportation safety requirements
        i. If a vehicle came with seatbelts, the employer must maintain and require the use of seatbelts by drivers and passengers.
    - Protection against passport and other immigration document withholding

        i. Employers will be explicitly prohibited from holding or confiscating a worker's passport, visa, or other immigration or government identification.
    - Protections in the event of a minor (14 calendar day) delay in the start of work
        i. Employers would be required to notify workers no later than 10 days before a minor delay to the start date of work. The employer would be required to pay workers for any calendar day of work missed if the employer fails to provide adequate notice of the minor delay.

- **Enhanced integrity and enforcement capabilities**
    - Reduced submission periods for appeal requests for debarment matters and submittal of rebuttal evidence to the Office of Farm Labor Certification (OFLC).
        i. Reduces time for rebuttals, for parties to appeal debarment to an Administrative Law Judge, and for parties to appeal debarment decisions to the review board. Additionally, it shortens all time frames for requests for an appeal hearing from 30 days to 14 days, except for civil money penalties or the payment for back wages – which will stay at a 30-calendar-day timeframe for appeal.
    - Enhancements to DOL's ability to apply orders of debarment against successors-in-interest.
        i. Clarifies the liability of successor in interest for debarment purposes and streamlines the DOL procedure to deny labor certifications filed by or on behalf of successors in interest.
    - Defining the single employer test for assessing temporary needs or enforcing contractual obligations like corresponding employment.
        i. Will add a newly defined "single employer" definition to determine if two or more entities are truly intertwined as a single H-2A employer. Codifies the "integrated employer" test into a single employer test that will look at four factors: 1.) common management; 2.) interrelation between operations; 3.) centralized control of labor relations; and 4.) the degree of common ownership and financial control.

U.S. Department of Homeland Security (DHS) – Modernizing H-2 Program Requirements, Oversight, and Worker Protections

Comment deadline: November 20, 2023

Comment website:
https://www.federalregister.gov/documents/2023/09/15/2023-19852/improving-protections-for-workers-in-temporary-agricultural-employment-in-the-united-states

Summary of significant changes:

- **Prohibited fees**
  - Will require that the employer monitors the entire recruitment chain of foreign workers to ensure workers are not paying prohibited fees to obtain the H-2 job opportunity. Employers will have a "due diligence" requirement to monitor the practices of agents, attorneys, facilitators, recruiters, or other employment service providers (like SWAs and Ministries of Labor). Petitions can be denied or revoked, and employers could be debarred from the program for a minimum of 1 year if prohibited fees are identified (for just one worker), even if fees were repaid. Employers could be further debarred from the program for up to 3 years if they cannot demonstrate all workers were fully reimbursed without exceptions.

- **Mandatory and discretionary visa petition denials**
  - Petitions would be automatically denied if the petitioning party was debarred from DOL H-2 programs. Petitions could be discretionarily denied for labor violations of federal, state, or local laws, for criminal convictions, or for final administrative or judicial determinations against individuals acting on behalf of the employer. Both debarments and denials would have a 3-year lookback period.

- **USCIS will have the authority to investigate petitions and interview H-2 workers where labor is performed.**

- **Extending similar H-1B whistleblower protections to H-2 workers**
  - Employees who have reported an employer for "potential" H-2 violations or labor law violations, who are advocating for better pay or working conditions, or who are complaining to a

manager would be protected by the whistleblower protections. The protection would allow the employee to extend their stay to seek H-2 employment elsewhere.

- **Grace periods during pre-employment, post-employment, and early contract terminations**
    - Extend to H-2A 10 days to enter the U.S. before employment (already exists for H-2B) and extend to H-2B 30 days to stay in the U.S. post-employment (already exists for H-2A). There would be a new 60-day grace period when an H-2 worker ceases employment for a termination, resignation, or other reason to seek new employment, such as when USCIS revokes a petition and the worker is without employment.

- **H-2A employer (like H-2B) will be required to pay the worker's return transportation if the petition is revoked and the worker has not found post-revocation employment.**

- **H-2 visa portability**
    - The portability will allow an H-2 worker to start work immediately upon filing of a petition for an extension of status in the same category or on the start date of the work petition, whichever is later. The receiving employer will no longer need to E-Verify the transferring employee. To transfer, the worker must have maintained their status, still be within the authorized period of stay, and not have unlawfully worked.

- **DHS will remove the "dual intent" standard from H-2 workers where a family member or the employer has filed for permanent residence.**

- **DHS will remove the eligible countries list, meaning workers from any country can come on H-2 visas.**