

SB 483: A rebuttable presumption of discrimination in Oregon

Traditionally, principles of due process in the law require that an individual who accuses an employer of an unlawful practice must bear the burden of proving that the employer actually violated the law. It was the plaintiff, not the defendant employer, who was tasked with proving its allegations and showing that the employer engaged in illegal conduct.

But new legislation passed by the Oregon Legislature and set to be signed into law by Gov. Kate Brown serves to eradicate procedural due process and flip that burden – implementing a “rebuttable presumption of guilt” in certain cases that will *presume* that the employer violated the law, and then task the employer with proving by a preponderance of the evidence that it didn’t.

Such a presumptive standard overturns what has long been an axiomatic principle of law in both civil and criminal cases not only in Oregon but across the entirety of United States jurisprudence – that the rebuttable presumption is of innocence – not guilt.

The Oregon Legislature has declared this presumption of guilt “an emergency,” and the law will go into effect immediately upon passage.

The summary

Senate Bill 483, which was introduced during the 2021 regular session, creates a rebuttable presumption of guilt that presumes that an employer discriminated against a prospective, current or former employee if the employer discharges or otherwise takes adverse action against that individual within 60 days of the individual’s engagement in any health or safety activity codified under ORS 654.062(5)(a)-(d).



COMPLIANCE CORNER

Chris Morgan

COMMENTARY

ORS 654.062(5) precludes, among other things, discharging or otherwise discriminating against an employee because they opposed or challenged the health and safety practices of their employer. In practical terms, it means that if an employee opposes or challenges a health or safety practice (the protected activity), and is subsequently terminated (even for a reason entirely independent of the complaint), the law will assume that the employer illegally discriminated against the employee and discharged them *because of*, and in retaliation for, engaging in protected activity by raising the health or safety concern.

The presumptive standard makes no exceptions and does not otherwise attempt to account for the veracity of the underlying allegations that will serve as the basis for protected activity.

Other statutory employment laws in Oregon, such as ORS 659A.199 (which is intended to protect employees who make good faith reports of their employers’ engagement in illegal activity), at least require the predicate that the complaint at issue be made to the employer in *good faith*. Here, no such exception exists – and the employer will simply be presumed to have engaged in an unlawful practice in the event that the employer takes adverse action against the employee within the

60-day period subsequent to the protected activity.

The process

In the event that a prospective, current or former employee raises concerns, and then subsequently files an action with the Oregon Bureau of Labor & Industries, BOLI will treat the complaint the same as it would if the complaint involved allegations of an unlawful employment practice under ORS 659A.030(1)(f) – which prohibits employers from discharging or otherwise discriminating against an employee because the employee has opposed any unlawful practice, or because the employee has filed a complaint, testified or assisted in any legal or administrative proceeding under ORS Chapter 659A.

BOLI would then be required to make a determination within 90 days, starting with the presumption that the employer engaged in an unlawful employment practice, and requiring the employer to prove by a preponderance of the evidence that it did not. Irrespective of BOLI’s determination, the employee would then have a right to file a formal civil action for damages in any circuit court in the state of Oregon with 365 days of BOLI’s determination. The presumption of guilt for the employer would continue in any subsequent civil proceeding as well.

The implications

The implications for employers are significant, particularly where the prospect of potentially frivolous litigation could otherwise derail many organizations’ economic recovery in the wake of the ongoing COVID-19 pandemic. The legislation also raises more broad concerns for employers regarding the Oregon

Legislature’s apparent willingness to overturn traditional due process principles in favor of a presumption of guilt for defendant employers.

As a best practice, employers of all sizes and industries must ensure that they are diligently following their own health and safety protocols (particularly as it relates to COVID-19); that they are carefully documenting and responding to any health and safety concerns raised by a prospective or current employee; that they are carefully documenting conversations with those prospective or current employees; and that they are carefully considering the risks associated with taking any adverse action against an employee who raises a health or safety complaint, even if the complaint has no merit.

Employers should be mindful that the risk of litigation, even from those whom they never hire, increases exponentially in the event that the individual raises a health or safety concern – irrespective of whether that concern is legitimate or backed up by any credible evidence.

Employers should consider consulting employment counsel prior to making any decisions or taking any adverse action against an individual in these circumstances.

Chris Morgan is an attorney with Barran Liebman LLP. He specializes in the defense of complex and high-profile employment matters. Contact him at 503-276-2144 or cmorgan@barran.com.

The opinions, beliefs and viewpoints expressed in the preceding commentary are those of the author and do not necessarily reflect the opinions, beliefs and viewpoints of the Daily Journal of Commerce or its editors. Neither the author nor the DJC guarantees the accuracy or completeness of any information published herein.