

2009 LEGISLATION ALERTS

TORTS

DISCRIMINATION

WHISTLEBLOWER DISCRIMINATION ORS 659A.885

2009 OR LAWS CH 524 (HB 3162)

HB 3162 amends ORS 659A.885 by making it an unlawful employment practice for an employer to discharge, demote, suspend, or in any manner discriminate or retaliate against an employee who has, in good faith, reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation.

Effective date: January 1, 2010

The amendments apply to conduct occurring on or after January 1, 2010.

MILITARY SERVICE DISCRIMINATION ORS 659A.885

2009 OR LAWS CH 378 (HB 3256)

HB 3256 establishes an unlawful employment practice of discriminating against a service member if an employer discriminates against that service member for fulfilling his or her military service obligation, prohibiting an employer from denying a service member initial employment, reemployment on return from duty, job retention, promotion, or any other job term or condition because of that person's service in any uniformed service, or from discharging, disciplining, or retaliating against such individuals.

Effective date: January 1, 2010

The amendments apply to conduct occurring on or after January 1, 2010.

FILING CHARGES OF DISCRIMINATION ORS 659A.820

2009 OR LAWS CH 108 (SB 56)

SB 56 requires the complainant to sign a charge of discrimination filed with the Bureau of Labor and Industries (BOLI). Current law does not require a signature but instead states that the complainant "may" sign the charge; it also permitted an attorney to sign on the complainant's behalf. This amendment will mandate a signature from a complainant and a complainant only.

Effective date: January 1, 2010

The amendments apply to complaints filed on or after January 1, 2010.

ORDERS TO WITHHOLD ORS 25.424

2009 OR LAWS CH 445 (SB 373)

SB 373 creates a private right of action, for both the obligor and obligee, against the withholding employer for failure to pay the DOJ as required by the withholding order. This bill supersedes *Arvidson v. Kurahashi*, 217 Or App 74, 81 (2007), which held that ORS 25.424 only provided a cause of action against a withholding employer for overwithholding, not for failure to pay the DOJ on time. SB 373 also removes damages limitations by allowing the obligor or obligee to recover for any amounts improperly withheld and any damages as a result of a withholding violation. Such damages

December 2009

Issue 109

CONTENTS

Discrimination
Page 1

Minors
Page 2

Oregon Tort Claims Act
Page 3

Personal Injury
Page 3

Miscellaneous
Page 4

DISCLAIMER

IN BRIEF includes claim prevention information that helps you to minimize the likelihood of being sued for legal malpractice. The material presented does not establish, report, or create the standard of care for attorneys. The articles do not represent a complete analysis of the topics presented, and readers should conduct their own appropriate research.

would include those alleged in *Arvidson* like having to pay late fees as a result of late support payments.

Effective date: January 1, 2010

The amendments apply to all orders to withhold, whether served before, on or after January 1, 2010, except for any amount that was withheld or paid under an order to withhold before January 1, 2010.

RELIGIOUS ACCOMMODATION
ORS 659A, 342.650
2009 OR LAWS CH 744 (SB 786)

SB 786 amends ORS Chapter 659A by requiring employers to reasonably accommodate religious practices of employees. Types of accommodation include using vacation or other available leave to engage in religious observances or practices, allowing the employee to wear religious clothing, and taking time off for a holy day or other religious observance or practice. Significantly, Oregon law will now create a more stringent burden for an employer seeking to avoid accommodating an employee because of an “undue hardship,” defining that term as one involving “significant difficulty or expense,” compared to Title VII’s requirement, which only requires an employer to demonstrate something more than a *de minimis* cost.

Effective date: January 1, 2010

The amendments apply only to conduct that occurs on or after January 1, 2010.

DISABILITY DISCRIMINATION
ORS 659A.100 ET SEQ.
2009 OR LAWS CH 508 (SB 874)

SB 874 amends ORS Chapter 659A by conforming Oregon’s disability discrimination statute (which applies to those with six or more employees) to the more stringent federal ADA Amendments Act of 2008 (ADAAA), which went into effect on January 1, 2009. It instructs courts to adopt a broad standard when determining whether an individual is considered disabled, requires employers to ignore mitigating measures (except for ordinary eyeglasses or contact lenses) when determining whether the individual is disabled, expands the list of major life activities, and lowers the standard for determining whether an individual is “regarded as” disabled.

Effective date: January 1, 2010

The amendments apply to conduct occurring on or after January 1, 2010.

MINORS

DEPOSITS OF FUNDS FOR MINORS
ORS 126.725
2009 OR LAWS CH 311 (HB 2687)

ORS 126.700 provides that a person who is required to pay not more than \$10,000 to a minor may, among other things, pay the money to a “financial institution incident to a deposit in a federally insured savings account in the sole name of the minor.” Similarly, ORS 126.725 provides that a person having custody of a minor may enter into a settlement agreement for the minor under which not more than \$25,000 is “deposited directly into a federally insured savings account in the sole name of the minor.” Some financial institutions have refused to accept such deposits because minors lack the capacity to contract.

HB 2687 addresses this problem by providing that, notwithstanding other law, a minor may contract with a financial institution to establish an account for receiving deposits pursuant to ORS 126.700 and 126.725, as well as receiving deposits not exceeding \$25,000 when the funds are paid by a person obligated by a judgment to pay the moneys to the minor. Accounts established under these provisions are “binding upon the minor and cannot be voided or disaffirmed by the minor based upon the minor’s age or status as a minor.” The bill further provides that the consent of the minor’s parent, guardian or custodian is not needed to establish the account.

The bill further provides that when settlement or judgment payments are made for a minor who is represented by an attorney, the payment must be made “by direct deposit into the attorney’s trust account”, and the attorney must then deposit the moneys “directly into a federally insured savings account that earns interest in the sole name of the minor, and provide notice of the deposit to the minor.”

Effective date: January 1, 2010

These new rules apply to amounts paid to minors, settlements made and judgments entered on or after the January 1, 2010.

**STATUTE OF LIMITATIONS IN CHILD ABUSE CASES
ORS 12.117**

2009 OR LAWS CH 879 (HB 2827)

HB 2827 amends ORS 12.117 to extend the statute of limitations for civil actions against the perpetrator of child abuse or an individual who knowingly allowed, permitted, or encouraged child abuse. The action must be commenced before the later of: (1) the date on which the person turns 40 (previously 24), or (2) five years (previously three years) from the date the person discovers or in the exercise of reasonable care should discover the causal connection between the child abuse and the injury.

Effective date: January 1, 2010

The amendments apply to all causes of action, whether arising before, on, or after January 1, 2010, except for any cause of action for which a judgment was entered before January 1, 2010.

OREGON TORT CLAIMS ACT

EMERGENCY SERVICE VOLUNTEERS

**ORS 18.348, 176.800, 190.156, 254.471,
401.015 – 401.990, 453.322, 469.533,
469.611, 480.347, 656.031, 80.208; SB
311**

2009 OR LAWS CH 718 (HB 3021)

HB 3021 provides that a qualified emergency service volunteer is an agent of a public body under Oregon Tort Claims Act (OTCA) for purpose of acts and omissions that are within the course and scope of the volunteer's duties if they occur during a declared state of public emergency.

The bill also requires counties to provide workers compensation coverage to qualified search and rescue volunteers and allows self-insured counties to use the workers' compensation assigned risk pool.

The measure provides government compensation for people tortiously injured by such emergency providers by treating these providers as agents of the state for purposes of coverage under the OTCA.

Effective date: January 1, 2010

TORT ACTIONS AGAINST PUBLIC BODIES

**ORS 30.260 – 30.287, 144.600, 742.502,
742.504**

2009 OR LAWS CH 67 (SB 311)

SB 311 is the legislative fix to the Oregon Tort Claims Act (OTCA) necessitated by *Clarke v. Oregon Health Sciences University*, 343 Or. 581 (2007). The bill sets new,

higher limits for damages recoverable by those injured by a public body or its employees, officers, or agents in the course of their duties.

SB 311 provides for direct appeal to the Oregon Supreme Court in cases in which a plaintiff wishes to appeal only the constitutionality of the new liability caps as applied to the plaintiff's case. Finally, the bill mandates the creation in January 2014 of a Task Force on the OTCA to study and report on the impact of SB 311 and other laws governing the tort liability of public bodies.

Effective date: July 1, 2009

PERSONAL INJURY

MOTOR VEHICLE LIABILITY COVERAGE

ORS 742.524, 806.070

2009 OR LAWS CH 66 (HB 2326)

HB 2326 amends ORS 742.524 to increase the personal injury protection (PIP) maximum monthly income replacement benefits from \$1,250 to \$3,000 when an injury prevents a person from returning to work. The bill also amends ORS 806.070 to increase the amount of motor vehicle liability insurance coverage required for property damage to others from \$10,000 to \$20,000. The bill also increases the minimum amount of optional uninsured motorist coverage for property damage that must be offered on private passenger motor vehicles not more than 12 years old from \$10,000 to \$20,000.

Effective date: January 1, 2010

Applies to motor vehicle insurance policies issued or renewed on or after January 1, 2010.

MOTOR VEHICLE LIABILITY SETTLEMENTS

ORS 742.518 – 742.542

2009 OR LAWS CH 545 (HB 2369)

HB 2369 preserves the subrogation rights of a motor vehicle liability insurer who furnishes personal injury protection (PIP) benefits to an eligible person under ORS 742.518 to 742.542 when the responsible person's insurer obtains a release for bodily injuries from the person within 60 calendar days after the accident. The bill requires the insurer who obtains the release to state in the release that the rights of the insurer furnishing PIP to recover payments made for medical benefits from the responsible person's insurer are not impaired. The bill also preserves the rights of the responsible person's insurer to contest a recovery claim from an insurer who furnishes PIP, based on liability or the reasonableness or necessity of medical benefits paid by the insurer furnishing PIP.

HB 2369 requires the representative of the insurer who obtains a release for a claim of bodily injuries “in person” from a person who is eligible to receive PIP to provide the eligible person with a clear and conspicuous notice that the contract is a binding contract that concludes their claims against the parties it identifies. This notice must be incorporated in the release or in a separate document.

The bill also allows the eligible person to rescind the release if they provide written notice of rescission to the insurer within five business days after executing the release.

Effective date: January 1, 2010

Applies to motor vehicle accidents that occur on or after January 1, 2010, and to releases obtained on or after January 1, 2010.

Practice Tip: If the injured person settles the claim soon after the accident, the extent of medical bills (and thus the PIP payments) may not be known. This bill provides that the PIP insurer’s subrogation rights against the responsible person’s liability insurer continue if there is a settlement within 60 days after the accident.

MOTOR VEHICLE FINANCIAL RESPONSIBILITY LIMITS ORS 806 ET. SEQ. 2009 OR LAWS CH 257 (SB 127)

ORS 806.190 requires every insurer that issues property and casualty insurance policies, as defined in ORS chapter 731, to report to the Department of Transportation (DOT) any person the insurer has reason to believe is involved in an accident while the person is operating a vehicle in violation of ORS 806.010 that prohibits driving while uninsured. SB 127 requires the insurer to file this report no later than 60 days after the insurer first has reason to believe that a person was involved in such an accident.

SB 127 also amends ORS 806.280 to allow the DOT to accept a certificate of insurance for purposes of future responsibility filings from an insurer that is not authorized to do business in Oregon if the insurer is an eligible surplus lines insurer as defined in ORS 735.405 or a risk retention group as defined in ORS 735.305.

Effective date: January 1, 2010

MISCELLANEOUS

DEFRAUDING OF A PUBLIC AGENCY ORS 180.095 2009 OR LAWS CH 292 (HB 2264)

This expansive bill prohibits certain acts related to false claims made to a public agency and provides for the investigation and civil prosecution of such acts by the Attorney General. An action under Section 3 must be brought within three years after the date that the officer or employee of the public agency charged with responsibility for the claim discovers the violation of Section 2. In no event may action under Section 3 be brought more than 10 years after the date on which the violation is committed. Section 6 permits the Attorney General to serve an investigative demand on any person who may have information or custody or control over information, documents, or other materials.

Effective date: January 1, 2010

Section 2 applies only to conduct that occurs on or after January 1, 2010.

LARGE COMMERCIAL STRUCTURES ORS 12.135, 12.280 2009 OR LAWS CH 715 (HB 2434)

HB 2434 changes the statute of ultimate repose for large commercial projects (defined in ORS 701.005). HB 2434 requires that certain causes of action related to improvements to certain large commercial structures be commenced within six years after substantial completion or abandonment of construction, alteration, or repair, unless the plaintiff is a public body or the project is owned and maintained by a homeowners/unit owners association. It requires that action commence, if the plaintiff is a public body, within 10 years after substantial completion or abandonment of construction, alteration or repair.

Effective date: January 1, 2010

The amendments apply only to causes of action arising on or after January 1, 2010.

STATUTE OF ULTIMATE REPOSE ORS 12.135 – 12.282, 30.905 – 30.908 2009 OR LAWS CH 485 (SB 284)

SB 284 increases the statute of ultimate repose for product liability actions, including wrongful death, to the later of 10 years or the statute of ultimate repose of the state in which the product was manufactured or from which it was imported.

The increase does not apply to manufactured homes and physicians, unless the physician was involved in the manufacture or design of the product.

The bill also exempts product liability actions for damages from halide or mercury vapor light bulbs from being subject to any statute of repose.

Effective date: January 1, 2010

The amendments to Section 1 apply only to causes of action that arise on or after January 1, 2010. Section 11 apply only to deaths, personal injuries, or property damage that occurs on or after January 1, 2010. Section 11 revives a cause of action for death, personal injury, or property damage that occurred before January 1, 2010 if the civil action was filed within the time provided by Section 11 and a final judgment was entered in the civil action on or after January 1, 2008 and before January 1, 2010. A civil action revived must be refiled within one year after January 1, 2010. The bill becomes effective January 1, 2010, except for the exemption for halide or mercury vapor bulbs which applies retroactively.

ATTORNEY FEES IN SMALL TORT ACTIONS ORS 20.080, 20.082 2009 OR LAWS CH 487 (SB 306)

SB 284 modifies the law allowing an award of attorney fees in small tort actions. First, it increases the length of time between when a demand for payment for small torts is made and when a corresponding lawsuit must be filed from 10 days to 30 days (20 days for small contracts). Second, the bill increases the demand limit amount of small tort actions from \$5,500 to \$7,500, and further mandates an increase to \$10,000 in 2012. Third, the bill adds a requirement that a plaintiff provide certain documentation along with the notice to the defendant such as medical records and records of property damage. The bill also requires a plaintiff to provide such documentation to the defendant's insurer if the insurer is known. The obligation of a plaintiff to provide supporting documentation continues until litigation.

A case filed under ORS 20.082 (suits under contract) is increased to \$10,000.

Effective date: January 1, 2010

The amendments to ORS 20.080 by Section 1 apply to all causes of action, whether arising before, on, or after January 1, 2010, except for an action that was filed before January 1, 2010. The amendments by Section 3 (increase from \$7,500 to \$10,000) become operative January 1, 2012, and apply to all causes of action, whether arising before, on, or after January 1, 2012, except for an action that was filed before January 1, 2012.

WRONGFUL DEATH ACTIONS ORS 30.030 2009 OR LAWS CH 51 (SB 403)

SB 403 allows beneficiaries to a wrongful death action to agree to distribution of damages rather than requiring distribution through intestate succession. ORS 30.030 governs the distribution of damages in a wrongful death case. In most situations, the beneficiaries are able to agree to a distribution of damages. Previously however, punitive damage awards were required to be allocated by the laws of intestate succession, meaning that payments would go to the surviving spouse. For tax implications, beneficiaries may be better off distributing the damages in a different manner. SB 403 allows the damages to be distributed by agreement of all the beneficiaries.

Effective date: March 31, 2009

CONFLICT OF LAWS IN TORT CLAIMS 2009 OR LAWS CH 451 (SB 561)

SB 561 provides a methodology for courts to use for determining which state's law will govern most tort and other non-contractual claims arising from situations having contacts with one or more state. SB 561 provides explicit rules for which state's laws should apply and also allows an escape clause in certain situations.

Effective date: January 1, 2010

Sections 1 to 12 apply to all noncontractual claims as defined in Section 1, whether arising before, on or after January 1, 2010, except for claims filed before January 1, 2010.

*The Professional Liability Fund sincerely thanks
Michael Stephenson and David C. Rocker
for assistance with this section of the
2009 Legislation Alerts.*