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OREGON LEGISLATIVE UPDATE

Presented by Karen Davis and Diane Buisman
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Today's Presenters



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The information presented here is not intended to be legal advice

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We counsel companies across the West Coast on complex employment-related issues.

Administrative items

- For a copy of the handout, see “downloadable files” section of the reminder email you received this morning
- Use the chat box at the edge of your computer screen to ask questions
- Next week you’ll receive a link to a recording of the webinar along with another copy of the handout

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What will we cover today?

- Oregon's busy 2017 legislative session brings big changes for employers
- We'll look at these new laws and provide practical tips for compliance:
 - Daily Overtime and Maximum Hours for Manufacturers (HB 3458)
 - Predictive Scheduling (SB 828)
 - Oregon Sick Leave Amendments (SB 299)
 - Pay Equity (HB 2005)

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Daily Overtime and Maximum Hours for Manufacturers





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Quick history of HB 3458

- Manufacturers, canneries, and seafood processors in Oregon required to pay:
 - Daily overtime over 10 hours in a day; and
 - Weekly overtime over 40 hours in a week
- Calculate both and pay the greater of the two
- Class action lawsuit filed in Dec. 2016 (*Mazahua Reyes, et al. v. Portland Specialty Baking, LLC*)
 - BOLI changed interpretation, saying employers must pay both daily and weekly overtime, even if double paying for same hours
- Lawsuit dismissed in March 2017, but BOLI stood behind interpretation that employers must pay both
- HB 3458 introduced to fix BOLI's interpretation

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What industries are covered by HB 3458?

	Industry	Daily OT after 10	13-hour daily cap on hours	Weekly cap on hours	10-hour rest between shifts
	Mills, factories, and other manufacturing establishments	Yes	Yes	Yes	Yes
	Canneries, driers, and packing plants	Yes	No	Yes	No
	Seafood processors	Yes	No	No	No
	Sawmills, planing mills, shingle mills, logging camps	No	No	No	No

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Limited exclusion for wood products industry

- Sawmills, planing mills, shingle mills, logging camps
- Excluded from all daily overtime and max hours requirements until similar laws are passed in WA, CA, and ID
 - See ORS 652.030



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Occupational exclusions for manufacturers

- Members of logging train crew
- Guards
- Boiler operators
- Employees engaged in transporting employees to and from work
- Employees engaged in care of quarters or livestock
- Employees in conducting of mess halls
- Supervisors
- Loading and removal of finished forest product
- Employees making necessary repairs or in emergency situation
- Employees whose principal duties are administrative or not otherwise engaged in the direct processing of goods
- Employees covered by CBA if it addresses overtime and maximum hours



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Exclusions for canneries

- Employees employed in a cannery, drier, or packing plant located on a farm that primarily processes products produced on the farm
- Employees engaged in manufacturing (but they will be covered by manufacturing rules)
- Employees whose principal duties are administrative or not otherwise engaged in the direct processing of goods
- Employees covered by CBA if it addresses overtime and maximum hours



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Daily and weekly overtime

- Effective immediately
- Covered employers can go back to calculating both daily and weekly overtime; pay greater of two
 - Daily over 10 in a day
 - Weekly over 40 in a workweek



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Maximum hours per day

- Maximum of 13 hours per day may be worked at covered employers, except in limited circumstances (same as old law)
- Don't forget overtime over 10 in a day!



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Maximum hours per week

- Effective January 1, 2018
- Maximum of 55 hours per week
- Employee may voluntarily agree in writing to work additional 5 hours per week (up to 60 hours per week)
- No coercion, threats, discrimination or retaliation if employee doesn't volunteer to work extra hours
- Undue hardship provision for employers working with perishable goods
- Don't forget overtime over 40 in a workweek!



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Undue hardship for perishable goods

- The 55-hour weekly cap still applies to manufacturers and canneries working with perishable goods
- However, employees are permitted to voluntarily work at a higher weekly cap during an undue hardship period
- What are “perishable goods”?
 - Product that may spoil, deteriorate, or undergo other material changes that render it unsuitable for use
 - Includes agricultural crops, meat, and fish



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Undue hardship for perishable goods (cont.)

- Undue hardship period can only be claimed for up to 21 weeks per calendar year
- Allows employees to voluntarily:
 - Work up to 84 hours per week for 4 workweeks; and
 - Work up to 80 hours per week for remainder of undue hardship period
- Must notify BOLI when claiming undue hardship and obtain written consent from employees
- Still cannot coerce or threaten employees or impose consequences if decline to work beyond 55 hours per week



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Rest period between shifts

- Effective January 1, 2018
- Applicable to all manufacturing employers (unless excluded from the rule)
- Must provide employees with at least 10 hours of rest after a shift of 8 or more hours
 - Exception: If employee had to work additional hours due to power outage, major equipment breakdown, severe weather, or similar emergency



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Predictive Scheduling

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Predictive scheduling (SB 828)

- *Covered employer:* Retail, hospitality, or food services establishment with 500 or more employees worldwide
- *Covered worker:* Employee of covered employer who provides services related to:
 - Retail trade (NAICS 44-45);
 - Hotels and motels (NAICS 721110);
 - Casino hotels (NAICS 721120); or
 - Food services (NAICS 722)
 - *Exceptions:* salaried exempt execs, admins, or professionals; leased workers; or employee of business providing services to or on behalf of an employer

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Advance notice of work schedules

- Must give new hires written good faith estimate of work schedule (eff. 7/1/18)
- Must give existing employees advance notice of work schedules in writing and post it
 - 7 days' advance notice eff. 7/1/18
 - 14 days' advance notice eff. 7/1/20

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Notice of changes to work schedules

- If employer wants to change written schedule within the mandatory notice period:
 - In-person or electronic notice of change okay;
 - But employee may refuse to work
- Employee may request in writing to be added to work shift or on-call shift

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Wage penalties for changes to work schedules

- Employees get 1 extra hour of pay if employer changes work schedule w/o proper notice if it:
 - Adds > 30 minutes to shift;
 - Changes date/start/end by > 30 minutes w/o loss of hours; or
 - Schedules employee for an extra shift
- Employees get ½ regular rate of pay for each scheduled hour employee doesn't work if employer:
 - Subtracts hours from shift;
 - Changes date/start/end by > 30 minutes w/ loss of hours;
 - Cancels shift; or
 - Doesn't ask employee to work when scheduled for on-call shift

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Exceptions to wage penalties

- Changes of 30 minutes or less
- Mutually agreeable shift swaps
- Employee-requested changes if employee documents in writing
- Employee written requests to add shifts
- Documented disciplinary reasons for just cause
- Threats to employees or property or due to recommendation of public official
- Utility failures

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Exceptions to wage penalties, cont.

- Natural disasters or similar causes outside employer's control
- Cancellation, rescheduling, or change in ticketed event outside employer's control
- Call-up from voluntary standby list
- Unanticipated customer needs or unexpected employee absence (employee must consent in writing; employer must have exhausted voluntary standby list; and employer must communicate appropriately)

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Voluntary standby list

- Employer may maintain voluntary standby list
- Listed employees must receive notice of rights
- Employer doesn't have to give advance notice or pay penalties for asking employee on list to work
- If unanticipated customer needs arise or an unexpected employee absence occurs and no one on voluntary standby list agrees to fill in, employer can ask others to work without penalty if:
 - Employer uses proper communication methods; and
 - Employee consents in writing

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Rest period between shifts

- Right to rest period of 10 hours between each shift unless:
 - Employee requests or consents to work; and
 - Employee is paid at 1½ times the regular rate (w/ limited exception for roadside assistance services)

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Other predictive scheduling provisions

- Employees have right to give input on their work schedules (but employers don't have to accept)
- BOLI must provide a poster template
- Employer must retain records for 3 years
- Local predictive scheduling ordinances are preempted by state law

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Enforcement of predictive scheduling

- Enforcement begins January 1, 2019, through BOLI complaints or private lawsuits
- If CBA provides equal or greater wage penalties for working during the 10-hour rest period or for employer changes to work schedule, no additional wage penalties are required
- BOLI can issue additional statutory penalties of:
 - \$500 for violations of posting requirement; and
 - \$1,000 for most other violations
 - But if employer pays full remedy (other than statutory penalty) w/in 14 days of service of order, BOLI must waive 50% of penalty

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Oregon Sick Leave Amendments

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Quick overview of Oregon Sick Leave

- Employers required to provide up to 40 hours of sick time per leave year
 - Paid hours if at least 10 employees (6 employees if in Portland)
 - Unpaid hours if less than 10 employees
- Accrues at rate of 1 hour per 30 hours worked, or frontload 40 hours at beginning of leave year
- Required to carryover 40 per year if accruing (no carryover if frontloading)
- Must be allowed to use in 1-hour increments
- Broad list of protected reasons for using sick leave

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Oregon sick leave amendment

- Effective January 1, 2018
- Makes adjustments to areas of ambiguity in the original law
- The basic structure of Oregon Sick Leave remains the same; amendment does not change:
 - Annual leave amount
 - Accrual rates
 - Frontloading method
 - Carryover

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Limitation on accrual and use

- Employers can cap accrual at 80 total hours ***and*** limit an employee to using no more than 40 hours per year
- How is this different?
 - Previously, the language said employer can either cap accrual at 80 total hours ***or*** limit an employee to using no more than 40 hours per leave year
 - Applying the previous language didn't make sense

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Accrual limited to 40 hours per year

- New language definitively states that employers can limit the accrual to 40 hours per year
- How is this different?
 - Vigilant always interpreted the language to allow employers to limit to 40 per year
 - However, there was some debate over whether the language was ambiguous and whether employers could truly stop the accrual after an employee reached 40 in a year
 - The new language settles the debate

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Counting employees

- Owners and their children, parents, and spouses are not counted as “employees” when calculating whether an employer has 10 (or 6 in Portland) employees
 - These family members are still entitled to earn and use sick leave
- How is this different?
 - Previously all employees were counted for purposes of determining total headcount
 - This provision is meant to alleviate financial burden of providing paid leave for small, family-owned businesses

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Commissioned and piece-rate workers

- If employee is paid an hourly, weekly or monthly wage, plus a commission or piece-rate, sick time must be paid at the greater rate of:
 - Rate equivalent to hourly, weekly or monthly wage; or
 - Minimum wage
- How is this different?
 - Previous language simply stated greater of “regular rate of pay” or minimum wage
 - Unclear whether “regular rate” was meant to include the commission or piece-rate calculation
 - New language clearly excludes those extra payments

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PTO and other paid leave policies

- If employer incorporates Oregon sick leave into PTO or other paid leave policy, only first 40 hours of year need to comply with law
- How is this different?
 - Simply clarifies an area of debate and potential confusion
 - Allows employers to apply different standards to first 40 hours used in the year versus the remaining leave available under the policy

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Temporary sites in Portland

- Employer who only maintains seasonal farm stand or temporary office trailer on construction site in Portland isn't a Portland employer
 - This means the 10-employee threshold rather than the 6-employee threshold applies regarding paid v. unpaid sick leave
- How is this different?
 - Previously these seasonal/temporary worksites counted for purposes of applying the Portland exception
 - This amendment helps to alleviate paid sick leave burden for local farms and construction companies

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Pay Equity

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Oregon's pay equity bill (HB 2005)

- Forbids asking for salary history
- Subjects employers to liability for differences in pay in 10 protected classes
- Allows only 8 specified reasons to explain differences in pay
- Requires the specified reasons in pay to explain 100% of differences

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Salary history provisions

- Employer cannot seek salary history from applicants or employees
 - Exception: Employer may obtain applicants' written authorization to confirm salary history after making an offer of employment that includes compensation amount
- Effective on 91st day after date the 2017 legislature adjourns
 - Adjournment was 7/7/17
 - 91st day after is 10/6/17

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Salary history enforcement

- Initially (as of 10/6/17), enforcement of salary history will be solely through BOLI complaints
- As of 1/1/24, workers may file civil lawsuits over employer questions about salary history
 - But civil lawsuits for pay equity can start 1/1/19!

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Salary history compliance

- Remove salary history questions from job application
- Consider asking applicants for their salary *expectations*
- If you conduct reference check before making job offer, don't ask for salary history

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Pay equity context: Equal Pay Act

- Federal Equal Pay Act (EPA) prohibits employers from paying men and women at a given location different wages for equal work on jobs that require equal skill, effort, and responsibility, and which are performed under similar working conditions, unless difference is due to a:
 - Seniority system;
 - Merit system;
 - System that measures quantity or quality of production; or
 - Any other factor other than sex

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Pay equity context: Title VII

- Title VII of the Civil Rights Act of 1964 forbids employers from discriminating in compensation because of a worker's race, color, religion, sex, or national origin
- Applies to both intentional discrimination (disparate treatment) and adverse impact

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New Oregon pay equity protected classes

- Race
- Color
- Religion
- Sex
- Sexual orientation
- National origin
- Marital status
- Veteran status
- Disability
- Age

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Acceptable reasons for differences in pay

- Seniority system
- Merit system
- System that measures production quantity/quality
- Workplace location
- Travel (if necessary and regular)
- Education
- Training
- Experience

Must be a bona fide factor related to the job

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What's missing from list of acceptable reasons?

- Relationship to owner of family-owned business
- Acquisitions/mergers
- Market factors in hiring or retaining employees
- Wage compression for long-term employees
- Negotiation skills
- Starting pay
- Catchall for any other reason other than race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, or age

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Title VII context: A little math for adverse impact

- Adverse impact cases allege that a seemingly neutral policy has a disproportionate effect on some workers based on a protected status
- *Standard deviation* measures how far away individual measurements tend to be from the average in a data set
- Courts have ruled that if the average pay for one protected group is within 2 standard deviations of average pay for the favored group, the differences likely occurred by chance

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Oregon pay equity comparison of jobs and wages

- Compare “work of comparable character”
- 8 established reasons (or any combination of those reasons) must explain 100% of differences in pay
 - Caution: If relying on merit system or system that measures quality of production, beware of subjectivity

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Oregon pay equity enforcement

- Effective 1/1/19
- 1-year statute of limitations, but each discriminatory paycheck is a fresh violation
- Violations are unlawful practices under Oregon civil rights statutes and also form basis for wage claims
- Employees may collect back pay starting with period up to 2 years before filing a complaint

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Oregon pay equity enforcement, continued

- Court may award punitive damages if employer:
 - Is a repeat offender; or
 - Engaged in fraud, acted with malice, or acted with willful and wanton misconduct
- Employer may ask court to disallow award of compensatory and punitive damages if employer conducted a good faith equal-pay analysis within the 3 years before lawsuit was filed
 - But employee can still collect back pay, court costs, and attorney fees

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Defense to compensatory/punitive damages

- Good faith equal-pay analysis
 - Must be reasonable in detail and scope in light of employer's size; and
 - Must relate to the protected class identified by the employee
- Employer must have:
 - Eliminated the wage difference for the complaining employee; and
 - Made reasonable and substantial progress toward eliminating wage differences for the protected class identified by the employee

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Pay equity compliance

- Consider doing analysis under direction of an attorney (preserve attorney-client privilege)
- Prioritize analysis by focusing on jobs with greatest risk (typically salaried jobs and jobs with significant numbers of people doing “comparable” work)
- Determine desired level of analysis (including cost)

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Pay equity compliance, continued

- Determine what jobs to compare
- Identify the factors that affect pay
- Determine whether/how to electronically capture those factors
- Determine what protected classes to analyze
- Budget for pay equity adjustments
 - Cannot lower an employee’s wages to comply
- Determine how to communicate adjustments and when to implement

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Wrap-up

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Conclusion

- If covered by daily overtime and/or weekly caps on hours, update schedules and work assignments in time for 1/1/18 deadline
- If covered by predictive scheduling bill, establish notice process and voluntary standby list before 7/1/18 deadline
- Review sick leave policy to see if adjustments are needed
- Stop asking applicants to disclose pay history
- Begin exploring pay equity analysis options

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Questions?

- Use the chat box in the bottom left corner to ask a question of our presenters

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QUESTIONS?

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