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LAVONNE GRIFFIN-VALADE
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ARCHIVES DIVISION

STEPHANIE CLARK
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 839
BUREAU OF LABOR AND INDUSTRIES

FILED

05/24/2024 2:37 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Amends rules related to workplace harassment to add substantive definitions.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 07/15/2024 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

CONTACT: Josh Nasbe
971-269-4431
josh.d.nasbe@boli.oregon.gov

1800 SW 1st Ave, Suite 500
Portland, OR 97201

Filed By:
Josh Nasbe
Rules Coordinator

NEED FOR THE RULE(S)

These rules are necessary to clarify the rights of employees and the responsibility of employers following allegations of workplace harassment.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Enforcement Guidance on Harassment in the Workplace, produced by the United States Equal Employment Opportunity Commission, is available here: <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>.

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

These rules will promote racial equity in this state by providing clear guidance to employees and employers in cases of workplace harassment. Incorporating definitions of "appropriate corrective action" and "promptly correcting harassing behavior" into the rules will clarify when and how employers are required to respond to instances of workplace harassment, including racially-motivated harassment based on a protected class. When implemented in cases of racial harassment, a prompt and appropriate response consistent with these rules is likely to eliminate continued harassment, thereby promoting racial equity in this state.

FISCAL AND ECONOMIC IMPACT:

These rule amendments reflect a synthesis of existing appellate court decisions addressing employer obligations when presented with claims of harassment in the workplace. As a codification of existing law, these rule amendments are unlikely to create a fiscal and economic impact. For employers unfamiliar with the responsibilities to take appropriate action to promptly correct harassing behavior, the additional direction provided by these rules may eliminate uncertainty and result in a positive fiscal and economic impact.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

All state agencies and units of local government, and all private employers, who meet the definition of "employer" in ORS 659A.001 are subject to these rules. All individuals who are employed by these employers are protected from continued harassment by these rule amendments. According to the Oregon Employment Department, there are nearly 165,000 small businesses in Oregon with at least one payroll employee. All of these employers are subject to these rules. As indicated above, these rules clarify existing legal obligations as articulated in appellate court opinions. Thus, it is unlikely that these rules impose any additional reporting, recordkeeping or administrative activities or costs. Both before and after the adoption of these rules, employers are likely to retain records documenting their response to workplace harassment. For similar reasons, the Bureau does not anticipate any increased costs of professional services, equipment supplies, labor or increased administration.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Small businesses, as well as all members of the public, are invited to comment on these rules. In addition, the Bureau will post notice of this rulemaking on its webpage and in the Oregon bulletin, while also disseminating this notice to the Bureau's mailing list.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

Given the breadth of employers subject to these rules, and the resources available to the Bureau, it is likely that providing this notice to business organizations, labor organizations and the public at large, will efficiently surface feedback from the persons and communities likely to be affected by the rule amendments.

RULES PROPOSED:

839-005-0010, 839-005-0030

AMEND: 839-005-0010

RULE SUMMARY: Amends rule to define "appropriate corrective action" and "promptly correcting harassing behavior" for purposes of cases of alleged workplace harassment.

CHANGES TO RULE:

839-005-0010

Discrimination Theories: Employment ¶¶

(1) Substantial evidence of intentional unlawful discrimination exists if the division's investigation reveals evidence that a reasonable person would accept as sufficient to support the following elements:¶¶

(a) The respondent is a respondent as defined by ORS 659A.001(10) and OAR 839-005-0003(14) of these rules;¶¶

(b) The aggrieved person is a member of a protected class;¶¶

(c) The aggrieved person was harmed by an action of the respondent; and¶¶

(d) The aggrieved person's protected class was the motivating factor for the respondent's action. In determining whether the aggrieved person's protected class was the reason for the respondent's action, the division uses whichever of the following theories applies:¶¶

(A) Specific Intent Theory: The respondent knowingly and purposefully discriminates against an individual because of that individual's membership in a protected class, unless the respondent can show that a bona fide occupational qualification or a bona fide voluntary, court-ordered affirmative action plan (OAR 839-005-0013) allows the action.¶¶

(B) Different or Unequal Treatment Theory: The respondent treats members of a protected class differently than

others who are not members of that protected class. When the respondent makes this differentiation because of the individual's protected class and not because of legitimate, non-discriminatory reasons, unlawful discrimination exists. In establishing a case of different or unequal treatment:¶

(i) There must be substantial evidence that the aggrieved person was harmed by an action of the respondent under circumstances that make it appear that the respondent treated the aggrieved person differently than comparably situated individuals who were not members of the aggrieved person's protected class. Substantial evidence of discrimination exists if the division's investigation reveals evidence that a reasonable person would accept as sufficient to support that protected class membership was a motivating factor for the respondent's alleged unlawful action. If the respondent fails to rebut this evidence with evidence of a legitimate non-discriminatory reason, the division will conclude that substantial evidence of unlawful discrimination exists.¶

(I) Pretext: If the respondent rebuts the evidence with evidence of a legitimate non-discriminatory reason, but there is substantial evidence that the respondent's reason is a pretext for discrimination, the division will conclude there is substantial evidence of unlawful discrimination.¶

(II) Mixed Motive: If the respondent presents substantial evidence that a legitimate, non-discriminatory reason contributed to the respondent's action, but the division finds the individual's protected class membership was also a motivating factor in the respondent's action, the division will determine there is substantial evidence of discrimination.¶

(ii) The aggrieved person at all times has the burden of proving that the aggrieved person's protected class was the reason for the respondent's unlawful action.¶

(2) Adverse Impact Discrimination: Substantial evidence of adverse impact discrimination does not require establishment of intentional discrimination as provided in (1) of this rule. Adverse impact discrimination exists if the division's investigation reveals evidence that a reasonable person would accept as sufficient to support the following elements:¶

(a) The respondent is a respondent as defined by ORS 659A.001(10) and OAR 839-005-0003(14) of these rules;¶

(b) The respondent has a standard or policy that is applied equally.¶

(c) The standard or policy has the effect of screening out or otherwise affecting members of a protected class at a significantly higher rate than others who are not members of that protected class; and¶

(d) The aggrieved person is a member of the protected class adversely affected by the respondent's standard or policy and has been harmed by the respondent's application of the standard or policy.¶

(3) An employer must reasonably accommodate an employee or applicant's religious belief, observance or practice unless the employer can demonstrate that such accommodation would cause undue hardship on the employer's business (see OAR 839-005-0140).¶

(4) Harassment: Harassment based on an individual's protected class is a type of intentional unlawful discrimination. In cases of alleged unlawful sexual harassment in employment see OAR 839-005-0030.¶

(a) Conduct of a verbal or physical nature relating to protected classes other than sex is unlawful when substantial evidence of the elements of intentional discrimination, as described in section (1) of this rule, is shown and:¶

(A) Such conduct is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment;¶

(B) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or¶

(C) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.¶

(b) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.¶

(c) Employer Proxy: An employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the employer's president, owner, partner or corporate officer.¶

(d) Harassment by Supervisor plus Tangible Employment Action: An employer is liable for harassment by a supervisor with immediate or successively higher authority over an individual when the harassment results in a tangible employment action that the supervisor takes or causes to be taken against the individual. A tangible employment action includes, but is not limited to, any of the following:¶

(A) Terminating employment, including constructive discharge;¶

(B) Failing to hire;¶

(C) Failing to promote; or¶

(D) Changing a term or condition of employment, such as work assignment, work schedule, compensation or benefits or making a decision that causes a significant change in an employment benefit.¶

(e) Harassment by Supervisor, No Tangible Employment Action: When harassment by a supervisor with immediate or successively higher authority over the individual is found to have occurred, but no tangible employment action was taken, the employer is liable if:¶

(A) The employer knew of the harassment, unless the employer took immediate and appropriate corrective

action.¶¶

(B) The employer should have known of the harassment. The division will find that the employer should have known of the harassment unless the employer can demonstrate:¶¶

(i) That the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and¶¶

(ii) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.¶¶

(f) Harassment by Coworkers or Agents: An employer is liable for harassment by the employer's employees or agents who do not have immediate or successively higher authority over the complaining individual when the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action.¶¶

(g) Harassment by Non-Employees: An employer is liable for harassment by non-employees in the workplace when the employer or the employer's agents knew or should have known of the conduct unless the employer took immediate and appropriate corrective action. In reviewing such cases, the division will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees.¶¶

(h)(A) As used in this rule, "appropriate corrective action" and "promptly correcting harassing behavior" means that an employer:¶¶

(i) Intervenes without avoidable delay to effectively halt harassing behavior;¶¶

(ii) Adequately investigates and ascertains the extent of harassing behavior;¶¶

(iii) Takes appropriate disciplinary measures proportionate to the seriousness of the offense;¶¶

(iv) Does not penalize the reporting employee or make the aggrieved party worse off; and¶¶

(v) Effectively acts to prevent further harassment or retaliation against the reporting employee or aggrieved party for reporting or exercising rights concerning harassing behavior.¶¶

(B) The success or failure of corrective action in stopping harassment is relevant, but not dispositive, as to employer liability in determining whether corrective action was reasonably likely to prevent the harassment from recurring.¶¶

(i) Withdrawn Consent: An employer may be liable for harassment by the employer's supervisory or non-supervisory employees, agents or non-employees even if the acts complained of were of a kind previously consented to by the complaining individual, if the employer knew or should have known that the complaining individual had withdrawn consent to the offensive conduct.¶¶

(ii) When employment opportunities or benefits are granted because of an individual's submission to an employer's harassment, the employer is liable for unlawful discrimination against other individuals who were qualified for but denied that opportunity or benefit.

Statutory/Other Authority: ORS 651.060, ORS 659A.805

Statutes/Other Implemented: ORS chapter 659A

AMEND: 839-005-0030

RULE SUMMARY: Amends rule to define "appropriate corrective action" and "promptly correcting harassing behavior" for purposes of cases of alleged sexual harassment in employment.

CHANGES TO RULE:

839-005-0030

Sexual Harassment in Employment ¶¶

(1) Sexual harassment is unlawful discrimination on the basis of sex and includes the following types of conduct:¶¶

(a) Unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's sex and:¶¶

(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or¶¶

(B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.¶¶

(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating a hostile, intimidating or offensive working environment.¶¶

(2) The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.¶¶

(3) Employer proxy: An employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer.¶¶

(4) Harassment by Supervisor plus Tangible Employment Action: An employer is liable for sexual harassment by a supervisor with immediate or successively higher authority over an individual when the harassment results in a tangible employment action that the supervisor takes or causes to be taken against that individual. A tangible employment action includes but is not limited to the following:¶¶

(a) Terminating employment, including constructive discharge;¶¶

(b) Failing to hire;¶¶

(c) Failing to promote; or¶¶

(d) Changing a term or condition of employment, such as work assignment, work schedule, compensation or benefits or making a decision that causes a significant change in an employment benefit.¶¶

(5) Harassment by Supervisor, No Tangible Employment Action: When sexual harassment by a supervisor with immediate or successively higher authority over an individual is found to have occurred, but no tangible employment action was taken, the employer is liable if:¶¶

(a) The employer knew of the harassment, unless the employer took immediate and appropriate corrective action.¶¶

(b) The employer should have known of the harassment. The division will find that the employer should have known of the harassment unless the employer can demonstrate:¶¶

(A) That the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and¶¶

(B) That the aggrieved person unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.¶¶

(6) Harassment by Co-Workers or Agents: An employer is liable for sexual harassment by the employer's employees or agents who do not have immediate or successively higher authority over the aggrieved person when the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action.¶¶

(7) Harassment by Non-Employees: An employer is liable for sexual harassment by non-employees in the workplace when the employer or the employer's agents knew or should have known of the conduct unless the employer took immediate and appropriate corrective action. In reviewing such cases the division will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees.¶¶

(8)(a) As used in this rule, "appropriate corrective action" and "promptly correcting harassing behavior" means that an employer:¶¶

(A) Intervenes without avoidable delay to effectively halt harassing behavior;¶¶

(B) Adequately investigates and ascertains the extent of harassing behavior;¶¶

(C) Takes appropriate disciplinary measures proportionate to the seriousness of the offense;¶¶

(D) Does not penalize the reporting employee or make the aggrieved party worse off; and¶¶

(E) Effectively acts to prevent further harassment or retaliation against the reporting employee or aggrieved party

for reporting or exercising rights concerning harassing behavior.[¶]

(b) The success or failure of corrective action in stopping harassment is relevant, but not dispositive, as to employer liability in determining whether corrective action was reasonably likely to prevent the harassment from recurring.[¶]

(9) Withdrawn Consent: An employer is liable for sexual harassment of an individual by the employer's supervisory or non-supervisory employees, agents or non-employees, even if the acts complained of were of a kind previously consented to by the aggrieved person, if the employer knew or should have known that the aggrieved person had withdrawn consent to the offensive conduct.[¶]

(9~~10~~) When employment opportunities or benefits are granted because of an individual's submission to an employer's sexual advances, requests for sexual favors, or other sexual harassment, the employer is liable for unlawful sex discrimination against other individuals who were qualified for but denied that opportunity or benefit.

Statutory/Other Authority: ORS 651.060, ORS 659A.805

Statutes/Other Implemented: ORS chapter 659A.030