WHISTLEBLOWER PROTECTIONS

Uniform Standards and Procedures Manual

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WHISTLEBLOWER PROTECTIONS

TOP 10 THINGS TO KNOW

1) Public and certain non-profit employees in Oregon have the **right to report waste, fraud and abuse or other workplace violations** without fear of retaliation.

2) Retaliation can take many forms. Any **adverse employment action** – such as termination, demotion, reduction of hours – **can represent unlawful retaliation** when taken in response to a good faith report of a potential violation of state or federal law.

3) **Private sector employees have similar protections** for disclosures of violations of federal or state law.

4) A report **does not have to be substantiated for the whistleblower to be protected** from retaliation. The employee must simply have a good faith belief when reporting a violation of law or unsafe working conditions.

5) Employees have **civil rights protections** if they experience retaliation due to protected whistleblowing activity, including **filing a complaint with BOLI or suing in circuit court**. Judgments may include job reinstatement, back pay or monetary damages.

6) Public and non-profit employers are **not allowed to disclose the whistleblower's identity** during an investigation without their consent.

7) All public and non-profit **employers must have a written policy** that describes how employees can make protected whistleblowing disclosures.

8) **Effective reporting channels** and protections for whistleblowers not only protect agencies from liability, but can also **lead to better government performance**.

9) Management must protect whistleblowers from retaliation **not just by supervisors, but by co-workers** as well. Employers must **take corrective action** when they determine that co-workers are retaliating against a peer for whistleblowing activity.

10) Agencies should promptly investigate reports of retaliation and work proactively to prevent such violations in the first place. The **best practice** response is to have an **independent, third party investigate** whistleblower reports.

OREGON'S WHISTEBLOWER LAW: SENATE BILL 1559 AT-A-GLANCE

In 2018, Oregon expanded its whistleblowing protection efforts for public employees by establishing a pilot program for anonymous reporting, requiring the creation of uniform standards and procedures for employees, and requiring biennial reports to the state legislature.

Sponsored by Senator Jackie Winters, SB 1559 earned broad, bipartisan support when signed into law by Governor Kate Brown after the 2018 regular session of the state legislature.

The bill strengthens several existing whistleblower protections for public and non-profit employees by requiring the following:

- The **Oregon Health Authority**, the **Oregon Departments of Transportation**, the **Oregon Department of Human Services**, and the **Oregon Department of Environmental Quality** must create procedures for anonymous disclosures pertaining to **ORS 659A.203**, i.e., protected whistleblowing activity. The reporting provision will serve as a pilot program until its sunset on January 2, 2021.

- BOLI shall create and make publicly available a **uniform standards and procedures manual** to serve as a resource for public and non-profit employers and employees alike.

- BOLI must **report to the governor and legislative assembly,** in odd-numbered years the number of whistleblowing disclosures as well as the number of retaliation reports made to the four above-mentioned agencies.

DEFINITIONS

What is Whistleblowing?

Over the years, the Oregon Legislature has expanded protections for "whistleblowers" – employees who report illegal activity by their employers. Oregon public employee whistleblower statutes prohibit public employers from taking action against or prohibiting employees from responding to legislative requests, disclosing information that the employee believes is evidence of a violation of law, reporting public endangerment resulting from an action by a public employer, or disclosing evidence of waste, fraud or abuse.

Importance of Whistleblowing

Whistleblowing plays an important role in the health of organizations.

The ability to report mismanagement and abuse is not only protected by law, but can also help improve the efficiency of public agencies and non-profit organizations. Think of whistleblowing as an early warning system for outdated, ineffective or inefficient systems that need attention.

Fostering a culture of improvement can help identify and control risks and threats to your organization. For instance, in 2013, whistleblowers revealed a widespread abuse of overtime rules at the U. S. Department of Homeland Security that was costing taxpayers $37 million annually. In response, Congress set up a new system for determining overtime eligibility for border patrol agents. Recent years have also seen whistleblowers revealing a pattern of negligence at Veterans Affairs hospitals, leading to congressional reforms and increased funding for the Veterans Health Administration.

Private sector whistleblowing can help identify financial malfeasance and corporate fraud. For instance, the Commodity Futures Trading Commission encourages whistleblowing to help protect against manipulation of derivatives and similar financial products. In fact, whistleblowers are often the main line of defense in private financial institutions, which is why the U.S. Securities and Exchange Commission operates a whistleblower program that can award between 10 percent and 30 percent of the money recovered from fraudulent activity at publicly traded companies. In fiscal year 2017, the Commission awarded $45 million to whistleblowers for reporting fraud and enabling the collecting sanctions.

Failure to protect whistleblowers comes at a cost. In the last decade, public entities in Oregon have spent millions of dollars on settling lawsuits that alleged whistleblower retaliation. Although each case is different — and settlement does not represent an admission of an unlawful practice — civil rights claims involving retaliation and whistleblowing have cost the state more than $4.7 million since January 2013.

Similarly, many private companies have seen significant monetary judgments for unlawfully discharging employees that had reported wrongdoing. Each dollar spent resolving these allegations could have been better spent on organizational improvement and innovation.

Setting the right tone – with clear policies and protections for employees stepping forward – can help prevent whistleblower retaliation while fostering a "speak-up" culture of accountability.

Some Notable Retaliation and Whistleblowing Enforcement Actions

In 2016, a complainant sued the Oregon Department of Transportation after he had been discharged following his internal disclosures relating to unsafe working conditions and other violations of law. The State of Oregon settled the lawsuit for $95,000.

In 2015, BOLI awarded a complainant $1,620 in back pay and $20,000 for emotional and mental suffering. The complainant was discharged because he had reported that Blue Gryphon, the adult foster care home that employed him, had an inadequate food supply for its residents. **34 BOLI 216**.

In 2016, a federal court awarded a former University of Oregon public safety officer $755,000 in damages and legal fees after finding that the university's police department retaliated against the officer for reporting department wrongdoing. *Cleavenger v. University of Oregon.*

In 2014, the head of Oregon Correction Enterprises sued the Department of Corrections for unlawful termination due to whistleblowing activity. The state settled the lawsuit for $450,000. In the same year, the state settled with the former chief administrative officer of the Employment Department, who claimed to have been terminated and retaliated against for raising concerns about abuse of authority and violations of state law.

In 2014, BOLI awarded two complainants $100,000 in damages for physical, emotional and mental suffering after they were terminated by a private company, Maltby Biocontrol, Inc., after cooperating with law enforcement, a protected activity under ORS 659A.230. **33 BOLI 121**.

In 2006, a professor brought a lawsuit against the University of Oregon, claiming retaliation for reporting financial irregularities in a university department. As part of a settlement, the University paid the complainant $500,000.

In 2005, BOLI awarded $2,400 in lost wages and $25,000 for emotional distress to a complainant who had been discharged by Cleopatra, Inc. for reporting criminal activity. **26 BOLI 125.**

In 2002, BOLI awarded $2,414 and $30,763 in back pay to complainants, and $5,000 and $10,000 in damages for emotional distress. Complainants had reported perceived criminal activity by their employer, Hermiston Assisted Living, Inc. **23 BOLI 96.**

In 1997, a complainant employed as a kitchen manager, reported health code violations to the county health department and was subsequently discharged. The commissioner awarded $1,917 in back pay and $20,000 in damages for mental suffering for the violations of whistleblower protections. **16 BOLI 21**.

In 1995, a complainant reported unlawful activity by Earth Science Technology Inc., to the Department of Environmental Quality and was discharged. BOLI awarded $20,700 and $30,000 for mental suffering to the complainant. **15 BOLI 115**

In 1993, an Oregon court awarded $90,000 in damages to a correctional officer employed at the Oregon State Correctional Institution, because the officer was demoted after complaining about overcrowding in the prison.

What is Retaliation?

Retaliation occurs when an employer takes **any adverse employment action** against an employee for making a good faith report of a violation of state or federal law, rule or regulation. Adverse employment actions can include discharge, demotion, suspension or discrimination or retaliation in any manner against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment.

Employers must work to ensure that whistleblowers are kept free from retaliation from not only management, but co-workers as well. Employers should set clear expectations that retaliation is not tolerated within their organizations.

Oregon law protects public and non-profit employees from retaliation for whistleblowing activity. Under state civil rights law**,** public employers may not lawfully retaliate against an employee who has disclosed information that the employee reasonably believes is evidence of a violation of any federal or state law, rule or regulation by the agency. **ORS 659A.199.**

Anti-retaliation measures protect employees for reporting violations of state or federal law if made in good faith (regardless of whether a subsequent investigation substantiates any actual violation). **ORS 659A.199**. Since 2009, the law has provided whistleblowers — including both public and private sector employees — protection when stepping forward to report potential violations of state or federal law, health or safety concerns.

Employers may not discriminate or retaliate against an employee who in good faith reports criminal activity, has caused a complaint to be filed, has cooperated with law enforcement, has brought a civil action against an employer, or has testified at a civil proceeding or criminal trial. **ORS 659A.230.**

Effective January 2017, Oregon law provides an affirmative defense for public and non-profit employees facing civil or criminal charges related to the disclosure of lawfully accessed confidential information. **ORS 659A.230.**

In addition, Oregon law makes it an unlawful employment practice for a covered employer to discharge or otherwise discipline an employee for making such a disclosure of information. **ORS 659A.203**. The law also requires public and non-profit employers to develop a policy that describes an employee's rights and remedies under the law and to distribute the policy in either written or electronic form to each employee. **ORS 659A.210 (6).**

The 2020 Oregon Legislature amended Oregon's whistleblower statute, **ORS 659A.203**, to prohibit school service employers from retaliating against school service employees for reporting any potential violations of any COVID-19 executive orders, laws or safety requirements. The law covers both public employers, but also private contractors performing food service, janitorial, transportation or other educational services.

NOTE: Employees in the health care or residential care sectors may also bring good faith reports of potential violations. **ORS 659A.233.** Employers may not discriminate or retaliate against an employee who has, in good faith, reported a possible violation of health care facility or residential care facility standards contained in **ORS Chapter 441** and **ORS Chapter 442**. According to **ORS 441.057**, employees reporting inappropriate care or any other violation of law or rules shall utilize established reporting procedures within the health care facility first, except if they believe patient safety to be in immediate jeopardy. Similarly, the law protects nursing staff against retaliatory action by hospitals if the employees disclose unsafe, dangerous, or potentially dangerous care practices to a manager in written form first. **ORS 441.181.** If nursing staff is reasonably certain that a practice represents a crime or already known to management, they may report to a private accreditation organization or a public body. Employees of home health or in-home care agencies must also follow the procedures established by their employer when reporting violations of law or rules, except if they believe a client's safety to be in immediate jeopardy. **ORS 443.355.** Despite those specific procedures for certain employees in the health care and residential care sector, they may also be able to rely on the general protection of the whistleblower law in **ORS 659A.199** and **ORS 659A.203**.

Frequently Asked Questions

Q: I know that Oregon law prohibits employers from retaliating against employees who are whistleblowers, but would it be legal for my agency to terminate or take disciplinary action against an employee who reports criminal activity if the reporting employee was also involved in the criminal activity? Here is my situation: Two of my employees are involved in criminal activity in violation of our agency's policy. After a period of time, one employee became uncomfortable with the activities and chose to report them. If, after investigating the allegations, the agency finds that the reporting

employee was also originally involved in the same behavior as the other, may we terminate the reporting employee for violating policy too?

A: It's always legal for you to follow your legitimate, non-discriminatory company policies and discipline employees for violations. If your agency has conducted a thorough investigation and concluded sufficient evidence of criminal activity exists, you may discipline that person as you would any other employee who violated the same policies the same number of times. If your normal policy would be to terminate a similarly situated employee, then yes, you could discharge the reporting employee. Make sure the employee knows that the discipline was for the involvement in criminal activity, not reporting the activity. However, you should discuss the risk of a claim of retaliation with an attorney .

As noted, Oregon law protects employees who report criminal activity, file lawsuits, cooperate with police investigations or testify in court proceedings. **ORS 659A.230.** Do you have sufficient documentation to show that you are basing the discharge on the employee's behavior and alleged criminal activity and not on the actual reporting of the other employee's alleged misconduct? It's always risky to terminate an employee so soon after the employee engages in some legally protected activity – in this case, whistleblowing – because the timing risks making your action appear potentially retaliatory. The closer an adverse employment action is in time to a protected event (reporting waste, testifying at the legislature, etc.) – known as "temporal proximity" – the more likely it is that the action will invite scrutiny and allegations of retaliation.

If you had to defend against a whistleblower retaliation claim, having what's called "comparator" evidence that supports a legitimate non-discriminatory reason for your actions is helpful. For example, are you able to show that other whistleblowers remain at the agency, dispelling the narrative that a pattern of discharging or otherwise taking adverse action against whistleblowers exists? Are you able to show that you have also terminated other employees engaged in the same violations of policy? If not, you should proceed cautiously and think twice before discharging the employee.

Q: I report to the chief financial officer and have discovered what I believe are fraudulent activities in my organization's accounting. I am thinking of going over my supervisor's head to management, but I am worried about losing my job. Would I have legal protection?

A: Yes. There are both state and federal laws that provide protection to employees who report illegal activities. Based on the information you've provided, you likely have protection under the Oregon whistleblower statutes, and federal law could also potentially protect you against retaliation if you report financial fraud within your organization.

Let's start with the Oregon civil rights statutes, which include a general

whistleblower law and one that applies to employees of public agencies.

Oregon's general whistleblower statute protects employees from discrimination or retaliation when they in good faith report criminal activity to any person, cooperate with a criminal investigation, bring a civil proceeding against an employer or testify at a civil proceeding or criminal trial. **ORS 659A.230.**

Some courts have also granted this protection when employees report internally what they in good faith reasonably believe to be a criminal violation. So, you may have protection under this law if you make a report to management, but it would depend in part on your ability to explain your reason for believing that the activity represented a violation of law.

The federal law that could give you protection as a whistleblower is the Sarbanes-Oxley Act, enacted in the wake of corporate scandals at companies like Enron and WorldCom. The Sarbanes-Oxley Act makes it unlawful for an employer to take adverse action against an employee who provides information or cooperates in an investigation related to financial fraud. The act also includes a provision for criminal penalties for persons who interfere with an individual's employment because of protected activity.

Under the law, publicly traded companies must establish complaint procedures regarding financial matters and internal accounting. Companies must allow employees to make confidential, anonymous reports regarding questionable accounting or auditing matters. An employee who reports what they reasonably believe to be a securities law violation is protected from discharge, demotion, harassment or discrimination. The protection applies not only when the employee reports a violation to Congress or a federal agency, but also when the employee reports internally to those with "authority to investigate, discover, or terminate for misconduct."

An employee who wishes to file a complaint under the Sarbanes-Oxley Act must do so within 180 days of the date of the alleged discrimination. To file, contact the Occupational Safety and Health Administration (OSHA), the division at the U.S. Department of Labor that will conduct the investigation. To prevail in whistleblower discrimination claims, employees must show that they engaged in protected activity (reported a violation), that the employer knew or suspected they did so, and that the employee suffered some adverse employment action as a result.

Opposition to Unsafe Working Conditions

No employer may terminate, discipline or discriminate against employees or prospective employees because they have opposed unsafe or unhealthy working conditions. This protected activity includes the right to have complained or assisted in an occupational safety and health proceeding under state law. **ORS 654.062(5).**

Employees may file civil rights complaints with the Civil Rights Division of the Bureau of Labor and Industries or lawsuits in court if they believe that an employer has discriminated against them because they opposed safety or health hazards. Retaliation protection extends not just to employees who have filed formal complaints, but also to those who merely raise issues informally, including any action that puts the employer on notice that an employee believes a health or safety problem exists.

****IMPORTANT**** The window in which to file a retaliation civil rights complaint with BOLI's Civil Rights Division is shorter than the five-year deadline from the date of harm for many other violations. Employees alleging retaliation on the basis of reporting unsafe working conditions **must file a complaint with BOLI's Civil Rights Division within one year** of the date that the individual had reason to believe that an illegal action occurred.

Note: Retaliation law protections usually do not protect an employee who refuses to work, unless that refusal is based upon a reasonable belief that the employee is at immediate risk of serious injury or death, that the employer is not willing to take action to alleviate that perceived risk, and that the refusal is limited to the specific activity that poses the risk.

Frequently Asked Questions

Q: An employee on our maintenance team, Kurt, has raised a number of safety concerns about our forklifts needing basic maintenance and tune-ups. He has also insisted that all warehouse staff wear a mask or face covering when on the job site. As a result, we've increased the number of tune-ups and directed employees that they will face disciplinary action for not wearing proper face coverings. Several employees resent the new safety rules, and Kurt has reported that they are retaliating against him, including calling him a "whiner" who "lives in fear" What is our responsibility here?

A: Oregon law protects employees who oppose unsafe or unhealthy working conditions. The Oregon Safe Employment Act, in particular, makes it unlawful for an employer to retaliate or discipline an employee who raises safety concerns. **ORS 654.062(5).**

In addition, Oregon employers must follow all COVID-19 related executive orders, including the requirement to wear a mask or face covering unless a disability prevents the employee from doing so. By the way, Kurt would be entitled to retaliation protection even if you were unable to determine that his co-workers were actually harassing him. As long as Kurt or any other employee brings a safety concern to you in good faith, you have a duty to protect the employee. Management may not allow retaliation against such a worker.

To avoid legal liability and risk, you should promptly investigate complaints of retaliation. Take them seriously. If you find evidence of harassment, take appropriate corrective action to ensure that Kurt and others are kept free from retaliation and abuse.

The law provides broad protections from discrimination when an employee opposes any illegal health and safety practices, makes any safety-related complaints, files a formal complaint with OSHA, or testifies in an OSHA investigation. “Opposition” may take numerous forms. Employees who exercise their rights to oppose health and safety hazards in the workplace on behalf of other employees or prospective employees are also protected. An employee talking with another co-worker about a safety hazard that is overheard by management would still qualify for protection against unlawful retaliation. The same would apply with an employee writing a letter to the editor of the local paper regarding a protected matter.

Employees may file an OSHA-related discrimination complaint with BOLI within one year of the alleged discriminatory act. But hopefully, you can proactively address your workers’ concerns by encouraging employees to come forward when health or safety issues arise, welcoming employee input, and assuring that your agency and Kurt’s co-workers won’t take adverse action in response.

Q: What should an employer do if an employee complains of retaliation for whistleblowing?

A: The employer must undertake a prompt, thorough investigation to determine whether evidence of retaliation exists. The employer should take detailed statements from the complaining person, the alleged retaliator, and any witnesses, and review and preserve any documents (such as emails, notes or letters) or physical evidence available (voice mail, surveillance video, etc.). Employers should document all steps of the investigation – including rebuttal statements obtained when there is conflict between witnesses’ stories. A final report should include credibility findings whenever possible. Employers may wish to consult an attorney for assistance with retaliation investigations. The investigation should include a written plan for how investigators will conduct the inquiry.

Q: May an employer also be liable for retaliation by co-workers?

A: Yes, if the employer knew or should have known of the conduct, but failed to take immediate and appropriate corrective action, an employer may be held liable for retaliation.

Q: What if the investigation shows that retaliation has occurred?

A: The employer must take "immediate and appropriate corrective action," which means doing whatever is necessary to put a stop to the retaliation. A good indicator that an employer took immediate corrective action is that the behavior does not occur again.

Depending on the severity, appropriate corrective action could include any of the following: verbal or written warnings; counseling; suspension; sensitivity training or education on civil rights laws and appropriate workplace conduct; reassignment of workers to different locations or shifts; or dismissal in more serious cases. When

choosing to make changes in assignments or work locations, it's preferable to apply the changes to the alleged retaliator(s) rather than the victim, otherwise the changes may be construed as further retaliation. If the victim of the alleged retaliation requests a change in their own assignments, schedule or location, it would be wise to get a written acknowledgement from the victim that the change is desired and not viewed as retaliation for having complained.

Q: Does the employee need to first complain to the alleged retaliator or employer before taking legal action?

A: No. An employee alleging unlawful retaliation may file a lawsuit or a complaint with an administrative agency without first exhausting intra-company remedies. It is important however, for an employer to have in place policies, practices and procedures for an employee or aggrieved person to pursue should a potential whistleblower retaliation situation arise at work. In some cases, an employer may be able to avoid liability by showing that the employee or aggrieved person unreasonably failed to take advantage of those policies, practices or procedures, allowing the employer no opportunity to take immediate corrective action to stop the behavior.

Q: What if the complaining worker is also not meeting work performance standards?

A: Employees, including those who allege retaliation for whistleblowing, still must meet work performance standards and the core duties of the position. However, the closer in time you are to protected whistleblowing activity, the greater risk there is that a disciplinary action may appear connected to whistleblowing and not a legitimate performance issue. Proceed with caution.

As an employer, you still have the right to work with your employee to ensure that performance standards are met. Ideally, you should have accurate, existing performance reviews documenting the areas that require improvement. An employee who files a complaint still has a duty to perform the essential functions of the job. You should take special care – and go to greater lengths to document – how your actions are solely rooted in business necessity, rather than serving as a pretext for unlawful discrimination. You still may discipline a non-performing employee, but you should think about how your actions would look if forced to defend them in front of a jury or administrative law judge.

Sample Policy Language:

Protection Against Retaliation. We will not retaliate in any way against an employee who reports discrimination, harassment or other workplace violation nor will we permit any other employee to do so. Any person who retaliates against another employee for reporting a potential violation will face disciplinary action, up to and including termination. Management will consider any adverse employment action – such as loss of hours, bullying, demotion or threats – as retaliation.

Any employee aware of or facing retaliation in the workplace should report that information immediately to company management. An employee may make the report verbally or in writing to the employee's immediate supervisor or higher management, if the employee prefers. As an alternative, an employee may report the harassment to the company's human resources office.
(Note: Employees should always report incidents involving violence or threats of violence immediately to law enforcement). Employees may report to any of the persons listed above, regardless of any particular chain of command.

Investigation. The recipient of the complaint shall promptly forward it to the appropriate human resources official for investigation. All staff should know that the agency will take such complaints seriously, including conducting prompt and discreet investigations, to the degree possible. We will provide the complainant with a written response outlining the results of the investigation within 30 calendar days of receiving the complaint, absent extenuating circumstances. If the agency needs additional time for investigating the allegations or issuing a report, it will notify the complainant in writing.

Note: Nothing in this process precludes any person from filing a formal grievance in accordance with a collective bargaining agreement (if applicable), a complaint with the Bureau of Labor and Industries' Civil Rights Division or the Equal Employment Opportunity Commission, or a lawsuit in court.

STANDARDS AND PROCEDURES FOR ANONYMOUS WHISTLEBLOWING

Procedures for Disclosing Information under 659A.200, 659A.224

Best Practices

An effective whistleblower protection system requires commitment by senior leadership, an organizational culture that encourages speaking up, multiple pathways for disclosing and reporting retaliation, and ongoing training and monitoring across all levels of an organization.

The following best practices are based on existing procedures from public agencies in Oregon —the Oregon Health Authority, Oregon Departments of Transportation, Oregon Department of Human Services, and the Oregon Department of Environmental Quality — as well as documents from the Occupational Safety and Health Administration (OHSA), the Securities and Exchange Commission (SEC), Transparency International and the Organization for Economic Co-operation and Development (OECD). These recommendations apply to both the public and private sectors.

1) Only an open commitment from senior leadership and supervisors can provide whistleblowers with effective protection against retaliation.

- Leadership should be familiar with definitions of whistleblowing and retaliation and encourage employees to come forward. By emphasizing protections against retaliation, they set a positive tone from the top. Simple steps like offering regular office hours provide a good way to reach out to employees and establish a culture of openness.
- Organizations, where possible, should designate a chief compliance officer who enacts and enforces the whistleblower program independently from regular human resources management.
- Leadership should work with union leaders for represented employees to encourage employees at all levels to come forward when necessary.
- Organizations should have strong ethics codes and whistleblower policies that are written in a clear, accessible manner and known by employees.
- Employers should take action against any employee found to have engaged in retaliation against a co-worker.

2) Whistleblowers will only come forward if there is an internal speak-up culture.

- Employees are likely to report to their supervisors first. Employers should ensure that supervisors receive adequate training on how to appropriately address concerns while protecting the whistleblower.

- Agencies should create multiple channels for reporting, so that employees can choose the reporting mechanism with which they are most comfortable. Outlets could include the director of human resources, supervisors, an anonymous fraud, waste, and abuse hotline, an office of Equity and Inclusion or the agency leadership. Your written policy, trainings and posters should spell out the exact ways of reaching those channels. Make it easy!
- An anonymous hotline is the most critical tool for protecting employees and detecting illegal activities (and is required by SB 1559). Employers should work to boost the hotline's visibility so that all employees know about the resource. If possible, the hotline should operate 24 hours a day. Allowing multiple uses of the hotline — for instance, as a helpline or suggestion line — lowers the psychological barriers to usage.
- Allow disclosures to be made in confidence via phone, postal mail, email, website and in person with a designated employee. Include at least one way to disclose information externally to the organization.

3) Anonymous whistleblowing will solicit more frequent high-quality disclosures.

- Agency policy should clearly identify which reporting avenues are anonymous and which are not. Give specific directions for how to report anonymously. For instance, a hotline can easily take anonymous disclosures, but visiting a supervisor during office hours does not guarantee anonymity. Provide your employees directions for how to write an anonymous letter or email. It is a good practice to create an online form that allows employees to send anonymous emails to the appropriate person.
- You should tell employees that even if reports are made anonymously, sometimes it's possible to know or guess who the complainant must be simply by the nature of the allegations or investigation. State that you will try to keep a complainant's name anonymous or confidential, but you cannot guarantee that no one will figure it out.

4) A transparent investigative process will instill confidence in whistleblowers and help improve the public agency.

- It's good practice to have a central investigative unit that handles all whistleblower disclosures, regardless of how the organization received the information. However, in many cases, this centralized approach will not be possible since Oregon law has a very broad definition of whistleblowing. Because of the expansive protections in the law, the specifics of an investigation will depend on where an employer files a complaint, which office conducts the investigation and the nature of the potential issue. Nonetheless, you should let your employees know the general investigative process, including how long it will typically take and what follow-up to expect. Tell your employees about the investigation stages and what they entail, such as interviews, document review and so on. Include information about who will lead the investigation and who to come to with questions.

- Informal resolution and mediation might be options to offer, if all parties agree. Investigators should close with a final report that summarizes the findings and recommended actions. You should make the report available to affected parties, or when appropriate, the agency as a whole.

5) Only proactive efforts will prevent retaliation.

- Organizations should review their formal policies and informal practices to eliminate incentives that discourage whistleblowing. Your policy should clearly outline how the organization will work to prevent retaliation, and what employees can do if they think they experience retaliation. At a minimum, make clear to everyone in the organization that your policy strictly prohibits retaliation of any kind. You should provide managers with training on the investigative process, including the expectation that the organization does not tolerate retaliation.
- The independent unit charged with investigating whistleblower claims should also proactively work to ensure that there is no retaliation in the first place. When they find evidence of retaliation, they should take immediate corrective action to prevent further harm. Agencies have a duty to protect employees, even if the substance of claims does not represent actual wrongdoing. Avoid the temptation to act defensive. Instead, focus on reviewing the complaint and addressing the concerns.
- Consider creating a retaliation response system separate from the investigation of whistleblower claims. The system should have strong provisions to prevent conflicts of interest. Employees should know that they can elevate matters to higher levels if they believe that current investigators have a conflict. For disclosures involving senior leadership, make sure that to have a process to appoint third-party, independent investigators.

6) Whistleblowers will only come forward if they know how.

- Good training starts with a written whistleblower and anti-retaliation policy that states in plain language the organizational commitment to a speak-up culture. The policy should include the kinds of information that fall under protected disclosures, proper channels for disclosures, protections in place against retaliation, internal remedies for employees encountering retaliation, as well as external remedies and legal protections. In all instances, agencies should include specific examples of unlawful retaliation. To encourage more employees to come forward, include past examples that demonstrate how your agency has responded to whistleblowing complaints while protecting the employee stepping forward.
- Training should be ongoing and regular to foster an open culture and ensure that employees actually understand company policies and whistleblower rights.
- Training should specifically address what constitutes retaliation, how to respond to it, and what to do when supervisors or co-workers do not respect employee protections.

- Training should also cover relevant law, rights of employees, and what do to when the internal mechanisms of the organization fail.
- Training for managers should specifically address how to protect employees against retaliation, including from their peers. Emphasize that their role is not to immediately defend the organization, but to take whistleblowers seriously. Ultimately, a strong reporting culture and system will strengthen and improve the organization.

7) Monitor progress in a way that encourages disclosures.

- Don't measure progress by a low number of reports. Instead of sweeping issues under the rug, know that a higher number of reports following a new program's implementation can actually be evidence of a speak-up culture taking hold. Try to design measurements that capture the existence of such a culture.
- Problems often stay hidden from leadership. Consider an independent audit of the program's effectiveness. Tools that can support such transparency include anonymous employee surveys and confidential interviews.
- Track the number of whistleblower reports carefully, and provide your employees and the broader public with feedback on both the number of disclosures and the resolution of each. For certain public agencies, this tracking is required by SB 1559. Put emphasis on how whistleblowers have made the agency more effective and efficient.

Rights and Remedies for Disclosing Information under 659A.200, 659A.224

Civil Rights Laws:

Under ORS 659A.203, public and non-profit employees have the right to report their good faith and reasonable belief of evidence of:

- A violation of any federal, state or local law, rule or regulation;
- Mismanagement, gross waste of funds or abuse of authority; and
- Substantial and specific danger to public health and safety.

In addition, all public and non-profit employees have the right to cooperate with law enforcement, including the duty to report those subject to a felony or misdemeanor warrant for arrest. **ORS 659A.212.**

Public and non-profit employees also have the right to discuss the activities of any public employee or agency with members of any state or local legislative assembly and staff.

The public or non-profit employer may not require the public employee to give notice to their supervisor prior to disclosure. However, public or non-profit employers may establish an optional procedure for disclosing information first to a supervisor. **ORS 659A.221(2).** In addition, any public or non-profit employer must have a written

policy on how to disclose information protected as whistleblowing activity. **ORS 659A.210(6).**

The public or non-profit employer may neither discourage disclosure nor take disciplinary action against employees for engaging in protected whistleblowing activity (retaliation). Doing so is an unlawful employment practice and a Class A misdemeanor. **ORS 650A.203(1)(4).**

Disclosing the name of an employee engaged in protected whistleblowing activity without their consent is also an unlawful employment practice. **ORS 659A.218(2).** Finally, adverse employment action against employees that have filed complaints for retaliation is itself unlawful. **ORS 659A.865.**

Oregon law also protects whistleblowing of lawfully-accessed confidential information if it is disclosed to any state or federal regulatory agency, any law enforcement agency, any manager of a public or non-profit employer or an attorney licensed to practice law in Oregon. The statute — **ORS 659A.210** — sets forth the requirements for an employee to establish an affirmative defense to a civil or criminal charge related to the disclosure by the employee.

These rights are in addition to – and go beyond – other state whistleblower rights that apply to all employees, including **ORS 659A.199** protecting reports of violations of the law or health and safety dangers covered by **ORS 654.062.**

In addition, some other whistleblowing activities may enjoy protection under different federal laws administered by various federal agencies.

Remedies

Employees have several remedies when they experience retaliation due to their protected whistleblowing activity:

- Filing a complaint with BOLI's Civil Rights Division;
- Filing a civil suit in state circuit court;
- Complaining through the public employer or non-profit's internal grievance system;
- Appealing to the Employment Relations Board;
- Filing a grievance under a union contract, where applicable; and
- Filing a suit in federal district court or filing a complaint with an agency that administers a federal whistleblowing law protection.

BOLI's Civil Rights Complaint Process

The Civil Rights Division of BOLI (CRD) enforces whistleblower protections. Any person experiencing unlawful discrimination or retaliation may file a complaint within a year of

the date of harm or for alleged OSHA-related retaliation, within one year. Under the agency's administrative process, the Civil Rights Division will conduct a fair and thorough investigation.

Investigators do not serve as advocates for complainants or respondents, but rather as neutral fact finders dedicated to determining whether substantial evidence of the alleged retaliation exists, given the unique situation.

There are several steps involved in the civil rights complaint process at BOLI. The steps vary, depending on the findings of the CRD intake officer and the investigator assigned to the complaint. The division must complete most investigations within one year from their filing date by statute, but many take considerably less time.

An employee may initiate a complaint through a telephone call or email to the Civil Rights Division. The aggrieved employee (called a "complainant") will then fill out and return a complaint questionnaire to the division.

Once the Civil Rights Division receives the questionnaire, an intake officer will determine if the division has jurisdiction and if there is prima-facie evidence to draft a formal complaint. The division may contact the complainant to request more information or documentation. If the evidence provided by the complainant does not fall within BOLI's jurisdiction or there is not enough evidence to warrant an investigation, the agency notifies the complainant in writing.

If the complainant provides sufficient evidence to show a basis for alleging discrimination, investigators or intake officers will draft a formal complaint against the employer (called a "respondent"). A formal complaint will include:

- Name and address of the complainant and the respondent;
- Protected class of the complainant; and
- Description of the alleged discriminatory incidents, including:
  - date(s) of occurrence(s);
  - alleged discriminatory action;
  - how the action harmed the complainant; and
  - the causal connection between the complainant's protected class and the alleged harm.

The complainant will receive a mailed formal complaint for review. When the Civil Rights Division receives a signed copy from the complainant, it considers the complaint verified and filed on that date.

BOLI's federal counterpart, the Equal Employment Opportunity Commission (EEOC), investigates violations of federal discrimination laws (Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act). If an allegation includes potential violations of both state and federal

law, a complaint filed with BOLI is automatically co-filed with the federal counterpart, the EEOC. These are called dual filings.

After the agency receives the complaint, the Civil Rights Division sends a notification letter to both the complainant and the respondent. The division determines what additional information, if any, is necessary to make a determination in the case. Investigators may request additional information from the respondent, complainant or third parties.

In considering whether to dismiss the complaint, the investigator examines the evidence offered by both the complainant and respondent. If the division believes that substantial evidence of discrimination exists, it issues what's called a "Notice of Substantial Evidence Determination." Oregon law defines substantial evidence as "proof that a reasonable person would accept as sufficient to support the allegations of the complaint." **OAR 839-003-0005(15)(a).**

When investigators dismiss a complaint, they notify all parties and in applicable cases, send the complainant a notice of their right to file a civil suit. **ORS 659A.880.**

At any time, BOLI may facilitate settlement and conciliation between the complainant and the respondent. If the investigator makes a substantial evidence determination, the enforcement division will contact both parties and may attempt to reach a voluntary, no-fault settlement and conciliation of the complaint. If the parties reach a conciliation agreement, the agency will close the file.

After a substantial evidence finding, if the parties do not agree on a settlement, the Civil Rights Division will review the case to decide whether to refer the case to BOLI's Administrative Prosecution Unit (APU) for further action. If either the Civil Rights Division management or the Administrative Prosecution Unit decide against an administrative hearing, the agency will close the case and issue a notice to the complainant of their right to file a civil suit within 90 days.

If agency administrative prosecutors accept the case, the complainant has the option of moving toward a contested hearing before an agency administrative law judge, or withdrawing their complaint from BOLI and filing a lawsuit in state or federal court.

If the agency finds that the public or non-profit employer has engaged in an unlawful practice, the BOLI commissioner may issue an appropriate cease and desist order including requiring the respondent to:

- Eliminate the effects of the unlawful practice, including paying an award of actual damages suffered by the complainant, complying with injunctive or other equitable relief;
- Protect the rights of the complainant and other similarly situated persons;
- Submit reports to the commissioner to ensure compliance; and

- Refrain from any action specified in the order that would jeopardize the rights of the complainant or other persons similarly situated.

Employees and whistleblowers can **contact the Bureau of Labor and Industries' Civil Rights Division** at (971) 673-0764 or visit the agency's website at oregon.gov/boli/civil-rights. Potential complainants can have an informal, confidential conversation with division staff prior to filing a formal civil rights complaint. Please note that actual civil rights complaints are public records subject to disclosure after they are filed. **ORS 659A.850.**

State Civil Court

Any person alleging unlawful retaliation for whistleblowing activity may file a civil action in circuit court. The court may order injunctive relief and any other equitable relief that may be appropriate, including:

- Reinstatement or the hiring of employees with or without back pay;
- Awarding prevailing party costs and reasonable attorney fees at trial and on appeal; and
- Compensatory and punitive damages.

The employee or affected party must file within one year after the occurrence of the unlawful employment practice, unless a timely complaint was first filed with BOLI. **659A.885.** If BOLI dismisses a complaint, the complainant has 90 days to file in circuit court. **659A.880.**

Bringing a Case:

- To establish a prima facie case under the whistleblower protection law, a plaintiff must show that: (1) they engaged in a protected activity; (2) they suffered an adverse employment decision; and (3) there was a causal link between the protected activity and the adverse employment decision. *Lindsey v. Clatskanie People's Utility District; Shepard v. City of Portland.* If a prima facie case is established, the McDonnell Douglas burden-shifting framework applies, i.e., the employer needs to articulate a legitimate non-discriminatory reason for termination and the employee needs to show that this reason was a mere pretext. *Shepard v. City of Portland.*
- To determine whether there is a causal connection between a public employee's termination and the employee's protected conduct under the whistleblower protection law as required by the McDonnell Douglas burden-shifting framework, a court examines the knowledge of employee's reports by the supervisor responsible for employee's discharge and the timing of that discharge. *Harper v. Mt. Hood Community College; Medina v. State of Oregon.*
- Constructive discharge is prohibited retaliation under the whistleblower protection law. *See OAR 839-005-0011.*

- An employee may not blow the whistle on their own misconduct to escape disciplinary action*. Minter v. Multnomah County.*

Remedies:

- The statutory remedies available under the whistleblower protection law do not prevent employees from bringing common law action for wrongful discharge. *McGuire v. Jackson Education Service District; Olsen v. Deschutes County*.
- Recovery of damages from public employers under the whistleblower protection law are limited by the Oregon Tort Claims Act. *Rabkin v. Oregon Health Science University.* Liability limits for personal injury and death awards for public entities are regularly adjusted for inflation and other factors. They can be found in **ORS 30.271** and **ORS 30.272**.

Complaining Through the Public Employer or Non-profit's Internal Grievance System

Check employer's policies.

Appealing to the Employment Relations Board

The employee may also appeal to the Employment Relations Board any adverse acts of the employer based on protected whistleblowing activity. **ORS 240.560 via 659A.215.**

To file an unfair labor practice (ULF) complaint with the Employment Relations Board, an employee may use the form from the agency's website (oregon.gov/erb), and submit it with a $300 filing fee to:

- Employment Relations Board, 528 Cottage St. NE, Suite 400, Salem, OR 97301;
- ERB.Filings@oregon.gov; or
- Fax: (503) 373-0021 (there is a $25 fax filing fee).

Filing a Grievance Under a Union Contract

Represented employees may always consult their union when deciding how to proceed when they have been subjected to unlawful employment practices. Under some circumstances, the grievance officer of the union may be able to resolve an issue through the formal grievance process.

Federal Protections

Federal law does not have general whistleblower protections for public and non-profit employees in the same way Oregon organizes its protections. However, many federal laws include whistleblower protection related to the implementation and enforcement of specific laws, including the Energy Reorganization Act of 1974, the Fair Labor Standards Act of 1938, the Federal Mine Safety and Health Act, the Federal Water

Pollution Control Act of 1972, the Occupational Safety and Health Act of 1970, the Safe Drinking Water Act, the Solid Waste Disposal Act, the Surface Mining Control and Reclamation Act and the Toxic Substances Control Act. In many cases, employees may file retaliation complaints with the U.S. Secretary of Labor or in federal district court. In addition, certain retaliatory actions might be covered by federal anti-discrimination law and a complaint may be filed with the federal Equal Employment Opportunity Commission (EEOC).

Other federal whistleblowing laws for employees in specific industries include the Dodd-Frank Wall Street Reform and Consumer Protection Act, the FDA Food Safety Modernization Act, the Longshore and Harbor Workers' Compensation Act, the Migrant and Seasonal Agricultural Worker Protection Act, the Sarbanes-Oxley Act of 2002, and the Department of Defense Authorization Act of 1987. In addition, other federal protections for federal employees include the Whistleblower Protection Act of 1989 and the Whistleblower Protection Enhancement Act of 2012, with specified grievance procedures for retaliation.

Additional federal resources include:

The Directorate of Whistleblower Protection Programs at the Occupational Safety and Health Administration (OSHA) receives and investigates complaints in relation to many of these laws. However, only some apply to public employees in state and local government.

If an employee experiences retaliation due to a report of certain unsafe working conditions, such as a threat related to asbestos, pipeline safety, or public transportation, the worker can file a report with OSHA. Similarly, employees can also complain to OSHA if you are retaliated against due to reporting unsafe cargo, unsafe drinking water, other types of pollution, illegal waste disposal or violations of the Affordable Care Act.

A whistleblower may not file an OSHA complaint anonymously. Reports may be filed:

- **Online:** osha.gov/whistleblower/WBComplaint.html

- **Email:** OSHA-REG10-WB@DOL.gov

- **Mail:**
  Assistant Regional Administrator for WPP
  U.S. Department of Labor – OSHA
  300 Fifth Avenue, Room 1280
  Seattle, Washington 98104

- **Phone:** 206-757-6700

Note: If an employee experiences unsafe working conditions, or believes an employer is not following OSHA standards, the employee may file a complaint with Oregon OSHA

and request an inspection. Employees do not have to know whether a specific OSHA standard has been violated in order to file a complaint. The complaint should be filed as soon as possible after noticing the hazard or lack of compliance because OSHA citations may only be issued for violations that currently exist or existed in the past six months.

- Online: www4.cbs.state.or.us/exs/osha/hazrep
- Contact any Oregon OSHA field office via phone, fax, email or letter.

Implementation of Statutes and Rules Under 659A.200 and 659A.224, Including Relevant Case Law

Several court decisions provide additional clarity around the application of whistleblower protections provided under Oregon law. **ORS 659A.200 to 650A.224.**

- Whistleblower protections apply to public employees. A public employee is a person employed by or under contract with the state or any agency of or political subdivision in the state; or (b) employed by or under contract with any person authorized to act on behalf of the state or agency of the state or subdivision in the state, with respect to control, management or supervision of any employee. **OAR 839-010-0010**.
- In *Dinicola v. State of Oregon* the Oregon Court of Appeals elaborated that "employed by" means having one's personal services engaged or used by an employer, with the employer reserving the right to control the means by which such service is or will be performed. "Under contract with" means providing services to an employer, but not being subject to the employer's control over the method by which services are provided. However, if the employee is on paid leave, and a private party reimburses the state for the salary, the employee is not considered employed by the state for the purposes of the whistleblower protection law. *Dinicola v. State of Oregon.*
- Whistleblower protections apply to employees whose work for their employer routinely includes disclosure of information that the employee reasonably believes is evidence of a violation of law, mismanagement or gross waste of funds. *Harper v. Mt. Hood Community College.*
- Whistleblower protections also apply to disclosures of covered information made to the respective agency itself. *Bjurstrom v. Oregon Lottery*; *Folz v. State of Oregon.*
- Protected disclosures must reveal previously unknown conduct. Reporting publicly available information does not constitute a protected disclosure. Recommendations on how to resolve internal personnel issues do not constitute protected disclosures. *Folz v. State of Oregon.*
- Court decisions affirm administrative rules on whistleblower protections and definitions (**OAR 839-010-0010**): Mismanagement means serious agency misconduct having the effect of actually — or potentially — undermining the agency's ability to fulfill its public mission. *Bjurstrom v. Oregon Lottery; Hall v. Douglas County.*

Other Notable Cases

Under the federal anti-discrimination statutes in employment, Title VII of the 1964 Civil Rights Act, and Oregon counterpart laws have provisions that prohibit a covered employer from retaliating against an employee for complaining about alleged discriminatory employment practices. The complaining individual is sometimes referred to as a “whistleblower.” The U.S. Supreme Court in *Thompson v. North American Stainless*, *LP,* 562 U.S. 170 (2011), found that a complaining party’s family member or friend who falls within the “zone of interests” is also protected from retaliation based on the whistleblowing activities. In this case, Thompson and Thompson’s fiancée at the time were both employees of North American Stainless, LP. Thompson’s fiancée filed a sex discrimination complaint against the employer with the EEOC.

The employer fired Thompson but not his fiancée who actually filed the charge. An “aggrieved person” is interpreted broadly in an EEOC whistleblowing case.

OTHER RESOURCES FOR EMPLOYEES

The Oregon Secretary of State has designated the Oregon Audits Division to receive reports of waste, inefficiency or abuse by state agencies, state employees, or people under contract with state agencies, as part of their administration of the Government Waste Hotline.

The hotline can be contacted through the following channels:

- Toll free phone, 24/7: 800-336-8218
- FAX: 503-378-6767
- Mail: Oregon Audits Division, Government Waste Hotline, 255 Capitol Street NE, Suite 500, Salem, Oregon 97310
- Online: oregonsos.alertline.com

The identity of anyone calling the Government Waste Hotline or otherwise making a report under ORS 177.170 is confidential per ORS 177.180(2). Whistleblowers should make sure to mark written communications as “confidential.”

Based on reports, the Government Waste Hotline of the Audits Division conducts special investigations regarding potential misuse of state resources. These investigations may occur at state agencies, or may involve local governments or contractors receiving state or federal funds from state agencies.

CONTACTING BOLI

The mission of BOLI is to protect employment rights, advance employment opportunities and protect access to housing and public accommodations free from discrimination.

The four principal duties of BOLI are to:

- Protect the rights of workers and individuals to equal, non-discriminatory treatment through the enforcement of anti-discrimination laws that apply to workplaces, housing and public accommodations;
- Encourage and enforce compliance with state laws relating to wages, hours, terms and conditions of employment;
- Educate and train employers to understand and comply with both wage and hour and civil rights law; and
- Promote the development of a highly skilled, competitive workforce in Oregon through the apprenticeship program and through partnerships with government, labor, business and educational institutions.

If you have questions about any of these areas, please feel free to contact us.

oregon.gov/boli

BOLI_help@boli.oregon.gov

971-673-0761

RESOURCES FOR EMPLOYERS

BOLI's Technical Assistance for Employers Program oregon.gov/boli/employers works to help public agencies, non-profits and other employers stay compliant so that they can avoid potential violations in the first place. We can help employers navigate retaliation and other civil rights protection through our confidential employment assistance hotline and email resources. In addition, we can provide low cost, on-site seminars customized to help your workforce and management team understand Oregon's regulatory requirements and civil rights laws.

Contact us at:

- **Technical Assistance Hotline:** 971-361-8400
- **Email Resource for Employer Questions:** ta.email@boli.oregon.gov.

Thank you!