

# Wage and Hour, Considering the Remote Worker

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Laurie Grenya, SPHR  
HR Answers, Inc.



# Agenda

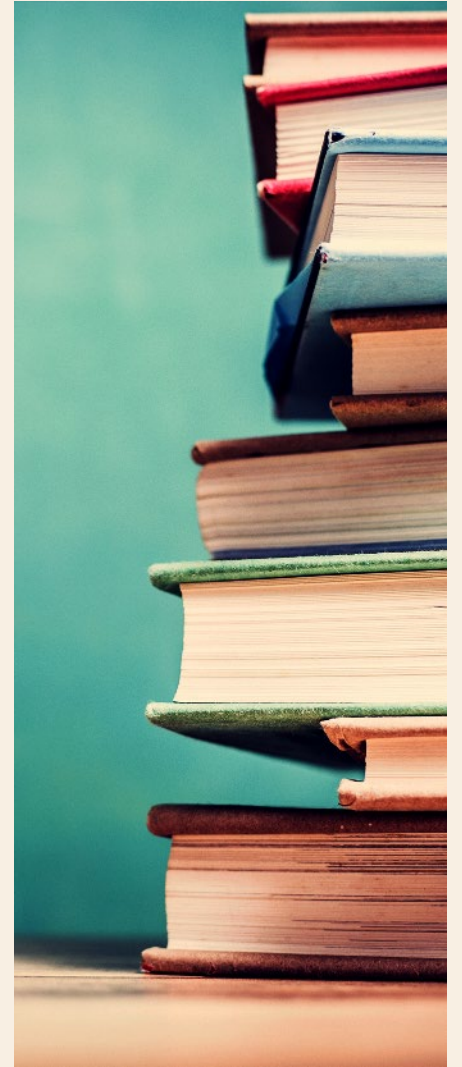
Remote Worker

Wage and Hour Basics

Breaks Meal Periods

Travel

Q & A



# Remote Work

## FULL-TIME REMOTE

- Work exclusively or primarily from a location other than the company's physical office.
- Often have a dedicated home office setup.
- Workers are typically hired with this understanding.

## PART-TIME REMOTE

- Predictable schedule of in-office and remote worksite days.
- Request and approval of the schedule is required
- May be part of the hiring process.

## FLEXIBLE REMOTE

- Worker may request remote work on occasion.
- Approval of each instance is required.
- Not typically part of the hiring process.

# Federal Resources

- \* [Department of Labor: Wage and Hour Division](#)
  - \* [Fact Sheets](#)
  - \* [Administrator Interpretations](#)
  - \* [Opinion Letters](#)
  - \* [Field Handbook](#)
  - \* [Field Bulletins](#)
- \* **Law**
  - \* [Fair Labor Standards Act](#)
- \* **Regulations**
  - \* [29 CFR Chapter V](#)

# Oregon Resources

- \* [Oregon Bureau of Labor and Industries](#) (employers)
- \* [Fact Sheets and FAQs](#)

# “Greatest Challenge...”

- "The single greatest challenge in employing remote nonexempt employees is creating an accurate record of hours worked each day."
- "The FLSA's record-keeping requirements for nonexempt employees apply equally when the employee is working from home or from some other remote location."

According to the DOL

# Wage and Hour Basics

Federal and State



# Minimum Wage

Minimum wage laws establish the lowest hourly wage that an employer can legally pay to most workers.

This wage is set by federal and state government authorities and is intended to provide a baseline level of income to ensure that workers can meet their basic needs.





# Overtime Pay

Overtime regulations require employers to pay eligible employees a higher wage for hours worked beyond a certain threshold within a specified workweek.

The overtime rate is usually 1.5 times the regular hourly wage and is designed to compensate employees for the additional time and effort they put into their jobs.



# Hours of Work

Wage and hour laws often define standard working hours, meal and rest break requirements, and limits on the number of hours an employee can work in a day or week.

These regulations are in place to prevent employee exploitation and ensure that workers have adequate time for rest and personal activities.



# Breaks and Meals

<b>Shift length</b>	<b>Rest breaks (10 min)</b>	<b>Meal breaks (30 min)</b>
2 hrs or less	0	0
2 hrs 1 min - 5 hrs 59 min	1	0
6 hrs	1	1
6 hrs 1 min - 10 hrs	2	1
10 hrs 1 min - 13 hrs 59 min	3	1
14 hrs	3	2
14 hrs 1 min - 18 hrs	4	2
18 hrs 1 min - 21 hrs 59 min	5	2
22 hrs	5	3
22 hrs 1 min - 24 hrs	6	3



# Flexibility and Location

- State law requires no less than 10 minutes as a paid break.
  - Employers may choose to be more generous.
- Federal Interpretation says rest periods up to 20 minutes or less are generally counted as paid time.
  - Once an employee has been “completely relieved of their duty” for 30 minutes or more we reach unpaid potential.
- The location of a paid break should take into consideration the reality of “work time” which is covered by workers compensation insurance.
  - The location should minimize the potential of workplace injury or illness. No different than the work location.



# Completely Relieved of Duty

- The employees must be told in advance that they may leave the job and they will not have to commence work until a specified hour has arrived.

OR

- The employer allows the employee to freely choose the hour at which they resume working and the time is long enough for the employees to effectively use for their own purposes.



Sunday, February 7, 20XX

# Expression of Breast Milk

- Reasonable break time must be provided for up to 1 year after the child's birth.
  - This is varied based on the mother/child need
- Must be a place other than a restroom
- Must be shielded from view or intrusion from co-workers or the public.
- Includes remote work site, client site, or event site.



# Record Keeping

Employers are typically required to maintain accurate records of employees' work hours, wages, and other employment-related information.

These records help ensure compliance with wage and hour regulations and can be used to resolve disputes between employers and employees.



# Federal Requirements

- Time and day of week when employee's workweek begins.
- Hours worked each day.
- Total hours worked each workweek.

DAY	DATE	IN	OUT	TOTAL HOURS
Sunday	6/3/07	-----	-----	-----
Monday	6/4/07	8:00am	12:02pm	
		1:00pm	5:03pm	8
Tuesday	6/5/07	7:57am	11:58am	
		1:00pm	5:00pm	8
Wednesday	6/6/07	8:02am	12:10pm	
		1:06pm	5:05pm	8



This Photo by Unknown Author is licensed under [CC BY-ND](https://creativecommons.org/licenses/by-nd/4.0/)



# State Requirements

- Time of day and day of week on which the employee's workweek begins.
  - If the employee is part of a work force or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole work force or establishment will suffice.
- Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of seven consecutive workdays);

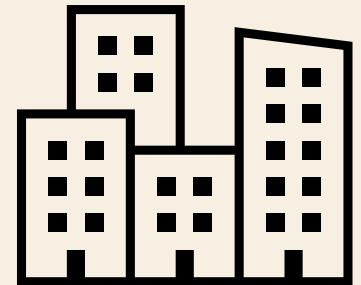
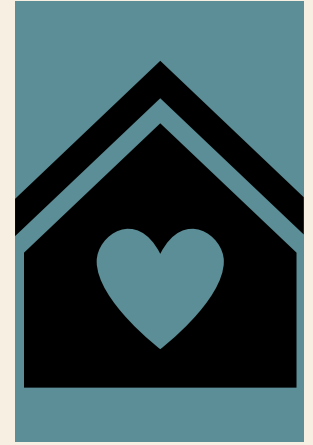


# Travel



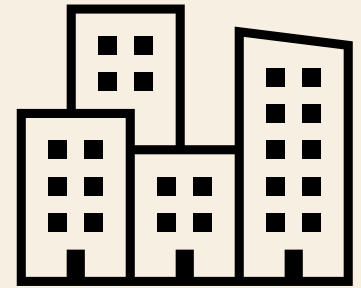
# Home-to-Work and Work-to-Home (Unpaid)

- Employers are not responsible to pay for a worker's commuting time or mileage if they are traveling to or from their traditional workplace.
- Even if the employee lives a considerable distance from work, their typical commute goes unpaid.
- This applies even when operating employer-sponsored vehicles.



# Worksite-to-Worksite (Paid)

- The scenario changes when employees are required to travel beyond their commute to perform their duties.
- Non-exempt employees that work at multiple locations are paid if travel is required during their workday.
- Paid travel does not include commuting to and from their first worksite from home.



# Same-Day Travel (Paid)

- One-day conferences or meetings outside your city may send employees hitting the road for just a few hours.
- If you need to send an employee out of the office for the day, this trip and time are compensable.



# Overnight Travel (Paid)

- Time spent traveling for work over one or more nights must be paid when it occurs during an employee's normal work hours.
- This rule stands no matter the day of the week and is always the case if the employee is the driver.
- If the hours fall outside of the employee's normal work hours and the employee is a passenger, it becomes more complicated. For example, if any employee rides as a passenger outside their typical work hours – and is not required to work during that time – those hours are not compensable.



# Questions



# Thank You

Laurie Grenya

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Thursday, October 12, 2023



The background of the slide features a vertical column of shattered glass on the left side, with numerous sharp, translucent fragments of glass scattered across the rest of the frame. The overall color palette is a mix of light and dark greys, with the glass pieces providing a textured, high-contrast visual element.

# When Employment and Criminal Matters Intersect: An Employer's Guide to Addressing the Fallout

**By Tamara E. Russell**  
Deputy General Counsel – CIS

**Jeff Williams**  
Public Safety HR Consultant – CIS



citycounty insurance services  
[cisoregon.org](http://cisoregon.org)

**“Book ’em!”**

Not so fast...



# Agenda

1. Common Crimes in the Workplace (and the Employees Most Impacted by Them)
2. Story Time!
3. Issues Relating to Crimes in the Workplace
4. “Stump the Lawyer and HR Consultant” (Q & A)

**Insert “Using Mentimeter” QR code here**



# Common Crimes in the Workplace



*And the Employees Most Impacted by Them*



**ORS 162.415**

(1<sup>st</sup> Degree)

**ORS 162.405**

(2<sup>nd</sup> Degree)

# OFFICIAL MISCONDUCT

The CIS logo consists of the letters 'CIS' in a white, sans-serif font, centered within a dark blue circular background. The logo is positioned in the bottom right corner of the slide, above a decorative graphic of several parallel white lines that extend from the right edge towards the center.

CIS

**ORS 166.165**

(1st Degree)

**ORS 166.155**

(2nd Degree)

## BIAS CRIMES

(NEWISH!)

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CIS

# Bias Crimes (newish!)

ORS 166.165 (1st Degree) and ORS 166.155 (2nd Degree)

**Bias Crime?**

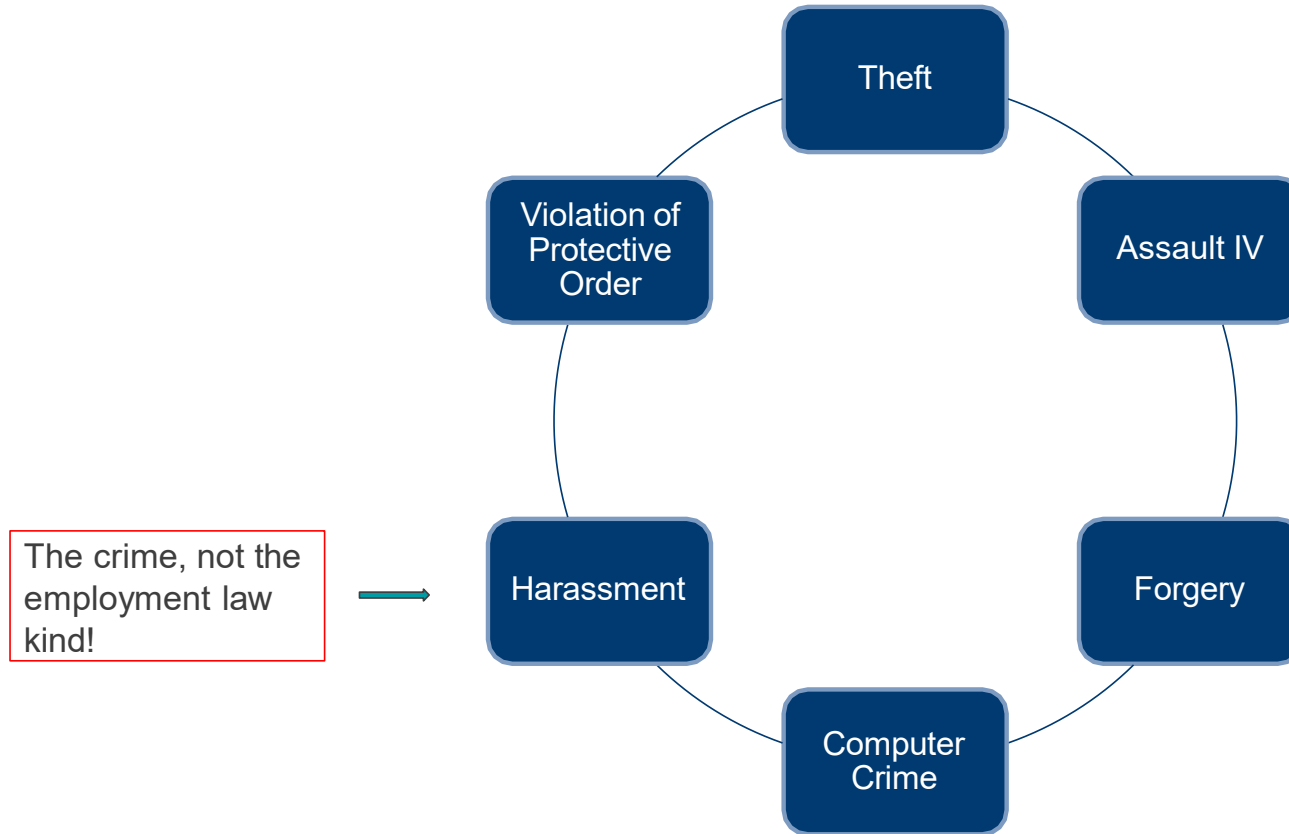
**Bias Incident?**





# Other Common Crimes in the Workplace

TRO



**Slide 9**

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**TR0** Do you want the statute citations included in the slide?  
Tamara Russell, 2023-09-26T22:33:43.559

**JW0 0** I think it's fine without the specific citations.  
Jeff Williams, 2023-09-26T23:06:01.655

# Common Crimes in the Workplace

“Crimes and crimes”

## Overreaction? Or Theft?

- Employee who “borrows” a City lawn mower without first asking for permission.
- Taking a \$7 sandwich purchased by the City for someone else.
- A Department Head using a County vehicle to travel to a second job that the County didn’t know about.
- An employee who doesn’t accurately record their time.

## So which employees are most affected by crimes they commit?

- Law enforcement personnel
- CDL holders
- Finance staff (contact with public funds)
- Staff who work with “vulnerable populations” (think: park staff, pool staff, library staff)
- City attorneys

**In reality, ALL of your city's employees can be affected by crimes they commit.**



## **Rule #1:**

Employees who commit crimes  
while they are “on the clock” or  
when they are “off the clock”  
are not protected  
under Oregon or federal employment law.



## Rule #2

Employees who are convicted of crimes and serve time in jail or prison are not entitled to use any protected leave or vacation time (etc.) to cover the absence.

This is true even with respect to PLO!! (At least, as of today . . .)





## So can I fire that employee because he/she/they committed a crime?

- If represented by a union, check the applicable CBA. Is there “just cause”?
- If not represented by a union, you can. BUT . . . please **consider the consequences**:
  - Precedent
  - Potential of unlawful disparate impact
  - Optics (for a jury, only)

*Consider mini-Due Process before firing!*

a Story!



Photo by Dariusz Sankowski on Unsplash

# Disclaimer!

**All the names, dates, and facts in the following stories were changed to protect the innocent.**

Any similarities to your organization's employees, your BFF, your dog, your ex, or your uncle are purely coincidental!



## Friday Afternoon at 4:45pm

### Voice Mail Message:

“I just wanted to let you know that Emily’s ex-husband sent sexually explicit photographs to her supervisor’s work e-mail. Have a great weekend!”



**Chapter One:** (Friday Afternoon at 4:46 p.m.)

**What is the first thing you should you do in response to receiving this information?**

## Friday Afternoon at 4:46pm - Options

- Reach out to Emily
- Reach out to Emily's supervisor, Barry
- Contact IT and ask them to preserve email
- Do nothing. It's Friday afternoon, after all, and getting anyone in this organization to work after 4:30 on a Friday is impossible.

# Mentimeter Polling Slide



# Oregon Protections for Employees Like Emily

ORS 659A.270 to 659A.285  
(Leave of Absence)

ORS 659A.290  
(Safety Accommodations)

All records and information kept by an employer regarding safety accommodations are confidential and may not be released without the employee's "express permission" (or as required by law).



## Monday Morning at 10:00am

- Emily decided to report the event to local law enforcement.
  - She tells you that her ex-husband and Barry are close and it makes for an awkward working situation. But she's never reported it because nothing has come up.
  - Emily reluctantly says that she thinks Barry has been collecting sexually explicit pictures from her ex for some time.
- Meanwhile, local law enforcement asks you for: (1) access to your IT system; and (2) access to Emily and Barry to interview them.

**Chapter Two:** *(Monday Morning at 10:00 a.m.)*

**What should you do next?**

# Mentimeter Polling Slide



## So which comes first?



# Do you comply with law enforcement's requests?

- Do you require a search warrant? A subpoena?
- Do you treat their request like a public records request?
- What do your policies tell employees about their privacy with respect to email, internet searches, etc.?



## Internal Investigation Efforts

- Should you hire an investigator?
- When do you look at the email and the evidence?
- What do you tell Emily?
- Should you say anything else to anyone?

## Investigations: Let's Talk About Garrity

When the questions asked during an investigation might subject an employee to criminal liability, the employer should provide a **Garrity warning**, informing the employee of his/her immunity with respect to his/her answers in later criminal proceedings.

Failure to provide Garrity warnings when required is a violation of the employee's due process rights.

## **Garrity: But what if . . .**

What if the prosecutor requests information obtained from an employee's compelled statement, after a Garrity warning was provided?



## Wait a Minute, Jeff and Tamara!



If I'm investigating a wastewater treatment plant operator in connection with an investigation, does that person *really* need a Garrity warning?

*I thought only cops were supposed to be given a Garrity warning.*

## Wrap up

So what happened to Emily?

And Barry?

And the ex?

a NEW Story!



Photo by Dariusz Sankowski on Unsplash

## Wednesday at 8:01am

Voice Mail Message:

“Uh... this is Bob, I work with Sarah. I want to report that Sarah found a racially charged and highly inappropriate meme sitting on her keyboard this morning. She didn't want me to report this, but I think I have to under policy. ‘Bye.’”



**Chapter One:** (Wednesday at 8:01 a.m.)

**What do you want to know?**

**Mentimeter Polling Slide Inserted Here**



TRO

## Wednesday Afternoon at 2:00pm

What you've learned:

- Sarah has complained of prior microaggressions from co-workers to her supervisor (not to HR)
- There is video footage showing the entrance to Sarah's workspace, but not her desk
- Sarah has requested "leave" due to what occurred and is demanding the workplace be made safe.

**Slide 38**

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**TRO**

Same question as above: Let's discuss.

Tamara Russell, 2023-09-21T19:49:06.643



**Chapter Two:** (Wednesday afternoon at 2:00 p.m.)

**What is the first thing you do with this information?**

**Mentimeter Poll Results Here**



## Chapter Two: Other Steps

Discuss with HR (if you're not HR). Let the supervisor know that there's an issue that will be investigated in their department.

- Consider hiring an investigator.
- Secure the video footage – no automatic deletions.
- Consider your internal messaging.
- Have a plan!

## Fast forward two months!

- No conclusive findings as to who left the meme.
- No real “smoking gun” on the microaggression issue.  
But . . .action needs to be taken, regardless:
  - Training
  - Policy review and development
  - Ongoing support to Sarah (legally required and otherwise)

The background of the slide is a dark red color with a complex, cracked, and textured appearance, resembling aged paper or stone. The texture consists of irregular, interconnected shapes and lines that create a sense of depth and movement.

# Issues Related to Crimes in the Workplace

# Recognizing Complaints:

## “Do You Have a Minute?”



- Information delivered internally
- Information received externally
- Information received from law enforcement sources

**What do your policies tell employees  
about reporting crimes  
to your organization?**

# Working With Employees Who are Crime Victims





TRO

“Please Keep this Just Between Us...”

**TOP SECRET**

**CONFIDENTIAL**

**FOR YOUR EYES ONLY**

**Slide 47**

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**TRO**

Jeff: What if we turn this into the next event? Now that Emily has filed her criminal complaint, now that Barry is under internal investigation, she wants everything dropped. What should you do?

Tamara Russell, 2023-09-21T19:46:07.510

# What can we say to whom?

- Elected Officials
- Press Releases and responding to inquiries the press
- Employees

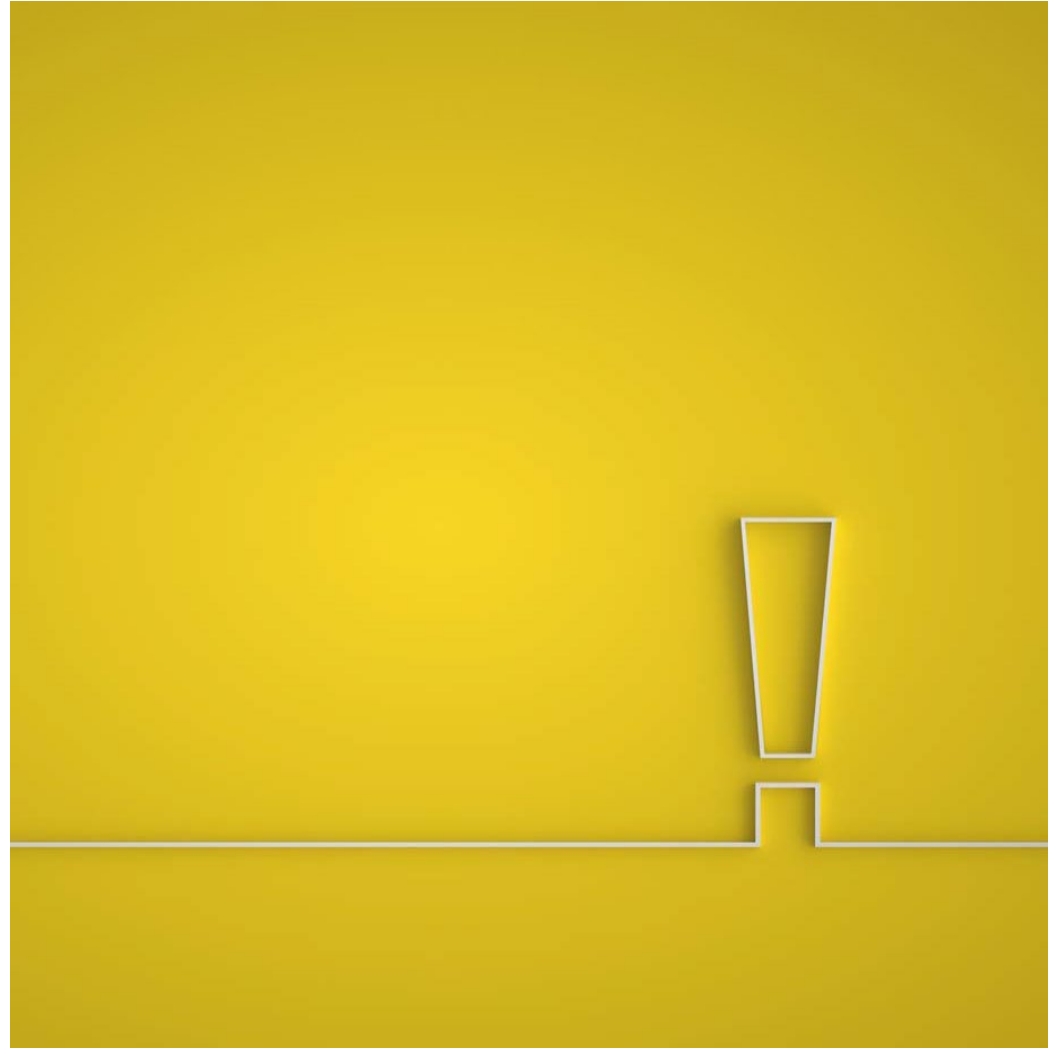


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# Paid Leave and Criminal Indictments



# Be Aware of Retaliation Fallout



**When should a  
city contact law  
enforcement  
regarding one of  
its employees?**



It depends!

## Situations When LE Contact Should be Made

- Crimes against the City – e.g., theft.
  - How about employee wage “theft”?
- Crimes committed by an employee while at work (but not against the City) – maybe.
- Potential crimes against City employees while they are working – e.g., citizen harassment at a Council meeting or in City offices.
  - What about those pesky First Amendment “Auditors”? Is that harassment or protected activity?

A close-up photograph of several stacked logs, showing the circular cross-sections of the wood with visible grain patterns and some cracks. The logs are piled together, creating a textured, natural background.

## Questions?

Let's play "Stump the Lawyer  
and HR Consultant"!

*"The power to question  
is the basis  
of all human progress."*

*– Indira Gandhi*



THANK YOU



citycounty insurance services  
cisoregon.org

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Photo by Alexas\_Fotos on Unsplash

# Employment Law Trends and Updates

LOC Annual Conference  
October 2023

**By Cindy M. Lin**

Pre-Loss Employment Attorney - CIS

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# Agenda

1. Employment Law Updates
2. What's on the Horizon?  
(Trends and the Pre-Loss/H2R View)
3. Questions?

# Employment Law Updates



# Paid Leave Oregon

(PLO)

# Coverage

- **Employers**

- Small (<25 employees) – Not required to pay employer contribution

- **Employees**

- Earn at least \$1,000 the year you apply for benefits
- Potentially eligible the date of hire



# Reasons for Leave

- **Medical Leave** - to take medical leave for an employee's own **serious health condition** or disabilities due to pregnancy
- **Family Leave**
  - to care for an “eligible family member” who has a **serious health condition**
  - to **care and bond** with a child during the first year after birth, adoption, or foster care placement
- **Safe Leave** – to take **safe leave** for an employee experiencing issues related to domestic violence, harassment, sexual assault or stalking

# PLO Benefits

- **Paid Leave**

- Up to 12 week of paid leave per benefit year
- + 2 weeks of paid leave for pregnancy and childbirth related reasons
- +4 weeks of unpaid leave for other OFLA qualifying reasons

- **Supplement** - Employee may use accrued leave while waiting for PLO benefits and during PLO period

- **Job Protection** - (Employed 90+ days) Employee must be returned to same job including hours/days, rate of pay and benefits, etc.



# **Pregnant Workers & Nursing Mothers**

# Pregnant Workers Fairness Act (PWFA)

Employers must offer reasonable accommodations to qualified applicants/employees when needed due to pregnancy, childbirth, or related medical conditions unless the accommodation(s) would impose an undue hardship.

- Applies to employers with 15 or more employees
- Went into effect **June 27, 2023**



# Pregnant Workers Fairness Act (PWFA)

**PWFA** imposes these requirements on employers only when the pregnant applicant/employee has “**known limitations**”



“Known limitations” - physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions **that the employee or employee’s representative has communicated to the employer**

# Pregnant Workers Fairness Act (PWFA)

## Covered employers cannot:

- Require an employee to accept an accommodation without interactive process discussion;
- Deny a job or other employment opportunities based on the person's need for a reasonable accommodation;
- Require an employee to take leave if another reasonable accommodation can be provided;
- Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
- Interfere with any individual's rights under the PWFA.

# So How is the PWFA Different Than Oregon Law?

*(PWFA: 15+ ees; Oregon law: 6+ ees)*

Four interesting differences:

1. Oregon specifically identifies “lactation” as a “medical condition” (not under the PWFA, but . . .)

	<b>Oregon prohibits employers from</b>	<b>PWFA prohibits employers from</b>
2.	Requiring an applicant/employee to accept a reasonable accommodation that is “unnecessary” for the applicant or the employee to perform the essential duties of the job or when the “known limitation” isn’t known.	Requiring an applicant/employee to accept a reasonable accommodation “other than any reasonable accommodation arrived at through the interactive process”



# So How is the PWFA Different Than Oregon Law?

*(PWFA: 15+ ees; Oregon law: 6+ ees)*

Four interesting differences, cont'd:

3. PWFA requires accommodations when the employee is pregnant, period – broader definition of “known limitations” than under Oregon law.
4. Oregon’s notice/poster must be provided to new hires and an “employee who informs the employer of the employee’s pregnancy” (within 10 days after the employer receives the information).

# PUMP Act – The Basics

## (Changes effective April 28, 2023)

**PUMP Act** provides **both** exempt and non-exempt employees the right to **receive break time** and a **private place to pump** at work.

### Break Time – How much?

A “reasonable” amount. Frequency and duration will vary

### Does the break time have to be paid?

Yes, if:

- The employee expresses milk during a paid rest break or meal period; or
- The employee is doing some work during the time they are expressing milk

# PUMP Act – The Basics

## What is a “private place”?

- NOT a bathroom stall
- It is shielded from view and free from intrusion by co-workers and members of the public
- The location must be functional as a space to express breast milk, so it needs to have a place to sit, a surface on which to place the pump, and access to electricity

## How long do we have to provide this break?

For up to one year following the birth of the employee’s child



# PUMP Act – The Basics

## What about remote workers?

- Still applies, but the employer doesn't have to provide a "private place".
- Must be able to turn off the camera on computers, phones, etc.

# PUMP Act – The Basics

## Exception to Compliance:

Employers with fewer than 50 employees if compliance with the PUMP Act would impose an “**undue hardship**”.

DOL: “Undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, or structure of the employer’s business”.

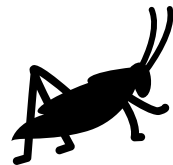
# So How is PUMP Different than Oregon Law?

*(PWFA and Oregon law: 1 or more ees unless “undue hardship”)*

Oregon’s law provides more protection:

- “Child” is 18 months of age or younger under Oregon law  
(**PUMP**: 12 months)
- Oregon: OK to temporarily change job duties if the employee’s regular job duties do not allow the employee to express milk (Be sure to document the temporary nature of this!)
- Oregon: An employee can bring a cooler or other insulated container into the workplace to store the expressed milk. The refrigerator in the break room isn’t necessarily off limits!

– **Federal:**



# But: BIG Difference re Compliance

- Both laws prohibit employers from retaliating against employees
- **PUMP Act:** An employee who is denied PUMP Act breaks/a private space can seek: Reinstatement, promotion, payment of wages lost plus an equal amount as liquidated damages, compensatory damages and “make-whole relief” and punitive damages

# Notice

- Updated Federal Minimum Wage poster:  
<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/minwagep.pdf>

## **PUMP AT WORK**

The FLSA requires employers to provide reasonable break time for a nursing employee to express breast milk for their nursing child for one year after the child's birth each time the employee needs to express breast milk. Employers must provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by the employee to express breast milk.

# So Now What Do We Do?

- 1. Check your handbook for policies** re rest breaks for expression of breast milk and pregnancy accommodation policy. What does it say, and should it be updated?
  - Do you have a process in place to assess pregnancy-related accommodations?
- 2. Alert and train your supervisors.** What are the buzzwords they should listen for, or signs to look for, to know when an employee should be directed to HR (or HR should be contacted)?

# Religious Accommodations

# Religious Accommodations

- Employers must accommodate employees whose sincerely held religious beliefs conflict with an employment requirement or policy, unless doing so would impose an undue hardship on the conduct of the employer's business (Title VII)
- Anything more than a “de minimis” burden = “undue hardship”, per 1977 US SC precedent
  - Until now . . .



# Religious Accommodation

**Groff v. DeJoy**, No. 22-174 (June 29, 2023):

An undue hardship is shown “when a burden is substantial in the overall context of an employer’s business.” That is a “fact-specific inquiry.”

– It is NOT the same test as is the one used with the ADA

- But what is a “substantial increased cost”?

# Religious Accommodation

- **Bottom Line:** Your organization will likely grant more accommodation requests
- What does your policy state? Remove any references to “de minimis” (that shouldn’t have appeared in your policy, anyway . . .)
- Remember – A “sincere religious belief” is broadly defined
- Be prepared to evaluate requests objectively

**Effective 2024**

# SB 851 (Bullying in the Workplace)

(effective January 1, 2024)

- SB 851 does not outright ban “bullying” in the workplace
- But the Legislature told BOLI that they “shall”:
  - “prepare a model respectful workplace policy that employers may adopt”; and
  - “create informational materials that identify the harms to employees and employers caused by workplace bullying”

# SB 907 (Right to Refuse to Perform Certain Work Assignments)

(effective January 1, 2024 – all employers)

It will be unlawful to retaliate or otherwise discriminate against

- a “prospective employee”/employee
- who, “with no reasonable alternative and in good faith, refused to expose the employee or prospective employee to serious injury or death arising from a hazardous condition at a place of employment.”

# What's on the horizon? – Trends and insights

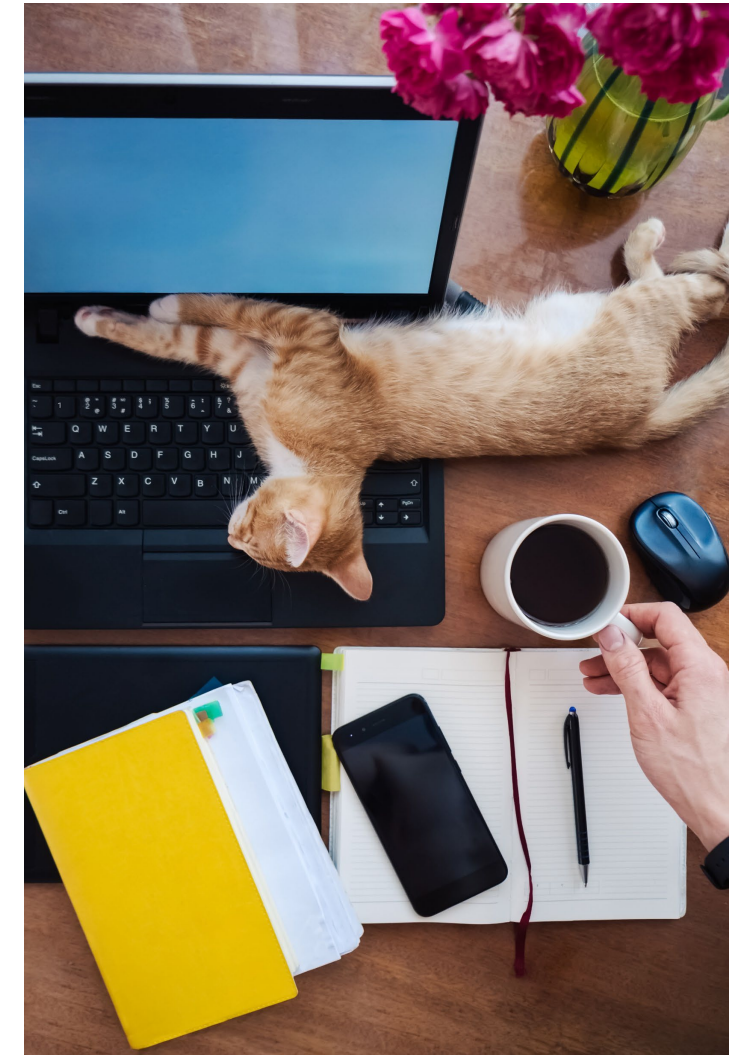


# Talk of the Town

# Return to the Office

(everyone's talking about it...)

- **7/19/23** *“Fall 2023 is shaping up as remote work’s biggest test yet with 1 million workers facing orders to go back to the cubicle”* (Fortune)
- **8/7/23** *“Even Zoom is making people return to the office”* (NY Times)
- **9/1/23** *“Remote work is harder to come by as companies push for return to office”* (NPR)





# Return to the Office

“Because I said so” just doesn’t cut it

## Employer Roadblocks

- Employee retention
- Morale



## What can we do?

- Communicate!
- Update your policy
- Be fair
- Consider potential incentives



# Return to the Office

“Because I said so” just doesn’t cut it

## Legal Considerations

- Discrimination
- Reasonable accommodation obligations
- Discipline/discharge/layoff
- Safety concerns

# Return to the Office

(A word about reasonable accommodations)

There is no automatic right to telecommute after on site operations resume **but:**

- On site work cannot be a blanket “**essential job function**” of all positions
- “**Undue hardship**” required to deny accommodation is very high bar
  - Significantly difficult or expensive in relation to the size of the employer, the resources available and the nature of the business
  - No bright line rule, depends on objective facts

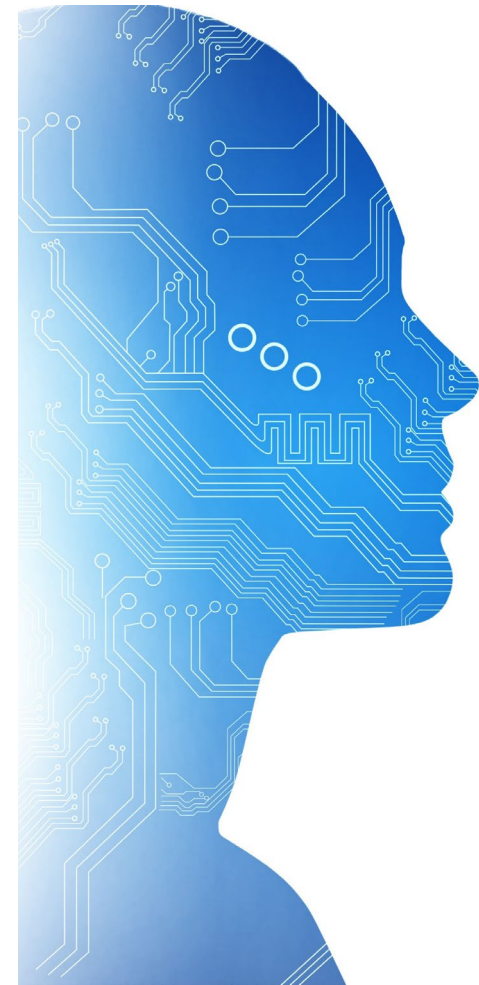
# Artificial Intelligence

## The Potential

- Increased productivity/efficiency
- Staffing solution?
- Improved accuracy, decision making

## The Risks

- Discrimination, disparate impact, bias
- Job security concerns
- Reliance on inaccurate/copyrighted information
- Data security
- Confidentiality



# Artificial Intelligence

- ***EEOC v. iTutorGroup, Inc., et al.***, No.: 1:22-cv-2565--PKC-PK (E. D. N. Y.)
  - \$365,000 Settlement
  - Application software programmed to exclude women over age 55 and men over age 60
- *See also* – 5/12/22 EEOC Technical Assistance on the ADA and AI – Applicants and Employees



# Pre-Loss/H2R Insights

# Public Safety Reform Implementation (ORS 181A.686)

LE agencies must report **discipline** imposed on a police officer that contains an **economic sanction** within 10 days after the disciplinary has become final and any arbitration process is complete.

The report “**must**” include:

- The name and rank of the officer disciplined;
- The name of the law enforcement unit at which the officer is or was employed; and
- A description of the facts underlying the discipline imposed, including a copy of any final decision.

# Public Safety Reform Implementation (ORS 181A.686)

## Problems with Lengthy Reports:

- Potential for mischaracterizing events. Also:
  - The underlying information isn't public once discipline ensues
  - Detail doesn't necessarily mean your agency will look better
- Potential for name-clearing hearing if termination is reported and "stigmatizing" details are extensive or mischaracterized



# Public Safety Reform

## Implementation (ORS 181A.681(3)(a))

A police officer or reserve officer who witnesses another police officer or reserve officer engaging in misconduct or a violation of the minimum standards for physical, emotional, intellectual and moral fitness for public safety personnel established under ORS 181A.410, shall report the misconduct or violation as soon as practicable, but no later than 72 hours after witnessing the misconduct or violation.

# So is There a conflict?

## ORS 181A.668(6) “Request for Information”

Employment information – which is written - received by a LE unit as part of a background check is confidential and can't be disclosed to another LE unit (unless that LE unit is doing its own background check).

## ORS 181A.681 “Reporting Misconduct/Violations”

A police officer or reserve officer “shall report the misconduct or violation” that he/she witnesses.

**NO!**

# Our Recommendation

- The City should not produce a copy of the background investigator's findings or any documentation that the investigator or the City received from the candidate's previous employers to Agency X
- But the City could (and probably should) present Agency X with a summary of the information that was developed during the background check that related to the candidate's "minimum standards" as defined in ORS 181A.681

# Public Safety Reform

## Implementation (Presumptive Disciplinary Actions)

**ORS 243.809** – Directs law enforcement agencies (and arbitrators, civilian/community oversight boards) to make determinations regarding alleged misconduct and impose disciplinary action in response to such determinations in accordance with uniform standards.

# Public Safety Reform

## Implementation (Presumptive Disciplinary Actions)

### OAR Chapter 265, Division 10 (Discipline Standards for Misconduct)

- Sexual Assault (265-010-0001)
- Sexual Harassment (265-010-0005)
- Assault (265-010-0010)
- Unjustified or Excessive Use of Force (265-010-0015)
- Conduct Motivated by or Based on a Real or Perceived Factor of an Individual's Race, Ethnicity, National Origin, Sex, Gender Identity, Sexual Orientation, Religion, or Homelessness (265-010-0020)
- Moral Character (265-010-0025)
- Use of Drugs or Alcohol While on Duty (265-010-0030)

### Chapter 265-010-0035 - Aggravating and mitigating factors



# Probationary Employees

## What we're seeing:

- Employees hired in spite of red flags
- Employees hired who are not qualified/lack required skills
- Lack of capacity to adequately supervise new hires
- Desire to terminate early in probation



# Probationary Employees

## At will employment:

- *Employee may be terminated at any time, for any reason, or for no reason at all **except in violation of law***
- *Beware “unfair” terminations because **“at will” employees can still bring a claim***

# Probationary Employees

	Probationary	Regular
Harassment/Discrimination/ Retaliation (Title VII; ORS 659A)	Yes	Yes
Whistleblower Protection (ORS 659A)	Yes	Yes
ADA (Disability Laws, including reasonable accommodations)	Yes	Yes
Paid Leave Oregon	Maybe (If eligibility requirements met)	Maybe (If eligibility requirements met)
FMLA/OFLA	Maybe (If eligibility requirements met)	Maybe (If eligibility requirements met)
Constitutional Protections	Yes, minus some “due process”	Yes
CBA Process/Grievance Rights	Usually No	Yes



# A Reminder about Retaliation

*Over half of the charges filed with the EEOC are retaliation charges.*

*An employee's underlying allegation does not need to be:*

- *Accurate*
- *Formal*
- *Reported in a specific way*

# A Reminder about Retaliation

## Protected Activities

- Served in the military
- Injured worker (WC)
- Used protected leave (sick leave, military, family, PLO, jury duty)
- Associated with a member of a protected class
- Requested accommodations
- Filed complaint, charge, lawsuit
- Participated in investigation as a witness
- Filed bankruptcy
- Testified in criminal or civil proceedings
- Opposed unlawful practices

# A Reminder about Retaliation

## What to do:

- Be alert for protected activities – train supervisors
- Follow consistent processes for addressing protected activities
- Be objective
- Document legitimate reasons for employment actions

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