OREGON

CIVIL RIGHTS

NEWSLETTER

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Oregon's 2010 Special Session: A Legislative Update

Oregon's 75th Legislative Assembly began its 2010 special session on Feb. 1, 2010, and adjourned *sine die* at 2 p.m. on Feb. 25, 2010. The legislature considered several bills related to civil rights. This article provides a brief summary of proposed and enacted legislation of interest to our readers. Detailed measure history and the full text of the legislation is available on the legislature's website, www.leg.state.or.us.

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SB 996: Expanded Whistleblower Protection for Public Employees

Senate Bill 996 amends ORS 659A.203 and 659A.206, expanding protection under the public employee whistleblower law. The legislation includes in the scope of protected whistleblowing activity an employee's discussions with a member of an elected governing body of a political subdivision in the state, or with an elected auditor of a city, county, or metropolitan service district.

The preexisting public employee whistleblower law protects employees who disclose information such as evidence of a violation of any federal or state law, rule, or regulation; mismanagement, gross waste of funds, or abuse of authority; or a substantial and specific danger to public health and safety.

SB 996 was introduced on Feb. 1, 2010; passed in the Senate with amendments (30–0 vote) on Feb. 11, 2010; and passed in the House (58–0 vote) on Feb. 19, 2010. The bill declares an emergency and was signed into law by Governor Ted Kulongoski on March 4, 2010. The new law is now in effect.

SB 1045: Use of Credit History for Employment Purposes

Senate Bill 1045 amends ORS 659A.885 and makes it an unlawful employment practice, with certain exceptions, for an employer to use credit history information in any employment-related decisions. Specifically, under this bill it is a violation for an Oregon employer

> to obtain or use for employment purposes information contained in the credit history of an applicant for employment or an employee, or to refuse to hire, discharge, demote, suspend, retaliate or otherwise discriminate against an applicant or an employee with regard to promotion, compensation or the terms, conditions or privileges of employment based on information in the credit history of the applicant or employee.

The bill creates exceptions for employers that are federally insured banks or credit unions; employers that are required by state or federal law to use individual credit history for employment purposes; and employers who employ various types of public safety officers. It also permits the use of credit history when "the information is substantially job-related and the employer's reasons for the use of such information are disclosed to the employee or prospective employee in writing."

Employees or job applicants alleging violations may file civil actions in circuit court. Remedies include injunctive and other appropriate equitable relief, back pay, costs, and reasonable attorney fees.

SB 1045 was introduced on Feb. 1, 2010; passed in the Senate with amendments (17–13 vote) on Feb. 15, 2010; and passed in the House (33–26 vote) on Feb. 22, 2010. The bill declares an emergency and is effective immediately upon passage, allowing the BOLI commissioner to prepare for enforcement, assuming the governor signs the bill. If he does, the bill's specific prohibitions and remedies will become operative on July 1, 2010.

HB 3686: Religious Accommodation, Clothing Requirements for Employees

House Bill 3686 amends ORS 659A.033 and addresses circumstances in which an employer restricts an employee's ability to wear religious garb or denies accommodation for certain religious activities. The bill repeals statutory provisions prohibiting teachers in public schools from wearing religious clothing while engaged in teaching duties. The bill also clarifies that the "undue hardship" analysis used to determine when a school district, education service district, or public charter school may

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Recent Decisions

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Ninth Circuit Court of Appeals

***McDermott v. Ampersand Printing LLC*, 593 F.3d 950 (9th Cir. 2010)**

A group of senior newspaper editors and reporters resigned in protest over what they deemed unethical pressure from the publisher to slant the content of their news stories. The remaining employees began an organizing campaign, which included public rallies and an effort to encourage readers to cancel their subscriptions until the paper recognized the union. During the campaign, the union brought unfair labor practice charges, contending that eight employees had been terminated for their organizing activity. An ALJ found merit in the union's charges and recommended that the employees be reinstated. The case is still pending review before the NLRB.

Separately, the NLRB regional director sought an injunction in federal district court under NLRA § 10(j), seeking reinstatement of the terminated employees. Affirming the district court, the Ninth Circuit held that a preliminary injunction was inappropriate because, under the heightened standard necessary for granting a preliminary injunction that touches on First Amendment expression rights, the union was unable to meet the traditional four-part test.

***Narouz v. Charter Communications LLC*, 591 F.3d 1261 (9th Cir. 2010)**

The plaintiff brought a putative class action suit alleging violations of California wage and hour law, in addition to an individual claim for wrongful discharge. The parties reached a settlement that required the defendant to pay over $250,000 for the putative class's wage and hour claims, and $60,000 to the plaintiff for his individual wrongful discharge claim. The district court refused to certify a class for settlement purposes. Pursuant to the settlement agreement, however, the plaintiff filed a stipulated request for dismissal with prejudice of his wage and hour and wrongful discharge claims, then appealed the district court's denial of class certification.

The Ninth Circuit held that when a class representative settles his individual claim, he may still challenge a district court's denial of class certification (despite a mootness objection) if he retains an individual stake in obtaining the class certification. The Ninth Circuit found that the plaintiff had retained such a stake because of the possibility that he could recover his attorneys' fees and costs upon successful prosecution of the class claim, in addition to a monetary enhancement fee of $20,000.

U.S. District Court for the District of Oregon

***Markell v. Kaiser Foundation*, No. CV 08-752 (D. Or. Oct. 15, 2009)**

The plaintiff sued under the Age Discrimination in Employment Act (ADEA) after alleging that Kaiser terminated her employment to prevent her from receiving retirement benefits. Kaiser moved for summary judgment, arguing that the plaintiff's claim was procedurally barred because, in arbitration pursuant to the plaintiff's collective bargaining agreement (CBA), the arbitrator ruled against her. The court denied summary judgment for Kaiser on the arbitration argument, distinguishing the plaintiff's CBA from the CBA considered by the U.S. Supreme Court in *14 Penn Plaza, LLC v. Pyett*, 556 U.S. __, 129 S. Ct. 1456 (2009), on the grounds that it did not expressly authorize arbitration of statutory claims and therefore did not contain a "clear and unmistakable waiver" of the right to sue in federal court. The court did, however, grant summary judgment for Kaiser on the merits of the ADEA claim. ✦

The authors represent employers in labor and employment law.

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OREGON CIVIL RIGHTS NEWSLETTER

The *Oregon Civil Rights Newsletter* is published by the Civil Rights Section of the Oregon State Bar
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The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

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One Year In: Civil Rights Developments in the Obama Administration

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Just over a year into President Barack Obama's administration, significant changes in civil rights policy, enforcement, and legislation have been implemented, and more changes are promised. While health care dominated the 2009 agenda, jobs and related civil rights issues are poised to take center stage this year. This article provides an overview of recent developments and an update to "Change We Can Count On: Civil Rights Developments in the New Administration," which ran in the March 2009 issue of this newsletter.

Equal Pay Legislation and Enforcement

President Obama signed The Lilly Ledbetter Fair Pay Act (HR 11, S 181) on Jan. 29, 2009, just nine days after taking the oath of office. The law overturned a 2007 U.S. Supreme Court decision and resuscitated pay discrimination claims that were previously time-barred. Now the statute-of-limitations period for such claims runs from the date of any allegedly discriminatory paycheck, benefit accrual, or action affecting compensation, rather than from the original date on which the employer made a discriminatory compensation decision.

Sponsors of that legislation also hope to enact the Paycheck Fairness Act (HR 12, S 182), which was passed in the House on Jan. 9, 2009, and would broaden the Equal Pay Act provisions of the Fair Labor Standards Act. The PFA would make it easier to establish a pay discrimination claim; facilitate the filing of pay-related class action suits; prohibit retaliation against employees who share salary information with each other; and expand remedies for prevailing plaintiffs.

The Fair Pay Act of 2009 (HR 2151, S 904), introduced on April 28, 2009, seeks to end wage discrimination against individuals in female-dominated and minority-dominated jobs by requiring equal pay for equivalent work, based on the job's value to the employer and the wages paid in male-dominated jobs.

The president, in his first State of the Union address, on Jan. 27, 2010, also stated that his administration would step up enforcement of existing equal pay laws "so that women get equal pay for an equal day's work." The Office of Federal Contract Compliance Programs (OFCCP) saw its 2010 fiscal-year budget expanded substantially as a result of the December 2009 amendments to the federal American Recovery and Reinvestment Act, and the agency is likely to increase its enforcement activity, including employer audits focused on discrimination in hiring and compensation. The U.S. Department of Labor is also significantly increasing staffing and enforcement in its Wage and Hour Division and other units as a result of budget increases.

ADAAA Regulations

The ADA Amendments Act of 2008 (S 3406, Public Law 110-325) took effect on Jan. 1, 2009, substantially broadening the coverage of the Americans with Disabilities Act of 1990 and shifting the focus to reasonable accommodation of individuals with disabilities. The U.S. Equal Employment Opportunity Commission (EEOC) issued proposed ADAAA regulations on Sept. 23, 2009, to conform to changes made by the ADAAA and to adopt a more expansive definition of "disability." The public comment period closed on Nov. 23, 2009, and the agency intends to issue final rules by July 2010.

The regulations expand on what constitutes a major life activity; direct that disability be assessed without regard to any mitigating measures; address when episodic impairments constitute a disability; broaden the "regarded as disabled" protection; and provide examples of conditions that will consistently meet the disability definition if they substantially limit a major life activity.

Mental Health Parity Rules

The Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) (S 558, HR 1424) initially took effect for health insurance plan years beginning after Oct. 3, 2009. The Act applies to all group health plans with 51 or more employees and broadly prohibits discrimination in mental health coverage. Under MHPAEA, health insurance providers that offer mental health benefits are required to do so on the same terms as their medical coverage for physical conditions. The MHPAEA prohibits group health plans from imposing higher copayments or deductibles for mental health conditions than for physical health problems, and from imposing limits on mental health treatment if no limits apply to medical and surgical care.

The departments of Health and Human Services, Labor, and the Treasury issued interim final MHPAEA rules on Feb. 2, 2010, and the public comment period closes on May 3, 2010. The regulations allow employers until the first plan year beginning on or after July 1, 2010, to comply with the Act's requirements. The regulations expand on numerous provisions in the MHPAEA and include prohibitions on using an employee assistance program (EAP) as a "gatekeeper" for mental health services or requiring employees to exhaust EAP benefits before they can access mental health care, if similar requirements are not imposed for accessing medical and surgical services.

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Repeal of "Don't Ask, Don't Tell" Policy Promised

In his State of the Union address, President Obama renewed his pledge to work with Congress and military leaders during 2010 to repeal the "don't ask, don't tell" policy on gays in the U.S. Armed Forces (Public Law 103-160, 10 USC § 654) and to allow gay and lesbian soldiers to serve openly without fear of reprisals. Though congressional action is required for a repeal of the policy, Defense Secretary Robert Gates announced on Feb. 2, 2010, that the Pentagon has already taken initial steps toward repeal, including appointing a high-level working group to review issues with implementation.

Employment Non-Discrimination Act

The Employment Non-Discrimination Act would amend Title VII of the Civil Rights Act of 1964 to prohibit discrimination against employees on the basis of sexual orientation or gender identity. In 2007, two versions of ENDA were introduced—one that included gender identity as a protected category (HR 2015), and one that did not (HR 3685). In the current Congress, only a transgender-inclusive version of ENDA is pending. Massachusetts Representative Barney Frank introduced that legislation (HR 3017) in the House on June 24, 2009, and Oregon Senator Jeff Merkley introduced the same bill (S 1584) in the Senate on August 5, 2009. President Obama continues to pledge his support for the legislation.

Federal Hate Crimes Legislation

On Oct. 28, 2009, President Obama signed into law the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009 (HR 1913, S 909). Various forms of the legislation had been introduced in Congress since 1997 but had failed to pass in both houses. HCPA expands the federal criminal code to prohibit willfully causing or attempting to cause bodily injury through the use of dangerous weapons because of the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of any person. HCPA authorizes appropriations for fiscal years 2010–2012 to increase Department of Justice personnel to assist state, local, and tribal law enforcement agencies in combating hate crimes.

Closing Guantanamo Bay Prison

President Obama signed Executive Order 13492 on Jan. 22, 2009, directing the closure of detention facilities at the Guantanamo Bay Naval Base and banning torture. On Dec. 15, 2009, Obama issued a memorandum ordering the acquisition, activation, and use of the Thomson Correctional Center (TCC) in western Illinois as a high-security United States penitentiary to facilitate the Guantanamo Bay prison closure and relocation of terrorism suspect detainees. TCC, which will meet "supermax" prison standards, will also be used to hold military tribunals for transferred detainees. TCC will accept fewer than 100 of the inmates from Guantanamo Bay, and administration officials have not yet provided a timetable for the transfer. Although Executive Order 13492 called for closure of Guantanamo Bay prison within one year, the process has been delayed because of difficulty in deciding where to move the other detainees.

Genetic Nondiscrimination Rules

The Genetic Information Nondiscrimination Act of 2008 (HR 493) prohibits employers and health insurance companies from discriminating in hiring, firing, job placement, and promotion based on genetic information, including family history of illness, and prohibits denying coverage or charging higher premiums solely based on genetic testing results or predisposition to developing a disease. GINA's employment provisions, in Title II of the Act, took effect on Nov. 21, 2009. GINA's insurance provisions took effect for plan years beginning after May 21, 2009.

The EEOC published its proposed regulations for employers in the *Federal Register* on March 2, 2009. The agency approved final regulations in September 2009 and submitted them to the Office of Management and Budget for review and clearance, but they have not been released as of this writing. The departments of Health and Human Services, Labor, and the Treasury published their interim final regulations for group health plans and insurers in the *Federal Register* on Oct. 7, 2009, effective for plan years starting on or after Dec. 7, 2009.

The Employee Free Choice Act

The Employee Free Choice Act (HR 1409, S 560) would amend the National Labor Relations Act and facilitate workers' ability to organize labor unions. In its presently introduced form, EFCA would allow a "card check" process, requiring the National Labor Relations Board to certify a union if a majority of bargaining unit employees sign cards indicating their selection of the union. The debate over health care reform pushed EFCA to the back burner in 2009, but it appears likely to advance this year. Sponsors of the legislation are likely to drop the controversial "card check" provision but retain other provisions that protect union activity and increase penalties on employers for retaliation.

Age Discrimination Burden of Proof

In June 2009, the U.S. Supreme Court determined in *Gross v. FBL Financial Services, Inc.*, 557 U.S. __, 129 S. Ct. 2343 (2009), that to prevail on a claim under the Age Discrimination in Employment Act of 1967 an employee must prove that age discrimination was the "but-for" cause of an adverse employment action. Legislation has now been introduced in both the House and Senate to overturn *Gross* and make it easier for employees to prevail on age claims. The Protecting Older Workers Against Discrimination Act (HR 3721, S 1756) would set the same burden of proof under the ADEA as has been set for

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other types of discrimination claims, allowing a "mixed motive" analysis and evidence that age was a "motivating factor."

In the Feb. 18, 2010, *Federal Register*, the EEOC released proposed regulations on the "reasonable factors other than age" affirmative defense (29 USC § 623(f)(1)) that employers must prove under the ADEA to justify employment practices that have a disparate impact on employees aged 40 and over. These rules are consistent with the U.S. Supreme Court's decisions in *Smith v. Jackson, Miss.*, 544 U.S. 228 (2005), and *Meacham v. Knolls Atomic Power Lab*, 554 U.S. __, 128 S. Ct. 2395 (2008).

COBRA and Unemployment Rights

The American Recovery and Reinvestment Act of 2009 (HR 1), signed by President Obama on Feb. 17, 2009, included provisions extending unemployment benefits and subsidizing COBRA health insurance premiums for employees who lost their jobs in the recession. The stimulus plan initially provided certain eligible workers involuntarily terminated between Sept. 1, 2008, and Dec. 31, 2009, a 65% subsidy toward their health care premium for up to nine months.

On Dec. 19, 2009, President Obama signed a defense appropriations bill (HR 3326) that directs Recovery Act funds to extend the COBRA subsidy to employees involuntary terminated on or before Feb. 28, 2010, and to increase the premium-discount period from nine months to 15 months. The legislation also added an extra 14 weeks of emergency unemployment compensation—20 extra weeks in states, including Oregon, whose unemployment rate exceeds 8.5%. The president's budget for fiscal year 2011 proposes to further extend the COBRA subsidy to workers involuntarily terminated through Dec. 31, 2010.

Paid Leave and FMLA Bills

The Airline Flight Crew Technical Corrections Act (S 1422) makes it easier for airline employees to qualify for leave under the Family and Medical Leave Act of 1993 in terms of meeting hours-of-service requirements. The legislation passed in the Senate on Nov. 10, 2009; passed in the House on Dec. 2, 2009; and was signed by President Obama on Dec. 21, 2009.

In recent legislative sessions, the late Senator Edward Kennedy introduced the Healthy Families Act (S 910, HR 1542), which would amend FMLA to require employers of 15 or more employees to provide seven days of paid sick leave annually that could be used by employees to care for themselves or ill family members, including a child, parent, spouse, or any other individual related by blood or a "close association" equivalent to a family relationship. Mandatory paid sick leave remains high on the agenda for the current Congress, with at least three bills (HR 2460, HR 3047, S 1152) pending.

Another bill, introduced in the House on Jan. 22, 2009, The Federal Employees Paid Parental Leave Act (FEPPLA) (HR 626), would allow federal workers four weeks of paid parental leave and would allow them to use any accumulated paid sick leave during their FMLA leave regardless of their agency's sick leave policy language or usual practice. The House passed FEPPLA on June 4, 2009. It is still pending in the Senate.

The Family and Medical Leave Enhancement Act of 2009 (HR 824), introduced Feb. 3, 2009, would amend FMLA by allowing employees leave to attend their children's and grandchildren's educational and extracurricular activities, and to allow leave for routine family medical needs and to assist elderly relatives. The Family Leave Insurance Act of 2009 (HR 1723), introduced March 25, 2009, would provide for a paid family and medical leave insurance program.

The Family and Medical Leave Inclusion Act (HR 2132), introduced April 28, 2009, would expand FMLA by permitting leave to care for a same-sex spouse, domestic partner, parent-in-law, adult child, sibling, or grandparent who has a serious health condition. The Domestic Violence Leave Act (HR 2515), introduced May 20, 2009, would amend FMLA to allow leave to address domestic violence, sexual assault, or stalking and their effects and would include domestic partners in its coverage.

Immigration Reform and Enforcement

Though comprehensive immigration reform was deferred in 2009, President Obama pledged in his State of the Union speech that his administration would strive to fix the nation's "broken immigration system." Department of Homeland Security Secretary Janet Napolitano has publicly supported comprehensive immigration reform that would include a legalization program for the estimated 12 million undocumented people in the United States.

In the interim, the administration continues to focus on immigration enforcement. On Nov. 19, 2009, U.S. Immigration and Customs Enforcement (ICE) Assistant Secretary John Morton announced the issuance of Notices of Inspection to 1,000 U.S. employers, and an increased level of I-9 enforcement is expected in 2010. A new I-9 form became effective on April 3, 2009, reducing the number of permissible work-eligibility documents. In 2010, the U.S. Citizenship and Immigration Services plans to further limit permissible identity documentation and again revise the I-9.

After numerous delays, federal contractors were required to use the E-Verify employment eligibility verification program as of Sept. 8, 2009, to confirm individuals' work eligibility. Several proposals in Congress would establish E-Verify permanently and mandate participation by all employers. ✦

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restrict an employee's religious clothing or otherwise deny a requested religious accommodation includes the difficulty or expense of maintaining a religiously neutral work environment and refraining from endorsing religion.

HB 3686 was introduced on Feb. 1, 2010; passed in the House with amendments (51–8 vote) on Feb. 10, 2010; passed in the Senate with amendments (21–9 vote) on Feb. 23, 2010; and repassed in the House with Senate amendments (48–7 vote) on Feb. 23, 2010. If the governor signs the bill, it will take effect July 1, 2011.

HB 3631: Insurer Discrimination Against Victims of Violence

House Bill 3631 amends ORS 746.015 and prohibits an insurer from treating injuries sustained from sexual violence as a preexisting condition for coverage, underwriting, or rating purposes. The statute already prohibited discrimination by insurers against people who are victims of domestic violence.

HB 3631 was introduced on Feb. 1, 2010; passed in the House with amendments (59–0 vote) on Feb. 9, 2010; and passed in the Senate (28–0 vote) on Feb. 22, 2010. The bill declares an emergency and, assuming it is signed by the governor, is effective immediately upon passage.

HB 3623: Information on Human Trafficking

House Bill 3623 allows a tax-exempt nonprofit organization to supply to the Oregon Liquor Control Commission free copies of informational materials regarding human trafficking that may include adhesive stickers, logos, symbols, graphics, and a cover letter to OLCC licensees urging the posting of stickers or other materials at the premises licensed by the OLCC. The bill requires the OLCC to include informational materials on human trafficking with certain license renewal notices sent prior to Jan. 1, 2012.

HB 3623 was introduced on Feb. 1, 2010; passed in the House with amendments (59–0 vote) on Feb. 9, 2010; and passed in the Senate (30–0 vote) on Feb. 19, 2010. The bill declares an emergency and, if it is signed by the governor, is effective immediately upon passage.

SB 999: Diversion from Criminal Prosecution for Servicemembers

Senate Bill 999 amends ORS 135.881 and modifies circumstances under which current or former members of the Armed Forces, Reserves, or National Guard may be offered diversion from criminal prosecution. The bill increases the stay of criminal proceedings to a period not to exceed two years for servicemembers who enter into certain diversion agreements and who enter a plea of guilty or no contest to an offense that involves domestic violence. The bill provides that diversion may not be offered in connection with certain offenses, including those that involve serious physical injury to another person and those that involve both domestic violence and the violation of an existing protective order.

SB 999 was introduced on Feb. 1, 2010; passed in the Senate with amendments (30–0 vote) on Feb. 16, 2010; and passed in the House (55–2 vote) on Feb. 23, 2010. The bill declares an emergency; was signed by Governor Kulongoski on March 4, 2010; and is now in effect.

HB 3634: Victims' Rights

House Bill 3634 provides crime victims with certain rights in appeals, post-conviction relief proceedings, proceedings conducted by the Psychiatric Security Review Board, and proceedings conducted by the State Board of Parole and Post-Prison Supervision. The rights afforded to victims under this legislation include the right to be notified by the district attorney of the victims' rights described in the bill; the right to reasonable, accurate, and timely notice from the attorney general when an appeal is taken in the criminal proceeding; the right to timely notice from the state's counsel when the conviction is the subject of a petition for post-conviction relief; the right to attend any public hearing on the criminal proceeding conducted by an appellate court; and the right to be reasonably protected from the offender, if the offender is present, at any related appellate or post-conviction relief proceeding.

HB 3634 was introduced on Feb. 1, 2010; passed in the House with amendments (56–0 vote) on Feb. 23, 2010; and passed in the Senate (30–0 vote) on Feb. 24, 2010. The bill declares an emergency and, if it is signed by the governor, is effective immediately upon passage.

SB 1000: Veterans Designation on Driver Licenses

Senate Bill 1000 amends ORS 807.110 and directs the Oregon Department of Transportation, upon request and proof of veteran status, to identify veterans on Oregon driver licenses and identification cards. The bill also permits the department to waive the customized registration plate fee for people with Congressional Medal of Honor registration plates.

SB 1000 was introduced on Feb. 1, 2010; passed in the Senate (27–2 vote) on Feb. 22, 2010; and passed in the House (51–1 vote) on Feb. 24, 2010. If the bill is signed by the governor, it will take effect on Jan. 1, 2011.

SB 1008 (Proposed), SB 1064: Felons' Access to Firearms

Proposed Senate Bill 1008 would have amended various sections of ORS chapter 166 to modify the circumstances under which a person convicted of a felony may obtain relief from the prohibition against possession and transfer of firearms; modify firearms provisions related to commitment of a person with mental illness; and eliminate the requirement that forfeiture counsel send a copy of a judgment to the Asset Forfeiture Oversight Advisory Committee. SB 1008 was introduced on Feb. 1, 2010, and referred to the Senate Judiciary Committee. It died in committee.

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Related legislation, Senate Bill 1064, was introduced on Feb. 18, 2010, and it did pass both houses. SB 1064 amends ORS 166.274, which permits a felon to file a petition for relief from the bar on possession and transfer of firearms. SB 1064 changes the law to require that any petitions be filed in the circuit court in the petitioner's county of residence, not in a justice court. The statute suggests that a felon may, immediately upon release from prison, file a petition for relief from the bar and obtain authorization from the court to possess a firearm. It is unclear, however, whether that provision, which took effect Jan. 1, 2010, has any real effect in this regard, given that federal law (18 USC § 922(g)(1)) continues to prohibit gun possession by any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year."

SB 1064 passed in the Senate (16–13 vote) on Feb. 22, 2010; passed in the House with amendments (48–0 vote) on Feb. 24, 2010; and repassed in the Senate with House amendments (29–0 vote) on Feb. 24, 2010. The bill declares an emergency and, if the governor signs it, is effective immediately upon passage.

HB 3653 (Proposed): Attendance at Mandatory Employer Meetings

The 2009 Oregon legislature passed Senate Bill 519, which took effect on Jan. 1, 2010, prohibiting an employer from taking adverse employment action against an employee who declines to attend a meeting or participate in communication concerning the employer's opinion about religious or political matters. The new law is found at ORS 659.780 and 659.785.

"Political matters" (ORS 659.780(5)) is defined to include "the decision to join, not join, support or not support any lawful political or constituent group or activity." And "constituent group" (ORS 659.780(5)) is defined to include "mutual benefit alliances, including labor organizations."

On Dec. 22, 2009, the Associated Oregon Industries and the U.S. Chamber of Commerce filed a complaint for injunctive relief in U.S. District Court (3:09-cv-01494 MO), challenging SB 519 on the basis that it bars communications against union organizing, violates employers' First Amendment free speech rights, and is preempted by the National Labor Relations Act. That complaint is pending.

This year's House Bill 3653 would have amended the definitions in ORS 659.780 and the exceptions applicable to the prohibition on adverse action. It would also have modified the damages available to an employee prevailing in a civil action.

HB 3653 was introduced on Feb. 1, 2010; passed in the House with amendments (34–26 vote) on Feb. 12, 2010; was referred to the Senate Rules Committee on Feb. 17, 2010; and died in committee.

SB 1018, SJR 43 (Both proposed): Sobriety Checkpoints

Senate Bill 1018 and Senate Joint Resolution 43 would have authorized law enforcement agencies to establish sobriety checkpoints, meaning roadblocks "established for the purpose of apprehending persons who are driving while under the influence of intoxicants in violation of ORS 813.010," if the agencies followed guidelines issued by the National Highway Traffic Safety Administration. SJR 43 would have amended Article I, § 9, of the Oregon Constitution and referred the proposed amendment to Oregon voters for approval or rejection at the next regular statewide general election.

SB 1018 and SJR 43 were both introduced on Feb. 1, 2010, and referred to the Senate Judiciary and Rules Committees; both died in committee.

SB 1063, SJR 41: Annual Legislative Sessions

Senate Bill 1063 amends ORS 171.010 to allow for annual legislative sessions and to specify the date on which regular sessions of the Legislative Assembly are to commence. However, the bill specifies that the modifications become operative only if Oregon voters approve Senate Joint Resolution 41 at the next regular general election. Under SB 1063, regular legislative sessions would be held beginning on Feb. 1 of each year, or on the following Monday if Feb. 1 is a Thursday, Friday, Saturday, or Sunday. If SJR 41 is not approved by Oregon voters, the bill allows the Legislative Assembly to adjourn for more than three calendar days during January 2011 and suspends payment of per diem during that recess period.

SJR 41, as introduced, would have amended Article III, § 3; Article IV, §§ 6 and 10; and Article IX, §§ 5 and 14, of the Oregon Constitution to limit legislative sessions in odd-numbered years to 160 calendar days and in even-numbered years to 35 calendar days. An engrossed version of the resolution approved by the Senate set the session limits at 135 days and 45 days, respectively. After much wrangling and several work sessions, the final version of the resolution allows for sessions of 160 days in odd-numbered years and 35 days in even-numbered years; allows for extension of a session by five calendar days by affirmative vote of two-thirds of the members of each house; and also permits an organizational session that is not subject to time limits.

SB 1063 was introduced on Feb. 17, 2010; passed in the Senate (23–7 vote) on Feb. 19, 2010; and passed in the House (37–20 vote) on Feb. 24, 2010.

SJR 41 was introduced on Feb. 1, 2010; passed in the Senate with amendments (24–6 vote) on Feb. 17, 2010; and passed in the House with amendments (34–24 vote) on Feb. 24, 2010. The two houses agreed on the final version of the resolution just prior to adjournment on Feb. 25, 2010. ✦

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Supreme Court Update

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Decided

***Briscoe v. Virginia*, No. 07-11191 (Jan. 25, 2010)**

The U.S. Supreme Court vacated the judgment of the Virginia Supreme Court in this per curiam decision, remanding the case for further proceedings consistent with the its decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. __, 129 S. Ct. 2527 (2009). In *Melendez-Diaz*, the Court ruled that it is a violation of the Sixth Amendment's confrontation clause to introduce crime lab reports into evidence against a defendant without having the expert who prepared them testify. In *Briscoe*, the State of Virginia sought to introduce certificates of drug-lab analysis, without calling the analyst who prepared them, to show that the substance in each defendant's possession at the time of his arrest was cocaine. The Virginia Supreme Court ruled that the admission of the certificates was constitutional because adequate procedures were in place to safeguard the defendants' rights, including the ability to call the analyst as a defense witness. The U.S. Supreme Court vacated that ruling.

***Citizens United v. Federal Elections Commission*, No. 08-205 (Jan. 21, 2010)**

In a 5–4 decision, the U.S. Supreme Court invalidated § 441b of the Bipartisan Campaign Reform Act of 2002 (BCRA), also known as the McCain-Feingold Act, which prohibited corporations and unions from using their general treasury funds to make independent expenditures for "electioneering communications" or for expressly supporting or opposing a political candidate. In reaching its decision, the Court overruled its own decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which upheld a restriction on corporate campaign expenditures based on the government's interest in preventing "the corrosive and distorting effects of immense aggregations of [corporate] wealth" on the democratic process. In ruling that the government may not prohibit speech based on corporate identity, the Court found that the threat of corruption or appearance of corruption was not a sufficient government interest to survive First Amendment scrutiny. The Court did, however, rule that the disclosure and disclaimer sections of the BCRA were constitutional because, although such requirements may burden protected speech, they may be justified by the government's interest in providing the electorate with information about election-related spending sources.

Certiorari Granted

***Christian Legal Society v. Martinez*, No. 08-1372 (Dec. 7, 2009)**

The Court will hear this case out of the Ninth Circuit regarding whether a public law school violates the First Amendment by denying funding and other benefits to a student organization because the organization requires its officers and voting members to agree with its religious views. The Christian Legal Society (CLS), a religious student organization at the University of California, Hastings College of the Law (Hastings), does not allow students to become voting members unless they agree with the group's core religious viewpoints. Because the requirement contravened the school's nondiscrimination policy, which requires open membership for all student groups, the school refused to recognize CLS as a registered student organization. CLS sued, asserting that its First Amendment rights had been violated. The Ninth Circuit affirmed the ruling of the district court in favor of Hastings, holding that the school's nondiscrimination policy is viewpoint neutral and reasonable.

***City of Ontario v. Quon*, No. 08-1332 (Dec. 14, 2009)**

In this case out of the Ninth Circuit, the Supreme Court will address whether government employees have a reasonable expectation of privacy in the content of text messages sent from employer-provided electronic devices. In this case, the city of Ontario provided pagers to its police officers and informed the officers of an informal policy of allowing limited personal use. When one officer exceeded the limit, his pager was audited, revealing sexually explicit content. The officer sued, asserting that the audit was an unlawful search in violation of the Fourth Amendment. The Ninth Circuit agreed, holding that the officers had a reasonable expectation of privacy in the content of the text messages and that the search was unreasonable in scope because the city had less intrusive alternatives. ✦

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