

HB 3256 – An Orientation

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1. HB 3256:
 - a. Chapter 378, (2009 Laws); Gov signed 6/18/09
 - b. Effective date January 1, 2010. (conduct is actionable if it occurs on or after the effective date)
2. Summary of HB 3256's Provisions:
 - a. Provides that it is an unlawful employment practice for an employer to discriminate against a person because the person serves in a uniformed service.
 - b. Provides that discrimination takes place if one of the following occurs:
 - i. a *public* employer denies a public employee the status or rights provided in ORS chapter 408 (related to advantages given to veterans in public employment); or,
 - ii. an employer denies any of the following "because" the person applies, performs or has performed in a uniformed service:
 1. initial employment,
 2. reemployment following leave taken for service in a uniformed service,
 3. retention in employment,
 4. promotion, or
 5. any other term or condition of employment; or,
 - iii. an employer discharges, expels, disciplines or threatens a person for exercising or attempting to exercise rights to participate in a uniformed service
 - c. Establishes an affirmative defense. An employer does not commit an unlawful employment practice if:
 - i. The employer acted based on a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business, and,
 - ii. The employer's actions could not be avoided by making a reasonable accommodation of the person's service.

3. Background and Context

- a. Prior to the 2009 legislative session, Oregon had just two statutes that protected veteran employment rights, and they are limited in scope.
 - i. ORS 408.240 (Provides reemployment rights for *public employees*, only)
 - ii. ORS 399.230 (Provides certain reemployment rights for members of the national guard who are performing duty in their state capacities (e.g., doing fire suppression, as opposed to deploying overseas). It does not protect reservists and does not protect members of the National Guard who are put into federal service (e.g., combat))
- b. The circumstances and assumptions that gave rise to HB 3256 included the following:
 - i. The ongoing wars in Iraq and Afghanistan put tremendous demands on members of the Guard and Reserve forces, their families and their employers. More than 3,000 Oregon Guardsmen deployed in 2009. These pressures invariably impact a serviceperson's ability to get and keep a civilian job, and an employer's incentive to hire and retain citizen soldiers.
 - ii. Most employers were viewed as patriotic and supportive. To the extent that senior management of such employers learned of a veteran's employment related problems, they tended to fix the problem, find an acceptable accommodation and use the experience to educate subordinate managers regarding their legal and social obligations.
 - iii. The federal system for protecting employment rights of citizen soldiers is largely voluntary and is strained with a large volume of cases.
 - iv. Existing federal programs have had great success, particularly with respect to cooperating employers. These programs include the US Department of Defense's, "Employer Support for the Guard and Reserve (ESGR)" and the Department of Labor's, "Veterans' Employment and Training Service (VETS)."
- c. Existing Federal Remedies: USERRA
 - i. The principal anti-discrimination statute is the Uniform Services Employment and Reemployment Rights Act of 1994, (USERRA), 38 U.S.C. §§4301-4344. USERRA creates civilian employment rights for Servicemembers and veterans.
 - ii. Among other things, and under certain conditions, USERRA requires employers to put individuals back to work in their civilian jobs after military service. USERRA also protects Servicemembers from

- iii. In general terms, USERRA offers federal protection to guardsmen and reservists who are voluntarily or involuntarily recalled to active duty. It requires employers, regardless of size, to reemploy returning veterans on the terms they would have otherwise enjoyed but for their military duty (the so-called “escalator” theory).
 - iv. The federal remedies for alleged USERRA violations are primarily administrative in nature. Complaints are made to the US Department of Labor (DoL), specifically to its Veterans’ Employment and Training Service (VETS) program. Among other things, VETS takes administrative complaints and attempts to solve USERRA problems through its mediation program. Unresolved complaints are referred to the US Department of Justice Civil Rights Division for possible enforcement action.
 - v. The Department of Defense also has a program that helps solve USERRA problems. As its name implies, the Employer Support for the Guard and Reserve (ESGR) program is focused on employers; it emphasizes employer education and incentives for supporting guard and reserve employees. ESGR has a nationwide network of volunteer mediators who handle USERRA complaints. Complaints that are not withdrawn or resolved through mediation are referred to the Department of Labor.
 - vi. If the service member hires private counsel, and does not “cooperate” with federal authorities, the federal authorities dismiss their case.
- d. What are the typical results of the federal process?
- i. In fiscal year 2006, according to its most recent Annual Report to Congress, the Department of Labor considered:
 - 1. 1357 formal USERRA complaints
 - 2. 414 were resolved in favor of the veteran
 - 3. Either 93 or 81 cases were referred to the US Department of Justice’s Civil Rights Section (depending on which data one accepts)
 - 4. US DOJ “handled” [no explanation] 75 of those cases through its national office and referred 6 cases to US Attorney’s offices
 - ii. The ESGR program reportedly mediated some 1,899 complaints, nationally. Of those, 14 were cases in Oregon.

- e. HB 3256 is about improving state judicial access for veterans
 - i. Few veterans can afford to stay the course of enforcing their federal rights as against a non-complying, non-cooperative employer
 - 1. It is difficult, expensive and time consuming to prove discrimination.
 - 2. Proof is often circumstantial. Disingenuous employers almost always camouflage workplace discrimination with the same rhetoric protected class members have heard since before anti-discrimination laws were first passed. “Downsizing” or “reorganization” or feigned performance or conduct charges are clichés to be invoked to hide an employer’s intent to discriminate.
 - 3. A victimized, returning veteran can expect to be out of work and to be financially vulnerable for extended periods of time while the federal voluntary process gives way to the federal administrative process which in turn may give way to a federal lawsuit brought by the United States Department of Justice.
 - ii. Few private attorneys can afford to invest time or money in an extended federal process.
 - iii. Fewer still are the attorneys or clients who are in a position to seek preliminary injunctions or restraining orders that might protect a service member’s job while the legal process unfolds.
 - f. Existing voluntary programs, like ESGR, will presumably be even more effective when:
 - i. They are backed by a state law enforcement entity with the statutory tools and willingness to step in where needed – like BOLI or the Oregon Department of Justice; and,
 - ii. Veterans can turn to their local attorneys and local courts for state remedies.
4. State Agencies With Enforcement Authority
- a. BOLI will continue to have the statewide lead regarding the enforcement of civil rights in the workplace.
 - b. Veterans’ complaints about reemployment rights, including rights created by HB 3256, initially should be directed to the same agencies that traditionally deal with alleged USERRA violations, including BOLI's Civil Rights Unit, the Department of Labor's VETS Service, and ESGR.
 - i. BOLI has existing rules for civil rights violations and complaint processes. These administrative rules probably apply to HB 3256 violations; BOLI will make that decision.

- ii. *See* OAR 839, Division 3 (civil rights complaint procedures) and Division 5 (civil rights general description of discrimination)
- c. Attorney General John Kroger is joining the State’s enforcement effort.
 - i. The Attorney General is empowered to initiate civil actions.
 - 1. AG may file suit where he or she has reason to believe there is a “pattern or practice of resistance” to the rights protected under ORS § 659A.855. ORS § 659A.885(7) (2009).
 - 2. AG is also authorized to intervene in suits by private persons where the Attorney General certifies the case “is one of general public importance”. ORS § 659A.885 (9) (2009).
 - 3. AG’s authority to initiate actions is concurrent with the identical authority of the Commissioner of the Bureau of Labor and Industry (BOLI). ORS § 659A.885(7) (2009). Where the Attorney General or BOLI Commissioner files suit under this section, substantial civil penalties are available in addition to the remedies otherwise available to private litigants.
 - ii. DOJ’s enforcement efforts:
 - 1. Will not take the place of BOLI, VETS or ESGR in terms of taking, investigating, or resolving complaints normally handled by those agencies. DOJ will not be taking complaints directly from veterans, in most instances.
 - 2. Will rely, primarily, on referrals from other agencies. These agencies typically will include the Oregon Military Department, BOLI, VETS, or ESGR. The ability to make such a referral may increase employer cooperation with such agencies.
 - 3. Will focus on cases which are particularly egregious and/or have state-wide significance.
 - iii. DOJ has a new Civil Rights Unit that was authorized by the last legislative session (2 attys authorized; 1 investigator). This unit will ultimately prosecute civil rights cases of all kinds, including veterans' civil rights cases. Diane Schwartz Sykes is the Assistant Attorney General currently assigned.
 - iv. In addition to the creation of the Civil Rights Unit, the AG has designated SrAAGs Dave Kramer and Paul Sundermier as DOJ’s primary contacts for veterans’ issues.

1. They will be able to get answers as to HB 3256 questions, among others.
2. They will be the intake “portal” for cases referred for potential enforcement action by the Oregon Attorney General. Referral sources will include, BOLI, the Oregon Military Department, ESGR, VETS, MAP, and other veterans-related organizations.
3. They can be contacted at (503) 947-4700, or by e-mail to david.kramer@state.or.us, or, paul.sundermier@state.or.us.