Washington and Oregon Legal Update: New World, New Risks

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Washington and Oregon Legal Update: New World, New Risks

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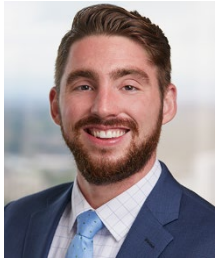

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2022 Oregon Employment Legal Update

Oregon Employment Law Update

- Workplace Fairness Act
- Paid Family Leave
- Oregon Workers' Compensation

Oregon Workplace Fairness Act

Workplace Fairness Act- Overview

- Workplace Fairness Act was passed in 2019.

- Main purpose of the act was to extend statute of limitations for filing workplace discrimination and harassment claims and limit employers' ability to enter into agreements preventing employees from disclosing harassing and discriminatory workplace conduct.

Workplace Fairness Act- Overview

- Requires employers to have an anti-harassment/discrimination policy.
- One main clause prohibited employers from entering into non-disclosure and no-rehire provisions with aggrieved employees unless the employee requested such a clause.
- Employers were getting around this provision by making any settlement offers contingent on employees requesting the clauses or prohibiting only the disclosure of the amounts settled for.

2022 Amendments to Workplace Fairness Act

- Employers can no longer prohibit disclosure of amount of settlement unless the employee requests such a provision.
- Employers can no longer make a settlement offer contingent on employee's request to include confidentiality or no re-hire clause.
- Employers are required to provide a copy of anti-harassment/discrimination policy with any agreement to resolve harassment/discrimination claims.
- Changes go into effect on January 1, 2023

Oregon Paid Family Leave

Oregon Paid Family Leave

- Provides up to 12 weeks of family and medical leave with partial wage replacement to eligible employees.
- Reasons for leave are the same as the existing Oregon Family Leave Act.
- Works like unemployment benefits—run by the Oregon Employment Department and employees must submit application to state to receive benefits.
- Applies to all employers with at least one employee.

Oregon Paid Family Leave

- Benefits are calculated based on the workers' average weekly wage.
- Paid for by contributions from employers and employees.
- Contributions to start in January 2023. 1% of worker's pay will be used to fund the program. Workers will pay .6% every paycheck and employers will pay .4%.

Oregon Paid Family Leave

- Employers with fewer than 25 employees are not required to pay the 40% contribution but if they do, can be eligible to receive assistance grant.
- Benefits will start to be paid out in September 2023.
- Employers required to participate unless they have an equivalent plan approved by the Employment Department.

Oregon Workers' Compensation

HB 4138 -Time Loss Compensation in Oregon Workers' Compensation

- Employees who are injured on the job are entitled to replacement wages for any time loss due to the compensable injury/occupational disease.
- HB 4138 is making significant changes to temporary disability payments.
- Allows attending physicians to retroactively authorize temporary disability for up to 45 days instead of the current 14 days.
- Confirms temporary disability authorization limitations do not apply when a claim is denied, there is a dispute over who the attending physician is or if the insurer does not provide notice of when benefits will end.

HB 4138 -Time Loss Compensation in Oregon Workers' Compensation

- Requires insurer to send the worker a notice explaining when benefits will end, and the reason benefits will end.
- Prevents an attending physician from declaring a worker medically stationary more than 60 days prior to the determination.
- Requires insurer to notify the worker when they are declared medically stationary.
- Limits an insurer from recovering more then 50% of an overpayment out of the PPD awarded at closure.
- Limits insurer from asserting an overpayment on compensation paid more than two years prior.

Oregon Workers' Compensation Case Law Update

Johnson v. SAIF, 369 Or 577 (2022)

- If a worker's compensable injury is a material cause of a worker's impairment, the worker is entitled to the full value of the total impairment, including the portion of the impairment attributed to denied conditions.
- DCBS working on temporary rules to implement decision.

Dancing Bear v. SAIF, 314 Or App 538 (2021)

- Claimant's attorney entitled to assessed attorney fee under ORS 656.383(1), if Order on Reconsideration identifies additional temporary disability entitlement.

Oregon Workers' Compensation Case Law Update

Rogers v. CorVel, 317 Or App 166 (2022)

- Medical expert opinion that exposure to infectious disease at work is a fact of consequence sufficient to establish material contributing cause standard for injury claim.

Luis F. Nava 74 Van Natta 372 (2022)

- Carrier has an affirmative claim processing obligation to revise the claim acceptance when medical information indicates that a previously issued notice of acceptance should be modified. Going forward failure to revise the claim acceptance may result in a penalty for unreasonable claim processing.

Questions?

2022 Washington Legal Update

Washington Workers' Compensation Law Update

- New IME rules – Effective 4/23/22
- *In re Janice Brinson-Wagner*
- *In re Jeremy Carrigan*
- *In re Samuel Peña*

Allowed Reasons for an IME

- Claim Allowance Decision (one per claim)
- Reopening Decision (one per claim reopening)
- New Medical Issue
- Case Progress
- Evaluate PPD (one IME unless IME determines rating is premature or claim is closed and reopened)
- An Appeal (only per Department pre-approval)

Case Progress IMEs and Notification

- At the request of the AP
- No treatment plan, treatment is palliative or stalled, treatment plan complete without improvement
- 120 days after claim filing or 120 days after last case progress IME and additional treatment has been authorized
- No response from an AP to treatment plan
- 28-day notice prior to IME (except for claim allowance)

In re Janice Brinson-Wagner

- *Clark County v. Maphet, 10 Wn. App. 2d 420, 451 P.3d 713 (2019).*
- *Maphet* fundamentally changed an employer's liability from only accepting potential compensable consequences stemming from authorized treatment to accepting responsibility for the entire condition for which treatment was authorized regardless of causation.
- Claimant had a left ankle injury
- Unrelated left knee arthritis was slowing recovery, 2 knee surgeries paid for under the claim as an aid to recovery.
- Claimant sought a third knee surgery under the claim pursuant to *Maphet*
- The Board held the compensable consequences doctrine did not extend to the results of treatment for unrelated conditions treated as aids to recovery when the industrially related condition (left ankle) was MMI.
- Otherwise, employers would be responsible for unrelated conditions long after industrially related conditions are MMI.

In re Jeremy Carrigan

- Claimant injured his low back in 2018
- Employer authorized epidural steroid injections
- Claimant argued the employer was responsible for L5-S1 disc protrusion and degenerative disc disease based on authorizing the injections.
- Injections can be both therapeutic and diagnostic
- Board held the employer's authorization of injections for the accepted lumbar strain did not constitute acceptance of other conditions.

In re Samuel Peña

- Claimant injured his back working as a janitor
- In mid-2019 the Department issued orders segregating claimant's mental health conditions.
- Claimant appealed asserting because the Department authorized medication to treat his bipolar disorder, it accepted the condition under *Maphet.*
- The Board held the issue in *Maphet* was not whether the self-insured employer accepted a condition because it paid for treatment for the condition, but rather whether the employer accepted the condition because it authorized multiple surgeries to treat the condition.
- "The holding in *Maphet* was not simply that payment equals acceptance… We do not interpret the court's decision in *Maphet* as requiring acceptance of a condition merely because the Department (or employer) may have paid for medicine."
- Claimant presented no evidence on the reason for payment for the medication – could have been paid as a condition inhibiting recovery (see *In re Janice Brinson-Wagner)* or due to adjudicator error.

Washington Employment Law Update

Washington Silenced No More Act

- Prohibits employers from entering into any nondisparagement or nondisclosure agreements with employees that cover any conduct that an ***employee*** reasonably believes to be illegal discrimination, harassment, retaliation, wage-and-hour violation, sexual assault, or conduct that is recognized as against a clear mandate of public policy.
- No exception for settlement agreements. However, may still confidential the amount paid in settlement.
- Differs from Oregon where employees may request to enter into a nondispargement/nondisclosure clause in settlement agreement.
- Any such agreement is void and unenforceable. Violating employers can be subject to civil penalties of actual or statutory damages up to $10,000 (whichever is greater) plus attorney fees and costs.
- Applies retroactively to any agreements entered into prior to the passage of the law, except for settlement agreements.
- Starting June 9, 2022, no longer can enter into settlement agreements with these provisions.

Questions?

Additional Insured Issues

- "New" forms of additional insured endorsements – the impact of the *Charter Oak* decision.
- Multi-state/non-domestic issues – enforcement of foreign forum-selection and mandatory arbitration clauses.
- Primary & non-contributory coverage – what does that even mean?

2013 Revisions to ISO Additional Insured Endorsement

- In 2013, the ISO revised its additional insured endorsement to provide that, where coverage is required by separate contract, the insurance afforded to the additional insured will “not be broader than” what is required by the contract.

- The impact of the revised additional insured endorsement had not been tested in the courts until *Charter Oak Fire Insurance Company v. Zurich American Insurance Company, et al.*, 462 F Supp 3d 317 (SD NY 2020).

The *Charter Oak* Decision – Background Facts

- Owner hired Contractor to modernize an elevator in Owner's Manhattan apartment building.
- The Prime Contract required Contractor to obtain CGL coverage and name Owner as an Additional Insured for "claims caused in whole or in part by the Contractor's *negligent* acts or omissions."
- The additional insured endorsement provided that: (1) coverage applied only with respect to liability for injury caused, in whole or in part, by Contractor's acts or omissions or the acts or omissions of those acting on Contractor's behalf, and (2) where coverage provided to the additional insured is required by a separate contract, the insurance afforded to such additional insured *will not be broader than* that which Contractor is required by the contract or agreement to provide for such additional insured.
- Contractor's employee was injured on the job and sued Owner for negligence.

The *Charter Oak* Decision – Analysis of Duty to Defend

- Issue: Was Contractor's CGL insurer required to defend Owner in the negligence suit?
- The Prime Contract required coverage for claims caused in whole or part by Contractor's *negligent* acts or omissions, whereas the AI Endorsement provided coverage for liability caused in whole or part by Contractor's acts or omissions, whether negligent or otherwise.
- The court held that the "will not be broader than" language referred to the scope of coverage, not to the policy limits, and therefore the insurer's duty to defend extended to *claims* caused in whole or in part by Contractor's *negligent* acts or omissions, even though the endorsement itself provided for broader coverage.
- Because there was evidence that the employee's injuries were caused by Contractor's negligence, the insurer had a duty to defend Owner.

The *Charter Oak* Decision – Key Takeaways

- In finding that the insurer had a duty to defend Owner, the court relied not only on the allegations in the complaint and the policy/endorsement language, but also on information possessed by the insurer – namely, Contractor's potentially negligent acts.

- Oregon law demands a different result, as Oregon is a strict "Eight Corners" state.

- Key Takeaway: *Charter Oak* serves as a reminder that parties should *meticulously* review any language in a trade contract that outlines either the requirements for or limitations on additional insured coverage. A failure to devote sufficient attention to these provisions can have an outsized impact on the insurer's duty to defend, and may even render the coverage listed in an additional insured endorsement illusory.

Multistate/Non-Domestic AI Issues

- U.S. retailers and product designers commonly require that product manufacturers add the retailer as an “additional insured” on the manufacturer’s liability policies.

- The main benefit of a retailer being an “additional insured” is having a direct legal basis to compel the insurer to provide a defense, without having to litigate that issue, in the event of a lawsuit by an injured customer.

- Issues arise if the manufacturer is overseas and uses a foreign insurer, particularly where there is a mandatory venue provision in the policy.

- In *Molodyh v. Truck Ins. Exch.*, 304 Or. 290 (1987), the Oregon Supreme Court held that a statutorily-mandatory venue provision in an insurance policy violated the Oregon Constitution’s guarantee to a trial by jury.

- Oregon Department of Financial Regulation Bulletin (Jan. 14, 2020):
(1) mandatory arbitration provisions and foreign forum-selection clauses in insurance contracts are forbidden under *Molodyh*; (2) the DFR would not approve any policy forms containing such provisions, and (3) foreign forum-selection clauses were an unfair trade practice under ORS 746.240.

Multistate/Non-Domestic AI Issues

JPaulJones L.P. v. Zurich General Insurance Company (China) Limited

- *JPaulJones L.P. v. Zurich General Insurance Company (China) Limited*, 2021 WL 1341358 (D. Or. April 9, 2021).
- JPJ, a product design firm based in Texas, contracted with a manufacturer in China to build JPJ's products.
- The manufacturer also agreed to include JPJ as an additional insured under its liability insurance policy, which was issued by Zurich General Insurance Company (China).
- JPJ filed suit after Zurich China denied coverage for claims made against JPJ in several states, including Oregon.
- The court granted Zurich China's motion to dismiss based on the policy's forum-selection clause, which provided that the exclusive forum for dispute resolution was a certain Chinese arbitral institution.

Multistate/Non-Domestic AI Issues

JPaulJones L.P. v. Zurich General Insurance Company (China) Limited

- The court held that *Molodyh* applies only to statutory provisions that deprive a party of a right to a trial by jury, not to voluntary agreements to forgo a jury trial.
- The DFR Bulletin was insufficient to demonstrate that Oregon has a strong public policy against mandatory arbitration provisions and foreign forum-selection clauses in insurance contracts, and a plaintiff must instead point to a statute or judicial decision.
- ORS 742.018, which prohibits insurance contracts from requiring the contract to be construed under foreign law, was not in play because the policy was not issued in Oregon. The policy was executed in China, with a Texas company being added as an additional insured. Thus, this case did not involve an insurance policy that was "delivered or issued for delivery" in Oregon and ORS 742.018 did not apply.
- Affirmed by the Ninth Circuit Court of Appeals in April 2022.

Multistate/Non-Domestic AI Issues

JPaulJones L.P. v. Zurich General Insurance Company (China) Limited

- The key takeaway from the *JPaulJones L.P.* decision is that companies working with overseas partners, and who intend to rely on additional insured status as part of their risk management plan, need to very carefully analyze *all* of the terms of the insurance policy providing additional insured protection to make sure that there are no surprise provisions that will diminish the value of the additional insured protection – such as a foreign venue clause.

- Recommended approach: include a provision in the contract with the manufacturer requiring that the manufacturer procure an insurance policy from a domestic (U.S.) insurer that provides the additional insured benefit.

Primary/Non-Contributory – What Does That Mean?

- Primary versus Excess Coverage:

  > Primary policies are “first in line” to provide coverage, meaning they must pay claims (up to their policy limits) before other policies are triggered.

  > Excess policies do not come into play unless the first (primary) layer of insurance is exhausted, meaning an excess insurer’s coverage obligations are not triggered unless and until the primary insurer(s) has exhausted its coverage obligations.

- Non-Contributory policies do not seek contribution from any other policy in paying on a claim, and a non-contributory policy’s coverage obligations must be exhausted before the same claim could be tendered to another party/insurer.

- Recommended approach: Companies who intend to rely on additional insured status as part of their risk management plan should confirm that the additional insured endorsement provides for primary and non-contributory coverage for covered claims.

Bad Faith…in Oregon?

- Entering 2022, the conventional wisdom was that policyholders could recover *only* through a breach-of-contract claim or quasi-contract claim, and "bad faith" damages were generally not available for an insurer's breach of its duties to the insured, other than where an insurer has agreed to defend under a liability policy.

- While the issue had not been directly addressed by the Oregon Supreme Court, federal courts in Oregon previously predicted that, if the issue was presented, the Oregon Supreme Court would reject a policyholder's right to bring a tort claim against its insurer.

Bad Faith…in Oregon?

- *Foraker v. USAA Casualty*, No. 14-87-SI (July 26, 2017) (Simon, J.) (opining that the Oregon Supreme Court would not allow an insured to bring a negligence *per se* claim against its insurer for a violation of ORS 746.230 (Unfair Claim Settlement Practices Act)).

- *Farris v. United States Fid. & Guar. Co.*, 284 Or 453, 587 P2d 1015 (1978) (holding that an insurer cannot recover emotional distress damages resulting from the insurer's refusal to defend, as the insurance code was intended to prohibit insurance companies from breaching insurance contracts and not to allow recovery of tort damages).

- *Georgetown Realty Inc. v. Home Ins. Co.*, 313 Or 97, 831 P2d 7 (1992) (holding that an insurer may be liable to its insured in tort when the insurer is subject to a standard of care that exists independent of the contract).

Bad Faith…in Oregon?

- *Moody v. Federal Insurance Co.*, 317 Or App 233 (Jan. 26, 2022).
- Policyholder sought to collect on a $3,000 life insurance policy following husband's accidental death while hunting.
- Policy excluded coverage for death "caused by or resulting" from the insured's use of intoxicants. After an autopsy revealed that the deceased husband had marijuana in his system at the time of death, the insurer denied coverage.
- Policyholder argued that her husband's death was not "caused by" his alleged intoxication; rather, he was shot by someone else.
- Alleging that insured's violations of ORS 756.230 (Unfair Claims Settlement Practices Act) supported a claim for negligence *per se*, policyholder sought damages for emotional distress.

Bad Faith…in Oregon?

- The trial court dismissed insured's negligence *per se* claim, but the Court of Appeals reversed.
- The Court of Appeals held that the discussion of negligence *per se* claims in *Farris* was non-binding dicta, and that subsequent judicial decisions had allowed claims to proceed based on violations of other codes, such as the Oregon Building Code.
- While not mentioning "bad faith," *Moody* potentially allows for common-law bad faith claims in insurance coverage disputes.
- To state a claim for negligence *per se*, the policyholder must prove (1) that the insurer violated a statute, (2) that the policyholder was injured as result, (3) that the policyholder is in the class of people the statute was meant to protect, and (4) that the injury suffered is of a type that the statute was designed to protect.
- ORS 746.230 prohibits many actions by an insurer, including the misrepresenting of facts or policy provisions, the failure to act promptly upon communications, the refusal to pay claims without a reasonable investigation, and the failure to attempt in good faith to promptly and equitably settle claims where liability has become reasonably clear.

Cyber Insurance Issues

- “Silent cyber” – cyber coverage under traditional property and liability policies.
- Applications as warranties in cyber policy applications – pitfalls for policyholders.

Cyber Insurance Issues – “Silent Cyber”

- “Silent cyber” or “non-affirmative cyber” refers to cyber risks that are neither expressly covered nor excluded under traditional property or liability insurance policies.
- This is an enormous concern for insurers who have not factored these potential cyber risks into their risk profile and the corresponding premium charged to policyholders.
- Recent case law on “silent cyber” creates opportunities for policyholders who have not purchased cyber but have, e.g., Computer Fraud or Funds Transfer Fraud coverage, or broad property coverage (damage to data).
- Insurers have responded by excluding cyber coverage from non-cyber policies through new policy language.
- Recommended approach: Policyholders should carefully review the language in their current policies, as well as new exclusions/endorsements proposed by insurers, to determine whether they have coverage for cyber risks other than through a cyber policy.
- If coverage is insufficient, a stand-alone cyber policy may be necessary.

Cyber Insurance Issues – Applications as Warranties

- Insurers for cyber policies typically require insureds to complete detailed policy applications addressing the insured's security procedures and risk controls with regards to potential cyber incidents.

- Given the potential for costly damages arising from cyber incidents, insurers will look for any basis to deny coverage for cyber incidents subject to a cyber policy.

- One such tactic has been for insurers to treat representations made in policy applications as warranties, allowing the insurer to void its policy based on a policyholder's alleged misrepresentations in the policy application.

Cyber Insurance Issues – Applications as Warranties

- *Columbia Cas. Co. v. Cottage Health Sys.*, 2016 WL 10966383 (C.D. Cal. Dec. 2, 2016).
- Insured operated a network of hospitals in Southern California and was issued a cyber policy from its insurer in 2013.
- Following a data breach to insured's servers, a putative class action was filed against insured in 2014 on behalf of those patients whose personal information was compromised as a result of the data breach.
- The class action lawsuit settled for $4.125 Million. Insurer funded the settlement but reserved the right to seek reimbursement from insured.
- The insurer then brought suit in federal court, arguing that there was no coverage under insured's cyber policy because the insured allegedly failed to comply with the cybersecurity practices and procedures that it described in its policy application, and therefore insured was responsible to insurer for the $4.125 Million settlement payment.

Cyber Insurance Issues – Applications as Warranties

- Insurer specifically pointed to a “Failure to Follow Minimum Required Practices” exclusion in the cyber policy that excluded coverage for any loss arising out of “any failure of an Insured to continuously implement the procedures and risk controls identified in the Insured’s application * * * and all related information submitted to the Insurer in conjunction with such application whether orally or in writing.”

- Insurer also argued that it could void the policy based on misrepresentations made in insured’s completed “Risk Control Self Assessment,” including insured’s misrepresentations that it replaced factory default settings to ensure that its information security systems were securely configured and that it regularly checked and maintained security patches on its systems.

- Case was dismissed for failure to mediate before filing suit.

Cyber Insurance Issues – Applications as Warranties

- However, the *Cottage Health System* case demonstrates the potential pitfalls for policyholders when completing policy applications for cyber insurance. Given the recent rise in cyber incidents, policyholders must be vigilant in completing and submitting policy applications.

- Both affirmative statements *and* material omissions in a policy application may provide insurers with a basis on which to either deny coverage or rescind a policy following a cyber incident.

- Recommended approach: Policyholders should exercise extreme care and attention when completing policy applications to ensure that all information is correct, and then confirm that the risk controls and security procedures described in the application are faithfully implemented.

- Policyholders should also have coverage counsel review the language in cyber policies, especially with respect policy exclusions, to identify potential gaps in coverage.

Questions?

Thank you.