Oregon Business Lawyer

Oregon State Bar Business Law Section Newsletter • June 2023

Putting the equity in equity pay

By Kathryn P. Roberts, Markowitz Herbold PC

The pay gap between male and female employees is both the subject du jour of many commentators and a serious systemic issue that defies easy answers. In recent years, states, including Oregon, have expanded equal pay protections in hopes of solving this persistent problem. The 2017 Oregon Equal Pay Act (OEPA) broadened existing protections and created new ones. Prior to this, Oregon law had already prohibited discrimination between the sexes in payment for work of comparable character; i.e., men and women who do equivalent work must receive equivalent pay. The OEPA took the pay-equity protections several steps further. Among other changes, the new law extended equal-pay provisions to members of several protected classes in addition to gender, expanded the definition of compensation, and made it newly unlawful for employers to seek salary history of a job applicant.

Yet, despite significant attention to pay inequity in general, the question of disparities in executive compensation—including equity pay and stock options—has largely flown under the radar. This is likely so because executives hold positions that are perceived as unique, and they are compensated in ways that can mask meaningful disparities. As was reported in 2022, "The gender pay gap among top executives at S&P 500 companies in the first year of the pandemic grew to its widest since 2012, fueled in part by male executives' disproportionate gains from stock-based compensation." [1]

Regardless of whether this qualifies as a moral concern to a given business client, it can be a source of significant liability if ignored or unaddressed. For example, in May 2023, Goldman Sachs paid $215 million to settle a class action involving pay disparities amongst employees, including vice presidents. These claims are particularly challenging for employers because, unlike related laws, there is no requirement to show discriminatory intent.

The risks are particularly high in Oregon where the OEPA redefined compensation to include not only regular pay, but also bonuses, benefits, fringe benefits, and equity-based compensation. ORS 652.210(1)(a).

Thus, an employer who awards comparably situated employees different bonuses, including those based on equity or stock grants, must justify the disparity by one or more "bona fide factors." The OEPA provides an exclusive list of bona fide factors that can justify a pay disparity; it does not include a catch-all provision that would allow employers to adjust compensation for any other non-discriminatory reasons.

The OEPA's list of bona fide factors does not include an employer's need to provide hiring or retention bonuses. This issue came to the fore during the COVID-19 pandemic, when a tight labor market motivated employers to secure and retain workers. In recognition of this reality, the Oregon legislature in 2021 explicitly exempted hiring and retention bonuses from the definition of compensation under the OEPA. However, the exemption was temporary, and since September 28, 2022, hiring and retention bonuses are again considered compensation subject to the OEPA's equal-pay analysis. Oregon employers are again constrained from providing incentive pay to

Continued on page 2

In this Issue

Pay Equity

Continued from page 1

Kathryn Roberts is an attorney with Markowitz Herbold in Portland.. She specializes in legal research, analysis, and drafting, with a substantive focus on commercial litigation, and labor and employment law.

employees, including those in the C-Suite (the highest-ranking senior executives in an organization), unless they provide similar pay to those performing comparable work based on a pre-existing system that recognizes seniority, performance, or another bona fide factor. As the Oregon Bureau of Labor & Industries explains, "Any system used to justify a compensation differential must be a consistent and verifiable method that was in use at the time of the alleged violation." [2]

Does this really implicate executives who, by their nature, are not readily compared to other employees? It can. Oregon's latest amendment also provides new guidance regarding what constitutes work of comparable character, potentially encouraging employees to argue that they should be compared to others with an outwardly different position. For purposes of the OEPA, work of a comparable character is "work that requires substantially similar knowledge, skill, effort, responsibility, and working conditions in the performance of work, regardless of job description or job title." ORS 652.210(12). Under equal pay standards, employees who are otherwise singular in their function or accomplishments may be considered comparable to colleagues who are not deemed their peers in certain respects. This will not be lost on female executives, many of whom have the skills and resources to challenge and expose employers that fail to adjust to a changing legal landscape.

The Ninth Circuit addressed the pay equity question in the analogous context of professorial pay in *Freyd v. Univ. of Oregon*, 990 F.3d 1211 (9th Cir. 2021). The court recognized that the professors "were not identical" and that the jobs could be deemed "unequal by the differences in the research that they do, centers that they run, and funding that they obtain." Id. at 1220-21. But the court emphasized that the "overall job," not the individual responsibilities, governed whether two positions were considered comparable in an equal-pay analysis. Further, even under the less-expansive federal law, to show that pay was unlawfully disparate, "the plaintiff must demonstrate that the jobs being compared—not the individuals who hold the jobs—are substantially equal." Id. at 1219-20.

This analysis could be applied with equal force to executives who perform similar core tasks for a company. An employer should not assume that a court will agree that its chief financial officer and chief human resources officer hold fundamentally different roles when faced with a disparity in compensation, including equity pay and stock options, between the two. To the extent that executive compensation varies from position to position, a company should be mindful that pay-equity laws pose important limitations, and adjust accordingly

Companies with concerns about executive compensation would be wise to conduct a pay-equity audit. The OEPA contains a safe harbor for employers who have done so in the three years preceding the filing date of any action, provided they took reasonable action as a result of the audit to correct any pay discrepancies. ORS 652.235(1). The safe harbor allows the employer to avoid compensatory and punitive damages that might otherwise be awarded to the plaintiff. Employers should further be advised that performance or other merit-based differentials must be based on compensation frameworks that were established before the compensation decision was made. Reliance on objective measures to justify pay disparities after a lawsuit is filed will not satisfy the requirements of the OEPA.

Ultimately, the elimination of the gender gap in compensation at the executive level is a worthy pursuit in its own right. With pay equity in the headlines, employers have an opportunity to get ahead of the curve and address pay disparities among executives on their own terms. This change won't happen on its own. Between 2018 and 2020, the pay gap among executives actually widened: "In 2020, women in the C-suite earned 75% of what their male counterparts took home, a report released by Morningstar found. That's the widest the gap has been in nine years, and down from 88% — a high point — in 2018." When it comes to equity pay, the gap is even wider with women earning only 70 percent of the compensation paid to their male counterparts. That is a big number, and creating systems that standardize equity pay or adjusting existing formulas to reduce that disparity would be a great place to start. ◆

Endnotes

1. https://www.morningstar.com/sustainable-investing/corporate-leadership-wont-reach-gender-parity-until-2060-its-current-rate

2. https://www.oregon.gov/boli/workers/Pages/equal-pay.aspx (under the For Employers tab of the Frequently Asked Questions).

Forum Selection Clauses

by Vivek Kothari, Markowitz Herbold PC

Vivek Kothari, a shareholder at Markowitz Herbold, advises businesses and individuals on how to resolve disputes in a variety of areas, including trade secrets, securities, false claims and qui tam, defamation, employment, and contractual matters. He has negotiated the resolution of complex disputes and has tried many civil and criminal cases in courts across the country. He has led major investigations to identify waste, corruption, and fraud. He is on the board of the Oregon Justice Resource Center and is the co-founder of the Oregon Clemency Project to create a more just, transparent, and equitable clemency process in Oregon.

I love time machines. There are many times as a litigator that I wish I had a time machine—if only my client had not said that or done this. As a matter of the laws of physics, of course, time machines are a fantasy. But lawyers create time machines every day. We don't call them time machines, of course. We call them forum selection clauses.

Legal time machines, aka forum selection clauses, allow you to travel through time and space. They won't let you take back that ill-advised text message or undo a critical vote. Instead, forum selection clauses let you manage risk, choose your forum, and choose the law that will apply to future disputes. By including a forum selection clause in a contract, a party can travel through time and select a specific jurisdiction for resolving any future disputes. By choosing a specific jurisdiction, a party can mitigate the risk of future disputes and ensure that they have a clear plan in place for resolving issues. Just as a time machine could help someone travel through time and avoid potential dangers or pitfalls, a forum selection clause can help a party navigate the complex world of contract disputes and ensure they are prepared for any eventuality.

Exclusivity

Your time machine can be mandatory or permissive. It can either require that all litigation shall occur in the chosen court to the exclusion of other courts or allow the litigation to take place in a certain court without preventing litigation in other jurisdictions. As a general rule, forum selection clauses are not exclusive. The language used can overcome that presumption. Language of exclusivity includes magic words, such as a certain jurisdiction is the "only" or "exclusive" forum or that claims "must" be brought in a jurisdiction. By contrast, if the parties merely "submit" or "consent" to a particular jurisdiction, the clause will not be exclusive. The same goes for a forum selection clause that states that claims "may" be brought in a particular court.

Scope

Not every claim is automatically covered by a forum selection clause. The parties must decide how broadly the clause will sweep and whether it includes contractual (breach of contract) and non-contractual (tort) claims. Again, the language of the forum selection clause controls. The scope of a forum selection clause is determined by the language of the clause itself, and can vary depending on the specific terms used. For example, a clause might state that any disputes "arising out of or relating to" the contract must be resolved in a particular forum. This language could potentially encompass both contractual and non-contractual claims, as long as the non-contractual claims have some connection to the contract. Other forum selection clauses may be more limited in scope, applying only to disputes that arise directly from the contract itself. In these cases, non-contractual claims may not be subject to the forum selection clause unless they are somehow related to the contract.

Effect on third parties

There are several circumstances in which third parties can enjoy the benefits of the forum selection clause. Two of those involve the underlying facts and circumstances of the case: 1) when the non-signatory is a party to a global transaction, but is not a signatory to a specific agreement within that transaction, as long as the agreements are executed at the same time, by the same parties or for the same purpose; and (2) when the non-signatory is closely related to one of the signatories. The third, however, turns on the phrasing of the forum selection clause itself. The forum selection clause can contain what is sometimes referred to as a negating clause, which prevents third parties from benefitting from the agreement. If the forum selection clause clearly and unequivocally prevents third parties from benefitting from it, then it will not apply to third parties.

State v. federal court

Most forum selection clauses specify state courts as the operative jurisdiction to hear claims. Federal courts, being courts of limited jurisdiction, cannot hear every dispute. A forum selection clause that identifies federal court as the forum to hear disputes where there is no subject-matter jurisdiction will result in an unenforceable forum selection clause. Where the forum selection clause provides that disputes must be resolved in the courts of a given state, it usually means that state courts have been selected by the parties. Where the parties have selected courts in a particular state, either the state or federal courts are available.

Continued on page 4

Forum Selection *Continued from page 3*

This article is part of a series on miscellaneous contract provisions in common business, commercial, and real-estate agreements. When disputes arise, these overlooked provisions can determine the fate of a transaction.If not closely examined in the context of every agreement, they can provide grounds for litigation or threats of litigation.

Choice of law

If the parties do not select the law that should apply to determine whether the forum selection clause is enforceable, the court considering it will engage in a choice of law analysis. Make your time machine work for you and select the law you want to apply, given the textual choices you've made in the forum selection clause.

Fees

Forum selection battles can be lengthy and expensive, sometimes costing millions of dollars. If you've managed your risk well, the other side may try to find a way to evade its requirements. Under the American Rule—which says two opposing sides in a legal matter must pay their own attorney fees, regardless of who wins the case—a party typically cannot recover fees related to forum selection battles. Consider structuring the forum selection clause to permit or require an award of fees and costs to a prevailing party so that you don't blow your war chest fighting collateral battles.

In conclusion

The next time you're drafting a forum selection clause, do not think of it as a boring boilerplate clause that you're copying and pasting from your last contract. The drafting tips in the article let you defy the laws of physics and travel to the future to give your client an edge for any disputes. ◆

Mentoring Program Needs Experienced Lawyers

A message from the Business Law Section Executive Committee

In 2011, the Oregon Supreme Court instituted the New Lawyer Mentoring Program that is required for all new OSB members in their first 12–18 months as lawyers. The program seeks to preserve professionalism and the sense of community throughout the Bar, while supporting each new lawyer during the transition from student to practitioner.

The Bar is seeing quite a bit of interest in business law among new lawyers. The regions needing the most mentors in this practice area include Clackamas, Multnomah, Malheur, Linn, and Washington counties. As of March 2023, approximately 12 new lawyers interested in business law were not yet matched with a mentor..

This is a wonderful opportunity for our section to welcome our newest colleagues and to provide guidance toward rewarding careers in our chosen field. The benefit to the new lawyers seems clear, but we can agree that the entire Bar—not to mention clients and the public—also benefits by having each new lawyer welcomed and guided through the transition to become a competent and professional practitioner.

This is a one-year commitment. The Bar expects it to equate to about 60 minutes a month, although circumstances may vary. There is a curriculum, but the program is designed so that the mentor and the mentee have great flexibility to create a plan that best meets the needs of the new practitioner. The mentor receives 8 CLE credits, including two ethics credits, at the completion of the program. A mentor must have five years of experience to serve, and is appointed by the Oregon Supreme Court.

Many of us know from personal experience that mentoring a young professional can be uniquely gratifying, and particularly valuable in terms of one's service to the Bar and the public. We hope you'll join us in looking more closely at this initiative.

Information about the program can be found on the OSB website at https://www.osbar.org/nlmp.

You can also email questions to mentoring@osbar.org or reach program coordinator Cathy Petrecca at (503) 431-6355. ◆

The Rise and Fall of 2023 Senate Bill 909: Oregon's Revised Uniform LLC Act

By Valerie Sasaki, Samuels Yoelin Kantor LLC

Valerie Sasaki, a partner at Samuels Yoelin Kantor LLC, serves as a member of the Oregon Law Commision.

Much like the Roman Empire, 2023 Senate Bill 909 (SB909) was not built overnight. Over the last six years, members of the OSB Business Law Section have been working to evaluate whether the Revised Limited Liability Company Act is right for Oregon. The Oregon Law Commission (OLC) approved taking this on as a workgroup in 2018. The workgroup started meeting in person in 2019 but switched to monthly Zoom meetings during the pandemic. It was a huge effort and I'm awed and grateful for the contributions of so many smart people who participated in this process.

The workgroup finished its task in the summer of 2022, and then coordinated with the Oregon Legislature's Office of Legislative Counsel to turn the act with edits into a bill. The OLC commissioners approved advancing the bill draft as an OLC bill. OLC Commissioner, Senator Prozanski introduced it on Oregon's birthday—February 14, 2022. SB 909 was subsequently referred to the Senate Judiciary Committee.

This is a bill that will be good for Oregon businesses of all sizes and—while there were some minor edits we were discussing—it had no substantial political opposition. However, even the most casual observer of what is going on in Salem knows that this has been a "challenging" legislative session. In January, Senate Republicans began to require all legislation to be read on the floor in full before a final vote is taken on a measure. In actual practice, this meant that a computer read each bill out. Since SB 909 is 161 pages long, it would take an extraordinarily long amount of time for the computer to read it out.

I am sure that many of you saw the short article for the OSB's Capital Insider entitled, "Legislative Deadlines, Important Dates, and What to Watch For." In that article, the author, Amy Zubko, noted that for bills to advance, they had to have had a work session scheduled on or before March 17, and be voted out of committee in its chamber of origin on or before April 4. As noted in the article, the Rules Committees are exempt from these deadlines, as are the Ways and Means Committees.

The Judiciary Committee scheduled a work session on SB909 in time to meet the first deadline, but did not refer it out of committee before the April deadline, despite our best efforts. We had hoped that, if it could not be referred out of the Senate, it could at least be sent to the Senate Rules committee for consideration and included in a possible late-session compromise. Unfortunately, that did not happen and the bill was dead in the water for this session.

What's next? As I write this, the Senate walkout has continued and is making it difficult if not impossible to conduct legislative business. Our hope is that we can work with our legislators over the summer and reintroduce RULLCA for pre-session filing in the 2024 short session.

If you are interested in helping with this process or any of the other OLC projects, please email me at vsasaki@samuelslaw.com.◆

Section Supports OSB Summer Stipend Program

The Oregon State Bar Diversity & Inclusion (D&I) Department, with the assistance of the Advisory Committee on Diversity and Inclusion, administers summer employment stipends to law-school students who will help achieve the Bar's diversity mission.

The Business Law Section annually contributes funds to the Summer Stipend Program to provide a $9/ hour supplement to the hourly wage of one student who finds an internship with a focus in business law. The stipend is paid directly to the student.

While a great program for students, the Summer Stipend Program is also a great program for small to mid-sized law firms or other organizations that might not otherwise have the funds to pay a student's full wages for a summer.

Although recipients of the stipend program are responsible for finding their own summer internship, the D&I Department provides the them with a list of potential employers.

If your law firm is interested in hiring a summer intern with a focus on business law, and would like to be added to the list of potential employers, please email Suraya Barbee at sbarbee@osbar.org. Specify if you would like to be added to the list for this year, or would prefer to be added to the list for the summer of 2024 and beyond. ◆

Nominate an Outstanding Business Attorney for Special Recognition

The James B. Castles Leadership Award was established in 1998 to recognize an Oregon lawyer for excellence in the practice of business law, professionalism among fellow business lawyers, and outstanding community leadership. It is the highest recognition the Business Law Section can bestow on one of its members.

James B. Castles began his career as an Oregon business lawyer advising Tektronix, Inc. founders Jack Murdock and Howard Vollum in the start-up phases of their business. He subsequently became the founding General Counsel of Tektronix and a long-time director of the company. Mr. Castles was also well known for his philanthropic support of Northwest organizations, and served as a founding trustee of the M. J. Murdock Charitable Trust.

Previous recipients of the James B. Castles Leadership Award include Otto B. Frohnmayer, Henry H. Hewitt, Brian Booth, Andrew J. Morrow, Jr., Donald L. Krahmer, Jr., Neva Campbell, Robert Art, MardiLyn Saathoff, John Jaqua, Ruth Beyer, Brent Bullock, Carmen Calzacorta, Kenneth D. Stephens, Jeffrey C. Wolfstone, John M. McGuigan, Ronald Greenman, and Robert J. McGaughey.

Candidate qualifications

1. The nominee must be a licensed (or retired) member of the Oregon State Bar, recognized for excellence and professionalism;
2. A significant portion of the nominee's career must have involved the practice or teaching of business law; and
3. The nominee must have shown outstanding community leadership in one or more of the following areas:
   - Activities supporting other members of the Oregon State Bar in the practice of business law, such as serving on committees or task forces of the Business Law Section or other business-law-related committees or task forces, serving on the Board of Governors, writing business law-related articles or treatises, teaching CLE seminars, and other similar activities
   - Civic leadership, such as serving on public boards or commissions, as a member of federal, state, regional, county, or local government, or as an employee of the Department of Justice or a state agency, or otherwise having been elected or appointed to public office
   - Business or nonprofit leadership in community affairs or economic development, such as serving with one or more nonprofit organizations engaged in community development, economic development, or charitable activities

Nomination procedure

To nominate an Oregon business lawyer for the James B. Castles Leadership Award, please email the name of the nominee, together with the pertinent details regarding the nominee's qualifications for the award, to Anne Arathoon at anne.arathoon@realpage.com The deadline for nominations is August 15, 2023.

Nominations will be reviewed by past chairs of the Business Law Section, who will recommend a candidate to the Executive Committee of the Business Law Section for final selection. ◆

Upcoming CLE Programs

ERISA Basics For Business Lawyers,
June 30, 2023/noon
Presented by Tara Causland & Andy Cameron, U.S. Department of Labor Employee Benefits Security Administration
For details, contact Melissa Jaffe, at melissa@mbjaffelaw.com

Blockchain for Business Lawyers
August 2, 2023/noon
The Law Offices of Melissa B. Jaffe PC

Looking Forward: Trends and Changes in 2024
Annual Business Law Section CLE Program
November 10, 2023 /9:00 AM–4:00 PM
In person at Amaterra Winery in SW Portland
Includes luncheon and reception

We have a few spots remaining for presenters, and want to hear from you. If you have a topic and or presenter you'd like to see in person this year, please let us know. Self-referrals are welcomed. Please email topic requests to our CLE Chair, Melissa Jaffe, at melissa@mbjaffelaw.com no later than June 30.

Oregon State Bar Business Law Section

The mission of the Oregon State Bar Business Law Section is to provide excellent service to the diverse group of business law practitioners throughout the State of Oregon by providing regular, timely, and useful information about the practice of business law, promoting good business lawyering and professionalism, fostering communication and networking among our members, advocating improvement of business law, and supporting Oregon's business infrastructure and business community.