

Oregon Civil Rights Newsletter

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OREGON'S 2017 LEGISLATIVE SESSION PRODUCES SIGNIFICANT NEW CIVIL RIGHTS LAWS

by Dan Grinfas, Buchanan Angeli Altschul & Sullivan LLP

Oregon's 79th Legislative Assembly convened its 2017 regular session on February 1 and adjourned *sine die* on July 7. This article provides a brief summary of key civil rights legislation enacted during the session. Except as otherwise indicated, the new laws take effect on January 1, 2018. Detailed measure history and the full text of the bills are accessible on the legislature's website at <https://www.oregonlegislature.gov/>.

HB 2005: Oregon Equal Pay Act of 2017

States including California, Maryland, Massachusetts, Nebraska, and New York have recently enacted legislation focused on pay equity. Oregon joins those states with the passage of House Bill 2005, a new equal-pay law that adds substantial liabilities for Oregon employers.

The law generally prohibits inquiries by employers on the salary history of job applicants. The law also makes it an unlawful employment practice to discriminate in compensation on the basis of an employee's protected class, defined to cover race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, or age. Compensation at different levels for work of comparable character is only permitted if based on a bona fide factor such as seniority, merit, education, training, or experience.

HB 2005 also extends the time limitation to bring certain pay-equity claims by making each subsequent payroll action based on an underlying pay-equity violation actionable. It adds remedies for pay-equity and wage-related violations, including the right to a jury trial and the right to compensatory and punitive damages. Defenses to such damages are available if the employer demonstrates it has completed an appropriate equal-pay analysis.

The law takes effect on October 6, 2017, the ninety-first day following adjournment *sine die*. Private rights of action and non-discrimination provisions of the law become operative on January 1, 2019. The private right of action related to salary-history inquiries becomes operative on January 1, 2024.

HB 2113: Marriage Solemnization by Secular Organizations

House Bill 2113 adds secular organizations to the list of persons and entities authorized to solemnize marriages. The law defines a "secular organization" as one "that occupies a place in the lives of the organization's members parallel to that filled by a church or particular religious authority."

HB 2216: Oregon Foster Children's Sibling Bill of Rights

House Bill 2216 requires the Oregon Department of Human Services to adopt rules to establish the Oregon Foster Children's Sibling Bill of Rights. The law states an intent that siblings who are foster children have certain essential rights, including obtaining substitute care placements together whenever safe and appropriate; maintaining contact and visits with siblings while placed both in and out of substitute care placements; receiving transportation to maintain contact with and have visits with siblings; and obtaining placement with foster parents and caseworkers who have been provided with training on the importance of sibling relationships.

HB 2355: Police Stops and Reduced Criminal Penalties

House Bill 2355 directs the Oregon Criminal Justice Commission to develop a method for recording data concerning officer-initiated pedestrian and traffic stops. The law is aimed at avoiding profiling and reducing punishments for drug possession. It requires law-enforcement agencies to begin recording pedestrian and traffic stop data and to report the data to the commission, without individually identifying the officers or the people stopped. The law requires the commission to analyze the data and report findings no later than December 1, 2019, and annually thereafter. The law directs the department of state police to develop a standardized profiling-complaint form and specifies the process for submission to a review committee. The law also reduces certain drug-possession penalties and directs the commission to study and report on the impact of these changes no later than September 15, 2018. The law took effect on passage, August 16, 2017, by declaration of an emergency.

HB 2565: Priority Enrollment for Veterans in Institutions of Higher Education

House Bill 2565 changes how certain qualified veterans may receive priority registration for courses at public universities and community colleges.

HB 2673: Vital Records Identification Changes for Gender Identity

House Bill 2673 creates an alternative process for people seeking to change their name and listed sex on vital records for the purpose of affirming gender identity. It eliminates the requirement for courts to publicly post court orders changing the person's name or gender identity. The law provides that a court case involving the change of gender identity may be sealed. It takes effect on October 6, 2017, the ninety-first day following adjournment *sine die*, and its provisions become operative on January 1, 2018.

HB 2393: Withdrawing Life-Sustaining Procedures for Certain Incapable Individuals

Current law, ORS 127.635, outlines life-sustaining procedures and steps to be taken in determining who may decide to remove them from an incapable adult. House Bill 2393 clarifies that a case manager who receives notice that a person will have life-sustaining procedures withheld or withdrawn is to provide information in his or her possession that is related to the person's values, beliefs, and preferences with respect to withholding or withdrawing life-sustaining procedures.

HB 2527: Injectable Hormonal Contraceptives

House Bill 2527 allows pharmacists to prescribe and administer injectable hormonal contraceptives and to prescribe and dispense self-administered hormonal contraceptives. The law requires prescription drug benefit programs and prescription drug benefits offered under health-benefit plans to provide coverage for pharmacist consultations. The law took effect on passage, June 14, 2017, by declaration of an emergency.

HB 2616: Right to Counsel in Juvenile Delinquency Proceedings

House Bill 2616 sets forth the circumstances under which a court shall appoint counsel for youth in juvenile delinquency proceedings. The law prohibits a court from accepting a waiver of counsel by a youth, with exceptions.

HB 2740: Human Trafficking

House Bill 2740 expands the law on the crime of trafficking people for use in a commercial sex act, to cover situations when the defendant knows or recklessly disregards the fact that the other person is under eighteen years old and will be used in a commercial sex act. The law previously applied only to trafficking people under fifteen years old.

HB 2880: Public-Building Flag Displays

House Bill 2880 expands the definition of “public building” for purposes of determining which buildings must comply with the existing requirement to display the Oregon State flag and the National League of Families’ Prisoner of War/Missing in Action (POW/MIA) flag to include all other county, municipal, school district, and special district buildings on which or near which it is customary and suitable to display the United States flag. The law requires all county, municipal, school district, and special district buildings constructed on or after January 1, 2018, to be able to properly display all three flags.

HB 3008: Prohibition on Requiring Creation of False Documents on Hours Worked

House Bill 3008 prohibits an employer from requiring an employee to create, file, or sign documents containing information that the employer knows is false related to hours worked or compensation received by the employee. The law establishes a private right of action and authorizes a court to award statutory damages of \$1,000 per violation (or more if actual damages are greater), injunctive relief, and attorney’s fees and costs. The law also authorizes the Bureau of Labor and Industries (BOLI) Commissioner to assess civil penalties.

HB 3060: Requiring Public Contractors to Have Policies Preventing Harassment and Discrimination

House Bill 3060 prohibits a state contracting agency from entering into a public contract with a prospective contractor that has not certified that it has a policy and practice of preventing sexual harassment, sexual assault, and discrimination against workers who are members of protected classes. The law specifies minimum elements that the policy and practice must include and the method by which contractors may provide the required notice. The law takes effect on October 6, 2017, the ninety-first day following adjournment *sine die*, but its main provision becomes operative on January 1, 2018.

HB 3160: Permissible Use of White Cane

House Bill 3160 permits people who have limited vision and people who are deaf-blind to carry and use white canes on highways and in other public places. The law defines “limited vision” as visual acuity that does not exceed 20/70 and that is no worse than 20/200 in the better eye with corrective lenses. The law took effect on passage, May 25, 2017, by declaration of an emergency.

HB 3242: Law Enforcement Interviews of People Under 18 Years Old

House Bill 3242 requires a peace officer to electronically record a custodial interview with a person who is under 18 years old when investigating a felony or an allegation that the person committed an act that if committed by an adult would constitute a felony. It requires a jury instruction on, or court consideration of, superior reliability of recorded statements if the state offers testimony concerning an unrecorded statement as evidence in certain proceedings. The law also requires a law-enforcement agency to store a copy of the interview for a specified length of time and requires the district attorney to provide a copy of the recording of the interview in discovery.

HB 3391: Requiring Coverage for Abortion and Reproductive Health Care

House Bill 3391 was introduced as a response to proposed abortion restrictions and other federal funding cuts that would take effect under the currently tabled repeal and replacement of the federal Affordable Care Act (“Obamacare”). The law, which took effect on August 15, 2017, by declaration of an emergency, requires that health-benefit plans cover specified health-care services, drugs, devices, products, and procedures related to reproductive health. It allows an exemption for plans sold to religious employers as narrowly defined in ORS 743A.066.

The required coverage includes well-woman care; pregnancy-related services, including pregnancy tests, preconception care, abortion, and prenatal care; counseling for sexually transmitted infections (STIs), including HIV and AIDS; screening for various STIs and conditions; screening and counseling for tobacco use and domestic violence; folic acid supplements; breastfeeding support; genetic counseling; breast cancer chemoprevention counseling; any contraceptive drug, device, or product approved by the US Food and Drug Administration; voluntary sterilization; and education and counseling on contraception and sterilization.

HB 3391 also prohibits discrimination in the provision of health-care coverage on the basis of actual or perceived race, color, national origin, sex, sexual orientation, gender identity, age, or disability.

The law prohibits interference by a public body in a consenting woman's choice to terminate a pregnancy, or in a health-care provider's terminating or assisting in the termination of pregnancy of a patient if the provider is acting within the scope of the provider's license. It requires the Oregon Health Authority, in consultation with the Department of Consumer and Business Services, to design a program to provide statewide access to abortion coverage for Oregon residents enrolled in health-benefit plans that do not cover abortion.

SB 66: Mental Illness and Prohibition on Purchasing Firearms

Senate Bill 66 requires, among other things, that a court notify a person found to be a person with mental illness when state or federal law prohibits the person from purchasing or possessing a firearm, unless the person obtains relief from the prohibition from the Psychiatric Security Review Board or under federal law. The law also requires the court to notify a person determined to lack fitness to proceed that federal law prohibits the person from purchasing or possessing a firearm unless the person obtains relief from the prohibition under federal law.

SB 298: BOLI Commissioner Discretion in Civil Rights Enforcement Matters

In 2015, the Oregon legislature passed Senate Bill 380, which made certain actions based on civil rights complaints filed with the BOLI Commissioner discretionary on the part of the Commissioner rather than mandatory. Senate Bill 298 extends the sunset for such provisions such that the BOLI Commissioner retains discretion as to whether to prepare formal charges and pursue certain matters in court. SB 298 took effect immediately on passage, on June 14, 2017, by declaration of an emergency.

SB 250: Affirmative Defense to Prostitution Charge for Victim of Human Trafficking

Senate Bill 250 creates an affirmative defense to the crime of prostitution if, at the time of the alleged offense, the defendant was a victim of certain trafficking crimes as described in ORS 163.266(1)(b) or (c).

SB 299: Clarifications to Oregon Sick-Time Law

Senate Bill 299 clarifies various provisions of the Oregon Sick-Time law, ORS 653.601 to 653.661, relating to limits on sick-time hours, employer coverage standards, and the sick-time pay rate. The law provides that employers may adopt a policy that limits accrual of sick time to forty hours per year; that limits total accrual to eighty hours of sick time; and that limits an employee's use of sick time to no more than forty hours in a year.

For purposes of determining if an employer is a Portland employer (where stricter paid leave coverage standards apply), the law excludes an employer that only maintains a seasonal farm stand or a trailer in Portland that is used temporarily on a construction site for office purposes only.

The law excludes the following individuals from the determination of the number of employees an employer has: an individual or the parent, spouse, or child of an individual who is a director of a corporation who has a substantial ownership interest in the corporation; certain members of a limited liability company; a partner of a limited liability partnership who has a substantial ownership interest; or a sole proprietor of a business.

SB 299 also modifies the rate of pay for accrued sick time for employees paid on commission to be a rate equal to at least the Oregon minimum wage. It provides that for an employee paid an hourly, weekly, or monthly wage and also paid on a piece-rate or commission basis, the employer must pay for accrued sick time at the hourly, weekly, or monthly wage or the minimum wage, whichever is greater.

The law also clarifies that an employer using a sick-leave, paid vacation, or paid personal-time-off policy to comply with the sick-time law must, at a minimum, comply with the law's terms for the first forty hours that the employer's policy provides per year but need not comply with the requirements of the law beyond that.

These clarifications to the sick-time law took effect on July 1, 2017, by declaration of an emergency. They apply to hours worked and sick time accrued or used on or after January 1, 2018.

SB 302: Reducing Marijuana Penalties

Senate Bill 302 removes provisions related to marijuana offenses from the Uniform Controlled Substances Act and moves them to the Control and Regulation of Marijuana Act. The law reduces criminal penalties related to the possession of less than four times the legal limit and increases certain penalties for possession of greater levels. The law took effect immediately on passage, April 21, 2017, by declaration of an emergency.

SB 368: Health Insurance Coverage of Detainees

Senate Bill 368 prohibits an insurer from denying a claim for reimbursement of health-care services provided to an insured who is in a detention facility pending adjudication by a juvenile court. The law takes effect on October 6, 2017, the ninety-first day following adjournment *sine die*.

SB 573: Recognition of Fallen Military Servicemembers

Senate Bill 573 encourages Oregonians to pause for twenty-one seconds at noon on the twenty-first day of each month to honor and remember those who have given their lives in military service in war.

SB 846: Limits on Restraining Youth in Custodial Circumstances

Senate Bill 846 prohibits the use of physical restraints (such as handcuffs, chains, irons, straitjackets, cloth restraints, leather restraints, plastic restraints, etc.) in juvenile court proceedings on a youth, youth offender, or young person, with certain exceptions. The law also prohibits the use of physical restraints in the transportation of youth by the Department of Human Services, the Oregon Health Authority, or an agent, with certain exceptions.

SB 751: Documents Related to Marriage

Senate Bill 751 prohibits a form of marriage application, license, or record provided by the state registrar from requiring an address for a religious organization or congregation authorized by ORS 106.120 to solemnize marriage.

SB 802: Voting Registration Age

Senate Bill 802 amends ORS 247.016 to allow a person who is at least sixteen years old to register to vote (although the person may not actually vote in an election until the person attains the age of eighteen years). The law previously required a person to be seventeen years old to register.

SB 863: Shielding Personal Information of Recreational Marijuana Users

When purchasing marijuana, recreational marijuana users in Oregon must provide identification verifying that they are at least twenty-one years old. Senate Bill 863 prohibits marijuana retailers from recording, retaining, and transferring the type of information that is contained on a passport, driver's license, military identification card, or other identification card that bears a picture of a person. The law requires a marijuana retailer to destroy, within thirty days of the effective date, these types of identifying information the retailer has in its possession on the effective date of the act. The law took effect immediately on passage, April 19, 2017, by declaration of an emergency.

SB 828: Employee Scheduling Requirements

Senate Bill 828 requires large employers in specified industries (retail, hospitality, and food-service establishments with 500 or more employees worldwide) to provide a new employee with an estimated work schedule and to provide a current employee with seven days' notice of the employee work schedule. Effective July 1, 2020, the requirement is extended to two weeks' notice.

Covered employers are prohibited from scheduling work shifts that do not allow sufficient break time of ten hours between shifts, unless the employee earns one-and-a-half times the scheduled rate of pay. A covered employer must also pay a penalty wage if it changes a scheduled shift with less than seven days' notice, unless the change was outside the employer's control.

The law makes it an unlawful employment practice for a covered employer to interfere with employees' rights or to retaliate against an employee for exercising rights granted under the law, including making a request for a preferred work schedule. It allows for an administrative or civil cause of action and statutory penalties for each violation. The law took effect immediately on passage, August 8, 2017, by declaration of an emergency.

SB 834: Human Rights Commission for People with Disabilities

Senate Bill 834 requires the Oregon Department of Human Services to develop and present a proposal for the creation of a human rights commission to safeguard the dignity and basic human rights of individuals with intellectual or developmental disabilities. The proposal is to be made to interim committees of the legislative assembly no later than December 1, 2017. The bill took effect on passage, June 14, 2017, by declaration of an emergency.

SB 992: Recognition of Certain Servicemembers

Senate Bill 992 designates the third Friday in September of every year to be Oregon POW/MIA Recognition Day.

SB 949: Prohibiting Non-Competition Agreements for Home-Care Workers

Senate Bill 949 provides that notwithstanding ORS 653.295, Oregon's statute on permissible non-competition agreements, a non-competition agreement made in the context of an employment relationship or contract with a home-care worker as defined in ORS 410.600 is voidable by the home-care worker and may not be enforced by an Oregon court. The law contains the same restriction on covenants not to solicit employees of the employer and covenants not to solicit or transact business with customers of the employer.

Senate Concurrent Resolution 14: Recognizing Japanese-American Internment

Senate Concurrent Resolution 14 acknowledges the injustice, pain, and suffering inflicted on thousands of Japanese Americans during World War II, including by removal and placement into incarceration camps, and recognizes the national Day of Remembrance to increase public awareness of these actions.

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RECENT LEGAL DEVELOPMENTS

by Richard F. Liebman and Chris Morgan, Barran Liebman LLP

Circuit Courts of Appeals

Arias v. Raimondo, 860 F.3d 1185 (9th Cir. 2017)

The Ninth Circuit held that the Fair Labor Standards Act (FLSA) protects plaintiffs from retaliation from their employer and their employer's agents and attorneys. An undocumented worker brought a claim against his employer after the employer threatened to reveal his undocumented status if the worker took a position with another company. After the claim was brought, the defendant's attorney contacted immigration officials to facilitate the plaintiff being taken into custody at a scheduled deposition. The plaintiff then brought claims against the employer's attorney for retaliating against him in violation of the FLSA. The attorney defended solely on the grounds that because he never personally employed the plaintiff, he was not subject to the provisions of the FLSA. The court disagreed and distinguished the FLSA's economic provisions from the anti-retaliation provisions, which extend to "any person" acting directly or indirectly in the interest of an employer in relation to an employee.

Credeur v. Louisiana, 860 F.3d 785 (5th Cir. 2017)

The Fifth Circuit held that a trial attorney with a disability that prevented her from attending trial was not a "qualified individual" under the Americans with Disabilities Act (ADA), and therefore she was not entitled to an accommodation. A litigation attorney for the Louisiana Attorney General's office brought suit against the state department of justice (DOJ) for failure to accommodate, harassment, and retaliation after the DOJ denied her continued requests to work from home following serious medical complications. To be a qualified individual under the ADA, she had to prove that she was able to perform the "essential functions" of her position with or without reasonable accommodation. In affirming summary judgment for the DOJ, the court reasoned that the attorney was not a qualified individual within the meaning of the ADA because she could not perform an essential function of her job—regular attendance in the office or at trial.

McKeen-Chaplin v. Provident Sav. Bank, 862 F.3d 847 (9th Cir. 2017)

The Ninth Circuit held that mortgage underwriters are entitled to overtime compensation under the FLSA and are not subject to the administrative-employee exemption. Currently, the circuits are split on this issue. Siding with the Second Circuit, the Ninth Circuit held that because the mortgage underwriters' "primary job duties" did not relate to their employer bank's management or general business operations, the administrative-employee

exemption to overtime requirements did not apply, and the mortgage underwriters were entitled to overtime compensation for hours worked in excess of forty hours per week.

Sato v. Orange Cnty. Dep't of Educ., 861 F.3d 923 (9th Cir. 2017)

The Ninth Circuit rejected a challenge to schools' and a school district's sovereign immunity under the Eleventh Amendment. To determine whether a governmental entity is an arm of the state for purposes of sovereign immunity, the Ninth Circuit uses a five-factor test to evaluate the level of state control. In this case, the plaintiff contended that the California legislature's passage of a financial reform package designed to streamline public-education financing had the effect of abrogating sovereign immunity because it decentralized educational governance. The court, however, ultimately found that the legislation had no such effect and that in weighing the factors for sovereign immunity, "the fact that the state itself decided to give its local agents more autonomy does not change the fact that the school districts remain state agents under state control."

State Supreme Courts

Barbuto v. Advantage Sales & Mktg., LLC, 477 Mass. 456 (2017)

The Supreme Court of Massachusetts held that employers may be required to reasonably accommodate the use of medical marijuana outside of the workplace. The opinion was the first of its kind, in which the court opined that the classification of marijuana as a Schedule I drug under federal law does not make it per se unreasonable as an accommodation. The court tempered the scope of its ruling by clarifying that if an employer's policy bans the use of marijuana, then the employer must engage in the interactive process and explore other available options for reasonable accommodations. If no effective alternative exists, the employer would ultimately bear the burden of proving that the employee's use of marijuana would be an undue hardship on the employer. While this case has potential important national implications, Oregon courts have already made clear that no such similar claim is recognized under Oregon law. *E.g., Emerald Steel Fabricators, Inc. v. BOLI*, 348 Or. 159 (2010) (holding that "Oregon employers are not required to accommodate the medical use of marijuana and are not required to engage in the interactive process regarding potential accommodation").

Richard F. Liebman is a partner and Chris Morgan is a law clerk with Barran Liebman LLP, representing employers in labor and employment law.

SUPREME COURT UPDATE

by Damien Munsinger, Klein Munsinger, and Kirsten Rush, Busse & Hunt

***Matal v. Tam*, Docket No. 15-1293**

In an important free-speech case with Oregon roots, Justice Alito confirmed for an 8-0 Court that the disparagement clause of the Landham Act (which governs trademarks) violates the First Amendment's free-speech clause. The Portland-based rock band The Slants had been denied a registered trademark because the US Patent and Trademark Office deemed the band's name disparaging. The justices found that the act's disparagement clause represented viewpoint discrimination, targeting offensive speech for disfavored treatment. In deciding that trademarks can contain constitutionally protected expression, the Court made clear that trademarks cannot be regulated without passing constitutional muster.

***Microsoft Corp. v. Baker*, Docket No. 15-457**

By an 8-0 vote (Justice Gorsuch had not taken the bench at the time of oral argument), the Court struck down the Ninth Circuit's tolerance of a method for reviewing denied class-action certifications. Because the claims of individual plaintiffs survive a court's refusal to certify a class, a district court's denial of a class-certification is not a final order subject to immediate appellate review. Though Rule 23(f) allows appellate courts to consent to review an order granting or denying class-certification, the plaintiffs had adopted a novel tactic to circumvent the consent requirement. When a district court denied class-certification, the plaintiffs would respond by voluntarily dismissing their individual claims, which resulted in a final order ripe for appellate review. If the appellate court reversed the district court's denial of class-certification, the plaintiffs would revive their claims. Justice Ginsburg's

opinion held the tactic to be an impermissible end-run around Rule 23(f)'s requirement that review was simply not available absent an appellate court's consent.

***Pavan v. Smith*, Docket No. 16-922**

In a per curiam opinion, the Court held that the Constitution requires that states allow married same-sex couples to be listed on their children's birth certificate. The decision reversed an opinion by the Arkansas Supreme Court that held that although state law generally required a mother's male spouse to appear on a child's birth certificate, the rule need not extend to similarly situated same-sex couples. This had the effect of preventing a parent from being listed on their child's birth certificate based on sexual orientation. Under the Arkansas Supreme Court's rationale, female spouses of women who gave birth in Arkansas would not be included on the child's birth certificate. The Court rejected that view without oral argument, confirming that the landmark case *Obergefell v. Hodges* protects all rights relating to marriage. Justices Gorsuch, Thomas, and Alito dissented.

***Sessions v. Morales-Santana*, Docket No. 15-1191**

Justice Ginsburg, in an opinion joined by five other justices, rejected gender-based distinctions in America's citizenship laws. The Immigration and Nationality Act made it easier for children born abroad to an unwed U.S.-citizen mother to achieve citizenship than for children born abroad to a similarly situated father. Describing the gender-based discrimination as "stunningly anachronistic" and perpetrating unfair stereotypes against women while disfavoring men who "exercise responsibility for raising their children," the act was held to violate the Fifth Amendment's equal protection clause. Instead of holding that the shorter residency requirements would apply to everyone, however, the Court reasoned that the longer residency requirements would apply, to avoid disadvantaging married U.S.-citizen parents.

***Trinity Lutheran Church of Columbia, Inc. v. Comer*, Docket No. 15-577**

In a 7-2 opinion by Justice Roberts, which drew a dissent from Justices Sotomayor and Ginsburg, the Court held that otherwise publicly available benefits could not be denied to a religious-affiliated organization because of the organization's religious status. The Missouri Department of Natural Resources had a policy of denying grants to religious applicants because of a clause in the Missouri Constitution; and on those grounds, it turned down the church's application for a grant to resurface the playground at its school. In a purportedly narrow holding, the Court made clear that this case applied only to express discrimination based on religion with respect to "playground resurfacing" and not other kinds of discrimination. The Missouri Constitution clause prohibiting the state from giving any "aid" to a religious institution in this instance was a violation of the First Amendment's free-exercise clause. Despite the narrowness of the opinion, this case could have important implications for future school-voucher cases.

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**The Oregon Civil Rights Newsletter is
recruiting new members for its editorial board.**

If you are interested in serving as a board member,
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