

Oregon  
State  
Bar

CLE  
Seminars

# Labor and Employment Boot Camp, Day 3



*Cosponsored by the  
Labor and Employment Section*

Thursday, September 30, 2021  
9 a.m.–3:15 p.m.

5 General CLE credits (ID 81713)

## LABOR AND EMPLOYMENT BOOT CAMP, DAY 3

### SECTION PLANNERS

**Stephen Brischetto**, *Law Offices of Stephen L. Brischetto, Portland*  
**Scott Hunt**, *Busse & Hunt LLP, Portland*  
**Daemie Kim**, *Attorney at Law, Salem*  
**Elizabeth Semler**, *Bob's Red Mill Natural Foods Inc., Milwaukie*  
**Maria Witt**, *Stutheit Kalin LLC, Portland*

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— Amanda Gamblin, <i>Schwabe Williamson &amp; Wyatt PC, Portland, Oregon</i>	
— Heather Kmetz, <i>Sussman Shank LLP, Portland, Oregon</i>	



## SCHEDULE

### Practical Skills/Resolving Cases Through ADR

**9:00 Discovery in Labor and Employment Law**

Ashley Marton, *Crispin Marton & Cambreleng, Portland*

Haley Morrison, *Tonkon Torp LLP, Portland*

**10:00 Transition**

**10:05 Mediation/ADR**

Lisa Amato, *Amato Mediation, Portland*

Sally LaJoie, *LaJoie Mediation and Consulting, Portland*

**11:05 Break**

**11:15 Employment Agreements, Noncompetition, Nonsolicitation, and Trade Secrets**

Laura Salerno Owens, *Markowitz Herbold PC, Portland*

Jim W. Vogele, *Attorney at Law, Portland*

**12:45 Lunch**

**1:45 Agreements at Termination, Severance Agreements, Settlement Agreements and Taxation**

Angela Ferrer, *Buchanan Angeli Altschul & Sullivan LLP, Portland*

Amanda Gamblin, *Schwabe Williamson & Wyatt PC, Portland*

Heather Kmetz, *Sussman Shank LLP, Portland*

**3:15 Adjourn**



## FACULTY

**Lisa Amato**, *Amato Mediation, Portland*. Ms. Amato mediates in the areas of civil rights, employment, professional negligence, real estate, business, and estate/probate. Prior to becoming a full-time mediator, she maintained a civil trial practice and tried cases to verdict in state and federal courts in Oregon and Washington. She is a Fellow in the International Academy of Mediators and a member of the National Academy of Distinguished Neutrals. Ms. Amato is a lecturer on mediation and negotiation and is an Adjunct Professor at Pepperdine University Caruso School of Law.

**Angela Ferrer**, *Buchanan Angeli Altschul & Sullivan LLP, Portland*. Ms. Ferrer focuses on both employment litigation and providing advice and counsel to individuals and employers alike. She is an active member of the Multnomah Bar Association and serves on the Oregon Chapter of the Federal Bar Association board.

**Amanda Gamblin**, *Schwabe Williamson & Wyatt PC, Portland*. Ms. Gamblin advises construction and maritime clients on employment issues. She has tried many large, complex cases where companies are significantly exposed, including labor disputes and class actions such as wage and hour, race discrimination, and Title III Americans with Disabilities Act cases. She supports clients in a wide range of labor concerns, from contesting unfair labor practices to counseling employers of all sizes on organized labor issues, including union organizing activities, representation elections, union contracts, arbitrations, and lawsuits. She also helps companies with nonsolicitation and noncompete agreements, as well as bonus and retention programs. Ms. Gamblin is admitted to practice in both Oregon and Washington.

**Heather Kmetz**, *Sussman Shank LLP, Portland*. Ms. Kmetz's business and tax practice is focused on estate and wealth preservation planning, business succession planning, U.S. tax and information reporting for foreign accounts, trusts, and entities, trust and estate administration, nonprofit organizations law, and corporate and partnership law. She is a member of the American Bar Association Taxation Section, the Multnomah Bar Association, and the Oregon State Bar Business Law Section, Estate Planning and Administration Section, and Taxation Section. Ms. Kmetz has authored several articles and is an active lecturer. She is admitted to practice in Oregon and Washington.

**Sally LaJoie**, *LaJoie Mediation and Consulting, Portland*. Ms. LaJoie is a mediator and arbitrator in private practice working in labor and employment law in Oregon. In addition to mediation, she also provides preventative services, including training, facilitation, and communication skill-building. She currently works with Multnomah County supporting labor relations and human resources. Ms. LaJoie began her private mediation practice after serving as a mediator for the Oregon Employment Relations Board. As one of three mediators for the board, she assisted public employers and employee organizations throughout Oregon to resolve disputes and mediated over 100 cases. Those mediations included resolving collective bargaining disputes, grievances under collective bargaining agreements, unfair labor practice cases, and civil service appeals. She also conducted joint trainings and facilitation services for labor and management representatives for improved negotiations.

**Ashley Marton**, *Crispin Marton & Cambreleng, Portland*. Ms. Marton exclusively represents public and private employees facing workplace discrimination, harassment, and retaliation, including employees who have been subjected to sexual or race harassment, whistleblowing retaliation, disability discrimination, denial of reasonable accommodations, unlawful retaliation, and denial of wages and benefits. She also represents clients in disputes arising from employment agreements, arbitration agreements, and restrictive covenants including not to compete. Ms. Marton is cochair of the Oregon Trial Lawyers Association (OTLA) Employment Section, is a member of the OTLA Membership Section and New Lawyers Section, and serves on the OTLA Legislative Leadership Committee. She is an active member of Oregon Women Lawyers and the Multnomah Bar Association. She has authored articles in *Arizona Attorney* magazine and coauthored the "Whistleblowing" chapter in the *Arizona Employment Law Handbook*.

## FACULTY (Continued)

**Haley Morrison**, *Tonkon Torp LLP, Portland*. Ms. Morrison counsels employers on a wide variety of matters, with a particular focus on employment litigation, in both single-plaintiff and class-action contexts. She conducts comprehensive employment practice diagnostics for national and global companies, as well as workforce exempt classification reviews. She also provides advice on discrete issues in countless employment-related contexts. Ms. Morrison is a member of the American Bar Association, the Multnomah Bar Association, the San Diego County Bar Association, and the Los Angeles County Bar Association. She is admitted to practice in Oregon and California.

**Laura Salerno Owens**, *Markowitz Herbold PC, Portland*. Ms. Salerno Owens is the president of Markowitz Herbold and chair of the firm's Employment Practice Group, where she has represented employers and executives in hundreds of high-stakes employment issues. She also practices general business litigation and is a member of the firm's Bet-the-Company Practice Group. Ms. Salerno Owens is widely recognized as a thought leader in the business and legal community.

**Jim W. Vogele**, *Attorney at Law, Portland*. Mr. Vogele has spent most of his legal career representing employees in a wide variety of employment law matters, including wage and hour class actions, sexual harassment and discrimination cases, family leave, and contract matters. He also frequently assists other attorneys with trial and pretrial litigation. Mr. Vogele is an active member of the Oregon, California, and Montana bars.



## Chapter 1

# Presentation Slides: Discovery in Employment Law

**ASHLEY MARTON**

Crispin Marton & Cambreleng  
Portland, Oregon

**HALEY MORRISON**

Tonkon Torp LLP  
Portland, Oregon



# DISCOVERY

## in employment law

OSB Boot Camp 2021

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## AGENDA

- State Court Discovery
  - RFP
  - RFA
  - Depositions
- Federal Court Discovery
  - State +
  - ROG
  - Expert

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# PERSONNEL RECORDS

## Personnel Files – ORS 652.750

- Employee entitled to records used to determine qualifications for employment decisions (promotion, discipline, comp)
- Time and pay records (paystubs)
- Does not require RFP
- Does not require litigation

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# LITIGATION HOLD MEMO

## Speaking of pre-litigation...

- Litigation hold memo
- Timing
- Purpose
- Scope
- Best if **not** privileged

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## REQUEST FOR PRODUCTION

- ORS 43 & 36B:
  - Parties may inquire regarding **any matter**, not privileged, that is **relevant** to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, **documents**, or other tangible things, and the identity and location of **persons** having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears **reasonably calculated** to lead to the discovery of admissible evidence.
- Very broad, but not limitless

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## REQUESTS FOR PRODUCTION

Typically relates to:

- Parties
- Third parties/non-parties – e.g., supervisors, colleagues
- Comparative evidence
- Emotional/mental state
- Policies
- Damages/mitigation efforts

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## REQUESTS FOR PRODUCTION

- Appropriate objections
  - E.g., scope, relevance, burden, privacy, privilege, work product, breadth
- Produce or withhold
- Meet & confer
- Motion to compel

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## REQUESTS FOR PRODUCTION

- Inspection
  - Person or thing (e.g., computer)
- ESI
  - Collection
  - Culling – deduping, search terms
  - Metadata
  - Other resources – vendors, predictive coding

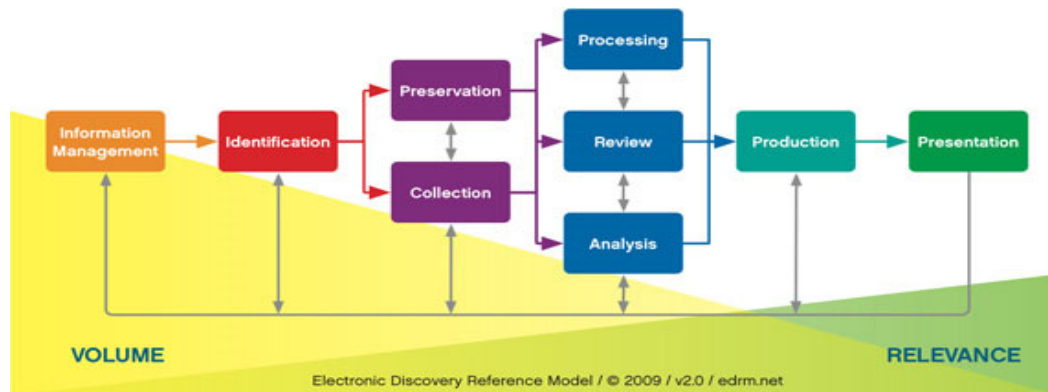
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# EDRM

## Electronic Discovery Reference Model



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# COMMON RFP ISSUES

- Texts, social media
- Internal investigations
- Work product
- Bates labeling and document management
- Protective orders

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## REQUESTS FOR ADMISSION

- Purpose
- When and why most often utilized
- Consequences for failure to timely respond

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## DEPOSITIONS

- Plaintiff(s)
- Defendant(s) (often via decision-maker/manager)
- Witnesses
- PMQ/PMK
- Class representative(s)
- Fed – experts

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# DEPOSITIONS

- Prepping witnesses
- Court reporter/video
- Attendees
- Admonitions
- Purpose/scope
- Proper objections

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# FEDERAL & LR26-7

- Federal Rules
  - R16 conference
  - R26(f) conference
  - Initial disclosures
- Local Rule 26-7
  - Disclosures **and** production for employment cases

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# QUESTIONS?

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## Chapter 2A

# Presentation Slides: Labor Mediation

**SALLY LAJOIE**

LaJoie Mediation and Consulting  
Portland, Oregon



# Labor Mediation

## 2021 OSB Labor and Employment Law Section

LABOR AND  
EMPLOYMENT BOOT  
CAMP

SEPTEMBER 30TH,  
10:05-11:05

Sally LaJoie  
LaJoie Mediation,  
Arbitration and Consulting



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## GOALS OF PRESENTATION

- When is mediation used? Labor Mediation – Public and Private Sector
- How does mediation work? Procedural Issues
- What works? What doesn't? Tips



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## LABOR MEDIATION DISTINCTIONS

How it differs from litigated cases or single-issue mediation

- Relationships are ongoing, more like workplace mediation
- Long term costs can be undervalued
- Multiple and disconnected subjects
- Lack of cohesion within a party, union structure often more dispersed than top-down

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## PUBLIC VERSUS PRIVATE SECTOR

Public is highly regulated by the PECBA

- Mediation is mandatory, administered by the Employment Relations Board (ERB) Conciliation Services
- Parties pay for mediation

Private administered by the Federal Mediation and Conciliation Service (FMCS)

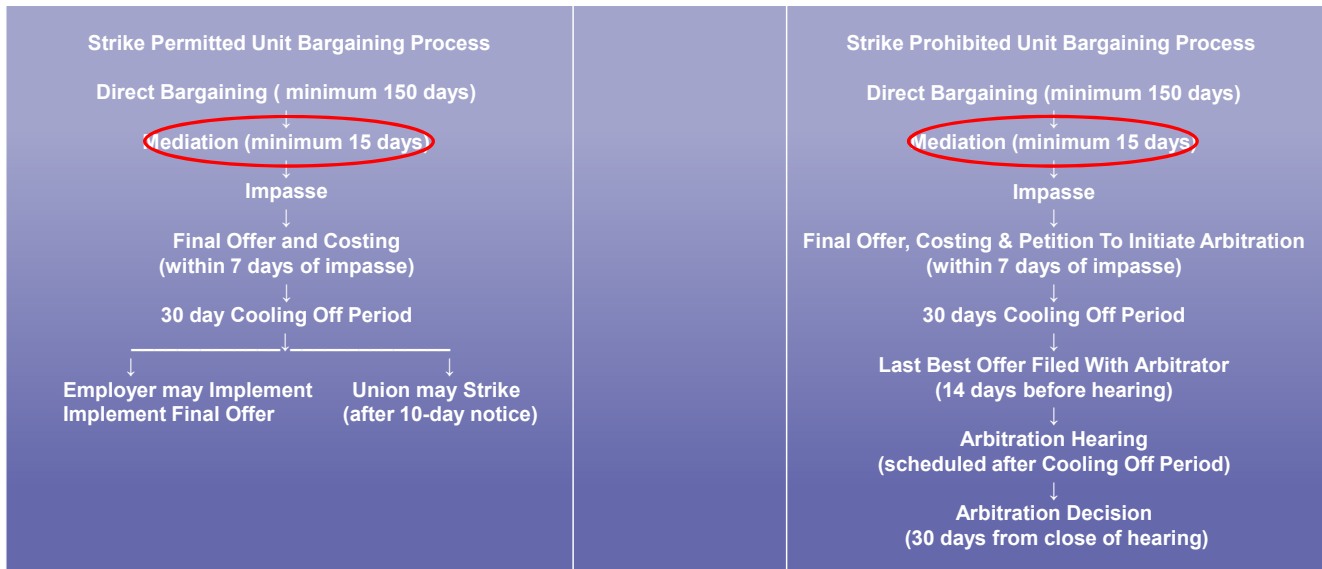
- Voluntary
- Free

*Both FMCS and ERB also offer grievance, Unfair Labor Practice Mediations, additional trainings on better bargaining and Labor Management Committees, and facilitation (see, slide #19)*

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# PUBLIC SECTOR PROCESS



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# BASIC BARGAINING TIMELINES

When a public agency and a certified employee organization fail to agree to a collective bargaining agreement after 150 days of bargaining, the Public Employee Collective Bargaining Act (PECBA), per [ORS 243.712](#), allows **either party** to submit a list of unresolved issues to the State Conciliator. The State Conciliator assigns a mediator to assist the parties in the bargaining process. The parties can continue to bargain past the 150 days if they choose, and often do. But mutual agreement is not required to move to mediation after the 150 days.

- Parties can mutually request mediation before the 150 days have expired.
- Examples: strike barred may move more quickly where they know won't reach agreement and intend to move to IA anyway, or benefits need to be resolved sooner.

Mediators cannot impose a settlement; the agreement is voluntary. But they will work with the parties for an agreement, generally their role is to support the PECBA, the peaceful resolution of disputes, and ensuring meaningful communication between labor organizations and employees to increase the effectiveness of public employees' work performance. ORS 243.656.

If no settlement:

Strike Prohibited:

- PECBA provides for contract resolution through binding interest arbitration for strike-prohibited bargaining units (e.g. police, fire, 9-1-1, correctional facility employees, parole and probation, transit or bus system employees, and deputy district attorneys). The arbitrator's decision becomes the parties' contract.

Strike Permitted:

- All other public organizations and unions ("strike permitted" bargaining units) have the option to proceed with a declaration of impasse, final offer - cost summary process. If, after this process, parties do not reach agreement, the public agency may implement its final offer and the labor organization may strike.

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## BARGAINING TIMELINE

- If the parties have not reached an agreement within 15 days of the first mediation session, the parties may either continue in mediation or either party may declare an impasse (ORS 243.712(2)).
- A party declares an impasse by filing a written notice of declaration of impasse with ERB and submitting a copy of the notice to the other party on the same day the notice is filed with ERB.
- Within 7 days of the date that the declaration of impasse is filed with ERB, both parties are required to submit their final offers and cost summaries of their offer to the mediator. For strike-prohibited units, the parties must also include a petition to initiate binding arbitration with the final offer.
- After the mediator receives the final offers and cost summaries, the mediator makes them public. A 30-day “cooling off” period follows the publication of the final offer. The purpose of this time is to allow for further attempts to resolve the dispute before the parties exercise their self-help measures.

Mediation is Ongoing: The State Conciliation Service continues to assist the parties in reaching a final agreement at all times prior to interest arbitration, impasse, implementation, or strike. does occur, ERB continues mediations until a resolution is achieved.

Outcomes: Over ninety percent (90%) of PECBA contract negotiation cases referred to mediation are settled prior to interest arbitration or strike. Less than 1% of these cases result in strike.

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## MEDIATION PROCESS – PARTIES HAVE BARGAINED FOR MINIMUM OF 150 DAYS, EITHER PARTY MAY REQUEST MEDIATION, WHAT IS NEXT?

Making the Request:

- Online forms at the ERB – strike barred/permitted, preferred dates, contact information, location
- ERB (unlike FMCS/private sector) charges for mediation. Mandatory to mediate for at least 15 days, if the parties do not reach an agreement and want to move to the next phase (impasse, implementation/strike or IA)

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## ASSIGNING A MEDIATOR

### Who are the mediators, backgrounds:

- Experience in collective bargaining
- Often former union business agents, sometimes lawyers, all experienced mediators
- 3 ERB mediators in Oregon, including the State Conciliator who also mediates
- How assigned: the Conciliator makes assignments based on caseload, and other considerations

### Role in the process:

- Process Assistance / Development
- Clarifying Interests
- Neutral
- Cannot force a settlement
- Confidential

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## SCHEDULING / LOGISTICS

- Mediations take place at mutually agreed location (*pre-Covid, presently all remain virtual*)
- Sometimes rotate depending on space available (union / management)
  - Space often a premium as a minimum of three rooms are needed
  - ERB may host mediations in Salem at the ERB.
- Number of Sessions / Dates
  - Sometimes parties request multiple dates, specific mediator
  - Generally one date provided, subject to Conciliator's judgment, same re: specific mediator requests.

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## SCHEDULING / LOGISTICS



- Time: often cases are scheduled after hours, e.g., schools, and may start after 4:00, can go late.
- Multiple Rooms Needed:
  - Mediator room to give parties space to meet separately
  - Parties' rooms (2)
  - Room large enough for a joint meeting
  - Breakout or sidebar room

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## PROCESS ON MEDIATION DAY

- Mediation is flexible
- Generally begin in a joint meeting, mediator gives opening remarks, and information about the process (proposals, logistics, confidentiality, neutrality/role) and answers questions
- Sometimes parties remain in joint session, other times mostly shuttling
- Caucuses: helpful to have mediator there at times, helps understand the interests and other dynamics

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## WHO SHOULD ATTEND

- Consistency – introduction of new attendees late in process can slow the process, at times helpful to have new ideas
  - Operations
  - Data
  - Finance / budget
- Mediator will always disclose who is in the room, no secrets with other party, process essential
- Observers (non bargaining team members):
  - Often union: transparency, training, process
  - Balance of functionality with benefits and the union's mission
  - Tell mediator if you plan to do this, they can let management know, help introduce concept
  - In general, a mediator will not present other party's message with non bargaining team members present, will ask them to step out, then they can caucus and discuss

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## PREPARATION

- Pre-mediation call or meeting with mediator
  - Free, not required, but valuable
  - Tell them where they can help
  - Written materials: fine to give them all proposals, but context helpful
  - Mediation briefs / memos rare but helpful
- Narrow issues, prioritize
- Prepare your team:
  - What to expect, mediator's role
  - BATNA
  - Pace, patience
  - Get the right people there: finance / budget, data, operations or available to run numbers or answer questions. And deciders.
- Proposals, be ready when day starts. If cannot meet with your team before mediation and need to start with caucus, tell mediator and other party in advance.

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## MEDIATOR'S ROLE AT MEDIATION

- Help identify data issues, small groups or joint to present
- Clarify, organize, bundle
- Have groups working on different issues (running costing, comparing other options)
- Help facilitate conversations, understand interests behind proposal - rather than “no”
- Coordinate breakouts, sidebars and small group meetings

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- Help keep focuses on issues, not the people / conflict
- Parties – try and stay in joint session where possible, more efficient complex or technical topics not effective for shuttling
- Don't try and “convince the mediator” of the righteousness of your position. They understand, they will communicate your interests, but they must be neutral and excessive “advocacy” will alienate the other party and raise concerns.

## MEDIATION TIPS



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# PROPOSALS

- Clarify with mediator how proposals are handled
- Generally most are “mediation proposals” similar to “what ifs” or “supposals” and do not officially advance the party’s position should it move to final offers.
  - Purpose is to encourage flexibility, creativity, and keep process moving
  - No need to write up every proposal, if just floating ideas
  - Insisting on writing out all proposals slows process. Language once written, if rejected has a different impact
- If a party wants to make an official bargaining proposal, put it in writing and mark it as such

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# LITTLE THINGS THAT HAVE AN IMPACT

Food, scheduled breaks, electronics / distractions

- Mediator will try and coordinate meals – one party working on a counter while the other breaks for a meal, meeting, etc.
- Have food, snacks available
- Mediator cannot accept food, drinks, unless also offered to other party (appearance)
- If possible, coordinate meals jointly, party hosting offers to order in and split cost, brings in easy rapport.
- Paying attention, hard to keep team focused when tired, try to limit electronics, people miss information, slows process.



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## ERB MEDIATORS OFFER ADDITIONAL MEDIATION / SERVICES

- ULPs
- Grievances (unless required by CBA)
- State Personnel Relations Law (SPRL)
- Interest Based Bargaining (IBB)
- Training: IBB, Labor Management Committees
- Facilitation

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## PRIVATE SECTOR

- Mediation for private sector generally handled by FMCS.
- NLRA. 29 USC Sec. 158(d)(NLRA Sec 8d), requires a party to serve written notice on other party at least 60 days before agreement expires, and notify FMCS within 30 days after such notice of the existence of a dispute. (dates are 60 and 90 days for healthcare institutions).
- 10 days' written notice for intent to strike, picket for healthcare employers. 29 USC 158 (g) (NLRA Sec 8(g)).
- FMCS has a form (F-7, *Notice of Bargaining*), to give notice about a bargaining dispute. The form is on the FMCS website.
- Regardless, the FMCS mediator (formally titled Commissioners), will contact both labor parties and management parties after the F-7 form is filed. They will track the bargaining but not be involved except **upon mutual request**.
- **Free**, no charge for mediation

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## PRIVATE SECTOR

- When to request mediation?
  - Almost to LBOs
  - No longer effective meeting to negotiate
  - Parties are “done” meeting
  - Generally issues are narrowed to most important, typically economics, with a few non economics
- Logistics: making the request
- Assigning the mediator, who they are
- Location: all virtual currently, otherwise the same process as public sector

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## CLOSING THE DEAL / FINAL TENTATIVE AGREEMENT

- When all agreements have been finalized, each separate article is marked “TA” and parties sign and date (including time)
- Could also be part of a larger package, a list of smaller agreements referencing which offers were included in the final agreement
- Mediator brings parties together to conclude:
  - Reviews all TA's to ensure clarity / agreement
  - Discusses the ratification process, notification of results, any issues with implementation if ratified, who will create a redline / final document
  - Durability



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QUESTIONS?

THANK YOU!





# Chapter 2B

## Mediation/ADR

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### MEDIATION ADVOCACY: WHEN AND HOW TO EFFECTIVELY MEDIATE A CASE TO CONCLUSION

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*Every negotiation contains an inherent tension between competing and collaborating.*

Mediation advocacy is distinctly different than trial advocacy or arbitration advocacy.

Five occasions in the mediation process that can be utilized to increase favorable settlement terms for your client.

1. Deciding When to Mediate
2. Choosing the Right Mediator
3. Preparing for the Mediation
4. Capitalizing on the First Caucus of the Day
5. Working with the Mediator

#### **DECIDING WHEN TO MEDIATE**

1. Educate your clients about dispute resolution options.
3. Be aware of how your own interests may impact your objectivity about choice of timing, mediator selection, and the mediation process.
4. Look for an optimal time to mediate.
  - a. Experience shows that the optimal time for a mediated settlement occurs as soon as each party has sufficient information to evaluate the case.
  - b. Outside the box considerations on timing.
    - i. Consider very early mediation in cases that require very little discovery.
    - ii. Engage in limited-scope mediation focused on specific issues.
    - iii. Conduct mediation as a series of sessions rather than a one-day event.
    - iv. Conduct pre-session meetings, in person or by phone, between mediator and counsel (or between mediator, counsel and client).



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**CHOOSING THE RIGHT MEDIATOR** Choose Carefully. Mediators have different styles, characteristics, skills and focus. Not any mediator is a good, let alone the best, choice for your case.

1. Consider the importance of subject matter expertise vs. negotiation expertise.
2. Some questions to ask yourself:
  - What styles and techniques does the mediator use, and do those techniques lend themselves to achieving the goals you have identified?
  - Is the mediator someone to whom you and your client will be able to relate? Is the other side likely to relate to the mediator when he or she presents your proposals to them?
  - If the mediator is someone you have used before, do you trust him or her enough to disclose potential weaknesses in your case, knowing that he or she will work hard to help you prioritize and achieve your goals?
  - What do you like/dislike about the mediator's style, and how likely is it that each of those pros and cons will affect the outcome of the case?
  - If the mediator is someone you have never worked with, is the mediator willing to speak to you to allow you to determine whether he or she is a good fit for your case?
  - When talking with peers who recommend a mediator, ask "What about this mediator do you like so much?"

**PREPARING FOR THE MEDIATION** Prepare as you would for trial – this may well be your client's day in court.

1. Be prepared on the facts. Complete sufficient discovery so you can **appreciate** the opposition's perspective.
2. Be prepared on the law. Know the rules of the jurisdiction.
3. Outline and evaluate issues of liability and damages.
4. Evaluate client's position on key issues. "must have issues" and "issues that can be let go"
5. Analyze the dispute (not the legal case).
  - a. Identify your client's underlying interests.
  - b. Identify the other parties' underlying interests.
  - c. List all possible options for settlement; be innovative. Focus on interests, not positions.



- d. Identify any impediments to overcome (e.g. party relationship, values, or interests).
- e. Identify how you want the mediator to contribute to resolving the dispute.
6. Prepare your client for mediation.
  - a. Explain the mediation process and your client’s role in the process.
  - b. Explain how your role at mediation is different than in court.
  - c. Re-interview your client.
  - d. Review strengths and weaknesses with your client.
    - i. BATNA: Best Alternative to a Negotiated Agreement.
    - ii. WATNA: Worst Alternative to a Negotiated Agreement.
    - iii. MLATNA: Most Likely Alternative to a Negotiated Agreement.
  - e. Review strengths and weakness for the opposing parties.
7. Identify your and your client’s goals coming out of the mediation?
8. Consider whether you need to gather any information or file motions before the mediation session.
9. Decide who should attend the mediation session.
10. Consider the level of confidentiality that you need.
11. Set any conditions that must be met prior to mediation, such as discovery requests.

### **Briefs/Submissions**

1. Mediator will generally have policy on exchanging brief or confidential briefs. If mediator lets parties choose, choose both.
2. Remember, ex parte communication in mediation is encouraged.
3. When preparing the brief/submission.
  - a. Remember mediator is new to the case.
  - b. Chronology is important for mediators.
  - d. Negotiation history is important.
  - d. Avoid repetition.
  - e. Draft a clear, concise liability argument and damage assessment.
4. If in litigation, identify important future deadlines and dates.



**CAPITALIZING ON THE JOINT SESSION AND FIRST CAUCUS OF THE DAY**

1. If there is a joint session, the mediator will likely have guidelines; if not, work with the mediator to shape the joint session guidelines and expectations.
  - a. Create the negotiating climate by openly recognizing the dispute and disparate views of what happened leading to litigation.
  - b. Express desire and willingness to find resolution.
  - c. Take the opportunity to state the issues in the case and summarize the facts, highlighting information which supports your case.
  - d. Be courteous yet firm, rather than argumentative.
2. How you can best open the mediation during the first caucus of the day.
  - a. Set the tone you think will be most effective that day.
  - b. Identify your client's mediation goals, and be as specific as possible.
  - c. Address the mediator congruent with the mediator's style.
  - d. Identify the key points – the headlines.
  - e. Explain any new developments since you last spoke to the mediator.
3. Throughout the mediation session as you firmly press for your client's goals, continue to do the following.
  - a. Consider how you address and refer to your opposing counsel and client.
  - b. Empathize with those who deserve it.
  - c. Create the negotiating climate by openly recognizing the other sides' interests and needs.
  - d. Relate to the opposing party, if you can find a common ground.
  - e. Build momentum by finding and speaking to areas where the parties agree.
  - f. Let your client tell as much of their story as possible.
  - g. Find what the other side values and deliver as much value in their terms as possible.
  - h. Be patient with the process.

**WORKING WITH THE MEDIATOR**

1. The mediator should be your ally at all stages of the process, with the singular goal of trying to assist you in achieving a resolution that is acceptable to all parties.



2. Your “style” of negotiation plays an important role in the dynamics and success at mediation.
  - a. Five styles of negotiation: (competing; accommodating; compromising; collaborative; avoidance)
  - b. It is important to examine how your style can be adapted to best fit the specific case.
3. Differences are fundamental to conflict, and those differences are what brought the parties to mediation.
  - a. The mediator works with the parties’ interests to find compatibility and strengthens compatibility the parties have already identified.
  - b. The mediator assists the parties in various ways to move away from difference to greater compatibility.
  - c. Attacks, blame, and argument highlight differences, and encouraging these forms of communication does not usually lead to settlement.
4. Distributive and Integrative Negotiation
  - a. Distributive Negotiation (when it’s about dividing the pie). Generally considered competitive, and zero sum
    - i. Use the predictability of the process.
    - ii. Matching moves to stay at a mid-point.
    - iii. Moving the mid-point in your direction with each successive move.
    - iv. Play the player, not the cards.
    - v. Your first 5 moves don’t count – learn from them.
  - b. Integrative Negotiation (when it’s about growing the pie). Generally considered collaborative, and win-win.
    - i. Use the creativity of the process to brainstorm.
    - ii. Ask questions to learn.
    - iii. Target the problem, not the other person.
    - iv. Think outside of the box.
    - v. Match your offers to their underlying interests.
  - c. It is most effective to use Integrative Negotiation or a combination of both.







**RESOURCES**

OSB Bar Book, ADR in Oregon revised 2019

Oregon Department of Justice, Appropriate Dispute Resolution

[www.doj.state.or.us/oregon-department-of-justice/client-resources/appropriate-dispute-resolution](http://www.doj.state.or.us/oregon-department-of-justice/client-resources/appropriate-dispute-resolution)

Dwight Golann. 1996. Mediating Legal Disputes: Effective Strategies for Neutral and Advocates

Harold I. Abramson. 2004. Mediation Representation: Advocating in a Problem-Solving Process

William Ury. 2015. Getting to Yes with Yourself (And other Worthy Opponents)

William Ury . 1991. Getting Past No: Negotiating with Difficult People





OSB Labor and Employment Boot Camp  
September 2021

Mediation/ADR

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Agenda

Overview of ADR

ADR and Why it Matters

Forms of ADR

Mediation

Voluntary Mediation

Labor Mediation

Q & A



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# Overview of ADR

ADR and Why it Matters

Forms of ADR



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# Overview of ADR

## ADR – and Why it Matters

ADR - Appropriate Dispute Resolution or Alternative Dispute Resolution

ADR is a continuum of dispute resolution opportunities



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## Overview of ADR

### Forms of ADR

#### Common Forms

Negotiation / Settlement Discussions  
Early Neutral Evaluation  
Arbitration  
(private and court annexed)  
Mediation  
(voluntary/court mandated and labor)  
Settlement Conferences  
Litigation

#### Less Common Forms

Mini Trial / Summary Trial  
Reference Judges  
Referees  
Panel Case Evaluations  
Any Creative Options Counsel May Devise



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## Mediation

Voluntary Mediation

Labor Mediation



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## Voluntary Mediation

There are Consistent Elements of Mediation

Path to Achieve Your Client's Goals

The "After-Mediation"



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## Consistent Elements of Mediation

Voluntary

Confidential (private v. public entity)

What are the Rules?



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# The Path to Achieve Your Client's Goals is through Strategic Preparation



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## Strategic Preparation

- ✓ Timing
- ✓ Mediator Selection
- ✓ Process Design
- ✓ Prepare Yourself, Prepare your Client
- ✓ Written Mediation Advocacy and Phone Call with Mediator
- ✓ Offer/Concession Strategies
- ✓ Working with the Mediator
- ✓ Listen and Take Notes



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## The After-Mediation

Settled and Agreement Signed? Keep track of the closing details

Still Unresolved?

Use what you learned to strategize with your client

When there is another window for continued settlement discussions consider other forms of ADR or reconnect with the mediator



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## Resources Handout

OSB Bar Book, ADR in Oregon revised 2019

Oregon Department of Justice, Appropriate Dispute Resolution

[www.doj.state.or.us/oregon-department-of-justice/client-resources/appropriate-dispute-resolution](http://www.doj.state.or.us/oregon-department-of-justice/client-resources/appropriate-dispute-resolution)

Dwight Golann. 1996. Mediating Legal Disputes: Effective Strategies for Neutral and Advocates

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# Chapter 3A

## Employment Contracts

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## I. ALL EMPLOYMENT IS CONTRACTUAL

### State Law

“The basis of the employee-employer relationship remains a contractual one . . . .” *Leonard v. Arrow-Tualatin* 76 Or App 120 (1985) (citing *Nordling v. Johnston*, 205 Or 315 (1955)).

### Federal Law

As stated above, the government's sole argument in the court below and in this court is that the relation between government and soldier is that of master and servant, or, at least, a relation analogous thereto. The right of a master to sue for the loss of services of his servant is an old remedy at common law. The action appears to have arisen when the basis of society was that of 'status' and when there was no procedure in the King's courts for enforcing a simple contract. In that early day, the servant was looked upon as a member of the master's family, and, thus, the action was similar to writs of trespass for injury to a wife or child, or for debauching a wife, daughter, or female servant. See Admiralty Commissioners v. S.S. Amerika, (1917) A.C. 38, 44, 45, 54 et seq.; Holdsworth, History of English Law, v. 8, p. 429; Wigmore, Interference with Social Relations, 21 Am.L.Rev. 764, 765-769; Green, Relational Interests, 29 Ill.Law.Rev. 460, 1041, 1042.

Today the master-servant relation is generally based on contract.

*Standard Oil Co. of Cal. v. United States*, 153 F2d 958, 960 (9th Cir 1946), *aff'd*, 332 US 301 (1947)

## II. EXPRESS WRITTEN/ORAL AND IMPLIED CONTRACTS

Employment contracts are generally governed by the same rules of contract interpretation as apply to other contracts. *See Fleming v. Kids and Kin Head Start*, 71 Or App 718 (1985).

Employment contracts may be either **written or oral express contracts**, or **implied contracts**, which are created by conduct between the parties.

## III. IMPLIED CONTRACT DOCTRINE

For an interesting discussion and example of how the implied contract doctrine expanded, then contracted in the employment law context in California, which parallels developments in other jurisdictions, *see* “The Inevitable Demise of the Implied Employment Contract,” Fineman, J., *Berkeley Journal of Employment and Labor Law* (2008).

## IV. CONTRACTS ARISING IN EMPLOYMENT

- Employment Contracts
- Offer letters
- Handbooks
- Policies

- Commission Agreements
- Option Agreements
- Shareholder Agreements (e.g. partnership agreements etc. Note that for purposes of Title VII, shareholders are employees)
- Arbitration Agreements<sup>1</sup>
- Indemnification Clauses
- Loan Agreements
- Severance Agreements (addressed later today, Sept. 30, 2021)
- Collective Bargaining Agreement
- Independent Contractor Agreements

### **Restrictive Covenants (see *Laura Salerno Owens*)**

---

<sup>1</sup> “The district court properly determined that the cost-sharing provision was substantively unconscionable. The provision required Capili, a retail employee making \$15 per hour, to pay up to \$10,000 at the outset of arbitration, not including the fees and costs for legal representation. . . . the cost-sharing provision here imposes substantial non-recoverable costs on low-level employees just to get in the door, effectively foreclosing vindication of employees’ rights.” *Capili v. Finish Line, Inc.*, 699 Fed Appx 620, 622 (9th Cir. 2017).

[S]ection 2 of the FAA “establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on ‘generally applicable contract defenses’ like fraud or unconscionability, but not on legal rules that ‘apply only to arbitration . . . . Specifically, the FAA preempts state laws that create notice requirements that apply only to arbitration provisions, and not to contract provisions in general. *See Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 683, [ ] (1996). [where] the . . . Supreme Court held that the FAA preempted a Montana statute that declared arbitration clauses unenforceable unless notice of the arbitration provision appeared on the first page of the contract in underlined, uppercase letters.” *Id.* at 688, 116 S.Ct. 1652. Like the Montana statute in *Doctor’s Associates, Inc.*, ORS 36.620(5) purports to impose notice requirements “specifically and solely on arbitration provisions.” 517 U.S. at 688, 116 S.Ct. 1652. Accordingly, the FAA preempts that provision, and ORS 36.620(5) provides no basis for invalidating the parties’ arbitration agreement.”

*Lumm v. CC Servs., Inc.*, 290 Or App 39, 44–45 (2018).

- Confidentiality Agreements
- Non-disclosure Agreements
- Invention Assignments
- Noncompetition/nonsolicitation and other Restrictive Covenants

## V. **CONTRACT FORMATION**

*Gaswint v. Case*, 265 Or. 248, 254 (1973) (“The letter agreement did, however, set forth the usual elements of an employment agreement in that it stated the term of employment, the amount of compensation, the place of employment, the type of employment, and a general description of the duties to be performed in that it was stated that plaintiff was to be employed ‘in the capacity of foreman of the corporation's plastics and fiber glass department. . . . Under the facts of this case the trial court did not err in holding that the letter agreement of August 14, 1969, included provisions which constituted a valid and enforceable contract of employment.”

### **Objective Theory of Contracts**

*Arboireau v. Adidas-Salomon*, 347 F.3d 1158, 1163 (9<sup>th</sup> Cir. 2003) (“That undisputed fact is dispositive in precluding the asserted contract claim under Oregon's objective theory of contract. Although there is contested evidence about the Arboireaus' asserted *impression* that Mignano was making a fixed-term offer, their subjective

impression does not bear on the words of Mignano's offer; *see also Arboireau, supra.* re “cultural ignorance” and “mere nondisclosure of material facts can be a form of misrepresentation.”).

Oregon subscribes to the objective theory of contracts. *Kabil Devs. Corp. v. Mignot*, 279 Or. 151, 155–57, 566 P.2d 505, 507–8 (1977) (“objective” theory of contracts operates in Oregon); *Wieck v. Hostetter*, 274 Or.App. 457, 471, 362 P.3d 254, 262 (2015) (“In assessing whether a contract was formed, Oregon applies an objective theory of contracts.”). Under this approach, in “determining whether a contract exists and what its terms are, we examine the parties' objective manifestations of intent, as evidenced by their communications and acts.” *Ken Hood Constr. Co. v. Pac. Coast Constr., Inc.*, 201 Or.App. 568, 578, 120 P.3d 6, 11 (2005), *modified on reconsideration*, 203 Or.App. 768, 126 P.3d 1254 (2006); *see also Wooton v. Viking Distr. Co., Inc.*, 136 Or.App. 56, 59, 899 P.2d 1219, 1222 (1995) (“we examine the parties' objective manifestations of intent, measured by whether a reasonable person would construe a promise from the words and acts of the other.”).

*Glob. Executive Mgmt. Sols., Inc. v. Int'l Bus. Machines Corp.*, 260 F Supp 3d 1345, 1367–68 (D. Or. 2017).

### **Re. “Meeting of the minds”**

We recognize that some commentators consider this phrase “quaintly archaic.” *See* Bryan A. Garner, *Garner's Dictionary of Legal Usage* 571 (3d ed. 2011) (quoting Grant Gilmore's *The Death of Contract* 43 (1974)). In fact, Garner calls “meeting of the minds” outmoded as a matter of substantive law because it “denotes a subjective rather than objective theory of contract.” *Id.* But our case law links a meeting of the minds to “objective evidence and not hidden subjective intent.” *See Schaer v. Webster Cnty.*, 644 N.W.2d 327, 338 (Iowa 2002). So we do not shy away from the phrase.

*Forbes v. Benton Cty. Agric. Soc'y*, 2021 WL 1907130, at \*3 (Iowa Ct App 2021).

Promissory estoppel can best be explained as an equitable substitutionary theory that replaces the consideration theory of contract law with a reasonable reliance theory. The exact genesis of the ascendancy of the doctrine of promissory estoppel is difficult to identify but it seems plain it was contributed to mightily by Grant Gilmore's classic claim in his work, *The Death of Contract* (1974) that the

consideration theory or “bargain theory” was largely invented by Samuel Williston, Christopher Langdell, and Oliver Wendall Holmes in the nineteenth century. Gilmore’s history has been disputed by such scholars as Richard E. Speidel, An Essay on the Reported Death and Continued Vitality of Contract, 27 Stanford Law Review, 1161 (1975)(book review).

*Mitchell v. DynCorp Int’l, LLC*, 2012 WL 12860119, at \*9 (D.N.D. 2012).

### **Note Re Unsigned Contracts (Employee Hoping to Evade the Conditions of Your Unsigned Contract, Don’t Get Your Hopes Up)**

When considering whether a contract is enforceable, the fact that a contract is unsigned is not dispositive. “It is equally efficacious if a written contract is prepared by one party and delivered to the other party, and acquiesced in by the latter without objection.” *W.B. Coppersmith & Sons v. Aetna Ins. Co.*, 222 N.C. 14, 21, 21 S.E.2d 838 (1942); see also *Peddler, Inc. v. Rikard*, 266 S.C. 28, 32, 221 S.E.2d 115 (1975).

*Federated Serv. Ins. Co. v. STIHL Inc.*, 2013 WL 1100728, at \*4 (D. Or. 2013).

### **Note re Counter-offers**

In Oregon, it is settled that “[t]he acceptance of an offer ... must ... correspond to the offer at every point, leaving nothing open for future negotiations.” *C.R. Shaw Wholesale Co. v. Hackbarth*, 102 Or. 80, 201 P. 1066, 1067 (1921) (internal quotation marks omitted); see also *Doughty Appliance, Inc. v. White*, 282 Or. 757, 580 P.2d 186, 187 (1978).

...

Even if we were to assume that Mignano did make an offer for fixed-term employment, Oregon’s parol evidence rule bars the admission of evidence of this alleged oral agreement made before the offer letter was signed if that agreement is used to contradict the offer letter. See, e.g., *State ex rel. Cipriano v. Triad Mech., Inc.*, 144 Or.App. 106, 925 P.2d 918 (1996); *Siegner v. Interstate Prod. Credit Ass’n of Spokane*, 109 Or.App. 417, 820 P.2d 20 (1991). The offer letter’s integration clause (“[The letter] is not to be construed as a contract of employment beyond the terms outlined herein”) bars the admission of the alleged



oral contract preceding the written offer letter.

*Arboireau v. Adidas-Salomon AG*, 347 F3d 1158, 1163 (9th Cir. 2003).

## VI. CONTRACT MODIFICATION

A modification of an existing contract requires additional consideration in order for the modification to be binding. *Jole v. Bredbenner*, 95 Or.App. 193, 196, 768 P.2d 433 (1989). Consideration is “the accrual to one party of some right, interest, profit or benefit or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.” *Shelley v. Portland Tug & Barge Co.*, 158 Or. 377, 387, 76 P.2d 477 (1938). Under that definition, “benefit” means that the promisor has, in return for the promise, acquired a legal right to which the promisor would not otherwise be entitled; “detriment” means that the promisee has forborne some legal right that the promisee would otherwise have been entitled to exercise. *Id.* at 388, 76 P.2d 477.

*McPhail v. Milwaukie Lumber Co.*, 165 Or App 596, 600–01 (2000).

### Implied Acceptance

As a matter of law, the promise of an at-will employee to continue in an employer's service for some specified future period of time constitutes consideration for an additional benefit promised by the employer. *See Stuart v. Tektronix, Inc.*, 83 Or.App. 139, 143–44, 730 P.2d 619 (1986) (an at-will employee who continues employment in reliance on a promise of a future salary increase may hold the employer liable for a breach of promise).

*Swenson v. Legacy Health System*, 169 Or App 546, 552–54 (2000).

## VII. CONTRACT INTERPRETATION UNDER OREGON LAW

### **Yogman Three-Step Process**

Under Oregon law, the primary objective for any court interpreting a contract is to give effect to the parties' agreed-upon intentions. *See, e.g., Connall v. Felton*, 225 Or. App. 266, 272, 201 P.3d 219 (2009). Oregon courts have established a three-step process for interpreting contracts. *See Yogman v. Parrott*, 325 Or. 358, 361, 937 P.2d 1019 (1997); *Ross Dress For Less, Inc. v. Makarios-Oregon, LLC*, 210 F. Supp. 3d 1259, 1263 (D. Or. 2016). **First**, a court must determine **whether the relevant contract provision is ambiguous**. *See Apeldyn Corp. v. Eidos, LLC*, 943 F. Supp. 2d 1145, 1149 (D. Or. 2013) (citing *McKay's Mkt. of Coos Bay, Inc. v. Pickett*, 212 Or. App. 7, 12, 157 P.3d 291 (2007)).

After finding that a contractual provision is ambiguous, a court proceeds to the second step in the *Yogman* analysis. **At the second step**, the trier of fact must look beyond the four corners of the agreement to determine the parties' mutual intention, if a mutual and common intention in fact existed. *Id.* “At the second step, **the trier of fact examines extrinsic evidence of the contracting parties' intent and construes the disputed contractual provision consistent with that intent**, if such a resolution can be determined.” *Id.* Oregon follows the objective theory of contracts, and thus relevant evidence at step two may include manifestations of intent, including any expressions of any common understanding communicated by the parties. *Id.* Without direct evidence of the parties' intent, a court also may look to the parties' course of dealing or their performance during the term of the contract as relevant circumstantial, or inferential, evidence of their common understanding, if any, of the ambiguous provision. *See Apeldyn*, 943 F. Supp. 2d at 1149; *Yogman*, 325 Or. at 363-64, 937 P.2d 1019.

Without either direct or circumstantial evidence to aid the trier of fact in determining the parties' intent, or if the contract remains ambiguous even after considering that evidence, **the third step is to apply any relevant maxims of construction**. *Id.* at 364, 937 P.2d 1019. When a contractual provision is ambiguous, determining its meaning at steps two and three of the *Yogman* analysis is generally a question of fact not appropriate for resolution at summary judgment. *Dial Temp. Help Serv., Inc. v. DLF Int'l Seeds, Inc.*, 255 Or. App. 609, 611, 298 P.3d 1234 (2013) (noting the general rule that the

meaning of a contract may be disposed of through summary judgment only if the contract is unambiguous).”

*McKenzie Law Firm, P.A. v. Ruby Receptionists, Inc.*, 501 F Supp 3d 965, 971 (D Or 2020) (emph. added).

## Maxims of Construction Examples

- **See, ORS Title 4, Chapter 42, e.g., 42.240 (intent)** (In the construction of an instrument the intention of the parties is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent shall control a general one that is inconsistent with it.”)
- ***Noscitur a sociis*** – Words are known by the company they keep: *Wayne Land & Mineral Grp. v. Del. River Basin Comm’n*, 894 F.3d 509, 532 (3<sup>rd</sup> Cir. 2018) (“[R]ules of contract interpretation advise us to interpret the meaning of a word by considering the words associated with it.”)
- ***Epressio unius est exclusion alterius*** – when certain matters are mentioned in a contract other similar matters not mentioned were intended to be excluded.
- ***Contra proferentum*** – ambiguities construed against the drafter.

## Statutory Guidance Governing Certain Employment Contracts

**ORS 15.320(3) Oregon law governs certain types of contracts,**

**including:**

“A contract of employment for services to be rendered primarily in Oregon by a resident of Oregon.”

**ORS 20.096(1) reciprocity of attorney’s fees provisions:**

In any action or suit in which a claim is made based on a contract that specifically provides that attorney fees and costs incurred to enforce the provisions of the contract shall be awarded to one of the parties, the party that prevails on the claim shall be entitled to reasonable attorney fees in addition to costs and disbursements, without regard to whether the prevailing party is the party specified in the contract and without regard to whether the prevailing party is a party to the contract.

**ORS 652.360:**

And in furthering a level playing field between employers and employees in matters concerning wage claims, Oregon's wage and hour provisions maintain a unique primacy *vis-à-vis* workplace contracts that might contravene those protections. That is so because ORS 652.360(1) expressly renders those statutes superior to *any contrary means* that an employer might apply to remove itself from the ambit and effect of the wage and hour provisions:

“An employer may not by special contract or *any other means exempt the employer from any provision of or liability or penalty imposed by ORS 652.310 to 652.414 or any statute relating to the payment of wages*, except insofar as the Commissioner of the Bureau of Labor and Industries in writing approves a special contract or other arrangement between the employer and one or more of the employer's employees.”

(Emphasis added.) This court has held that that statutory proscription preventing employers from exempting themselves from “any provision” relating to the payment of wages encompasses, among other things, contract terms that are contrary to those wage provisions. *See Taylor v. Werner Enterprises, Inc.*, 329 Or. 461, 468-69, 988 P.2d 384 (1999) (holding that, under ORS 652.360, where parent company hired long-haul truck driver and wage statutes defined “employer” as one so engaging an employee, the fact that the employment contract expressly identified parent company's wholly-owned subsidiary as truck driver's employer did not exempt parent company from liability for wage claim violation).

*Jones v. Four Corners Rod & Gun Club*, 366 Or 100, 131–32, 456 P3d 616, 633 (2020);

*see also Cordova v. FedEx Ground Package Systems, Inc.*, 104 F.Supp.3d 1119, (D.Or. 2015)

(employers may not “contract away their wage-related obligations” in light of the public policy underlying ORS 652.360, which is applicable to an employer’s legal duties under ORS 652.610).

## VIII. DEFENSES TO CONTRACT ENFORCEMENT

Moreover, a party who seeks to recover damages on a contract must plead and prove its own performance or a valid excuse for its failure to perform. *See Wasserburger v. Amer. Sci. \*\*66 Chem.*, 267 Or. 77, 82, 514 P.2d 1097 (1973). That principle is consistent with *Restatement (Second) of Contracts*, section 237 (1981). With regard to those principles, a material breach of a land sale contract by a party will prevent that party from obtaining strict foreclosure of the contract and excuse the other party's obligation to perform. *Cf. Reeder v. Kay*, 282 Or. 191, 577 P.2d 925 (1978) (holding that an immaterial breach of a land sale contract did not defeat strict foreclosure). Here, plaintiff is not entitled to strict foreclosure of the contract if his failure to repair the plumbing was an unjustified material breach of the parties' agreement.

*Kim v. Park*, 192 Or App 365, 369 (2004), *rev den.*, 338 Or 16 (2005).

### Impossibility

There is a fascinating contradiction inherent in the judicially created impossibility defense which reveals a basic tension in the law. Contracts are born of the need for certainty. They are the merchant's exchange of serendipity for serenity, the deal upon which he can rely, for better or worse, months or years hence. A contract is insurance against change. The early common law enforced the policy by making contractual liability absolute, *see e.g.*, 18 Williston, *The Law of Contracts* § 1939 (3d ed. 1978), on the theory that a contractual duty, unlike a duty imposed by, for example, tort law, is tailored by the party for himself and any eventuality might be provided for in the contract. *Paradine v. Jane*, 82 Eng.Rep. 897 (K.B. 1647).

But change is what impossibility is about. As Professor Gilmore put it, it arises as a defense when “the real world has in some way failed to correspond with the imaginary world hypothesized by the parties to the contract.” G. Gilmore, *The Death of Contract* 81 (1974). By recognizing impossibility as a sort of ‘escape



hatch' from the self-made chamber of contractual duty, the courts have recognized that absolute contractual liability is economically and socially unworkable. Impossibility accommodates the tension between the changes a party bargains to avoid and the changes, unbargained for and radical, that make enforcement of the bargain unwise.

*Cook v. Deltona Corp.*, 753 F.2d 1552, 1557–58 (11th Cir. 1985).

The impracticability<sup>16</sup> doctrine represents an exception to the accepted maxim of *pacta sunt servanda*, in recognition of the fact that certain conditions cannot be met because of unforeseen occurrences. Cf. *Aetna Casualty & Surety Co. v. Murphy*, 206 Conn. 409, 413, 538 A.2d 219 (1988). A party claiming that a supervening event or contingency has prevented, and thus excused, a promised performance must demonstrate that: (1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not assumed a greater obligation than the law imposes. 2 Restatement (Second), Contracts § 261; E. Farnsworth, *Contracts* (1982) § 9.6, p. 678. We discuss only the first two prongs of this test in disposing of the plaintiff's argument.

Although courts in recent years have liberalized the requirements for such an excuse; see G. Gilmore, *The Death of Contract* (1972) pp. 80-81; H. Berman, "Excuse for Nonperformance in Light of Contract Practices in International Trade," 63 *Colum.L.Rev.* 1413, 1414 (1963); only in the most exceptional circumstances have courts concluded that a duty is discharged because additional financial burdens make performance less practical than initially contemplated. See, e.g., *Neal-Cooper \*718 Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 294 (7th Cir.1974) (party not allowed "to escape a bad bargain merely because it is burdensome"); *American Trading & Production Corporation v. Shell International Marine, Ltd.*, 453 F.2d 939, 942 (2d Cir.1972) (closing of Suez Canal requiring charterer to sail nearly twice as many miles at a cost of nearly one-third more than the contract price does not excuse performance); *United States v. Wegematic Corporation*, 360 F.2d 674, 676-77 (2d Cir.1966) (duty of manufacturer to produce revolutionary computer system not excused because of "engineering difficulties" requiring two years and \$1.5 million to correct); *Peerless Casualty Co. v. Weymouth Gardens*, 215 F.2d 362, 364 (1st Cir.1954) (increased costs caused by the unexpected outbreak of war does not constitute superior force ending obligation of contract); *Matter of Westinghouse Electric Corporation*, 517 F.Supp. 440, 452-53 (E.D.Va.1981) (duty to remove spent fuel not excused merely because reprocessing of the fuel became unprofitable . . . .

*Dills v. Town of Enfield*, 210 Conn 705, 717–18, 557 (1989).

### **Contracts That Are Illegal or Against Public Policy**

See *Country Mut. Ins. Co. v. Gyllenberg Constr. Inc.*, Case No. CV-03-856-ST, 2004 WL 1490326, at \*8 (“Contracts which are illegal or against public policy are unenforceable.”) (citing *A-1 Sandblasting v. Baiden*, 293 Or. 17, 22 (1982)); see also *Hendrix v. McKee*, 281 Or. 123, 128 (1978) (recognizing that if a contract's purpose is illegal or against public policy, it is unenforceable).

*Seib v. Metro. Life Ins. Co.*, 2021 WL 2449099, at \*4 (D. Or. 2021), *report and recommendation adopted*, 2021 WL 2446168 (D. Or. June 14, 2021).

### **Impossibility, Force Majeure, and Covid 19**

Frustration of purpose applies “when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract.” (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 508 [1st Dept 2011] [quotation marks omitted].) This doctrine is narrow and does not apply unless the frustration is substantial. (*Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004].) In the context of the COVID—19 pandemic, the Appellate Division, First Department, rejected the defenses of impossibility and frustration of purpose where the tenant, an electronics store that was shuttered for a period because of pandemic-related executive orders but then reopened for curbside service, had failed to pay rent during the pandemic. (*558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561, 562 [1st Dept 2021].)

\*3 Here, defendant argues that operating a restaurant was prohibited by executive order 202.3 and thus impossible. This argument is not persuasive. First, tenant was at all times permitted to run a restaurant, albeit subject to certain restrictions. Second, the issue is not whether tenant was excused from operating the restaurant, but whether tenant was excused from performing its financial lease obligations. In that regard, the pandemic and the changes in tenant's operations necessitated by the executive order disrupted tenant's business. But the subject matter of the contract—the restaurant premises—

remained intact and usable. That the executive order required tenant to rearrange its operations to take-out-and-delivery services, which turned out to be less profitable, does not render performance of tenant's financial obligations impossible.

*45-47-49 Eighth Ave. LLC v. Conti*, 149 N.Y.S. 3d 891 (N.Y. Sup Ct 2021).

In this Fair Labor Standards Act (“FLSA”) collective action, Plaintiffs are 93 office managers (“OMs”) who sued their employer, Defendants Intelident Solutions, LLC and Coast Dental Services, LLC (collectively, “Defendants” or “Coast Dental” or “Defendants”), for unpaid overtime wages. In September 2020, the District Judge approved the parties’ Settlement Agreement as fair, adequate, and reasonable and retained jurisdiction to enforce the settlement for 180 days after the settlement administrator issued checks to Plaintiffs (Doc. 91). The District Judge's Approval Order dismissed the case with prejudice and directed the clerk to administratively close the case (*Id.* at 2-3).

....

In the FLSA context, courts applying Florida law have rejected Covid-19 as a basis for an impossibility of performance defense or the related frustration of purpose defense. *See Pinero v. Zapata*, 306 So.3d 1117, 1118-119 (Fla. 3d DCA 2020) (reversing lower court and enforcing February 2020 settlement agreement regarding partition sale of condos, despite defendant's May 2020 emergency motion arguing Covid-19 made performance impossible); *In re Cinemex USA Real Estate Hldgs., Inc.*, No. 20-14695-BKC-LMI, --- B.R. ----, 2021 WL 564486, at \* (S.D. Fla. Jan. 27, 2021) (enforcing lease against movie theater; theater could have partially reopened in June 2020 but chose not to because reopening at 50% would cause negative operating income).

*McGuire v. Intelident Sols., LLC*, 2021 WL 3195145, at \*3 (M.D. 2021), *report and recommendation adopted*, 2021 WL 3195051 (M.D. Fla. 2021).

This Court concurs, therefore, with the significant majority of Courts across the country which have considered whether a similar post-pandemic claim should be precluded as a claim for educational malpractice and concluded it should not.<sup>25</sup> More specifically, here as in other such actions, Plaintiffs seek reimbursement for services for which they paid but which were not received. Such claims are grounded in contract, not educational malpractice, and are therefore justiciable. *See Smith v. Univ. of Penn.*, 2021 WL 1539493, \*4 (“This is not a claim for educational malpractice. It is simply an action for breach of



contract.”)

*Figueroa v. Point Park Univ.*, 2021 WL 3549327, at \*10 (W.D. Pa. Aug 11, 2021).

## **IX. THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, QUASI-CONTRACT, AND TORT CLAIMS**

**Breach of implied covenant good faith and fair dealing is generally a contract claim under Oregon law**

“[T]he law imposes a duty of good faith and fair dealing with respect to all contracts to facilitate performance and enforcement of the contract where it is consistent with and in furtherance of the agreed-upon terms of the contract or where it effectuates the reasonable contractual expectations of the parties.” *Brown v. American Property Management Corp.*, 167 Or.App. 53, 63, 1 P.3d 1051 (2000) ([citation omitted] Viewing the record in the light most favorable to plaintiff, we already have concluded that the trial court erred in granting defendants' motion for summary judgment on plaintiff's breach of contract claim, because the record contains evidence from which a factfinder could find that plaintiff and defendants entered into an enforceable agreement for 24 weeks of severance pay. Maintaining that view of the record, we conclude that a factfinder also could find that defendants did not at all times act in good faith and deal fairly with plaintiff in regard to performance of the alleged agreement. For example, a jury *could* find—whether or not it *would* find—that defendants' unilateral actions in purporting to repudiate the agreement frustrated plaintiff's objectively reasonable expectation that defendants would pay her an enhanced severance amount.

*Swenson v. Legacy Health System*, 169 Or App 546, 554–55, 9 P3d 145, 149–50 (2000)

Defendant also asks for summary judgment on Plaintiff's breach of the implied covenant of good faith and fair dealing claim. First, Defendant argues Plaintiff's claim fails because it is foreclosed by Oregon law. ECF 63 at 31. Defendant notes Oregon law does not recognize tort actions between contracting parties, and Defendant therefore argues that an insured may only sue its insurer for breach of contract. *Id.* at 31–32. This argument is plainly without merit.

141516 While it is true that Oregon law generally does not allow for tort actions between contracting parties, *Georgetown Realty, Inc. v. Home Ins. Co.*, 313 Or. 97, 106, 831 P.2d 7 (1992), Plaintiff is not bringing a tort action, but an action in contract. The Oregon Supreme Court recognizes a claim for breach of the implied covenant of good faith and fair dealing as a claim sounding in contract. See *Best v. U.S. Nat. Bank of Or.*, 303 Or. 557, 561, 739 P.2d 554 (1987) (there is an obligation of good faith in the performance and enforcement of every contract). . . . .

*Degon v. USAA Cas. Ins. Co.*, 511 F Supp 3d 1144, 1155 (D. Or. 2021).

In Oregon, “[t]he law imposes a duty of good faith and fair dealing in the performance and enforcement of every contract.” *Hampton Tree Farms, Inc. v. Jewett*, 320 Or. 599, 615, 892 P.2d 683 (1995). The duty of good faith and fair dealing effectuates the reasonable contractual expectations of the parties. See *Best v. U.S. Nat’l Bank*, 303 Or. 557, 565, 739 P.2d 554 (1987). The purpose of the duty “is to prohibit improper behavior in the performance and enforcement of contracts, and to ensure that the parties ‘will refrain from any act that would have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’” *Klamath Off-Project Water Users, Inc. v. Pacificorp*, 237 Or. App. 434, 445, 240 P.3d 94 (2010) (quoting *Iron Horse Engineering v. Northwest Rubber*, 193 Or. App. 402, 421, 89 P.3d 1249 (2004) ). **A party may violate the covenant of good faith and fair dealing without breaching the express terms of the contract. *Id.* The covenant, however, “‘cannot contradict an express contractual term, nor otherwise provide a remedy for an unpleasantly motivated act that is expressly permitted by the contract.’” *Id.* (quoting *Zygar v. Johnson*, 169 Or. App. 638, 645, 10 P.3d 326 (2000)).**

Although a breach of contract claim and a claim for a breach of the covenant of good faith and fair dealing are related, each is distinct. See *Morrow v. Red Shield Ins. Co.*, 212 Or. App. 653, 663, 159 P.3d 384 (2007) (holding that the insurer was entitled to summary judgment on the plaintiffs’ breach of contract claim but allowing a breach of the duty of good faith and fair dealing claim based on the same facts to proceed to trial . . . [ citation omitted ] The implied duty of good faith in the performance of a contract cannot “contradict an express contractual term or otherwise provide a remedy for an unpleasantly motivated act that is expressly permitted by the contract.” *Glob. Exec. Mgmt. Sols., Inc. v. Int’l Bus. Machs. Corp.*, 260 F.Supp.3d 1345, 1377 (D. Or. 2017) (quotation marks omitted).

*Foraker v. USAA Cas. Ins. Co.*, 345 F Supp 3d 1308, 1309–10 (D Or 2018) (emph. added).

An example of a breach of implied covenant where there is not also a breach of contract often involves open-ended discretion invested in one party to the contract, which must be exercised reasonably and in good faith; e.g. party X retains complete discretion to terminate contract. For example: “We’ll try to have you work for us for an entire year. But there is no guarantee. We retain complete discretion to terminate the relationship at any time.”

Finally, Defendants argue that the contracts expressly granted the City full latitude to decide whether to extend its contracts with Plaintiff, therefore the implied covenant of good faith and fair dealing does not apply.

...

In the context of agreements granting unilateral discretion to one party, a duty of good faith is always implied absent language expressly allowing consent to be withheld “unreasonably.” *Wells Fargo Bank, N.A. v. The Ash Org.*, No. 09–CV–188–MO, 2010 WL 2681675, at \*7–8 (D. Or. July 2, 2010); *see also Tolbert v. First Nat’l Bank of Or.*, 312 Or. 485, 492 (1991). Without such language, which itself makes clear the objectively reasonable expectations of the parties, a party acts in bad faith by exercising its discretion “for purposes not contemplated by the [original] parties.” *Best*, 303 Or. at 563. To determine the purposes contemplated by the original parties, a trier of fact may consider both the terms of the contract and extrinsic evidence. *Gregory Funding, LLC v. Saksoft, Inc.*, No. 3:16–cv–480–SI, 2016 WL 4480693, at \*3 (D. Or. Aug. 24, 2016). While an implied duty of good faith will often exist by operation of law, its precise contours are always case specific and dependent upon specific evidence. *See Arnett v. Bank of America, N.A.*, 874 F. Supp. 2d 1021, 1033–35 (D. Or. 2012).

*Depaul Indus. v. City of Eugene*, 2020 WL 5078758, at \*4–5 (D. Or. 2020).

## Implied Covenant of Good Faith and Fair Dealing In At-Will

### Employment

*See Duncan v. Office Depot*, 973 F.Supp. 1171 (D.Or. 1997) (“In an at will situation, the duty of good faith and fair dealing applies to the performance and enforcement of the contractual terms, with the exception of the right to terminate”).

### Quasi-Contract Claims

Defendant contends that the doctrine of unjust enrichment cannot apply where an express contract exists. Mot. at 22.

However, “[i]t is proper for a party to plead counts in contract and in [q]uantum meruit covering the same course of events in complaint.” *Kashmir Corp. v. Patterson*, 43 Or. App. 45, 48 (1980) (citations omitted).

Quantum meruit is a form of restitution where the plaintiff has performed services for defendant and seeks to recover their fair value. The law, in appropriate situations, will imply a quasi-contract. It is not consensual. It is not a contract. It is a remedial device which the law affords to accomplish justice and prevent unjust enrichment.... Quantum meruit presupposes that no enforceable contract exists. *Id.* at 47–48.<sup>4</sup> “Such alternative pleading may be beneficial to the pleader in the situation where it is faced with a contract which may be void under the statute of frauds, where its performance has been hindered by the defendant, where the facts at trial may show that it did not substantially perform the contract but that it is entitled to the reasonable value of the services furnished, or *where the pleader is unsure of whether it can actually prove the existence of the contract at trial.*” *Id.* at 48 (emphasis added). Thus, a plaintiff may alternatively plead an express contract and quantum meruit, and is not “**required to elect upon which theory plaintiff will rely.**” *Global Exec. Mgmt. Sols., Inc. v. Int’l Bus. Machs., Corp.*, 260 F. Supp. 3d 1345, 1378 (D. Or. 2017).

*Mil-Ray v. EVP Int’l, LLC*, 2020 WL 3317931, at \*10 (D. Or. 2020), *report and recommendation adopted*, 2020 WL 3316979 (D. Or. 2020).

### **Intentional interference with economic/contractual relations.**

*See Porter v. OBA, Inc.*, 180 Or App 207 (2002) (“[t]o state a claim for intentional interference with economic relations, a plaintiff must allege each of the following elements: (1) the existence of a professional or business relationship (which could include, e.g., a contract or a prospective economic advantage), (2) intentional interference with that relationship, (3) by a third-party, (4) accomplished through improper means or for an improper purpose, (5) a causal effect between the interference and damage to the economic relationship, and (6) damages.”) (*Citing McGanty v. Staudenraus*, 321 Or 532 (1995)).

### **Fraud**

Although a prospective employee can bring a fraudulent misrepresentation claim in the context of at-will employment, we emphasize that there are limitations on those claims. Most notably, a plaintiff will have to prove damages to bring a successful claim. *See, e.g., Riley Hill General Contractor*, 303 Or. at 405, 737 P.2d 595 (listing damage to the plaintiff as an element of a fraud claim). Nonetheless, plaintiff’s decision to plead only damages associated with the loss of the corporate job—rather than damages associated with turning down the Medford Mail Tribune job—does not defeat his fraud claim, as the Court of Appeals suggested. *See Cocchiara*, 247 Or.App. at 552, 270 P.3d 350. As noted, the at-will nature of employment does not create a conclusive presumption barring a plaintiff from recovering future lost pay where the employee has been unlawfully terminated from the job, *Tadsen*, 324 Or. at 470–71, 928 P.2d 980, or, as in this case, where plaintiff was never hired as promised or allowed to start work. Because this case was decided on a motion for summary judgment, however, whether plaintiff can sufficiently prove his damages associated with not being hired for the corporate job is not now before this court.

*Cocchiara v. Lithia Motors, Inc.*, 353 Or 282, 299, 297 (2013).



## X. CONTRACT DAMAGES

When a party materially breaches a contract, including breaching the contract's implied covenant of good faith, the non-breaching party generally has a right to recover that party's expectation interest. *Zehr v. Haugen*, 318 Or. 647, 658 (1994). As explained by the Oregon Supreme Court:

The purpose of the remedy of damages for a breach of contract claim is to compensate the plaintiff for the loss *incurred as a result of the defendant's breach*. As pertinent here, that compensation may be accomplished by placing the aggrieved party in the position that he or she would have occupied had the contract been fully performed, that is, by compensating the party according to his or her “expectation interest.”

*Id.* (emphasis added). The phrase “incurred as a result of the defendant's breach” is simply another way to express causation. . . .

Further, consequential damages resulting from the breach are recoverable, if they are reasonably foreseeable. *Id.* (citing *Welch v. U.S. Bancorp*, 286 Or. 673, 70306 (1979) (stating that in a contract action, “consequential damages are recoverable if they are reasonably foreseeable”)).

. . . .

In addition, the general rule is that the time to measure damages is as of the time of the breach. *Benson v. Weaver*, 102 Or. App. 225, 227 (1990), *opinion adhered to as modified on reconsideration on other grounds*, 103 Or. App. 320 (1990).

Finally, damages for breach of contract cannot be recovered if they are too speculative. *Bixler v. First Nat'l Bank of Oregon*, 49 Or. App. 195, 202 (1980).

Long ago, the Oregon Supreme Court stated that “the evidence must disclose the damages sustained with reasonable certainty, and they must be shown to be the proximate result of defendant's wrongful acts in violation of its contractual duties.” *Parker v. Harris Pine Mills*, 206 Or. 187, 205 (1955). Approximately 20 years later, the Supreme Court explained the term “reasonable certainty” in this context:

What is actually meant by “reasonable certainty” is discussed in *McCormick, Damages 100*, § 27 (1935), in which it is stated, \* \* \* “[I]t appears that the epithet ‘certainty’ is overstrong, and that the standard is a qualified one, of ‘reasonable certainty’ merely, or, in other words, of ‘probability.’”

*Cont'l Plants Corp.*, 274 Or. at 624 (alterations in original). See Restatement (Second) of Contracts § 352 (“Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.”).

*Foraker v. USAA Cas. Ins. Co.*, 2020 WL 1914935, at \*3–5 (D. Or. 2020), *aff'd*, 2021 WL 3039418 (9th Cir. July 19, 2021).

## **XI. EMPLOYMENT CONTRACT LAW IN PRACTICE**

**A. Rocket Scientists Promised Funding Secure** – but contract language ambiguous: “This appointment expires June 30, 2024, and is renewable. As with all Rocket Scientist appointments, employment is subject to continued availability of funding.”

**B. Change in Control Clauses, e.g. Chief Medical Officer Promised Severance** – more ambiguity + implied covenant, such as 1 year of severance due “after 12 months of continuous service.” *See also Redmond v. Standard Ins. Co.*, 2020 WL 3051344, at \*5 (D Or June 8, 2020) (“Here Plaintiff alleges a loss of pension benefits merely as an element of his damages. . . . the Court concludes Plaintiff's common-law claims for breach of contract and tortious interference do not relate to the administration or regulation of an ERISA benefits plan. Accordingly, the Court concludes Plaintiff's claims are not preempted by ERISA.”); *Marr v. West Corp.*, 310 Neb. 21 (Aug. 27, 2021) (change in control triggered, including 30-year employee assigned to report to 28-year-old VP).

**C. Physician Promised Salary Increases** - promises of salary increases / employee acquiescence, i.e. implied acceptance.

**D. Entrepreneur Promised Ownership Interest** – oral promises of ownership can be complicated and hard to prove re. promises of ownership

**E. Contract for Lifetime Employment?** Lifetime employment promise

Defendant argued that its production manager's statement “as long as \*\*293 we have production to run” meant that a light duty job would exist, not that it would be promised to plaintiff until he retired. The statement could be so understood. But a jury also could find that plaintiff reasonably understood the statement as an assurance that he could return to employment as long as the work he was able to do was needed. Plaintiff was 55 years old at the time, so an inference that the job would last until plaintiff's normal retirement was not unreasonable. We agree with the Court of Appeals that there was some evidence to support the verdict.

*Seibel v. Liberty Homes, Inc.*, 305 Or 362, 365, 752 (1988).

**F. Oral Commissions Agreement / Past Conduct and Practices** - Oral commissions agreements are surprisingly common.

**G. We Need You in Our Office Full-time, but You're An Independent Contractor**

**H. We'll Take Care of You: Indemnification Agreements** -- various considerations, including who controls litigation? (*see also* Joint Defense Agreements).



**I. Section 1981** -- post-Civil War Act amendment, applies only to race claims.

Causation standard is "but for" rather than Title VII "motivating factor" standard:

“... § 1981 follows the general rule. Here, a plaintiff bears the burden of showing that race was a but-for cause of its injury. And, while the materials the plaintiff can rely on to show causation may change as a \*1015 lawsuit progresses from filing to judgment, the burden itself remains constant.

Congress passed the Civil Rights Act of 1866 in the aftermath of the Civil War to vindicate the rights of former slaves. Section 1 of that statute included the language found codified today in § 1981(a), promising that “[a]ll persons ... shall have the same right ... to make and enforce contracts, to sue, be parties, [and] give evidence ... as is enjoyed by white citizens.” 42 U.S.C. § 1981; Civil Rights Act of 1866, 14 Stat. 27.

*Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S Ct 1009, 1014–15, (2020).

**J. Contract providing for wage and hour protections** – CBAs will often provide for greater wage and hour protections than statutorily-mandated. But implied or express contracts can do the same thing in non-union settings.

*See Fleming v. Kids and Kin Head Start*, 71 Or.App. 718, 721, 693 P.2d 1363 (1985) (holding that plaintiff who alleged wrongful termination in violation of just-cause termination policy in employee handbook stated a claim and noting that “a breach of contract is a breach of contract”); *Wren v. RGIS Inventory Specialists*, 2009 WL 2612307, at \*17–19 (N.D. Cal. 2009) (discussing whether under Oregon law policies in handbooks can create a right to meal breaks).

**K. Workplace Fairness Act Considerations ORS 659A.370 - Workplace**

Fairness Act provides contracts cannot include various provisions, including a non-disparagement term that would prevent an employee or prospective employee from discussing certain matters:

**“659A.370 Employer prohibited from entering into agreements that prevent employee from discussing certain unlawful conduct;**

**exceptions; remedies.** (1) Except as provided in subsections (2) or (4) of this section, it is an unlawful employment practice for an employer to enter into an agreement with an employee or prospective employee, as a condition of employment, continued employment, promotion, compensation or the receipt of benefits, that contains a nondisclosure provision, a nondisparagement provision or any other provision that has the purpose or effect of preventing the employee from disclosing or discussing conduct: [as defined below].”

**L. Class Certification Granted in Breach of Contract Case**

*See McKenzie Law Firm, P.A. v. Ruby Receptionists, Inc.*, 2020 WL 1970812, at

\*4 (D. Or. Apr 24, 2020):

To satisfy the commonality requirement, Plaintiffs must show that the class members suffered the “same injury”—that their claims depend upon a “common contention.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quotation

marks omitted). “That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* Class members, however, need not have *every* issue in common: commonality requires only “a single significant question of law or fact” in common. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012); *see also Wal-Mart*, 564 U.S. at 359. Disputes over form contracts typically satisfy the commonality requirement. *See In re: Premera Blue Cross Customer Data Security Breach Litigation*, Case No. 3:15-md-2633-SI, 2019 WL 3410382, at \*18 (D. Or. July 29, 2019) (collecting cases).

*Id.*

**THE END**



## Chapter 3B

# Presentation Slides: Evaluating, Prosecuting, and Defending Noncompete and Trade Secret Litigation

**LAURA SALERNO OWENS**  
Markowitz Herbold PC  
Portland, Oregon



# Evaluating, Prosecuting, and Defending Non-compete and Trade Secret Litigation

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*Laura Salerno Owens*

Markowitz Herbold PC

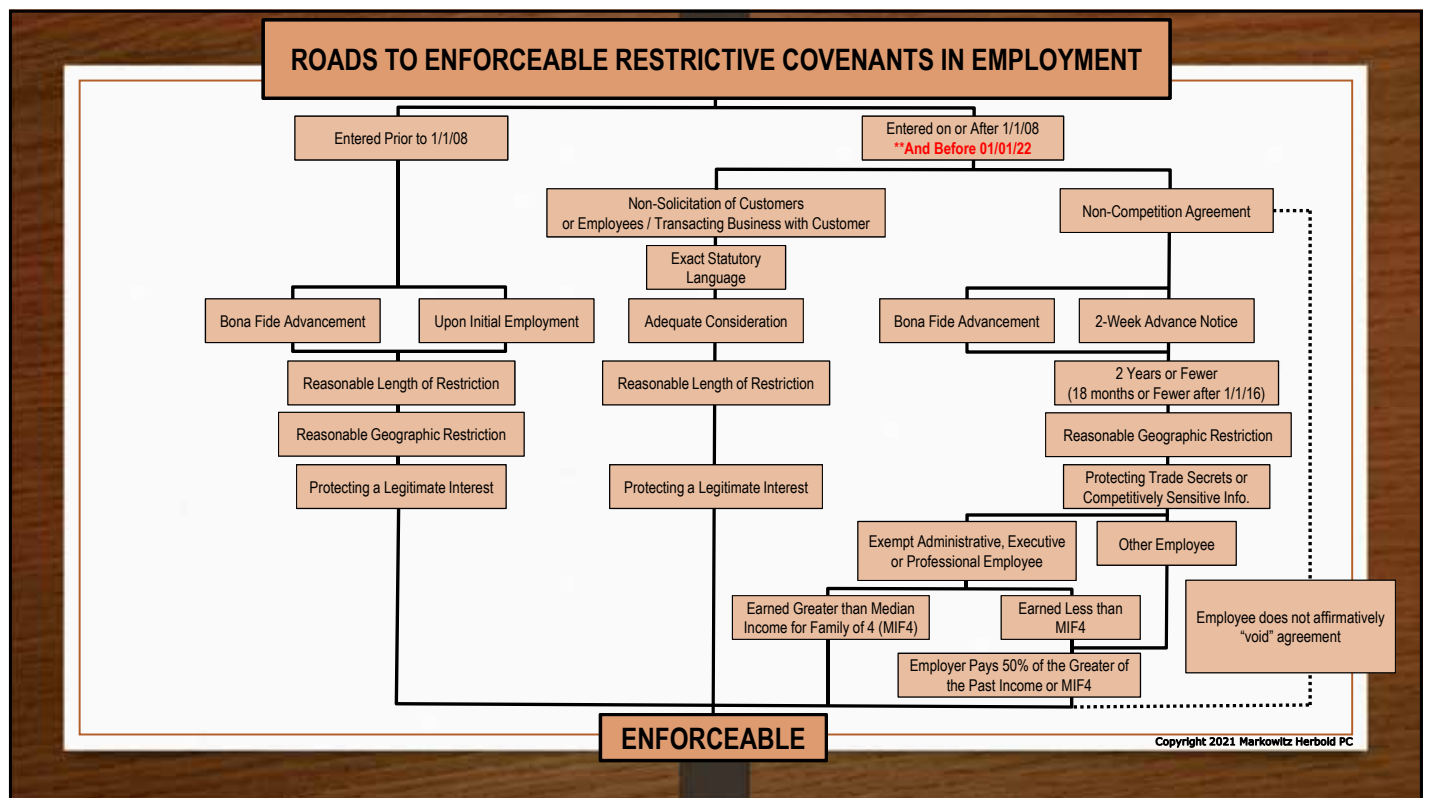
## Introduction

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- I. Non-competition and non-solicitation agreements**
- II. Misappropriation of trade secrets**
- III. Prosecuting and defending**

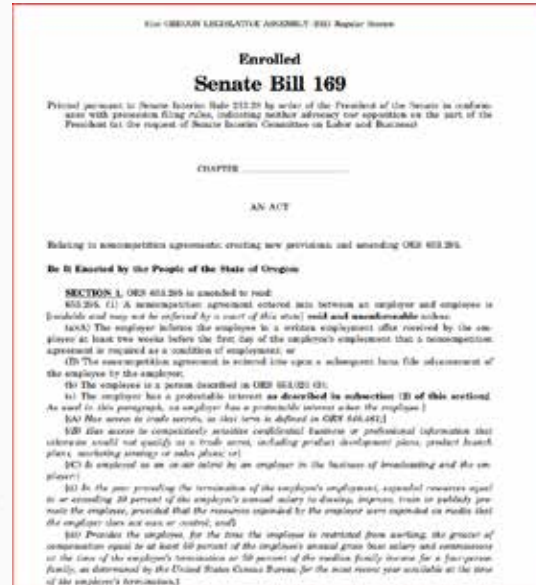
# Non-competition and Non-solicitation Agreements

1. Is there an enforceable non-competition or non-solicitation agreement?
2. Is there anything worth protecting?
3. What can the employee do when there is an enforceable non-competition or non-solicitation agreement?
4. What can the employee do when it is not enforceable?
5. What can employee do to reduce risk of being sued, and be in a better position to defend against a suit?
6. What are some of the most significant cases on these topics?

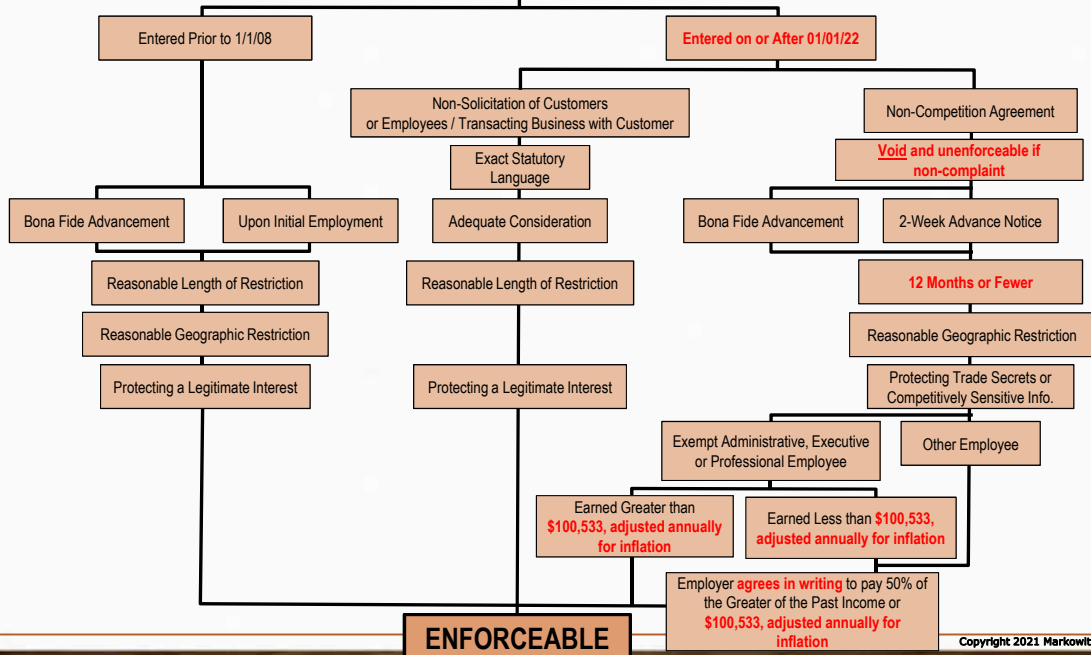




The law has changed for non-competition agreements entered into on or after **January 1, 2022**



### ROADS TO ENFORCEABLE RESTRICTIVE COVENANTS IN EMPLOYMENT



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## Misappropriation of Trade Secrets

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1. Does the information satisfy the definition of trade secret under ORS § 646.461? 18 USC § 1839(3)?
2. Is there actual or threatened misappropriation?
3. Identification of trade secrets during discovery?
4. Right to attorney fees?
5. Exemplary damages?
6. Civil seizure under DTSA?

## Prosecuting and Defending

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1. What you need for a TRO
2. How you oppose a TRO

Thank you.

---

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## Chapter 4

# Presentation Slides: Agreements at Termination, Severance Agreements, Settlement Agreements, and Taxation

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# LABOR AND EMPLOYMENT BOOT CAMP

Agreements at Termination, Severance Agreements,  
Settlement Agreements and Taxation

Thursday, September 30, 2021



## PRESENTED BY:

**Angela Ferrer**  
Buchanan Angeli Altschul & Sullivan LLP



**Amanda Gamblin**  
Schwabe Williamson & Wyatt PC



**Heather A. Kmetz**  
Sussman Shank LLP



## AGENDA

- When the different agreements are used
- Releases
- IRC § 409A
- Confidentiality & Non-disparagement
- Mutuality
- Allocation of Damages
- Other Provisions to Consider



## WHAT IS THE DIFFERENCE?

- Severance Agreements
  - ✓ Used regardless of whether there is a dispute
  - ✓ Used to gracefully transition an employee to another job
  - ✓ Used to reward an employee for service
  - ✓ Used in employment agreements to entice employees to move for a job or work in a remote location
- Settlement Agreements
  - ✓ Generally are resolving a specific dispute or alleged claim
  - ✓ Can be used regardless of whether a lawsuit or charge has been filed
  - ✓ Generally includes a covenant not to sue and an obligation to dismiss a complaint or charge





## RELEASES

- Disclaimer: This is Oregon only. (Other requirements in other states.)
- Releases generally
- ADEA/OWBPA Releases
- FLSA Releases
- FMLA Releases



## RELEASES GENERALLY

- Patently distinguishable from general releases because not an arms length contract
- Knowing and voluntary. Generally employer's burden. Totality of circumstances.
- Court's consider:
  1. education and business experience of the employee;
  2. the time the employee spent considering the agreement before signing it;
  3. the clarity of the language in the agreement;
  4. the employee's opportunity to consult with an attorney;
  5. whether the employer encouraged or discouraged consultation with an attorney; and
  6. the consideration given in exchange for the release compared to the benefits the employee was already entitled to receive.

*Paylor v. Hartford Fire Ins. Co.*, 748 F3d 1117, 1124 (11th Cir 2014); *Smith v. Amedisys Inc.*, 298 F3d 434, 441 (5th Cir 2002); *Hernandez v. Philip Morris USA, Inc.*, 486 F3d 1, 8 (1st Cir 2007); *Hampton v. Ford Motor Co.*, 561 F3d 709, 711 (7th Cir 2009); *Stroman v. W. Coast Grocery Co.*, 884 F2d 458, 462 (9th Cir 1989)



## RELEASES GENERALLY

### Readability – who is the audience?

- Consider letters, use the informal “you” or the employee’s name instead of “Employee” and “Employer”
- Short sentences, short paragraphs, lots of white space, bullet points
- List the types of claims being released
- Cannot waive prospective claims – not knowing

### Evaluate consideration

- Seems simple, but surprising how often parties fail to think it through
- Be open to negotiate - cram down agreements may not be voluntary

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## RELEASES – ADEA/OWBPA

- Age Discrimination in Employment Act as amended by the Older Worker Benefit Protection Act (29 USC Sec. 626(f))
- ADEA protects workers 40 years old and older from age discrimination
- Releases of ADEA claims are “voidable” if they do not comply with the OWBPA
- No tender back required for violation. *Oubre*, 522 U.S. 422 (1998).
- Following requirements are “at a minimum.”

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## RELEASES – ADEA/OWBPA

- Written in a manner calculated to be understood by the employee
- Waiver specifically refers to rights arising under the ADEA
- Employee does not waive rights that arise after signing the release
  - ✓ Reaffirmation agreements
  - ✓ Do they require additional consideration?
- Consideration

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## RELEASES – ADEA/OWBPA

- Employee is advised in writing to consult with an attorney
  - ✓ Insufficient “advising”: “I have had reasonable and sufficient time and opportunity to consult with an independent legal representative of my own choosing before signing this Complete Release of All Claims.”  
*Am. Airlines v. Cardoza-Rodriguez*, 133 F3d 111, 118 (1st Cir 1998).
  - ✓ Insufficient “advising”: “employee acknowledges that he/she has been advised to **consult** with an **attorney** prior to executing this Agreement.”  
*Cole v. Gaming Entm’t, L.L.C.*, 199 F Supp 2d 208, 214 (D Del 2002).
  - ✓ Use active voice: “Company X hereby advises you to consult an attorney before you sign this agreement.”

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## RELEASES – ADEA/OWBPA

- Employee is given 21 days to consider the agreement
  - ✓ Reflect date given to employee
  - ✓ Employee may sign before expiration of the consideration period, unless employee signs under threat that employer will withdraw or alter the offer prior to expiration
- 45 days for an “exit incentive or other employment termination program offered to a group or class of employees.”
  - ✓ Same terms offered to two or more employees

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## RELEASES – ADEA/OWBPA

- Exit incentive and employment termination programs have additional requirements
  - ✓ Identify the decisional unit – e.g., the Medford facility, the Accounting department, the whole company.
  - ✓ Identify the positions within the decisional unit that were considered for elimination
  - ✓ Identify the criteria used to identify those position that were chosen for elimination
  - ✓ In table format, list the ages and job titles of those within the decisional unit who were and were not selected for termination.

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## RELEASES – ADEA/OWBPA

- Include language that “the parties hereby agree that any changes made to this Agreement through negotiation, whether material or immaterial, do not restart the running of the 21 [45] day period.”
  - ✓ “Material changes to the final offer restart the running of the 21 or 45 day period; changes made to the final offer that are not material do not restart the running of the 21 or 45 day period. The parties may agree that changes, whether material or immaterial, do not restart the running of the 21 or 45 day period.” (29 CFR § 1625.22)

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## RELEASES – ADEA/OWBPA

- Employee is given 7 days after signing to revoke it
  - ✓ The 7-day revocation period cannot be shortened by agreement of the parties
- Agreement not effective until after revocation period expires
  - ✓ Pay on the 8th day after signing

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## RELEASES – ADEA/OWBPA

- “No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the [EEOC].”
- 29 USC Sec. 626(f)(4)



## RELEASES – ADEA/OWBPA

- Practical considerations
  - ✓ What if the employee is 41 or 42 years old?
  - ✓ What if they were replaced with someone older?
  - ✓ Consider an agreement by employee that age had nothing to do with their termination.
  - ✓ Still needs to be knowing and voluntary



## RELEASE - FLSA

- Department of Labor supervision of a settlement is required. *Dent v. Cox Communs. Las Vegas, Inc.*, 502 F3d 1141, 1146 (9th Cir 2007).
- For a bona-fide dispute in federal court, a court can approve a settlement under Fed. R. Civ. P. 41. *Cheeks v. Freeport Pancake House, Inc.*, 796 F3d 199, 203 (2d Cir 2015).

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## RELEASE – FLSA

- Practical considerations
  - ✓ If employer receives a demand, audit the payroll and pay anything owed plus liquidated damages immediately
  - ✓ Plaintiffs – don't hide the ball to increase fees (ethics issues, subject to bad faith defenses)
  - ✓ If there is a good faith dispute about what is owed, lawsuit may be the only way to effectively settle the dispute
  - ✓ Plaintiffs – consider going to DOL even if it means you might not recover fees

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## FMLA RELEASES

- Prior to 2009 split in the circuits whether FMLA claims could be settled without DOL or court approval
- DOL revised its rules in 2009 clarifying that only prospective FMLA waivers required DOL or court approval
- Still must be knowing and voluntary

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## IRC § 409A: DEFERRED COMPENSATION

- Generally, tax liability is due when an employee has a vested right for payment for services rendered. Deferred payment of compensation (and presumably deferred obligation to pay tax on that compensation) must comply with the requirements of Section 409A of the Internal Revenue Code of 1986, as amended (“IRC”).
- “Deferred compensation” occurs whenever an employee (or former employee) has a legally binding right during a taxable year to compensation that is or may be payable in a later taxable year for services previously provided, including payments under a Severance or Settlement Agreement. Any deferred compensation must be compliant with IRC § 409A.

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## IRC § 409A: RISK OF NONCOMPLIANCE

- Failure to comply with IRC § 409A requirements results in taxation of the deferred amounts when those amounts vest (whether or not paid); an additional excise tax of 20%; and interest at the underpayment rate plus 1%.
- The **employee** is liable for any tax imposed by IRC § 409A.
- The employer would have some additional reporting and employment tax obligations, but the material risk of additional taxes resulting from noncompliance is borne, at least initially, by the employee.

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## IRC § 409A: SHORT-TERM DEFERRAL EXCLUSION

- Separation pay due on an **involuntary** termination of employment that must be paid and is paid within the **short-term deferral period** are **not** treated as deferred compensation under IRC § 409A. Annual bonuses and incentive awards that are designed to be paid immediately on vesting typically fall within the short-term deferral exclusion.
- The short-term deferral period ends on the later of the 15<sup>th</sup> day of the third month following the end of the employee's first taxable year in which the right to the payment is no longer subject to a substantial risk of forfeiture or the 15<sup>th</sup> day of the third month following the end of the employer's first taxable year in which the right to the payment is no longer subject to a substantial risk of forfeiture. (Generally, by March 15 of the following year for a calendar year employer.)

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## IRC § 409A: SHORT-TERM DEFERRAL EXCLUSION

- A series of installment payments is treated as a right to a single payment unless the agreement provides otherwise. For example, if an agreement provides for 18 months of salary continuation on termination without cause and are treated as a single payment, then none of the installment payments would meet the short-term deferral exclusion because a portion of the single payment would be made after the end of the short-term deferral period.
- It is prudent to include a provision that provides: “If an amount is to be paid under this Agreement in two or more installments, each installment shall be treated as a separate payment for purposes of IRC § 409A.”

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## IRC § 409A: SEPARATION PAY EXCEPTION

- Also known as the “2 x 2 Rule,” separation pay will **not** be treated as deferred compensation under IRC § 409A if it is only paid as a result of **involuntary** termination of employment and meets the following requirements:
  - ✓ The separation pay does not exceed two times the lesser of:
    - The sum of the employee’s annualized compensation based on the annual rate of pay for the year preceding the year of termination; or
    - IRC § 401(a)(17) limit for the year in which the termination occurs (\$290k in 2021); and
  - ✓ The plan provides that the separation pay must be paid no later than the last day of the second taxable year of the employee following the year of termination.
- That portion of the pay that meets the requirements will be exempt.

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## IRC § 409A: GOOD REASON GENERAL RULE

- Application of the short-term deferral exclusion and separation pay exception depend largely on compensation payable solely on an **involuntary** termination without cause. Under the Regulations, a **voluntary** termination by the employee for “**good reason**” may be treated as an involuntary termination.
- Under the general rule, a “good reason” is when actions taken by the employer results in a material negative change to the employee.

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## IRC § 409A: GOOD REASON SAFE HARBOR

- Separation from service within two year following the initial existence of one or more of the following conditions arising without the consent of the employee:
  - ✓ A material diminution in the employee's base compensation.
  - ✓ A material diminution in the employee's authority, duties, or responsibilities.
  - ✓ A material diminution in the authority, duties, or responsibilities of the supervisor to whom the employee is required to report,
  - ✓ A material diminution in the budget over which the employee retains authority.
  - ✓ A material change in the geographic location at which the employee must perform the services.
  - ✓ Any other action or inaction that constitutes a material breach by the employer of the agreement under which the employee provides services.

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## IRC § 409A: GOOD REASON SAFE HARBOR

- The employee must be required to provide notice to the employer within 90 days of the existence of one or more of the conditions described and the employer must have 30 days during which it may remedy the condition and not be required to pay the separation pay.
- The amount, time, and form of payment on the separation from service must be substantially identical to the amount, time and form of payment payable due to an actual involuntary separation from service, to the extent such a right exists.

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## EXAMPLE: COMPLIANT GOOD REASON DEFINITION

“Good Reason” for purposes of this Employment Agreement means the occurrence of any of the following without the Employee's consent: (i) a material adverse change in Employee's title, duties or responsibilities (including reporting responsibilities); (ii) a material reduction in Employee's base salary; and (iii) any relocation of Employee's principal office by more than 50 miles from her office in [City], [State] (this does not apply to customary business travel throughout the U.S. and abroad associated with her role as [title] as required and determined by her job duties under Section 1. Employer and Employee agree that “Good Reason” shall not exist unless and until Employee provides the Employer with written notice of the acts alleged to constitute Good Reason within ninety (90) days of Employee's knowledge of the occurrence of such event, and Employer fails to cure such acts within thirty (30) days of receipt of such notice, if curable. Employee must terminate her employment within sixty (60) days following the expiration of such cure period for the termination to be on account of Good Reason.

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## NOT SUBJECT TO IRC § 409A

- Continued participation in the employer's insured health plan after termination of employment (even if the employer pays the entire premium for the health coverage and the continued participation extends past the COBRA period)
- Nontaxable reimbursement of business expenses, actual moving expense incurred with respect to the termination, dependent care coverage under IRC § 129 and legal expenses under IRC § 120 incurred by the end of the second year following the year of the employee's termination of employment and reimbursed by the third year following the year of the employee's termination of employment.

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## CONFIDENTIALITY AND NON-DISPARAGEMENT PROVISIONS

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## OREGON WORKPLACE FAIRNESS ACT – ORS 659A.370

- Except as provided in subsections (2) or (4) of this section, it is an unlawful employment practice for an employer to enter into an agreement with an employee or prospective employee, as a condition of employment . . . compensation or the receipt of benefits, that contains a nondisclosure provision or any other provision that has the purpose or effect of preventing the employee from disclosing or discussing conduct:
  - A. That constitutes discrimination prohibited by ORS 659A.030, including conduct that constitutes sexual assault; or
  - B. That constitutes discrimination prohibited by ORS 659A.082 or 659A.112; and
  - C. That occurred between employees or between an employer and an employee in the workplace or at a work-related event [including employer-sponsored off-site events]; or
  - D. That occurred between an employer and an employee of the employment premises.



## OREGON WORKPLACE FAIRNESS ACT – ORS 659A.370

- An employer may enter into a settlement, separation or severance agreement that includes one or more of the following provisions only when an employee claiming to be aggrieved by conduct described under subsection (1) of this section **requests** to enter into the agreement:
  - A. a provision described in subsection (1) of this section;
  - B. a provision that prevents the disclosure of **factual information** relating to a claim of discrimination or conduct that constitutes sexual assault; or
  - C. a no-rehire provision that prohibits the employee from seeking reemployment with the employer as a term or condition of the agreement.

Note:

Under ORS 659A.370(3), an employee has seven days to revoke the agreement after signing.

**This is not waivable.**

These limitations **do not apply to** separation, settlement, or severance agreements with an employee found to have engaged in the unlawful conduct.



## OREGON WORKPLACE FAIRNESS ACT – ORS 659A.370

- If employee wants confidentiality, they might consider offering the nondisclosure as a concession during negotiations.
- Limitations on nondisclosure clauses apply to **conduct**, not the settlement itself.
- Sample nondisclosure carve out:
- “Nothing in this provision or this Agreement shall have the purpose or effect of limiting Employee’s rights under the Oregon Workplace Fairness Act to disclose or discuss any alleged incident of sexual assault or other discriminatory conduct proscribed by ORS 659A.030, ORS 659A.082, or ORS 659A.112.”
- If the employee has not alleged any of the covered activity, specify that in the agreement. For example:
  - ✓ “Employee expressly represents and warrants that Employee has not claimed, and does not claim, to be aggrieved by conduct that constitutes discrimination or any other conduct prohibited under ORS 659A.030, ORS 659A.082, or ORS 659.112.”

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## ADDITIONAL CONSIDERATIONS WITH NONDISCLOSURE OR NON-DISPARAGEMENT PROVISIONS

- Liquidated Damages
  - ✓ A liquidated damages provision consists of “words of a contract that set the amount of damages to be recovered by one party from another in the case of the latter’s failure to perform as agreed.” *DiTommaso*, 309 Or 190, 195 (1990)
  - ✓ Should you use them?
- Look to state law – In Oregon, courts apply ORS 72.7180(1)
  - ✓ “Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonably in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.”

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## WHISTLEBLOWER CARVE OUTS

Agreements should provide that nothing in the agreement prohibits an employee from reporting or disclosing violations to the Security and Exchange Commission, OSHA, and other government agencies.



## THE TAX SIDE OF STAYING QUIET

- Consideration for confidentiality is taxable to the recipient and deductible by the employer as an ordinary and necessary expense.
- When the agreement is silent as to the composition of the award, it may be left to the Court to determine the just and fair amount that is paid in exchange for confidentiality.
- The Tax Cuts & Jobs Act of 2017 added IRC § 162(q), which eliminates deductions for settlement payments related to sexual harassment or sexual abuse “if such settlement or payment is subject to a nondisclosure requirement.” It also prohibits deductions for attorney’s fees “related to such a settlement or payment.”





## MUTUALITY OF RELEASES

- Should employees ask for a mutual release, mutual confidentiality, and mutual non-disparagement?
- Employer concerns:
  - ✓ Increased risk
    - Limit to certain management employees
  - ✓ Others?



## ALLOCATION OF DAMAGES



## TAX REPORTING OF A TERMINATION

- Agreements should clearly set out the character of the payments made with respect to each claim, or a Court may be left to allocate based on the complaint or the charge of discrimination in an administrative proceeding. Employer should require the employee furnish a Form W-9, Request for Taxpayer Identification Number, before making any payments.
- Severance payments (including back pay or front pay awarded as a result of discriminatory lost wages or wrongful termination) are taxable compensation, subject to employment taxes and withholdings applicable to wages. The employer should report these payments to the employee on a Form W-2.

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## TAX REPORTING OF A TERMINATION

- IRC § 61 provides that all income from whatever source derived is taxable ordinary income unless excluded by another section. IRC § 104(a)(2) excludes compensatory damages received “on account of personal physical injuries or physical sickness.”
- Emotional distress damages are taxable as ordinary income. For purposes of IRC § 104(a)(2), “emotional distress shall **not** be treated as a physical injury or physical sickness.” The employer should report emotional distress damages to an employee on a Form 1099.
- Punitive damages are taxed as ordinary income (regardless of the nature of the underlying claim). The employer should report punitive damages to an employee on a Form 1099.

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## TAX REPORTING OF A TERMINATION

- Recovery of attorneys' fees are taxable ordinary income to the plaintiff (even if paid directly to the attorney) and should be reported on a Form 1099.
- Indemnification provisions generally make the employee solely responsible for all tax liabilities imposed by the IRS or state taxing authority (including penalties, fines, interest, costs, expenses and attorneys' fees) associated with payments received, so it is in the employee's best interest to have the payments clearly defined and the taxes properly and timely paid / withheld.

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## ADDITIONAL POINTS

- Indemnification Clauses
- Arbitration
- Venue
- Attorneys' Fees
- Deadlines to Execute
- Unemployment Benefits
- References / Employment Verification
- Denial of Liability

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# THANK YOU

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