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The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

A BUDDING INDUSTRY MAY WITHER UNDER THE TRUMP ADMINISTRATION

by Greg Woods

Oregon's budding marijuana industry could wither under the Trump administration. Recent rhetoric indicates that the new administration is rethinking federal enforcement of recreational marijuana.[1] If the administration does target Oregon's marijuana industry, it could use civil-asset-forfeiture laws to seize those businesses' property—that is, unless The Responsibly Addressing the Marijuana Policy Gap Act is passed.[2] The proposed legislation would amend the Controlled Substances Act (CSA) and defend businesses complying with state law from federal civil asset forfeiture.

Civil asset forfeiture is a powerful legal tool that avoids most constitutional protections by distinguishing between the property owner suspected of a crime and the property itself. It places the burden on the claimant to prove the property's innocence.[3] Defending against the seizure is difficult to accomplish and rarely cost-effective. That is why Oregon attorneys should endorse federal reform efforts, encourage state lawmakers to prohibit state agencies from coordinating with federal enforcement efforts, and advise potentially affected clients about the "innocent owner defense."[4]

Marijuana Prohibition

Marijuana is still illegal in Oregon.[5] Federal law prohibits any Oregon business from manufacturing, distributing, dispensing, or possessing marijuana.[6] Under the CSA, marijuana is a Schedule 1 narcotic without any medically accepted use and with a high potential for abuse.[7] That characterization may be unpopular and inaccurate but it does have at least one significant supporter.

Jeff Sessions, US Attorney General, is a long-outspoken critic against marijuana. When he addressed state attorneys general, he emphasized the need for stricter law

1 *See* John Wagner & Matt Zapatosky, "Spicer: Feds could step up enforcement against marijuana use in states," Wash. Post (Feb. 23, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/02/23/spicer-feds-could-step-up-anti-pot-enforcement-in-states-where-recreational-marijuana-is-legal/?utm_term=.9e773db6a3f8.

2 The Responsibly Addressing the Marijuana Policy Gap Act, S. ___, 115th Cong. (2017), *available at* https://www.finance.senate.gov/imo/media/doc/(6) Responsibly Addressing the Marijuana Policy Gap Act (SIL17269).pdf.

3 Institute for Justice, "Grading State & Federal Civil Forfeiture Laws," IJ.org/report/policing-for-profit-/grading-state-federal-civil-forfeiture-laws/.

4 18 U.S.C. § 983(d) (2012).

5 21 U.S.C. § 801.

6 *See* 21 U.S.C. § 841(a)(1).

7 21 U.S.C.A. § 812(c); *see also* 21 U.S.C. §§ 841(b), 844.

enforcement and articulated his beliefs that a correlation exists between marijuana and crime. Mr. Sessions warned, "I'm dubious about marijuana. I'm not sure we're going to be a better healthier nation if we have marijuana sold at every corner grocery store."[8] The warning garnered attention. Sean Spicer, White House press secretary, told reporters that he believes that the US Department of Justice (DOJ) will look into the issue.[9] If the DOJ does pursue Oregon's marijuana businesses, civil-asset-forfeiture laws enable the government to shudder those businesses and seize their assets without ever filing a criminal charge.

Guilty Property

Civil asset forfeiture is a controversial law-enforcement practice based on the legal fiction of guilty property. A government agency can seize property that it alleges is connected to a criminal activity. The forfeited property is sold and the seizing agency benefits from the proceeds.[10] Critics decry that this incentivizes policing for profit.[11] Proponents assert that it is a necessary law-enforcement tool, reinforcing the longstanding notion that crime doesn't pay.[12]

There are three categories of forfeiture cases: criminal, civil judicial, or administrative (nonjudicial). Civil asset forfeiture refers to the latter two categories because the seizure is independent of any criminal charges. The case is against the property, not the person.[13]

Under forfeiture statutes, a law-enforcement agency may seize property that it suspects facilitated criminal activity or is an illicit gain from that alleged activity.[14] Property is guilty until proven innocent. Once property is seized, the most likely outcome is that no claimant will seek the property's return.[15] Seventy-six percent of all forfeitures are administrative, meaning there was no judicial process or legal challenge.[16] Because the seized property is based on allegations of criminal wrongdoing, many people are unsympathetic.[17] But assumptions that the property owner has committed a crime are wrong. [18] Only 13 percent of forfeiture cases are criminal forfeitures.[19] Yet, the threat of criminal prosecution deters owners, including innocent ones, from seeking the return of their property.

The property owner is rarely charged with a crime.[20] No criminal charges are necessary. Under section 981(b) of the Civil Asset Forfeiture Reform Act, the seizing agency may keep seized property for as long as the civil matter continues.[21] The seizure is lawful so long as the seizing agent attests that he or she has probable cause.[22] Once the seizure occurs, the government must generally provide notice "as soon as practicable, and in no case more than [sixty] days after the date of the seizure."[23] Those with an "interest in the property" can seek its return by filing a claim.[24] After the claim is filed, the government has ninety days to (1) return the property, (2) commence a criminal-forfeiture action, or (3) commence a civil-forfeiture action.[25] If an action is commenced, then under

8 Reid Wilson, "Confusion mounts over Trump administration's stance on marijuana," The Hill, (Feb. 28, 2017), http://thehill.com/home-news/state-watch/321639-confusion-mounts-over-trump-administrations-stance-on-marijuana.
9 Wagner, *supra* note 1.
10 18 U.S.C. § 981(e).
11 Marian Williams et al., Institute for Justice, *Policing for Profit,* 15–37 (1st ed. 2010), *available at* http://ij.org/wp-content/uploads/2015/03/assetforfeituretoemail.pdf.
12 *See* Asset Forfeiture and Money Laundering Section, U.S. Dep't of Justice, *Asset Forfeiture Policy Manual*, foreword, (2016), *available at* http://www.justice.gov/criminal-afmls/publications (stating that the mission of the Section is "to disrupt and dismantle criminal enterprises, deprive criminals of the proceeds of illegal activity, deter crime, and restore property to victims").
13 *See United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976 (9th Cir. 2008).
14 Civil Asset Forfeiture Reform Act, 18 U.S.C. § 981(a)(1)(A)–(I).
15 Dick Carpenter II, et al., Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, (2nd ed. 2015).
16 *Id.* at 5.
17 Stefan D. Cassella, "Forfeiture is Reasonable, and It Works," *Criminal Law & Procedure Practice Grp. Newsletter* (The Federalist Soc'y), May 1, 1997 (stating that "[i]f there isn't proof that a person committed a crime, there is no forfeiture"), *available at* http://www.fed-soc.org/publications/detail/forfeiture-is-reasonable-and-it-works.
18 Carpenter, *supra* note 15, at 5.
19 *Id.*
20 Christopher Ingraham, "Since 2007, the DEA has taken $3.2 billion in cash from people not charged with a crime," Wash. Post (Mar. 29, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/03/29/since-2007-the-dea-has-taken-3-2-billion-in-cash-from-people-not-charged-with-a-crime/?utm_term=.3d834985bf66.
21 18 U.S.C. § 981(b).
22 *Id.*
23 18 U.S.C. § 983(a)(1)(A)(i).
24 18 U.S.C. § 983(a)(1)(A)(iii).
25 18 U.S.C. § 983(a)(3)(B).

federal law the claimant must demonstrate by a preponderance of the evidence that the property is not subject to forfeit.[26]

This system incentivizes policing for profit.[27] And it is profitable. In 2014 the federal government seized more property than burglars stole.[28] The Drug Enforcement Agency (DEA) alone seized approximately $28 billion over a ten-year period.[29] In a report, the DOJ noted that the DEA's cash seizures may pose risks to civil liberties and not necessarily relate to criminal investigations.[30] Profit-seeking incentivizes questionable seizures because the seizing agency keeps a portion, if not all, of the proceeds.[31] As Kenneth M. Burton, the police chief of Columbia, Missouri, explained to a police review board, "It's kind of like pennies from heaven—it gets you a toy or something you need is the way that we typically look at it to be perfectly honest."[32] In the past similar practices have led to reform.

Oregon's Civil Asset Reform

Oregon has reformed its civil forfeiture laws twice since 2000. Ballot Measure 3 was Oregon's response to a nationwide sentiment against civil forfeiture. [33] It passed overwhelmingly. The measure guaranteed that no forfeiture could occur until a person is convicted of a crime involving the property, ensured that the value of the property should be proportional to the conduct that the owner was convicted of, and required that proceeds go to treating drug abuse.[34] Eight years later, however, those reforms were scaled back.

Forfeiture proponents sued the state and the litigation dragged on so long that the law expired prior to the case's conclusion.[35] Then Oregonians narrowly passed Ballot Measure 53. The measure reversed the criminal-conviction requirement and reinstated law enforcement's ability to retain a portion of the proceeds from seizures.

Oregon's efforts to minimize civil-asset-forfeiture abuses, despite the legal back and forth, have proven relatively successful.[36] The Institute for Justice ranks Oregon eighth for securing Oregonians' property rights from seizure.[37] Unlike at the federal level, forfeitures in the state are closely connected to a criminal conviction.[38] With some exception for drug crimes, the government and not the property owner must show by a preponderance of the evidence that the property is subject to forfeit.[39] The law also established an oversight committee, which helps guard against potential abuses.[40]

Yet the potential for abuse still remains. Under ORS 131A.360(4), law enforcement retains 62.5 percent of the proceeds from seizures.[41] In 2015 less than half of civil seizures were conducted with a search warrant or seizure order.[42] The vast majority was for cash, and only two claimants fought to have the cash returned. Although Oregon has not removed the profit incentive for police to seize cash, it does prohibit seizing less than $15,000 in US currency.[43] The federal Equitable Sharing Program undermines that safeguard.

Equitable sharing enables state agencies to circumvent Oregon's restrictive civil-asset-forfeiture safeguards for the more lenient federal standard. The program awards a portion of the proceeds that are seized under federal law

26 18 U.S.C. § 983(c)(1).
27 Carpenter, *supra* note 15, at 15.
28 Christopher Ingraham, "Law enforcement took more stuff from people than burglars did last year," Wash. Post (Nov. 23, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/?utm_term=.875fac11ec2b.
29 Office of the Inspector General, U.S. Dep't of Justice, *Review of the Department's Oversight of Cash Seizure and Forfeiture Activities*, at *i* (Mar. 2017), *available at* https://oig.justice.gov/reports/2017/e1702.pdf.
30 *Id.* at 20.
31 Carpenter, *supra* note 15, at 14.
32 *Id.* at 15.
33 *See* Janine Robben, "Losing by Forfeit?," *Oregon State Bar Bulletin*, Nov. 2006, *available at* https://www.osbar.org/publications/bulletin/06nov/forfeiture.html.
34 Oregon Property Protection Act of 2000, Ballot Measure 3 § 10(2) (2000).
35 *Lint v. Kitzhaber*, 188 Or. App. 526 (2003), *rev'd*, 341 Or. 496 (2006).
36 Williams, *supra* note 11, at 41–102.
37 *Id.*
38 ORS 131A.255(1), (3).
39 ORS 131A.255(2), (5).
40 ORS 131A.455.
41 ORS 131A.360(4).
42 Criminal Justice Comm'n, State of Oregon, "Asset Forfeiture in Oregon 2015" 2 (Apr. 2016), *available at* https://www.oregon.gov/cjc/assetforfeiture/Documents/2015 Asset Forfeiture in Oregon report.pdf.
43 ORS 131A.035.

to the state.[44] With that incentive in mind, state agencies may shift their priorities to align with federal priorities.[45] There is evidence that this is already occurring. Oregon is fourteenth in the Institute for Justice's equitable-sharing rankings.[46] In 2014, Oregon law enforcement in conjunction with federal investigations seized $3.2 million in assets. Those agencies profited $1.9 million.[47] That total exceeded statewide civil forfeitures.[48] If the Trump administration signals a priority in enforcing the federal prohibition against marijuana, absent legislative changes, that shift could cripple Oregon's marijuana industry.

Legal Changes and the Innocent-Owner Defense

If a seizure does occur, claimants can mount constitutional defenses or assert that they are innocent owners. The constitutional arguments are beyond the scope of this article, but generally, because the Supreme Court has focused on the property and not the claimant, most constitutional arguments fail. With that said, Justice Thomas recently indicated his doubt "that this historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice."[49] This shift in constitutional thinking has produced unlikely alliances. Following Justice Thomas's comments, Kentucky senator Rand Paul introduced the FAIR Act, seeking to curtail equitable sharing and the perceived due process violations.[50] The American Civil Liberties Union (ACLU) quickly issued a letter endorsing the bill.[51] The ACLU noted that "civil forfeiture is also fueling police militarization, another byproduct of the War on Drugs," and "the FAIR Act . . . eliminates the profit incentives driving civil forfeiture at all levels by ending federal and state/local partnerships known as 'equitable sharing' that have been used to circumvent state civil forfeiture reforms." The reforms ought to be welcomed and may be necessary, given that Oregonians' other option is to mount an innocent-owner defense.

The innocent-owner defense is an affirmative defense that requires the claimant to demonstrate by a preponderance of the evidence that he or she has an interest in the property and that the property's connection to criminal activity was without his or her consent or knowledge.[52] The defense is inapplicable when it is "contraband or other property that is illegal to possess."[53] For a retail marijuana shop, all cash and inventory are subject to forfeiture without a defense. Any other assets held by the shop ought to be minimized by using lease strategies and security interests to ensure that an innocent claimant can seek the property's return.

Conclusion

Marijuana businesses have a difficult row to hoe if confronted by aggressive federal enforcement. Continued prohibition means that any state-issued business license regarding marijuana is evidence of a crime. The existence of constitutionally dubious civil-asset-forfeiture laws means that those invested in the industry are risking significant financial losses. Further, equitable sharing incentivizes local law enforcement to "assist" in policing a federal scheme.

Good answers are scarce. Only a multi-faceted defense that encourages legislative changes at federal and state levels, combined with basic legal defenses to shield investors from those directly operating marijuana-related businesses, may deter the constitutional blight that is approaching. Those changes are occurring, but they need support. The "Path to Marijuana Reform" package directly addresses the most pressing threat. Lawmakers also ought to support passing the FAIR Act and take state legislative action in Salem to prevent state and local law-enforcement agencies from engaging in equitable sharing. If not, a new prohibition era may emerge and Oregon's newest industry will wilt.

Greg Woods is currently seeking an associate position in employment law in Portland.

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44 18 U.S.C. § 981(e)(2); 21 U.S.C. § 881(e).
45 18 U.S.C. § 981(e)(2).
46 Carpenter, *supra* note 15, at 27.
47 Samantha Matsumoto, "Oregon Police Received $1.9 Million From Federal Asset Seizures," Willamette Week (Sept. 10, 2014), http://www.wweek.com/portland/blog-32135-oregon-police-received-1-9-million-from-federal-asset-seizures.html.
48 Criminal Justice Comm'n, State of Oregon, "Asset Forfeiture in Oregon 2014" 11 (Apr. 2015), *available at* https://www.oregon.gov/cjc/assetforfeiture/Documents/2014_Asset_Forfeiture_in_Oregon.pdf (listing $1,593,345 in cash seized in civil forfeitures).
49 *Leonard v. Texas*, 580 U.S. __, 137 S.Ct. 847, 849 (2017).
50 Fifth Amendment Integrity Restoration (FAIR) Act, S. 542/H.R. 1555, 115th Cong. § 1 (2017).
51 Letter from Fiaz Shakir & Kanya Bennett, American Civil Liberties Union, to Rand Paul, senator from Kentucky, & Tim Walberg, congressman from Michigan (Mar. 16, 2017), available at https://www.aclu.org/letter/aclu-letter-endorsing-fair-act-civil-forfeiture-reform.
52 18 U.S.C. § 983(d).
53 *United States v. 144,744 Pounds of Blue King Crab*, 410 F.3d 1131 (9th Cir. 2005) (applying 18 U.S.C. § 983(d)(4)).

CIVIL RIGHTS LEGISLATION INTRODUCED IN OREGON'S 2017 SESSION

by Damien Munsinger, Barran Liebman LLP, and Matt Scherer, Buchanan Angeli Altschul & Sullivan LLP

The Oregon legislature convened its 2017 regular session on January 9, and legislators have introduced many proposed bills on civil rights matters. This article provides a brief preview and summary of some of the proposed legislation. Detailed measure history and the full text of the bills are accessible on the legislature's website at https://www.oregonlegislature.gov/.

HB 2005: Pay-Equity Provisions

House Bill 2005 contains several provisions regarding pay equity. The most important changes include a prohibition on discrimination against employees or applicants in the payment of wages or compensation because of an employee's or applicant's race, color, religion, sex, sexual orientation, national origin, marital status, disability, or age. Additionally, the bill prohibits employers from screening job applicants based on salary history, from basing salary decisions on salary history, or from seeking an applicant's salary history prior to making an offer of employment, with exceptions for internal hires. Where an employee can show that he or she performed similar work for less wages than co-workers of another race, color, religion, sex, sexual orientation, national origin, marital status, or age, the employer will have the burden to demonstrate a business necessity for the pay disparity, unless the disparity is based on merit, seniority, or piece-rate or production-based work.

SB 260: Sex as Victim Characteristic for Intimidation Crimes

Senate Bill 260 amends the statute describing the crimes of intimidation in the first degree and intimidation in the second degree. The bill adds sex to the list of victim characteristics for those crimes, in addition to the existing characteristics of race, color, religion, sexual orientation, disability, and national origin.

HB 2738: Marriage as Civil Contract Entered Into Between Two Persons

House Bill 2738 clarifies that the terms "husband," "wife," and "spouse" as used in Oregon statutes include married persons of the same sex. The bill also permits registered domestic partners to dissolve their domestic partnership for the purpose of entering into marriage. By its terms, the bill takes effect only if House Joint Resolution 11 (2017) is approved by the people in the November 2018 general election. The resolution would amend the Oregon Constitution to repeal section 5a of Article XV, which defines marriage as between one man and one woman.

HB 2557: Repealing Prohibition on Real ID Act

House Bill 2557 would repeal a current Oregon law that prohibits state agencies or programs from implementing the federal Real ID Act of 2005. The Real ID Act mandates certain requirements for state-issued identification cards, including drivers' licenses, for them to be considered acceptable by the federal government for official purposes. Official purposes include entering secure federal facilities, such as courthouses, as well as boarding commercial airline flights. The Department of Homeland Security has extended the deadline for compliance with the Real ID Act multiple times.

HB 2713: Barring Evidence Obtained From Unlawful Detention

House Bill 2713 renders evidence obtained as a result of an unlawful detention inadmissible in a criminal proceeding against the person subjected to the unlawful detention. The prohibition extends to evidence found during a search incident to a lawful arrest if the person was unlawfully detained. To apply, the court must be considering a motion to suppress evidence and find that the individual was unlawfully detained by a peace officer.

SB 1006: Noncitizen Crime Victims

Senate Bill 1006 directs any state law-enforcement agency, including judges and prosecutors, to certify in writing when a crime victim has been helpful in directing, investigating, or prosecuting certain crimes. For qualifying victims, the written certification must be provided to the United States Citizenship and Immigration Services within ninety days of the certificate being requested or fourteen days if the victim is in removal

proceedings. A victim who has not refused or failed to provide information and assistance reasonably requested by law-enforcement officials is presumed to have been helpful. Requests for certification may be made by the victim or the victim's family member.

HB 2167 and SB 292: Workplace Bullying

House Bill 2167 and Senate Bill 292 would amend ORS Chapters 654 and 659A to add prohibitions against acts of workplace bullying. The bills are substantively identical. Under the proposed amendments to Chapter 654, a workplace characterized by "an abusive work environment that an employer knew or should have known existed and failed to take prompt and appropriate corrective action" is an unsafe workplace under Oregon's occupational safety and health laws. It defines "abusive work environment" as one "in which an employee is subjected to abusive conduct that causes" physical or psychological harm. The abusive conduct must be "sufficiently severe or pervasive to create a hostile, intimidating or offensive work environment." Similarly, the bills would amend Chapter 659A to make it an unlawful employment practice for an employer "to create or maintain an abusive work environment." The bills would presume that an employer knew or should have known of the abusive environment unless the employer used reasonable care to prevent and correct the formation of such an environment *and* the employee failed to use the corrective opportunities the employer provided. An employee subjected to bullying could bring a civil suit under ORS 659A.885.

HB 2181: Requiring Employers to Explain Reasons for Termination and Creating Rebuttable Presumption in Context of Wage-Claim Retaliation Claims

House Bill 2181 would require employers who receive a written request from a terminated employee to provide "a full, succinct and complete written statement of the reason or reasons for the termination of the employee" within ten days of the request. For at-will employees, employers could comply with this requirement by sending the employee a statement that the employee was at will and was terminated for no particular reason. The employer would thereafter be prohibited from providing a contradictory statement of the reasons for termination. The same bill would also amend ORS Chapter 652 to state that when an employer discharges or otherwise engages in an adverse action toward an employee within ninety days after the employee made a wage claim, the action is rebuttably presumed to be retaliatory.

HB 2193: Employee Schedules

House Bill 2193 would amend numerous provisions in ORS Chapter 653 to encourage employers to provide employees with their preferred schedules, to encourage employers to create predictability in employees' schedules, and to punish employers who change employees' schedules without notice. The bill would impose obligations similar to the Americans with Disabilities Act on large employers in the retail, hospitality, and food-service sectors who receive scheduling-related requests from employees. The amended law would require such large employers to engage in an "interactive process" with an employee who requests "not to be scheduled for work shifts during certain times or at certain locations" or who identifies certain preferences about his or her work schedule. Under certain circumstances (for example, the employee has another job or has a serious health condition), the employer must accommodate the employee's preferred schedule "[u]nless the employer has a bona fide reason" not to do so. Such employers would also be subjected to a number of other additional requirements.

A separate section covering smaller employers similarly allows employees to request not to work certain shifts and to express preferences for what shifts they work, but the bill is less clear regarding the circumstances under which the employer may accept or reject employees' preferences. Another important provision in this bill would require employers to pay employees for at least four hours of work if the employee is scheduled or called into work but does not work the entire shift because of the employer, or if the employee is notified less than twenty-four hours before a shift that he or she need not report to work. Finally, the bill would also prohibit all employers from retaliating against any employee because that employee engaged in an activity or made a scheduling request protected by the bill.

SB 301: Barring Discrimination Against Cannibis Users

Senate Bill 301 would amend ORS 659A.315 to make it unlawful for an employer to "require, as a condition of employment, that any employee or prospective employee refrain from using a substance that is lawful to use under the laws of this state during nonworking hours." Currently, ORS 659A.315 protects employees' right to

smoke tobacco during off hours, and this bill is plainly aimed at extending that protection to cannabis users. Employers still may impose a restriction against cannabis use if that restriction relates to "a bona fide occupational qualification" (presumably, maintaining a license or participating in a business where drug testing is required) and still may impose restrictions to ensure that the employee's work performance is not impaired.

SB 400, 401, and 543: Tax Credits for Employers Who Provide Paid Family Leave or Sick Leave

Senate Bills 400 and 543 would permit small employers (those with fifty full-time employees or fewer) to receive a tax credit for any paid leave that qualifies under the Oregon Family Leave Act or the Family and Medical Leave Act. Senate Bill 400 would also extend this credit to paid sick time taken under ORS 653.601, Oregon's protected sick-time law, to care for an ill family member. The tax credit would be equal to the total amount of compensation paid to the employees for such leave. Senate Bill 401 would provide a similar tax credit to employers with fifty or fewer full-time employees who provide their employees with paid sick leave.

Bills Relating to the Minimum Wage

More than a dozen bills before the legislature this session look to blunt the full force of the statewide minimum-wage increase enacted by the legislature last year. Senate Bill 409 would freeze the minimum wage at current levels, effectively repealing the portions of Senate Bill 1532 that require the minimum wage to steadily increase over the next five years. Senate Bill 407 would limit the impending minimum-wage increases to employers with more than fifty full-time employees. Senate Bill 406 would not alter the minimum wage increase, but would give employers a tax credit to cover the increase in the minimum wage.

Senate Bill 410 would give local governments statewide the right to opt out of the minimum-wage increases. Three other bills focus on eastern Oregon. House Bill 2484 would defer the minimum-wage increase for two years for Baker and Malheur counties, Senate Bill 412 would freeze the minimum wage for jurisdictions along the Idaho border, and Senate Bill 411 would freeze the minimum wage in all of eastern Oregon.

A series of bills up for consideration this session would freeze the minimum wage or allow a lower minimum wage for certain categories of employees. House Bill 2145 would allow a lower minimum wage for work-study students. House Bill 2378 and Senate Bill 448 would likewise allow a lower minimum wage for younger workers, with the former bill allowing a lower minimum wage for employees under the age of twenty-one for the first ninety days of their employment and Senate Bill 448 permitting high school students in vocational-training programs to be subject to a lower minimum wage. Senate Bills 408 and 455 would freeze the minimum wage for agricultural workers, and Senate Bill 569 would freeze the minimum wage for agricultural workers, forest services industry workers, and all workers under the age of nineteen.

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

If you are interested in serving as a board member, please contact Megan Lemire at megan.lemire@gmail.com.

SUPREME COURT UPDATE

by Alyssa Engelberg, Dunn Carney, and Kirsten Rush, Busse & Hunt

***Bethune Hill v. Va. State Bd. of Elections*, No. 15-680 (March 1, 2017)**

The Court held 7–1 that the district court applied an incorrect legal standard in determining that race was not a predominant factor in the redrawing of eleven of twelve legislative districts in Virginia following the 2010 census. In the remaining district, the Court held that the legislature's use of race was narrowly tailored to the state's compelling interest in complying with the Voting Rights Act and thereby satisfied strict scrutiny under the standard required by *Alabama Legislative Black Caucus v. Alabama*. On remand, the Court instructed the district court to determine whether race was the legislature's predominant motive in redrawing the eleven other districts.

***Buck v. Davis*, No. 15-8049 (February 22, 2017)**

The Court reversed the Fifth Circuit 6–2, holding that expert testimony relating a criminal defendant's propensity for violence to his race was unduly prejudicial. The petitioner was found guilty of murder for shooting a family member and an acquaintance. Pursuant to Texas law, if the jury found that he had a propensity for violence, he could be sentenced to death. At trial, his counsel elicited the testimony of a psychologist who testified that because the petitioner was black, he was statistically more likely to commit violent acts. The Court held that under *Strickland*, the petitioner demonstrated ineffective assistance of counsel because the psychologist's expert testimony regarding his race was prejudicial and, by introducing the testimony, his counsel's behavior was deficient. The Court further held that the district court abused its discretion in denying the petitioner's Rule 60(b)(6) motion because the testimony regarding his race was not *de minimis*.

***Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, No. 15-827 (March 22, 2017)**

In a unanimous 8–0 decision, the Court reversed the Tenth Circuit, holding that for a school to meet its substantive obligation under the Individuals with Disabilities Education Act (IDEA), a school must offer an "individualized education program" reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The Court rejected the Tenth Circuit's test that the standard for "appropriate" progress is "merely more than *de minimis*," holding that the standard under the IDEA is more demanding and the instruction offered by a school must be specially designed and personalized to meet the child's unique needs, as every child should have the opportunity to meet challenging objectives.

***Expressions Hair Design v. Schneiderman*, No. 15-1391 (March 29, 2017)**

The Court held unanimously that a New York law prohibiting surcharges for payments made by credit card regulates speech under the First Amendment and is not vague as applied to the petitioners, five businesses and their owners. The New York law requires a merchant to charge the same sticker price to all purchasers, regardless of payment method, prohibiting additional fees added to the sticker price for customers paying by credit card. The Court found that the law regulates speech because unlike a typical price regulation, which regulates how much a merchant can collect from a customer, the law regulates how merchants communicate their prices. On remand, the Court directed the Second Circuit to determine whether the law survives First Amendment strict scrutiny.

***Fry v. Napoleon Cmty. Schs.*, No. 15-497 (February 22, 2017)**

The Court held unanimously that exhausting administrative procedures established by the IDEA is unnecessary when the gravamen of the plaintiff's suit is something other than the Act's guarantee of a "free and appropriate public education." The plaintiff, a student with severe cerebral palsy, brought claims for disability discrimination when the school refused to allow the plaintiff's service dog to assist her in school. The complaint was dismissed for failure to exhaust administrative procedures. The Court vacated and remanded the case to the Sixth Circuit with instructions that on remand, the court analyze whether the gravamen of the plaintiff's complaint seeks relief for the denial of a free and appropriate public education.

***McClane Co. v. EEOC*, No. 15-1248 (April 3, 2017)**

The Court reversed the Ninth Circuit 7–1, holding that a district court's decision whether to enforce or quash a subpoena issued by the EEOC should be reviewed for abuse of discretion, not *de novo*. This decision resolved

a disagreement among the circuit courts of appeals over the appropriate standard of review for the decision to enforce an EEOC subpoena. In the absence of an explicit statutory command as to which standard of review should apply, the Court looked to two factors: "history of appellate practice" and whether "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." The Court held that under both factors, the more deferential standard of abuse-of-discretion review is appropriate.

***Moore v. Texas*, No. 15-797 (March 28, 2017)**

The Court vacated and remanded the decision of the Texas Court of Criminal Appeals in this 5–3 decision. The petitioner was convicted of murder and sentenced to death. Despite a lower court's finding that the petitioner was intellectually disabled and his execution would violate the Eighth Amendment, the Texas high court held that the petitioner had not shown significant subaverage intellectual functioning based on his IQ scores. The Court held that the factors applied under the Texas test for determining intellectual disability disregarded current medical standards and were inappropriate for determining intellectual disability going forward because they do not comport with the Eighth Amendment or the Court's precedent.

***Pena-Rodriguez v. Colorado*, No. 15-606 (March 6, 2017)**

In a 5–3 decision, the Court held that when a juror makes a statement clearly exhibiting that he or she relied on racial stereotypes or animus in reaching the decision to convict a criminal defendant, the Sixth Amendment requires the no-impeachment rule under the state's rules of evidence to give way to permit the trial court to consider the juror's statement. The no-impeachment rule ensures that once a jury reaches a verdict, the verdict will not be called into question based on statements jurors made during deliberations. The Court noted at least sixteen jurisdictions with exceptions to the no-impeachment rule where racial bias played a role in deliberations and that common law prior to adoption of the Federal Rules of Evidence allowed exceptions in extreme cases. The Court cited the Fourteenth Amendment in its reasoning that racial bias is harmful to the administration of justice and the court must address such bias to prevent systemic loss of confidence in jury verdicts.

***White v. Pauly*, No. 16-67 (January 9, 2017)**

In this per curium opinion, the Court vacated the Tenth Circuit and remanded the case concerning a claim brought under 42 U.S.C. § 1983 for violating the Fourth Amendment right to be free from excessive force. A police officer arrived late to the scene of a police action and, having witnessed shots fired by one of several individuals inside a house surrounded by officers, shot and killed an armed occupant of the house without first giving a warning. The Court held that the police officer did not violate clearly established law because it was reasonable for an officer who arrived late to the scene of ongoing police activity to assume that proper police procedures, such as officer identification, were followed by the officers already on site.

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RECENT LEGAL DEVELOPMENTS

by Richard F. Liebman and Anthony Kuchulis, Barran Liebman LLP

Current Supreme Court Docket

Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (U.S. Jan. 13, 2017) (No. 16-285); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 909 (U.S. Jan. 25, 2017) (No. 16-300); *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (U.S. Jan. 13, 2017) (No. 16-307)

The Supreme Court has agreed to hear a trio of cases regarding the issue of whether an employer may utilize a mandatory arbitration agreement that prohibits employees from filing a class action for employment-related claims. The Court announced that oral argument on these cases would be scheduled in the next Term, beginning in October 2017. In *Ernst and Young,* the Ninth Circuit ruled that an employer violates the National Labor Relations Act by requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, or terms and conditions of employment. The other cases pending in the group are *NLRB v. Murphy Oil* and *Epic Systems Corp. v. Lewis*, with *Murphy Oil* ruling in favor of the employer and *Epic Systems* ruling against the employer. The Court declined to grant or deny certiorari of a Second Circuit opinion, thereby enforcing a class-action waiver.

Ninth Circuit Court of Appeals

Brandon v. Maricopa Cnty., 849 F.3d 837 (9th Cir. 2017)

The Ninth Circuit held that the First Amendment of the Constitution protects speech by private citizens on matters of public concern, not by public employees acting in the course of their employment. In the case at hand, a county lawyer alleged that she was terminated after having a statement published in the local newspaper suggesting that some cases are settled to save public officials from embarrassing depositions. In holding that the statements at issue related to the attorney's employment, the court noted that her statements "touched on the very matter on which she represented the county" and thus were not "constitutionally protected free speech."

Brunozzi v. Cable Commc'ns., Inc., ___ F.3d ___, No. 15-35623, No. 1537244, 2017 WL 1055588, 2017 US APP LEXIS 4997 (9th Cir. Mar. 21, 2017)

Applying Oregon's whistleblower statute, the Ninth Circuit held that private employees were protected from retaliation for making internal reports of possible violations of law. This is the first case to hold that internal complaints by an employee are protected under ORS 659A.199. The case involved a cable-installation technician who complained to his immediate supervisor that he believed the company's overtime formula was improper. He was terminated two days after making the complaint. The statutory language was unclear whether internal complaints were entitled to protection, but the court reasoned that based on the intent of the statute and public policy, whistleblowers were intended to have protection for all good-faith reporting of violations of law, whether internal or external.

Other Federal Case Law

EEOC v. Saint Joseph's Hosp. Inc., 842 F.3d 1333 (11th Cir. 2016)

The Eleventh Circuit held that employers are not required to reassign disabled workers into open positions ahead of more qualified, nondisabled employees. The Americans with Disabilities Act (ADA) provides that subject to exceptions, an employer must make a reasonable effort to accommodate a disabled employee. While the ADA suggests that reassignment "may" be an acceptable accommodation, reassignment is neither mandated nor always reasonable. Rather, the employer need only allow a disabled employee the opportunity to compete equally for a vacant position. The court asserted that to hold otherwise would discriminate against non-disabled workers. In sum, businesses should consider reassignment as an optional accommodation for disabled employees, but are entitled to deference with respect to their business judgment and best practices and may promote the best-qualified applicant for any given position.

Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61 (3rd Cir. 2017)

The Third Circuit held that workers in their fifties can sue under federal age-discrimination law when an employment policy has a disparate impact on them as compared to workers in their forties. In so doing, the Third Circuit rejected prior contrary rulings from the Second, Sixth, and Eighth Circuits. The ruling opens the door in some jurisdictions for an employee to argue that statistically, an employer's policy unintentionally discriminates against workers in their fifties, sixties, or seventies as compared to younger employees more than forty years old.

Hawai'i v. Trump, No. 1:17-cv-00050, 2017 U.S. Dist. LEXIS 36935 (D. Haw. Mar. 15, 2017); *Int'l Refugee Assistance Project v. Trump*, No. 8:17-cv-00361-TDC, 2017 U.S. Dist. LEXIS 37645 (D. Md. Mar. 16, 2017)

On March 15, 2017, federal judges in Hawaii and Maryland issued nationwide orders blocking President Trump's ban on travel from six Muslim-majority countries. The administration had argued that the order was intended to protect the nation from foreign terrorists entering the United States. The new travel ban, issued on March 6, was intentionally narrower than a previous effort and was drafted to specifically overcome the legal challenges that ultimately blocked the first order. Notwithstanding those revisions, Judge Watson for the federal district court in Honolulu wrote that a "reasonable, objective observer" would view even the new order as "issued with a purpose to disfavor a particular religion, in spite of its stated religiously neutral purpose."

Administrative Agencies

EEOC Guidance on Employees with Mental-Health Conditions

On December 12, 2016, the EEOC issued a guidance observing that mental-health discrimination claims under the ADA are on the rise, noting that it processed 5,000 such complaints and obtained approximately $20 million for employees denied accommodations in 2016. The guidance reiterates that individuals with mental-health conditions are entitled to accommodations and a harassment-free workplace. The guidance further asserts that when an employee cannot do his or her job because of mental illness, even with workplace accommodations, that employee may still be entitled to an accommodation in the form of unpaid leave. That unpaid leave may come after the employee has exhausted federal and state family-leave eligibility.

Department of Education Guidance on Transgender Issues

On February 22, 2017, a "Dear Colleague" letter from the Department of Education (DOE) formally withdrew its previous guidance that had asserted that Title IX's prohibition of discrimination "on the basis of sex" provided that students were entitled to use sex-segregated facilities based on gender identity. The letter signaled that the DOE under President Trump will not support interpretations of Title IX requiring schools to allow transgender students to use the bathroom or locker room corresponding to their gender identity instead of the gender on their birth certificate. The letter does not suggest new guidance, but asserts that the original guidance lacked "extensive legal analysis." In response, the US Supreme Court vacated and remanded a case it had accepted on the issue, G.G. *v. Gloucester County School Board*, and instructed the lower court to review its decision in the absence of the previously issued guidance.

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