

10/10/2010

**INTERAGENCY AGREEMENT
BETWEEN
THE DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
AND
THE OREGON BUREAU OF LABOR AND INDUSTRIES**

Pursuant to the provisions of ORS 654.062(5)(a) and (b), prohibiting discrimination by an employer against an employee for exercising employee rights provided by the Oregon Safe Employment Act (ORS 654), and the provisions of ORS 659, prohibiting discrimination by Oregon employers and individuals, the parties of, the Department of Consumer and Business Services, and the Oregon Bureau of Labor and Industries, enter into the following agreement:

RECITALS:

The Department of Consumer and Business Services (DCBS), Oregon Occupational Safety and Health Division (OR-OSHA), administers the Oregon Safe Employment Act (ORS 654) and enforces the Oregon Occupational Safety and Health Rules which establish minimum safety and health standards for all industries.

The Oregon Bureau of Labor and Industries (BOLI), Civil Rights Division (CRD), enforces anti-discrimination provisions contained in ORS Chapter 659 and has substantial expertise in such enforcement.

TERMS:

1. Scope of BOLI Services

BOLI shall provide those services set out in Exhibit A attached hereto and by reference incorporated herein.

2. Scope of DCBS Services

To assist the BOLI in carrying out its obligations hereunder, the DCBS shall perform the services set out in Exhibit B attached hereto and by reference incorporated herein.

3. Financial Obligation

The DCBS shall compensate the BOLI for work performed under this Agreement as set out in Exhibit C attached hereto and by reference incorporated herein. The payment shall be full compensation for work performed, for services rendered, and for all labor, materials, supplies, equipment and incidentals necessary to perform the work and services.

4. Term of Agreement

This Agreement shall be effective July 1, 2011 through June 30, 2013.

INTERAGENCY AGREEMENT:

5. Project Managers

- a.) For the DCBS, Attention: Michael Wood, Administrator, Oregon Occupational Safety and Health Division, P.O. Box 14480, Salem, Oregon 97309-0405.
- b.) For the BOLI, Attention: Amy Klare, Administrator, Civil Rights Division, 800 NE Oregon Street, #1045, Portland, Oregon 97232.
- c.) Any change in the above information will be communicated in writing.

6. Assignment

BOLI shall not assign the Agreement, in whole or in part, or any right or obligation hereunder, without the prior written approval of the DCBS.

7. Provisions for Review and Updating

The BOLI/CRD and the DCBS/OR-OSHA will meet annually to review the provisions of this interagency agreement, to update the agreement as necessary, and to exchange relevant program information.

8. Legal Services

Where the BOLI requires outside legal services for enforcement of civil rights claims under ORS 654.062(5)(a) and (b) against the DCBS as respondent, the BOLI will incur the expenses.

9. Modification of Agreement during Its Term

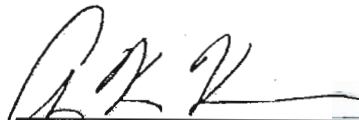
This agreement may be amended or modified during its term by mutual consent of the parties. Amendments may be proposed by either party by written notice to the other party and shall become effective upon signing or as otherwise specified in the amendment.

This Agreement supersedes all previous Agreements and will remain in effect until amended by legislative action or until modified with the approval of both parties.

OREGON BUREAU OF LABOR AND INDUSTRIES



Brad Avakian, Labor Commissioner
Division



Amy Klare, Administrator, Civil Rights

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES



Scott L. Harra, Acting Director



Michael Wood, Administrator, OR-OSHA

EXHIBIT A

DESCRIPTION OF ENFORCEMENT SERVICES TO BE RENDERED BY THE BUREAU OF LABOR AND INDUSTRIES

I. GENERAL DESCRIPTION OF SERVICES

The Bureau of Labor and Industries (BOLI) shall provide administrative enforcement of complaints filed under ORS 654.062(5)(a) and (b). This includes enforcement of claims filed against the Department of Consumer and Business Services (DCBS) itself.

II. ENFORCEMENT STEPS

A. Filing a Complaint

1. Immediately upon receipt of a complaint alleging a violation of ORS 654.062(5)(a) and (b), BOLI Civil Rights Division (CRD) shall commence processing of the complaint.
2. The procedures for filing a complaint are as follows:
 - a. An individual makes an inquiry to the CRD.
 - b. An intake officer talks with the individual to determine whether he/she has a potential basis for filing a complaint under ORS 654.062(5)(a) and (b).
 - c. If the intake officer determines that the individual has a basis for filing a complaint, the intake officer will draw up a complaint which the individual will review and sign. The signature must be notarized. CRD will provide notary services if needed.
 - d. The notarized charge will be forwarded to the Operations Manager for assignment to a senior civil rights investigator for in-depth Complainant interviews and prompt charge assessment.
 - e. A complaint must be filed with BOLI within 90 days after the Complainant has reasonable cause to believe that a violation of ORS 654.062 has occurred.

B. Notice of Filing

1. Notification letters will be sent to Respondent requesting a position statement within 14 days of case assignment to the investigator. The Respondent's position statement will consist of the proper identification of the Respondent and a response to the specific allegations in the complaint, laying out the employer's legal non-discriminatory reason for the adverse action.
2. Notification letters will be sent to the Complainant requiring that he/she contact the investigator within 14 days to schedule a complainant interview.

C. Charge Assessment

1. Complainants will be given an in-depth interview within 30 days from the date the complaint is filed with the Division. The interview will cover each specific harm suffered by the Complainant and the dates of its occurrence. For each harm suffered, the Complainant must be able to specify relevant incidents to show specific intent or different treatment. The Complainant must be able to articulate linkages or causal connection between the harm and the protected class. Witnesses and comparators must be identified if the Complainant was in a position to have access to such information.
2. If the Complainant states that missing evidence exists, Complainant will be given 14 days to provide the evidence upon request of the investigator. Failure to provide the required information will result in a dismissal.
3. Investigators will utilize the Civil Rights Division's screening criteria to separate cases into A, B, or C categories:
 - a. **A CASES** are those which more likely than not will result in substantial evidence cases. Full investigation will be conducted until the investigator is able to write a substantial evidence administrative determination or a dismissal memo.
 - b. **B CASES** are those which need more information in order to determine whether it is an A or C case. The investigator may utilize the investigative tools of "Fact Finding Conference", specific interrogatory, or witness/Respondent interviews as appropriate.
 - c. **C CASES** are those which are dismissed because the evidence gathered would not be sufficient to result in a substantial evidence finding. In most cases, Complainants will have been interviewed and a Respondent position statement will be in the case file.

The following are examples of cases that can be resolved under C category dismissal: non-jurisdictional allegations; charges unsupported by any direct or circumstantial evidence of discrimination when the Complainant was in a position to have access to such evidence; and the Complainant is not credible.

4. When a dismissal has been determined, the Complainant will be informed that he/she may pursue the case through the courts. The Complainant will receive a state notice of Complainant's right to file a civil suit. The investigator who is responsible for deciding a dismissal must explain to the Complainant why the dismissal action was taken.
5. Dismissal cases require the investigator to write a brief memo to the case file stating the reason why the case has been dismissed. The memo must be signed by a second investigator. A letter will be sent to the Complainant and Respondent advising them of the dismissal.
6. Cases that have not been dismissed after the Complainant interview will be assigned to a B-case team investigator who will continue the investigation. Cases in B category can be dismissed if it is determined there is insufficient evidence to demonstrate that the case would not result in a cause finding if pursued.

D. Conciliation

1. BOLI encourages Complainants and Respondents to resolve complaints by mutual agreement at any time before an Administrative Determination is made. CRD will notify both parties of this option in the notice of filing and during its initial contacts with them. CRD will mediate between the parties to aid such a settlement.
2. If, before an Administrative Determination is made, the parties agree upon settlement, a CRD investigator will draft a pre-determination settlement (PDS) agreement. The agreement will state:
 - a. That a "no-fault" settlement has been reached;
 - b. That the Complainant and Respondent accept the terms of the agreement as a resolution of the complaint;
 - c. The specific action(s) the Respondent and/or Complainant will take in settlement of the complaint and the time within which the action(s) will be taken; and
 - d. That BOLI may investigate any alleged breaches of the agreement.
3. The Complainant, Respondent, CRD investigator and the CRD administrator will sign the PDS agreement. Upon execution of the PDS agreement, CRD will close the complaint and notify the Complainant and Respondent.
4. The CRD shall not be a party to any third-party settlement agreements between the Complainant and Respondent except for mediation as outlined in section J.

E. Fact-finding Conference (FFC)

1. At such times as it deems appropriate, CRD may hold a fact-finding conference. Such a conference is part of CRD's investigation of the complaint. The purpose of the conference will be to:
 - a. Identify the undisputed elements of the complaint;
 - b. Define and, if possible, resolve the disputed elements of the complaint; and
 - c. Attempt settlement of the complaint.
2. An investigator of CRD will schedule the conference, notifying both the Complainant and the Respondent of the date, time and place. The CRD investigator may require the Complainant and/or Respondent to provide information and documents for use at the conference and will make such request at least ten (10) days prior to the conference.
3. Counsel may accompany the Complainant and the Respondent, but counsel's role is advisory only. The conference will be informal and cross-examination will not be allowed. A Complainant's failure to appear shall not result in administrative closure of the case through dismissal of charges against the Respondent, unless such failure is part of a sustained pattern of non-cooperation, making enforcement of the case unreasonable.

4. If the conference does not result in settlement, the CRD investigator will either:
 - a. Issue an Administrative Determination stating that there is substantial evidence of unlawful discrimination in support of the Complainant's allegations; or
 - b. Determine that there is insufficient evidence to support the allegation, issuing a Dismissal Memo; or
 - c. Refer the case to an investigator for full investigation.

F. Investigation

1. If a complaint is not resolved through pre-determination settlement or otherwise dismissed, CRD will investigate the allegations contained in the complaint. The purpose of the investigation is to determine objectively whether there is substantial evidence of unlawful discrimination.
2. The investigation will include interviews with the Complainant, Respondent, and anyone else who may be a source of evidence. The investigation may also involve the examination and analysis of written documents.
3. Except at the request of a witness, neither the Respondent nor the Respondent's representative will be present during interviews of witnesses who are the Respondent's non-supervisory employees or former employees. Upon request, CRD will provide the Complainant, Respondent or witness with a copy of any existing summary of his/her own testimony.
4. The investigator will make written requests to the Respondent for documents, records, files or other sources of evidence. The Respondent will be required to provide such information within twenty-one (21) days of the date of the investigator's written request. If the Respondent is unable to provide the information within that time, he/she will notify the investigator within ten (10) days of the date of receipt of the investigator's request. The notification will be in writing and will state the specific time, not to exceed fourteen (14) days beyond the original due date, when the information will be provided.
5. The investigator will make all reasonable efforts to obtain the Respondent's voluntary consent for access to the Respondent's business premises, relevant evidence, and sources of evidence when the nature of the complaint requires such access. When the investigator gains access to Respondent's business premises, the investigator may examine records and copy such materials, and may take the statements of such employees as are relevant to the allegations of the complaint. If the Respondent does not give voluntary consent, BOLI will exercise its vested authority to obtain the necessary information.

G. Administrative Determination/Dismissal

1. Upon completion of the investigation, CRD will issue an Administrative Determination or Dismissal Memo based on the statements of the Complainant, Respondent and witnesses, and the analysis of records and other relevant evidence. A copy of the Administrative Determination or Dismissal Memo will be provided to the Complainant and Respondent.

2. If CRD finds no substantial evidence of unlawful discrimination, BOLI will dismiss the complaint and notify the Complainant and Respondent of the dismissal. It will notify the Complainant of his/her right, if any, to file a civil suit. If CRD finds substantial evidence of unlawful discrimination, BOLI will notify the Complainant and Respondent. The complaint will be assigned for conciliation. However, the Commissioner may proceed directly to a contested case hearing if the interests of justice so require.
3. BOLI will process all cases from perfected charge through Administrative Determination, or dismissal, within 90 days.
4. The Administrative Determination or dismissal will be final.

H. Conciliation

1. If CRD finds substantial evidence of unlawful discrimination, an investigator of CRD will seek to eliminate the effects of the unlawful discriminatory act(s) by conference, conciliation and persuasion. BOLI will not allow such negotiations to be so lengthy that they defeat the purposes of the statutes enforced by BOLI. If an agreement is reached which is satisfactory to the Complainant and Respondent, CRD's investigator will draft a conciliation agreement. The agreement will state:
 - a. That the Complainant and Respondent accept the terms of the agreement as a resolution of the complaint;
 - b. The specific action(s) the Respondent and/or Complainant will take in settlement of the complaint and the time within which the action(s) will be taken; and
 - c. That CRD will investigate any alleged breaches of the agreement.
2. Upon execution of the agreement (signed by both parties), CRD will close the complaint and notify the Complainant and Respondent.

I. Failed Conciliation -- Contested Case Hearing

1. When CRD is unable to obtain voluntary compliance through conference, conciliation or persuasion, CRD will refer the complaint to its hearing case presenter to be prepared for a contested case hearing.
2. Should legal counsel outside of BOLI become necessary during any phase of a contested case hearing under this Agreement, with the exception of any case in which the DCBS is the Respondent, BOLI will utilize the services of the Department of Justice.

J. Mediation Program

1. The Operations Manager will consult with investigators to identify cases that might be well suited for mediation. Once identified, the agency informs the parties (complainant and respondent) that mediation is an alternative forum to resolve disputes without the time and expense of investigation, litigation, or administrative hearings.
2. In cases where mediation occurs the mediator assigned to the case is **not** the investigator assigned to the case. Merits of the case are generally not discussed, except to the extent relevant to the specific settlement proposal.

3. All mediation communications and documents prepared specifically for mediation are confidential (pursuant to ORS 36.256 and OAR836-051-0010).
4. Mediation Agreements signed by BOLI do not include terms requiring confidentiality of the parties or requiring/permitting a general release. Respondents may include a separate general release. BOLI is not a party to the release.
5. The Operation Manager will insure that mediators are certified to conduct mediations which meet in exceeds of the Basic Mediation curriculum requirements found in the Oregon Judicial Department Court-Connect Mediator Qualifications Rules, effective August 1, 2005.

III. RECORDS CONFIDENTIALITY

A. ORS 192.501(8) conditionally exempts investigatory information relating to any complaint filed under ORS 659.040 or 659.045, until such time as the complaint is resolved under ORS 659.050, or a final administrative determination is made under ORS 659.060. BOLI will therefore ensure that to the extent possible, records submitted to it meet the requirements detailed in ORS 192.502(3) "Confidential Disclosures by Citizens."

B. CRD will maintain a log of all complaints perfected relevant to discrimination against employees. This log will also record action taken in regard to these complaints and the status of these complaints.

IV. REPORTS

A. CRD shall submit federal case activity forms to OR-OSHA each month. CRD shall submit to OR-OSHA a billing invoice and quarterly report for cases processed during the quarter. The invoice and report shall be submitted on or before the 15th of the month following the end of each calendar quarter.

B. CRD shall conduct an annual review of costs incurred during the year pursuant to this agreement. CRD shall develop proposed billing rates based on the previous year's actual costs. Detailed cost justification shall be submitted to OR-OSHA in support of the proposed rates by September 15. OR-OSHA shall review the proposed rates and supporting documentation. OR-OSHA has the option to request reasonable additional justification before approving a rate change. Once the rates are agreed upon, they will become the basis for billing OR-OSHA for the year. Proposed rates shall be agreed upon by August 15 with the rates effective for the 12-month period beginning October 1.

V. REVIEWS

A. CRD shall provide OR-OSHA an opportunity to review any proposed regulations, rules, or standards relating to occupational safety and health prior to adoption. Such review is designed to assure that employers are not being burdened with unnecessary duplication of occupational safety and health codes, inspections or reports.

B. Upon receipt of such request for review of OSHA files, CRD will respond, if possible, within 30 days.

EXHIBIT B

THE DEPARTMENT OF CONSUMER AND BUSINESS SERVICES OBLIGATIONS

The DCBS shall assist the BOLI in carrying out its obligations by:

1. OR-OSHA's promptly reporting to the CRD any complaints received as a result of discrimination in accordance with the provisions of ORS 654.062(5)(a) and (b).
2. OR-OSHA's providing to CRD, upon written request, copies of all field reports, correspondence and other pertinent investigative and administrative data pertaining to any complaint and inspection where the Bureau certifies that complaint also has been entered pursuant to ORS 654.062(5)(a) and (b).
3. OR-OSHA providing each biennium a total of \$2,000.00 to CRD to partially offset costs associated with both Operational Managers' attendance to the federal Whistleblowers Conference.

EXHIBIT C

FINANCIAL OBLIGATIONS

Detailed Quarterly Billing Statements

BOLI shall prepare a detailed quarterly statement of charges specifying the individual cases for which payment is sought, with a breakdown of charges.

Contract Charges

BOLI will charge \$1,000.00 per case for the processing of complaints from II.A. "Filing a Complaint" to II.H. "Conciliation" as described in Exhibit A. This charge includes administrative closures (due to lack of jurisdiction, uncooperative Complainant, bankruptcy of Respondent, etc.). Administrative closures run fewer than 25 percent of caseload. This practice of charging for administrative closures is consistent with current BOLI contracts with other entities.

Contested Case Hearings

For those cases where a determination is made that an administrative hearing is warranted and such hearing is held, OR-OSHA agrees to reimburse the Bureau for the following categories of costs associated with each hearing:

- a. Case file preparation costs.
- b. Legal administrative costs.
- c. Department of Justice charges.
- d. Hearings officer's fees.

BOLI will charge actual costs for case preparation and hearings. Although costs vary with the difficulty per hearing, costs average \$2,800. The Division projects to process 1 case through administrative hearings.

Post-hearing Administrative Expenses

BOLI will charge actual costs for such expenses. Examples include testimony transcription, settling and receiving supersedeas bonds and holding money in trust pending appeal.