



STATE OF OREGON  
Legislative Counsel Committee

June 13, 2018

To: Oregon Law Commission Workplace Harassment Work Group

From: Dexter A. Johnson, Legislative Counsel

Subject: Overview of existing constitutional provisions, rules and practices applicable to harassment in the legislative branch

This report focuses on harassment and procedures for investigating and addressing harassment involving legislators specifically. Conventional processes and remedies are not easily applied to legislators—elected officials who are generally not employees—who are involved in harassment claims in the workplace. Hence the focus of this report. The report initially sets forth applicable constitutional provisions that bear on the discipline of members of the Legislative Assembly. Subsequently, the report discusses the roles of constitutional provisions, rules and statutes in establishing standards of conduct and procedures for investigating and disciplining those alleged to be violating those standards. The report then outlines the provisions of Legislative Branch Personnel Rule (LBPR) 27, the principal rule for establishing standards of conduct in the workplace and dictating procedures for informally reporting or making formal complaints seeking redress for harassment in the workplace. Integrated into this section of the report are staff observations about the rule, as well as a discussion of issues that have arisen in investigating and addressing informal reports and formal complaints. At the outset, the report's contents are summarized in an executive summary.

### **Executive Summary**

The Oregon Constitution vests exclusive authority to discipline a legislator in the house of which the legislator is a member. That authority is likely not delegable to a committee or officer of the legislative house. Legislatures act by meeting, deliberating and voting. The Constitution requires that all deliberations of either house of the Legislative Assembly or any committees of the Legislative Assembly must be open to the public. Accordingly, any committee directed to investigate and make recommendations on any disciplinary matter, and any deliberations on the matter by the Senate or House of Representatives, must be undertaken in full public view. The Constitution also directs each legislative chamber to adopt its own rules of proceeding, which the Senate and House always do at the beginning of each legislative term.

Current rules explicitly state, and case law suggests, that legislative rules or legislative determinations incident to those rules are granted higher precedential weight than statutes and are not reviewable by a court, except when the rule or application is inconsistent with a constitutional provision. Legislative Branch Personnel Rules are adopted as rules of proceeding of each house. With a rule of proceeding, an individual legislator may raise an issue of noncompliance with the rule and cause the Senate or House to deliberate and vote on the question of noncompliance. No similar mechanism exists to allow a legislator or other individual

to raise the issue of noncompliance with a statutory standard that on its face governs the conduct of the Legislative Assembly or a legislator.

LBPR 27 applies to legislators and legislative staff, including interns and volunteers, but does not apply to lobbyists or others unaffiliated with the legislative branch, except that the rule acknowledges that harassing conduct may include conduct by a nonemployee located in the workplace. Generally, the rule applies the same standards and procedures to legislators and legislative staff, although there are certain provisions that apply only to legislators.

The rule establishes an informal reporting process. As applied to legislators, the informal reporting process may result in corrective action, but the corrective action is purely advisory and a legislator is free to ignore the advice. Often, such voluntarily taken advice is sufficient; the legislator may simply be unaware of the offending conduct and once the legislator is made aware of the situation, the problem ceases. An open issue is whether enhancing the role of caucus leadership in response to informal reports may facilitate greater voluntary compliance by legislators with existing workplace conduct standards.

The rule also establishes a formal complaint process. If a legislator is the subject of a complaint, an independent investigator unaffiliated with the legislative branch must conduct an investigation. The rule provides significant procedural direction and a lengthy timeline for conducting the investigation, but does not provide for interim measures while the investigation is being conducted and recommendations are being developed. Open issues the work group may consider reviewing include the scope of recommendations that may be made to discipline a legislator, the timeline to be used for conducting the investigation and developing a recommendation, whether there is a need for consequential disciplinary actions that fall short of expulsion and other issues.

Finally, inherent in any action for disciplining a legislator for harassment is a tension between a complainant's or victim's interest in privacy and the public's interest in transparency in its legislature. A significant issue for the work group to consider is what is the appropriate balance between these competing objectives, and whether the rule unambiguously articulates that balance.

### **Constitutional provisions**

Several provisions of the Oregon Constitution bear on the investigation and discipline of legislators and operate to make such investigations and discipline significantly different from the investigation and discipline undertaken by an employer of an employee in a routine employment context. A starting point is the very general principle that the Oregon Constitution establishes a representative form of government in which an elected Representative or Senator is, by reason of election, given the right to vote in his or her respective chamber of the Legislative Assembly in order to represent and give voice to voters and other residents of the district that elected the legislator. An investigation or act of discipline that constrains a legislator's ability to cast votes, engage in legislative debate or otherwise perform legislative work thus inherently has the effect of depriving district voters and residents of their voice in representative government for a temporary duration, until either the constraint is lifted or a vacancy is created that can be filled by appointment.

Article IV, section 15, of the Oregon Constitution, is directly applicable. That provision provides:

Either house may punish its members for disorderly behavior, and may with the concurrence of two thirds, expel a member; but not a second time for the same cause.

Article IV, section 15, has never been interpreted by an Oregon appellate court, and therefore there is some uncertainty about its meaning. The term “disorderly behavior,” for example, is vague and flexible, and therefore capable of being applied by a legislative body to specific circumstances or determined by a legislative body to be inapplicable to specific situations, with relative ease. Other elements of the provision, however, appear straightforward. Article IV, section 15, vests authority for disciplining members in each chamber, not in a presiding officer or committee of the chamber. Legislative Counsel believes that this authority is exclusive and cannot be delegated to some other entity. While a sitting legislator that engages in illegal or tortious conduct may be held accountable in a court or other conventional forum in an individual capacity, any determination made in a court or other forum does not generally affect the legislator’s status as a legislator.

The Oregon Constitution provides two express exceptions to the general rule that only the house of which the legislator in question is a member has authority to punish or expel a member. First, Article IV, section 8, of the Oregon Constitution, expressly provides that in the event a legislator is convicted of a felony during the term of office of the legislator or during the period following the legislator’s election, the effect of the conviction renders the office vacant. In other words, an adjudication may result in a legislator being convicted of a felony, and an effect of that determination is to expel the legislator from office. The second exception is Article II, section 18, of the Oregon Constitution, which authorizes legislative district electors to petition for and, upon obtaining a requisite threshold of petition signatures, submit to voters the question of recalling any legislator; the effect of a successful recall vote is to cause an immediate vacancy in the office.<sup>1</sup> Unlike other public officers, a recall petition against a Senator or Representative may be filed almost immediately—“at any time after five days from the beginning of the first session after the election of the Senator or Representative.”<sup>2</sup>

Article IV, section 14, of the Oregon Constitution, requires all deliberations of each house, of committees of each house or of joint committees to be open to the public. Unlike the public meetings law, which under appropriate circumstances permits executive sessions, there is no executive session exception to the open meeting requirement of Article IV, section 14. This means that any legislative committee charged with making a recommendation on discipline to either house must hear facts pertaining to the discipline and must discuss and deliberate on the matter in public view, as must the house itself when it takes up the question of discipline.

Another provision of the Oregon Constitution that plays a significant role in the discipline of members of the Legislative Assembly is Article IV, section 11, of the Oregon Constitution, which provides, in relevant part, that “[e]ach house when assembled, shall . . . determine its own rules of proceeding[.]” Pursuant to this provision, the Senate and House each adopt rules at the beginning of every new two-year legislative term. For the Seventy-ninth Legislative Assembly,<sup>3</sup> Senate and House Rules both incorporate by reference the Legislative Branch Personnel Rules and *Mason’s Manual of Legislative Procedures* (2010).<sup>4</sup> The specifics of the branch personnel

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<sup>1</sup> Article II, section 18 (5), of the Oregon Constitution; see also ORS 249.865.

<sup>2</sup> Article II, section 18 (6), of the Oregon Constitution.

<sup>3</sup> The Seventy-ninth Legislative Assembly began on January 9, 2017, and will be in existence until January 14, 2019. See Article IV, section 4, of the Oregon Constitution.

<sup>4</sup> See, e.g., Senate Rule 18.01, which provides, in relevant part, that “[t]he Legislative Branch Personnel Rules . . . are incorporated into the Senate Rules by this reference as rules of proceeding of the Senate.” House Rule 2.03 is

rules will be addressed below, but the significant point is that Article IV, section 11, requires each house to independently adopt rules of proceeding and the rules so adopted include LBPR 27, the rule establishing standards of conduct in the workplace and procedures for informally reporting or making formal complaints seeking redress for harassment in the workplace. Several sections of *Mason's Manual*, in turn, provide guidance on the meaning and effect of a provision being considered a rule of proceeding adopted under Article IV, section 11. Specifically:

- Section 3 (4) provides that a constitutional provision stating that each house shall have the power to determine its own rules of proceeding “is not restricted to the proceedings of the body in ordinary legislative matters, but extends to determination of propriety and effect of any action taken by the body in the exercise of any power . . . or performance of any duty conferred upon it by the [C]onstitution.”
- Section 4 (2) states the order of precedence of legislative procedure, in descending order as follows:
  - (a) Constitutional provisions and judicial decisions under those provisions.
  - (b) Adopted rules.
  - (c) Custom, usage and precedent.
  - (d) Statutory provisions.

Again, the significance here is that the Oregon Constitution has directed that each house independently undertake the punishment and expulsion of its members and that each house adopt separately and independently its own rules of proceedings; those rules of proceedings establish standards of workplace conduct, procedures for making and investigating reports of misconduct and rules that memorialize a grant of significant precedential weight to those rules and lesser precedential weight to statutory provisions.

Rules adopted by either house of the Legislative Assembly, of course, reflect the views of that house. Oregon's constitutional framework establishes three branches of government, with the judicial branch charged with interpreting what the Constitution means and determining in particular cases whether actions by the Legislative Assembly comport with constitutional requirements. The rulemaking power granted to each house of the Legislative Assembly under Article IV, section 11, appears to be subject only to other constitutional limitations, however, and not to statutory provisions inconsistent with the terms of the rule in question.<sup>5</sup>

As noted above, *Mason's Manual* is adopted by reference and incorporated into both House and Senate Rules. *Mason's Manual* section 563 addresses the authority of each house of the Legislative Assembly to discipline its members under Article IV, section 15. Section 563 states:

1. The power conferred upon a house of the legislature by the constitution to determine the rule of its proceeding, and with

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worded slightly differently, but has the same meaning; House Rule 2.03 provides, in relevant part, that “[a]ll provisions of the Legislative Branch Personnel Rules . . . are incorporated herein by reference and are considered as an addendum to these rules and have the effect of a rule herein.”

<sup>5</sup> 37 Or. Op. Att’y Gen. 657, 662-663 (1975), quoting *French v. Senate of State of California*, 146 Cal. 604, 608 (1905) (“Senate has power to adopt any procedure, and to change it at any time [but] cannot tie its own hands by establishing rules which, as a matter of power purely, it cannot at any time change”). See also *Mason's Manual*, section 72 (7) (rules of legislature are not reviewable by judiciary except on constitutional grounds).

the concurrence of two-thirds of the members elected, to expel a member is exclusive; and the judicial department has no power to revise even the most arbitrary and unfair action of the legislative department taken in pursuance of the power committed exclusively thereto by the constitution.

2. There is no authority for courts to control, direct, supervise or forbid the exercise by either house of the power to expel a member. These powers are functions of the legislative department, and, therefore, in the exercise of the power thus committed to it, the house is supreme. An attempt by a court to direct or control the legislature, or either house thereof, in the exercise of the power, would be an attempt to exercise legislative functions, which it is expressly forbidden to do.

3. A legislative house, in a proceeding to expel a member, has power to adopt any procedure and to change it at any time without notice.

4. The courts will not entertain a proceeding to determine the rights of one who has been unseated by a legislative body.

The provisions of *Mason's Manual* quoted above are consistent with the few cases in Oregon that have considered challenges to the validity of a legislator's election in a general election or whether a legislator could remain in office due to also holding an appointed position in the executive branch. In those cases, the Oregon Supreme Court has held that courts have no jurisdiction to determine the qualifications of a member of the legislature and that such power is vested solely in the house of which that legislator is or claims to be a member.<sup>6</sup> While Article IV, section 15, has not been interpreted by Oregon courts, the similarity in purpose and construction between the Article IV, section 11, grant of exclusive jurisdiction to each legislative house to determine the qualifications of its own members and the Article IV, section 15, provision that "[e]ither house may punish its members" makes it likely that a court would conclude that the court lacked jurisdiction to adjudicate any dispute involving the discipline of a member.

The task before the work group is to make recommendations on best practices for encouraging and achieving a harassment-free workplace for all who are present in the Capitol building—legislators, staff, lobbyists, the public and other officials—and on procedures that will permit effective redress if norms of conduct and behavior appear or are perceived to be violated. The Legislative Assembly can, of course, enact statutes that are facially applicable to the Legislative Assembly. The problem is that there is no effective means of enforcement of a statutory provision against the Legislative Assembly in those areas where the Oregon Constitution has vested exclusive jurisdiction in a house of the Legislative Assembly. A single legislator may raise the issue of noncompliance with a rule adopted by the house the legislator is a member of by making an appropriate motion and, as a result of raising the issue, causing the chamber to deliberate and vote on the question of noncompliance.<sup>7</sup> By contrast, for the

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<sup>6</sup> *Combs v. Groener*, 256 Or. 336, 338-339 (1970); *Lessard v. Snell*, 155 Or. 293, 296 (1937) ("It would be wholly foreign to our constitutional system of government for the executive or judicial department to determine a matter expressly reserved for the legislature").

<sup>7</sup> Senate Rule 5.01 et seq.; House Rule 5.01 et seq.; *Mason's Manual* section 187 (5)-(8).

reasons discussed above, a single legislator or group of legislators may not challenge in court whether the Legislative Assembly is acting in compliance with a statute facially applicable to the Legislative Assembly. Similarly, there is no mechanism in legislative rules or otherwise for a legislator to bring the question of compliance with a statute before the house of which the legislator is a member. Every member has a right to remonstrate or, in other words, note a protest on the record.<sup>8</sup> A remonstrance would be an appropriate vehicle for noting a member's opinion that, for example, the Legislative Assembly is out of compliance with a statute prohibiting discrimination in a place of public accommodation, but such a remonstrance would not require deliberation and a vote on the question of compliance in the remonstrating member's house. Accordingly, any recommendations the work group and the Oregon Law Commission may make for the Legislative Assembly to adopt may be most effective if made in the form of proposed rule changes, unless the work group or commission determines that one or more proposed constitutional amendments are needed.

Before turning to LBPR 27 itself, there is one other constitutional provision to note, and at least one case that is inconsistent with the analysis described above. In *Monserate v. N.Y. State Senate*,<sup>9</sup> the United States Court of Appeals for the Second Circuit identified a liberty interest, grounded in the Due Process Clause of the United States Constitution, that an elected official may have in the elected official's reputation that requires certain procedural protections in any disciplinary process employed by a legislative body. In *Monserate*, a New York State Senator had been convicted of one count of misdemeanor reckless assault and his appeal of the conviction was pending at the time he was expelled from the Senate. The Second Circuit held that any liberty interest the Senator might have in his reputation must be assessed using a flexible standard that weighs the accused's private liberty interest against both (1) the risk of erroneous deprivation of that interest through procedures used and the value of other safeguards, and (2) the government's interest in making and explaining a decision to expel the Senator. The process the New York State Senate employed established a Select Committee of the Senate to investigate and allowed the Select Committee to meet in executive session, which it did for five of its six meetings. The accused State Senator was given notice of the investigation, was invited to appear before the Select Committee, and was invited to submit evidence, suggest witnesses and propose relevant questions for the Select Committee to ask witnesses. The court affirmed an earlier trial court decision that held that the process was sufficient to protect the accused Senator's liberty interest in his reputation.<sup>10</sup>

The United States Supreme Court and the United States Court of Appeals for the Ninth Circuit hold that there is no protected interest in being nominated or elected to public office.<sup>11</sup> In a case where a county commissioner was restricted from being in his office outside of routine business hours and denied access to his email account and office computer while an investigation of the commissioner's actions took place, the United States District Court in Oregon found that the commissioner had no liberty interest in his elected office.<sup>12</sup> In a subsequent proceeding on remand, the district court again held that the county commissioner did not have a liberty interest claim, but that the lack of claim was because his injury was due to not being re-elected, rather than from being removed from office.<sup>13</sup> Thus, in the Ninth Circuit, it

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<sup>8</sup> See Article IV, section 26, of the Oregon Constitution (“[a]ny member of either house, shall have the right to protest, and have his protest, with his reasons for dissent, entered on the journal”).

<sup>9</sup> *Monserate v. N.Y. State Senate*, 599 F.3d 148 (2nd Cir. 2010).

<sup>10</sup> *Id.* at 158-160.

<sup>11</sup> *Snowden v. Hughes*, 321 U.S. 1, 7 (1944); *N.A.A.C.P., L.A. Branch v. Jones*, 131 F.3d 1317, 1324 (9th Cir. 1997).

<sup>12</sup> *Handy v. Lane County*, 937 F.Supp.2d 1297, 1306 (D. Or. 2013), remanded to 585 Fed. Appx. 570 (9th Cir. 2014).

<sup>13</sup> *Handy v. Lane County*, 2016 U.S. District LEXIS 35078 (D. Or.) at 15-16.

is still an open question if an elected official can have a liberty interest in being removed from office due to stigmatizing conduct.

### **Legislative Branch Personnel Rule 27: Harassment-free workplace**

This portion of the report will highlight significant provisions of LBPR 27 and discuss staff experience in using the rule. For the reader's convenience, two attachments are appended to the report. The full text of LBPR 27 is attached to this memorandum as Attachment 1. Attachment 2 consists of LBPR 1: General Provisions and LBPR 2: Definitions. LBPR 1 and LBPR 2 may assist the reader in understanding the applicability of branch rules and process for modifying the rules, and in learning the meaning of commonly used terms. Attachment 2 also contains a table of contents for all legislative branch personnel rules.

The first thing to note about LBPR 27 is its application. The rule applies to members of the Legislative Assembly and to all employees of the legislative branch. An employee is defined to include a legislative intern or a volunteer performing services for the legislative branch. The rule expressly provides that it does not apply to persons who are not members or employees, except the rule acknowledges that harassing conduct may include conduct by a nonemployee located in the workplace. Thus, lobbyists and others who often are present in the Capitol for long periods are not afforded protections under LBPR 27. It may have been that in the past, the reasoning for not extending protections to lobbyists was out of concern that an unscrupulous lobbyist could manipulate the rule's protections to achieve a level of undue influence over one or more legislators. Also, staff experience includes instances where a legislator experiences harassment from a lobbyist. LBPR 27, as currently written, does not explain how a legislator may seek redress from a lobbyist through branch personnel rules for the lobbyist's harassment of the legislator, despite the acknowledgement noted above that harassing conduct may include conduct by a nonemployee.

Something else to note about the rule's application is that the rule generally establishes the same processes and procedures whether the person alleged to be engaging in harassing activity is a legislator or is legislative staff, the only significant differences being that if a formal complaint is made against a legislator, (1) an independent investigation must be conducted by someone unaffiliated with the legislative branch and who also has experience conducting investigations of harassment,<sup>14</sup> and (2) the process used after the independent investigator has completed and delivered the investigator's final report only applies if a legislator is the subject of the investigation.<sup>15</sup> As is discussed in more detail below, the rule establishes both an informal reporting process and a formal complaint process to address allegations of harassment. The informal reporting process is much more commonly used to raise concerns about an individual's conduct. By treating legislators and legislative staff under the same procedures for informal reporting, the rule fails to recognize the vast power differential between a legislator and staff, and the likely greater public scrutiny that may occur when a legislator is the subject of even an informal report.

Subsection<sup>16</sup> (1)(a) sets forth the basic policy goals of the rule in straightforward terms, an excerpt of which bears repeating:

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<sup>14</sup> LBPR 27 (6)(e).

<sup>15</sup> LBPR 27 (8).

<sup>16</sup> Unless otherwise expressly noted, all references to "subsection" in this section of the report refer to a specific subsection of LBPR 27.

The Legislative Branch is committed to providing a safe and respectful workplace that is free of harassment. Members of the Legislative Assembly and all Legislative Branch employees are expected to conduct themselves in a manner that is free of harassment . . . in the workplace.

Subsection (2) defines terms. Most of the defined terms are example type definitions, modified by the term “includes” or “including.” This type of definition is usually avoided in statutory drafting because it is inherently ambiguous; saying what a term includes does not tell the reader what is excluded, and also does not directly state what the term means. Both are reasons courts tend to disfavor such construction. The definitions of “retaliation,” “sexual harassment” and “unwelcome conduct” are outliers, in which the definition fixes the boundaries of what the term means.

Subsection (3) establishes the requirement that supervisors and appointing authorities “take appropriate action to prevent, promptly correct and report harassment about which the appointing authority or supervisor knew or, with the exercise of reasonable care, should have known.” The rule directs that reports be made to the Human Resources Director or the Legislative Counsel. All legislators are appointing authorities, and thus have this obligation to report harassment if they have actual knowledge of the harassment or, through the exercise of reasonable care, should have known of the harassment. This obligation is potentially a trap for the unwary for newly elected or less experienced legislators who do not perceive their status as appointing authorities.

The rule lays out both an informal reporting process and a formal complaint process, which will be explained separately.

#### Informal reports

Subsection (4) provides guidance to a legislator or employee who believes he or she has experienced harassment by identifying the parties to which the legislator or employee may report the harassment. Significantly, any legislator or employee may report the harassment to multiple parties. There is probably a need for a technical clarification that subsection (4) is addressing the informal reporting process and does not pertain to the formal complaint process. The subsection could also be clarified to state that any individuals who observe what they believe to be harassment, even if they personally are not experiencing the harassment, may report their observations in the manner described in the subsection.

Subsection (5) describes the informal reporting process. As the rule notes, the informal process is designed for persons who feel they may be experiencing harassment and simply want the particular conduct to stop. An informal report must be made within one year of the date of the alleged harassment. An informal report must contain certain specific information to constitute a report, but even if that threshold is not met, the Employee Services office, in consultation with Legislative Counsel, shall investigate instances of severe or pervasive harassment or discrimination based on a protected class. The rule states that such an investigation “may result in corrective action against a member or employee who engages in harassment.” Significantly, however, if an informal report or an investigation by Employee Services is about the conduct of a legislator, any corrective action that Employee Services or Legislative Counsel may take is purely advisory, and a legislator is free to ignore it. The rule does not grant any authority to staff to take mandatory corrective action, and probably could not

lawfully do so, because Article IV, section 15, vests that authority exclusively in the house of which the legislator is a member. Also, because Employee Services and Legislative Counsel staff are at-will employees, as are all legislative branch employees, staff are not well-positioned to mandate such action. That said, staff experience is that simply offering advice to a legislator is often sufficient to remedy the situation, as the legislator may simply be unaware of the offending conduct or how another party is perceiving that conduct. Once the legislator is made aware of the situation, it frequently ceases to be a problem. Finally, but significantly, subsection (5) expressly directs Employee Services or Legislative Counsel to “immediately take appropriate action to ensure that the reporting party has a safe and nonhostile work environment.”

A possible option for the work group to consider is to explicitly authorize staff to involve the appropriate caucus leader in any informal report brought to Employee Services and Legislative Counsel, or in any investigation undertaken by Employee Services or Legislative Counsel, that involves allegations of improper conduct by a legislator. Current specific provisions in the rule often, though not always, prevent caucus leader consultation. Subsection (5)(g) provides that all legislators and employees involved in the investigation shall keep information regarding the investigation confidential, though the subsection also acknowledges that certain records may be disclosable under the public records law. Subsection (7)(b) provides that if a party informally reports harassment and wishes the report to remain anonymous, the Human Resources Director or the Legislative Counsel “shall determine appropriate action.” Staff experience is that many informal reporters wish to remain anonymous. In this context, true anonymity is difficult to achieve, as many individuals accused of harassment can determine the accuser or narrow the choice down to one or two individuals based on facts and circumstances described to them. Staff believe that the “appropriate action” described in subsection (7)(b) does authorize consultation with the appropriate caucus leader if the Human Resources Director or Legislative Counsel determines that such an action is warranted, but it would be helpful to state this explicitly. In past incidents, considerable effort has been focused on the appropriateness of caucus leader involvement in informal reports. While a caucus leader has no more legal authority to impose mandatory action on a legislator than staff does, the caucus leader has far more tools available to facilitate voluntary change in behavior from a legislator than staff does. Finally, it is worth noting that if an informal reporter does not wish to remain anonymous, subsection (7)(c)(A) and (B) provide explicit direction to notify the caucus leader of the matter, or the presiding officer if the caucus leader is the individual involved in the harassment.

#### Formal complaint process

Subsection (6) authorizes both legislators and employees to, within one year of the date of alleged harassment, initiate a formal complaint process by submitting a written statement to the Human Resources Director.<sup>17</sup> The complaint must contain specified information, including the name of the complainant, the name of the person alleged to be involved in harassment, a description of the conduct and a description of the potential remedy desired. Thus, a formal complaint cannot be made anonymously. This may factor into why formal complaints under LBPR 27 are rare. In the history of LBPR 27,<sup>18</sup> only two formal complaints have been made against a legislator. Subsection (6) requires an investigator to be appointed within 10 days of receipt of the complaint. In all instances in which the person alleged to be involved in harassment is a legislator, the investigator may not be an employee of the legislative branch, and must have experience conducting harassment investigations. Although not a requirement of

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<sup>17</sup> If there is a conflict with the Human Resources Director, the complaint may be submitted to the Chief Deputy Legislative Counsel.

<sup>18</sup> The first iteration of LBPR 27 was adopted during the 2011-2013 biennium.

the rule, in practice there is considerable interest from both caucuses that the investigator have minimal political affiliation and minimal history of political activity. Finding an investigator that both meets the rule requirements and that lacks identifiable personal political leaning is challenging, particularly within a ten-day deadline.

As with informal reports, when a formal complaint is filed, Employee Services and Legislative Counsel are directed to “immediately take appropriate action to ensure that the complainant has a safe and nonhostile work environment.” When the report or complaint involves a legislator, achieving this objective on an interim basis while an investigation occurs can be challenging. The challenge is made even more difficult when the complainant is also a legislator, and with formal complaints that have a relatively lengthy timeline for the investigator to conduct the investigation and for the legislative body to resolve the matter. During session or legislative days,<sup>19</sup> legislators must necessarily interact in close proximity with each other, particularly those that serve in the same chamber or committee. Also, rules and tradition prohibit remote voting and a legislator has duty to physically attend when the Legislative Assembly is in session. Thus, conventional methods used in most employment situations where an employee is accused of misconduct and an investigation is needed to ascertain facts—methods such as placing the employee on administrative leave or stationing the employee at a remote location—are significantly constrained in the Legislative Assembly. The LBPR do not provide for any interim measure to be taken and a significant question for the work group to consider is the mechanics of what an interim measure would look like. Article IV, section 15, probably authorizes each house to impose an interim measure that would require an accused legislator to be absent from the Capitol when the Legislative Assembly is otherwise meeting so as to complete an investigation, but likely does not authorize that house to, by rule or otherwise, delegate the authority to make that determination to someone else—a presiding officer or committee, for example.

Once appointed, an investigator has 60 days to conduct an investigation; the 60-day period may be extended. Subsection (6)(h) directs the investigator to prepare draft findings of fact and recommendations and submit the draft to the parties, the Human Resources Director and Legislative Counsel. Parties may request modification of findings of fact, but modification of recommendations is not referenced. Modifications of findings of fact are made at the discretion of Employee Services and Legislative Counsel. In the case of an investigation of a legislator, once the investigator’s findings of fact and recommendations are finalized, subsection (8) requires the report to be delivered to the special committee on conduct. The special committee on conduct must hold at least one public hearing. At the hearing, the complainant and the alleged harasser may present physical evidence and may suggest witnesses, though only committee members may question or address witnesses. Subsection (8) directs the committee to deliberate and report a recommendation to the entire house, but subsection (8) limits the choice of recommendation to only four: reprimand, censure, expulsion or that the committee take no further action.

In addition to previously mentioned issues, there are five other issues that staff believes are appropriate for work group attention when a formal complaint is made against a legislator. Those issues are as follows:

- There is some confusion in the way the rule is drafted concerning whether the investigator is a fact-finder or is also tasked with proposing a recommendation to the

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<sup>19</sup> “Legislative days” are three-day periods during the interim between sessions when legislative committees meet in the Capitol. There typically are six sets of legislative days during a biennium.

special committee on conduct, given that the committee itself may select one of only four recommendations. See subsection (6)(h) and (j); and subsection (8)(c) to (e).

- Are Employee Services and Legislative Counsel the correct entities to determine whether a modification to findings of fact should be granted? See subsection (6)(j).
- The timeline for the investigation, committee deliberations and finalization of committee recommendations is exceptionally complex and long, and probably warrants streamlining. For brevity, the timeline will not be repeated here, but see subsection (6)(h), (j) and (k) and subsection (8)(b), (e) and (f).
- Article IV, section 15, requires a two-thirds majority vote of the chamber to expel a member, but permits other discipline to be determined by simple majority vote. Subsection (8)(f) requires any sanction to be adopted by a two-thirds majority vote.
- Subsection (8)(d) lists “reprimand” and “censure” as two of the four possible recommendations a special committee on conduct may make, but offers no guidance on how these two very similar terms differ. Similarly, there may be a need for discipline of a legislator that is more consequential than a reprimand or censure, but less drastic than expulsion.

#### Confidentiality and transparency

A workplace where elected officials, staff, lobbyists and members of the public interact inherently involves human interaction between individuals with vast differences in power and influence. When these interactions result in conduct by those possessing power and influence that may constitute harassment of those lacking in power and influence, victims may overwhelmingly desire to remain confidential. Article IV, sections 14 and 15, of the Oregon Constitution, and the formal complaint process outlined in LBPR 27 (6) and (8) ensure that the process be highly visible and transparent. The formal complaint process requires at least one complainant to identify himself or herself to the public and tell the complainant’s story under intense public scrutiny. If the stated goal of the Legislative Assembly is to “provid[e] a safe and respectful workplace that is free of harassment,”<sup>20</sup> the work group may wish to examine whether the formal complaint process strikes the correct balance between a complainant’s or victim’s interest in privacy and the public’s interest in transparency in its legislative. LBPR 27 (2)(e) defines retaliation and LBPR 27 (10) expressly prohibits retaliation, also stating that retaliation constitutes harassment under the rule. Another open issue is whether the retaliation prohibition is sufficiently adequate to foster reporting and protect victims.

The tension between a desire for privacy and a public interest in transparency also arises when individuals involved in an investigation respond differently to requests for information from the media. Both the informal reporting process and the formal complaint process direct “all members and employees involved in the investigation [to] cooperate and keep information regarding the matter confidential.”<sup>21</sup> Staff experience, however, has been that there is a lack of cooperation among individuals involved in an investigation in keeping the investigation confidential. An open issue is whether the quoted language is needed and, if needed, whether it can be made enforceable. LBPR 27 currently is silent on any consequence for breaching confidentiality, though other parliamentary procedures could be employed to compel compliance or establish a consequence for noncompliance.

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<sup>20</sup> LBPR 27 (1)(a).

<sup>21</sup> LBPR 27 (5)(g); see *also* LBPR (6)(f).

LBPR 27 contains four other subsections that are noncontroversial or inapplicable to legislators.<sup>22</sup>

Encls.

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<sup>22</sup> See LBPR 27 (9) and (11) to (13).

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## State of Oregon LEGISLATIVE BRANCH PERSONNEL RULES

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### Legislative Branch Personnel Rule 27: Harassment-Free Workplace

**APPLICABILITY:** This rule applies to members of the Legislative Assembly and all employees of the Legislative Branch. This rule and the processes described in this rule do not apply to persons who are not members of the Legislative Assembly or employees of the Legislative Branch, except as provided under subsection (3) of this rule.

**(1) Policy.**

(a) The Legislative Branch is committed to providing a safe and respectful workplace that is free of harassment. Members of the Legislative Assembly and all Legislative Branch employees are expected to conduct themselves in a manner that is free of harassment and to discourage all harassment in the workplace and at events, professional meetings, seminars or any events at which legislative business is conducted.

(b) This rule is designed to provide members and employees with informal and formal options to correct harassing conduct before it rises to the level of severe or pervasive harassment or discrimination. The Legislative Branch encourages members and employees to address potentially harassing conduct through reports to Employee Services or other avenues set forth in this rule.

**(2) Terms.** As used in this rule:

(a) “Employees” includes legislative interns and volunteers performing services for the Legislative Branch.

(b) “Harassing conduct” or “harassment” includes sexual harassment or workplace harassment. “Harassing conduct” may include conduct by a nonemployee located in the workplace such as a vendor or member of the public.

(c) “Knowledge” of harassing conduct includes conduct about which an appointing authority or supervisor knows or, with the exercise of reasonable care, should know.

(d) “Protected class” means a class of individuals defined by a characteristic that may not be targeted for discrimination, including age, race, sex, sexual orientation, gender, gender identification, national origin, disability and religion.

(e) “Retaliation” means action taken against an employee with respect to a term or condition of employment for the reason that the employee has opposed conduct that is prohibited under this rule.

(f) “Sexual harassment” means unwelcome conduct in the form of a sexual advance, sexual comment, request for sexual favors, unwanted or offensive touching or physical contact of a sexual nature, unwanted closeness, impeding or blocking movement, sexual gesture, sexual innuendo, sexual joke, sexually charged language, intimate inquiry, persistent unwanted courting, sexist insult, gender stereotype, or other verbal or physical conduct of a sexual nature, if:

(A) Submission to the conduct is made either explicitly or implicitly a term or condition of a person’s employment;

(B) A person expressly or by implication conveys that declining to submit to the conduct will affect a person's job, leave request, benefits or business before the Legislative Assembly; or

(C) The unwelcome conduct has the purpose or effect of unreasonably interfering with a person's job performance, or creates a work environment that a reasonable person would find intimidating, hostile or offensive.

(g) "Unwelcome conduct" means conduct that an individual does not incite or solicit and that the individual regards as undesirable or offensive. An individual may withdraw consent to conduct that was previously welcomed by the individual.

(h) "Workplace harassment" means unwelcome conduct in the form of treatment or behavior that, to a reasonable person, creates an intimidating, hostile or offensive work environment. "Workplace harassment" includes discrimination based on a person's protected class. "Workplace harassment" also includes unwelcome conduct that occurs outside of work during nonworking hours if the conduct creates a work environment that a reasonable employee would find intimidating, hostile or offensive. "Workplace harassment" does not include every minor annoyance or disappointment that an employee may encounter in the course of performing the employee's job.

### **(3) Appointing authorities and supervisors.**

(a) As used in this subsection, "supervisor" means a person who directs the regular work assignments of any employee.

(b) An appointing authority or supervisor shall take appropriate action to prevent, promptly correct and report harassment about which the appointing authority or supervisor knew or, with the exercise of reasonable care, should have known. "Harassing conduct" may include conduct by a nonemployee located in the workplace such as a vendor or member of the public.

(c) If an appointing authority or supervisor has knowledge of harassing conduct, the appointing authority or supervisor shall report the conduct to the Human Resources Director or the Legislative Counsel.

### **(4) Members or employees subjected to harassment.**

(a) A member of the Legislative Assembly or employee of the Legislative Branch who is subject to what the member or employee believes to be harassment should report the conduct as soon as possible.

(b) An employee may report what the employee believes to be harassment to any of the following individuals:

(A) The employee's supervisor. An employee may report conduct that the employee believes to be harassing conduct to the employee's supervisor. If an employee does not have a supervisor or is unaware of a supervisor, an employee may report concerns to other individuals listed in subparagraphs (B) to (D) of this paragraph.

(B) The employee's appointing authority. An employee may report conduct that the employee believes to be harassing conduct to the employee's appointing authority.

(C) Employee Services. An employee may report conduct that the employee believes to be harassing conduct to Employee Services.

(D) The Office of the Legislative Counsel. An employee may report conduct that the employee believes to be harassing conduct to the Legislative Counsel. The Legislative Counsel shall direct employees with concerns regarding harassing conduct to designated staff within the

Office of the Legislative Counsel.

(c) A member may report what the member believes to be harassment to any of the following individuals:

(A) Employee Services. A member may report conduct that the member believes to be harassing conduct to Employee Services.

(B) The Office of the Legislative Counsel. A member may report conduct that the member believes to be harassing conduct to the Legislative Counsel or the Chief Deputy Legislative Counsel.

(d) If an employee works for the person alleged to be involved in the harassment, the employee should report to an alternative point of contact listed in this subsection.

**(5) Informal reporting process.**

(a) A person who believes that the person may have been subjected to harassment may simply want particular conduct to stop, but may not want to go through a formal complaint process or legal proceeding. The informal reporting process is designed and intended to meet that need.

(b) A member of the Legislative Assembly or employee of the Legislative Branch may, within one year of the date of the alleged harassment, initiate an informal reporting process described in this subsection by reporting the harassing conduct to any of the parties listed in subsection (4) of this rule.

(c) The report must include specific details of the alleged harassment, the name of the person alleged to be involved in the harassment and the dates and times of the alleged harassment.

(d) Except as subject to applicable statutes of limitation and time limitations set forth in this rule, the selection of any one option does not preclude a reporting party from pursuing other options at any time.

(e) Even if no report is generated, Employee Services, in consultation with the Legislative Counsel, shall investigate instances of severe or pervasive harassment or discrimination based on a protected class, which may result in corrective action against a member or employee who engages in harassment as described in this rule.

(f) When an informal report is made under this subsection, Employee Services or the Legislative Counsel shall immediately take appropriate action to ensure that the reporting party has a safe and nonhostile work environment.

(g) If Employee Services conducts an investigation based on a report under this subsection, subject to the reporting requirement under subsection (3) of this rule, all members and employees involved in the investigation shall cooperate and keep information regarding the matter confidential. However, certain Legislative Branch records are subject to public records requests under ORS 192.410 to 192.505.

(h) After an informal report is made, or at any time during the informal reporting process, a reporting party may decide to institute a formal complaint process under subsection (6) of this rule.

(i) Institution of a formal complaint process supersedes and terminates any informal reporting process brought by the reporting party.

**(6) Formal complaint process.**

(a) A member of the Legislative Assembly or employee of the Legislative Branch may, within one year of the date of the harassment, initiate a formal complaint process by submitting a complaint with the Human Resources Director. In the event of a conflict with the Human

Resources Director, the member or employee may initiate a formal complaint process with a representative from Employee Services or the Chief Deputy Legislative Counsel.

(b) A formal complaint shall be in writing and include:

(A) The name of the complainant;

(B) The name of the person or persons alleged to be involved in the harassment;

(C) The names of all parties involved, including witnesses;

(D) A description of the conduct that the member or employee believes is discriminatory or harassing;

(E) The date or time period in which the alleged conduct occurred; and

(F) A description of the potential remedy the member or employee desires.

(c) The office or person that receives the complaint may require that an incomplete complaint be supplemented by the complainant to correct deficiencies.

(d) When a formal complaint is submitted, Employee Services or the Office of Legislative Counsel shall immediately take appropriate action to ensure that the complainant has a safe and nonhostile work environment.

(e) The persons who receive a formal complaint shall, within 10 days after receipt of the complaint, appoint an investigator. In all instances in which the person alleged to be involved in the harassment is a member of the Legislative Assembly, the investigator may not be an employee of the Legislative Branch and shall have experience conducting investigations of harassment. With respect to any other complaint, the persons who receive the complaint shall appoint an investigator who is an employee of Employee Services, an employee of the Office of Legislative Counsel or an investigator unaffiliated with the Legislative Branch with experience conducting investigations of harassment.

(f) All members and employees involved in the investigation shall cooperate with the investigation and keep information regarding the investigation confidential. However, certain Legislative Branch records are subject to public records requests under ORS 192.410 to 192.505.

(g) The person alleged to be involved in the harassment shall be notified that a formal complaint has been received and an investigation has been initiated.

(h) The investigator shall conduct an investigation and present a draft findings of fact and recommendations within 60 days of appointment under paragraph (e) of this subsection. The investigator may be granted an extension of time by the Human Resources Director or the Office of Legislative Counsel to complete the investigation.

(i) Notification and copies of the draft findings of fact and recommendations will be given to the Human Resources Director, the Office of the Legislative Counsel, the complainant and the person alleged to be involved in the harassment.

(j) Within five days after notification under paragraph (i) of this subsection, recipients may request modifications to the findings of fact. Any requests to modify the findings of fact must be made in writing and must explain the reason for the modification. Requests for modification may be granted at the discretion of Employee Services and the Office of the Legislative Counsel.

(k) Within 10 days after receipt of the final report, the Human Resources Director or the Office of the Legislative Counsel shall submit the investigator's final findings and recommendations report to the complainant, the person alleged to be involved in the harassment and the appointing authority of the person alleged to be involved in the harassment.

(L) The appointing authority shall act on recommendations received as soon as practicable after receipt.

(m) Even if no formal complaint process is initiated, Employee Services, in consultation with the Office of the Legislative Counsel, shall investigate instances of severe or pervasive harassment or discrimination based on a protected class, which may result in corrective action against a member or employee who engages in harassment as described in this rule.

**(7) Reporting requirements for informal reports and formal complaints.**

(a) Appointing authorities and supervisors shall report allegations of, or knowledge of, alleged harassing conduct to the Human Resources Director or the Legislative Counsel.

(b) If a party informally reports harassment and wishes the report to remain anonymous or wishes that no action be taken, the Human Resources Director or the Legislative Counsel shall determine appropriate action.

(c) In the case of an informal report of harassing conduct and with consent from the party making the report, Employee Services or the Legislative Counsel shall take the following steps, in addition to any steps taken under paragraph (b) of this subsection:

(A) If the person alleged to be involved in the harassment is a member of the Legislative Assembly, notify the highest ranking member of the same caucus as the alleged harasser of the fact that a report has been made and the name of the reporting party. The highest ranking member shall immediately notify the alleged harasser of the fact that a report has been made under this rule and the name of the reporting party.

(B) If the member alleged to be involved in the harassment is the highest ranking member of a caucus, notify the presiding officer of the chamber in which the alleged harasser serves, or if the member alleged to be involved in the harassment is the presiding officer, notify the caucus leader of the same caucus as the presiding officer. The member who is notified of the report shall immediately notify the alleged harasser of the fact that a report has been made under this rule and the name of the reporting party.

(C) If the person alleged to be involved in the harassment is a personal staff member, caucus staff member or leadership office staff member, notify the appointing authority of the fact that a report has been made and the name of the reporting party. The appointing authority shall immediately notify the alleged harasser of the fact that a report has been made and the name of the reporting party.

(D) If the person alleged to be involved in the harassment is a member of the nonpartisan staff, notify the agency head or parliamentarian of the agency or parliamentary office of which the alleged harasser is an employee. The agency head or parliamentarian shall immediately notify the alleged harasser of the fact that a report has been made and the name of the reporting party.

(E) If the person alleged to be involved in the harassment is an agency head, notify the presiding officers. The presiding officers shall immediately notify the alleged harasser of the fact that a report has been made and the name of the reporting party.

(F) If the person alleged to be involved in the harassment is a parliamentarian, notify the presiding officer of the chamber that elected the parliamentarian. The presiding officer shall immediately notify the alleged harasser of the fact that a report has been made and the name of the reporting party.

(d) In the case of a formal complaint, in addition to any steps taken under subsection (6) of this section, the office receiving the formal complaint shall deliver a copy of the formal complaint:

(A) In a case where the person alleged to be involved in the harassment is a member of the Legislative Assembly, personal staff member, caucus staff member or leadership office staff

member, to the highest ranking member of the caucus of the chamber in which the alleged harasser serves or works.

(B) In a case where the person alleged to be involved in the harassment is an employee of a legislative agency, to the agency head.

(C) In a case where the person alleged to be involved in the harassment is an employee of a parliamentary office, to the parliamentarian of the chamber the parliamentary office serves.

(e) Notwithstanding paragraph (d) of this subsection, if the person alleged to be involved in the harassment is a person required under paragraph (d) of this subsection to receive the written complaint, then in lieu of service under paragraph (d) of this subsection, the office receiving the report shall deliver a copy of the report:

(A) In a case where the person alleged to be involved in the harassment is a caucus leader or a parliamentarian, to the presiding officer of the chamber in which the caucus leader or parliamentarian serves.

(B) In a case where the person alleged to be involved in the harassment is a presiding officer, to the caucus leader of the same caucus and chamber as the presiding officer.

(C) In a case where the person alleged to be involved in the harassment is an agency head, the Human Resources Director or the Legislative Counsel, to the presiding officers of both chambers.

#### **(8) Formal complaints against members.**

(a) If the person alleged to be involved in the harassment is a member of the Legislative Assembly, the final report shall be given to the respective special committee on conduct of the chamber in which the member serves. Special committees on conduct are established as prescribed in subsection (12) of this rule.

(b) When a special committee on conduct receives an investigator's final findings and recommendations report, the committee shall schedule a public hearing and give notice to the complainant and alleged harasser of the date and location of the hearing. The hearing may not be set for a date that is less than 14 days nor more than 45 days after the committee receives the investigator's final report.

(c) At the hearing, the complainant and the alleged harasser, or their attorneys, may present documents or other evidence and may suggest witnesses. Only committee members may question or otherwise address witnesses. Committee members shall limit the scope of their questions to topics that a court in this state would deem relevant in a civil action involving the same conduct.

(d) The committee shall deliberate on the investigator's final report, testimony and other evidence presented at the hearing and report a recommendation. The committee may recommend:

(A) Reprimand;

(B) Censure;

(C) Expulsion; or

(D) That the committee take no further action.

(e) The committee shall report its recommendation to the complainant and the person alleged to be involved in the harassment. The complainant and the person shall each have 10 days to request that the committee review the recommendations. A request for review shall be in writing and shall state the requester's objections to the recommendation. A copy of the request for review shall be given to the other party, who shall have five days to respond in writing to the request for review. The committee shall consider the request for review and response and report its

recommendation within 10 days after the date for the filing of the response to a request for review.

(f) At the end of any review period under paragraph (e) of this subsection, the committee's recommendation shall be made to the chamber for which the committee serves. The chamber shall take action on the recommendation on the next day that it convenes. Any sanction considered by a chamber shall be adopted by the chamber only upon receiving at least a two-thirds majority vote in favor of adoption of the sanction.

(9) **Independent investigator costs.** The costs of an independent investigator hired pursuant to this rule shall be borne by the Legislative Assembly.

(10) **Retaliation prohibited.** Retaliation against any person who participates in a process described in this rule is prohibited. Retaliation constitutes harassment under this rule.

(11) **Liberty interest hearing for terminated employees.**

(a) A former employee of the Legislative Branch may request a hearing under this rule within one year of the date of the employee's termination if the employee reasonably believes that the employer has violated the employee's liberty interest.

(b) A reasonable belief that an employee's liberty interest has been violated exists if:

(A) The employer accuses the employee of conduct that impairs the employee's reputation for honesty, integrity, ethical behavior, morality or other characteristics necessary for continued employment;

(B) The accusations were made in connection with the employee's termination;

(C) The employee contests the accuracy of the accusations;

(D) The employer publicly discloses the accusations; and

(E) The accusations foreclose the employee's opportunities for future public employment.

(12) **Presiding officer duties.** As soon as practicable after the Legislative Assembly convenes in organizational session the Senate President and the Speaker of the House of Representatives shall each appoint the members of a special committee on conduct for their respective chambers. Each committee shall consist of an equal number of members from the majority party and the minority party. If a member of a special committee on conduct is the complainant or the person alleged to be involved in the harassment, the appropriate presiding officer shall discharge the member from the committee and appoint another member from the same party.

(13) **Human Resources Director duties.**

(a) The Human Resources Director shall give the following notice to all members of the Legislative Assembly and employees of the Legislative Branch:

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If you believe you have been a victim of harassment, you have options. You can tell the alleged offender about the harassing conduct that disturbed you and ask the alleged offender to stop. You can communicate to the alleged offender in person or in writing. You may also use the informal report or formal complaint process set forth in Legislative Branch Personnel Rule 27 to pursue a report or complaint of harassment if you:

- (A) Do not want to confront the alleged offender directly;
  - (B) Have talked to the alleged offender and the harassing conduct has not stopped; or
  - (C) Believe your report or complaint has resulted in retaliation.
- In addition, you have the right to seek redress with administrative agencies or the courts.
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(b) The Human Resources Director shall ensure that the text of the notice set forth in paragraph (a) of this subsection is posted in common work areas for all members and employees, and is available on the Legislative Intranet.

(c) The Human Resources Director shall notify all employees that an employee who engages in harassment as described in this rule may be subject to discipline, including dismissal.

(d) The Human Resources Director shall notify all employees involved in any aspect of an investigation conducted under this rule that retaliating against a person for making a report or complaint of discrimination, workplace harassment or sexual harassment will not be tolerated and that employees engaging in harassing conduct in violation of this policy may be subject to disciplinary action, including dismissal.

(e) The Human Resources Director shall notify members and employees with supervisory responsibilities of their obligations under this rule.

Approved: 1-16-2016

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## State of Oregon

### LEGISLATIVE BRANCH PERSONNEL RULES

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#### Legislative Branch Personnel Rule 1: General Provisions

(1) **General application of rules.** Unless otherwise stated in a specific rule, the Legislative Branch Personnel Rules (LBPR) apply to all members and employees of the Legislative Assembly, Legislative Administration, the Legislative Counsel Office, the Legislative Fiscal Office, the Legislative Revenue Office and the Legislative Commission on Indian Services.

(2) **Policy.** It is the intent of the Legislative Assembly for the Legislative Branch Personnel Rules to encourage a high level of competence and professional capability among legislative staff by providing an orderly, efficient and equitable plan of personnel administration. In the development and application of these rules, continuing recognition must be given to the unique political and administrative requirements of the legislative process and the distinctive relationships among the various units of the Legislative Branch. The Legislative Branch Personnel Rules are intended to serve as uniform procedures that reflect current Legislative Branch employment practices.

(3) **Process for modifying personnel rules.**

(a) Prior to the adoption, amendment or repeal of any personnel rule by the Legislative Administration Committee, the Legislative Administrator shall give notice of the intended action:

(A) At least 30 days before the effective date of the change in rule;

(B) To all agency heads, parliamentarians and leadership chiefs of staff; and

(C) By providing a copy of the changes to all agency heads, parliamentarians and leadership chiefs of staff.

(b) Each member and employee of the Legislative Branch shall be made aware of and given access to the personnel rules and any subsequent change, rescission or addition to the rules. Each member and employee is expected to review and become familiar with the rules.

(4) **Exempt service and at-will employment.**

(a) ORS 240.200 specifies that all officers and employees of the Legislative Branch are exempt service employees and are not generally subject to State Personnel Relations Law. Positions in the exempt service are not subject to the provisions of the rules and policies of the Oregon Department of Administrative Services Personnel Division. However, ORS 240.245 provides that a salary plan for the exempt service must be equitably applied to the exempt position and in reasonable conformity with the general state salary structure.

(b) Legislative Branch employees are at-will employees.

(c) Each Legislative Branch employee serves at the will of the employee's appointing authority. As a result, an employee may be terminated at the discretion of the appointing authority or designee.

(d) Nothing in the personnel rules and related policies is intended to:

(A) Create any type of employment contract, whether express or implied;

(B) Provide any type of cause standard for evaluation of continued employment;

or

(C) Give an employee the right to be employed for any specific period of time.

(e) Notwithstanding an employee's at-will employment status, corrective action may be taken as a mechanism for notifying an employee in a continuing status position of performance deficiencies with an opportunity to make correction, as described in LBPR 9.

(f) A personnel rule or related policy may not be construed as setting forth procedural or substantive provisions that entitle an employee to continued employment.

(g) An agreement between an appointing authority and an employee may not be construed as setting forth procedural or substantive provisions that entitle an employee to continued employment.

**(5) Application of certain labor laws.**

(a) The Legislative Branch Personnel Rules constitute rules of proceedings of the Legislative Assembly and take precedence over conflicting provisions of state law to the extent that the rules expressly provide for such precedence. Section 4, *Mason's Manual of Legislative Procedure* (2010 ed.).

(b) As provided by 29 U.S.C. 203(e)(2)(C), all Legislative Branch employees, except legislative library employees, are exempt from the Fair Labor Standards Act (29 U.S.C. 201 et seq.). These rules may modify state laws implementing the Fair Labor Standards Act to the extent that those laws apply to Legislative Branch employees.

**(6) Authority.**

(a) The authority for the personnel rules is derived from Article IV, section 11, of the Oregon Constitution, and, where otherwise not in conflict with the rules, ORS 173.005, 173.007, 240.200 and 240.245.

(b) The personnel rules shall be known and may be cited as the Legislative Branch Personnel Rules, the personnel rules or LBPR.

(c) The Legislative Administrator is responsible for the administration of the Legislative Branch personnel system.

(d) At the direction of the Legislative Administrator, the Human Resources Director shall prepare, maintain and administer the personnel rules, related policies, a classification system, a compensation plan and recruitment and selection procedures.

(e) Agency heads and parliamentarians are responsible within their respective agencies or offices for the exercise of appointing authority, for the supervision of agency or office operations and for the equitable administration of the personnel rules and related policies.

(f) Agency heads and parliamentarians, consistent with the personnel rules and related policies, are responsible for the selection, appointment and retention of division directors and unit managers.

**(7) Time records.** The payroll administrator shall maintain an official set of employee time records. The employee and the employee's supervisor, or the designee of the employee's supervisor, shall approve the employee's time record. Information for time records shall be recorded by the payroll administrator for each employee, after which the time records will become the basis for the payroll. An employee's time record maintained under this rule shall include the following information:

(a) Hours worked by nonexempt employees who are eligible for overtime as provided by LBPR 4 (7);

(b) Vacation leave used;

(c) Sick leave used;

(d) Any other paid leave used; and

(e) Unpaid leave used.

(8) **Interpretation.** The interpretation of a personnel rule by an agency head or parliamentarian is final and binding on the legislative agency or parliamentary office and the employees supervised by an agency head or parliamentarian. To promote consistency in the interpretation of the personnel rules throughout the Legislative Branch, an agency head or parliamentarian is encouraged to consult with the Legislative Counsel or the Human Resources Director.

Approved: 1-16-2016

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## State of Oregon LEGISLATIVE BRANCH PERSONNEL RULES

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### Legislative Branch Personnel Rule 2: Definitions

**APPLICABILITY:** This rule applies to members of the Legislative Assembly and all employees of the Legislative Branch.

The following definitions apply to the Legislative Branch Personnel Rules unless otherwise noted in a specific rule:

- (1) “Agency head” means the Legislative Administrator, the Legislative Counsel, the Legislative Fiscal Officer, the Legislative Revenue Officer or the Executive Director of the Legislative Commission on Indian Services.
- (2) “Appointing authority” means the person who has authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge or discipline an employee. “Discharge” includes dismissal and termination.
- (3) “At-will employee” means an employee who may be terminated without cause at the discretion of the appointing authority or designee. All Legislative Branch employees are at-will employees throughout their service, regardless of the duration of the position or the funding for the position, including service during an introductory period.
- (4) “Caucus leader” means the Democratic or Republican Leader of the Senate or the Democratic or Republican Leader of the House of Representatives.
- (5) “Caucus office” means the office of the Democratic or Republican Leader of the Senate or the office of the Democratic or Republican Leader of the House of Representatives.
- (6) “Class,” “classification” or “class of positions” means a group of positions sufficiently alike in duties, authorities and responsibilities that similar qualifications and schedules of compensation may be applied to the group of positions.
- (7) “Class specifications” means a document setting forth, for each class, a class title, distinguishing features, characteristic duties and necessary knowledge, skills and abilities.
- (8) “Compensation plan” means the schedule of rates of pay for the various classes and titles in legislative service.
- (9) “Compensatory time” means paid time off instead of cash payment for overtime worked.
- (10) “Continuing status” means a position of indefinite, ongoing duration as opposed to a session-only status position or other position with the Legislative Branch that is filled on a temporary or limited duration basis.
- (11) “District office” means any office facility operated for more than 30 days for the benefit of one or more members of the Legislative Assembly that is not located within the physical structure of the State Capitol building.
- (12) “Employee” includes officers elected by the Legislative Assembly but does not include officers elected by popular vote.
- (13) “Employee Services” means the division of Legislative Administration charged with employment and human resources administration for the Legislative Branch. The manager of Employee Services is the Human Resources Director.
- (14) “Flexible work schedule” means a work schedule that varies from a regular work schedule in the number of hours worked, the number of days worked or the starting or stopping times of work.

- (15) “Human Resources Director” means the manager of Employee Services.
- (16) “Introductory period” means the period following the initial appointment to a position in the Legislative Branch, a change in positions within the Legislative Branch or an appointment to a position in the Legislative Branch that follows a break in legislative service of at least 12 months’ duration.
- (17) “Leadership chiefs of staff” means the Chief of Staff of the Office of the Senate President and the Chief of Staff of the Office of the Speaker of the House of Representatives.
- (18) “Leadership office” means the Office of the Senate President, the Office of the Speaker of the House of Representatives.
- (19) “Legislative agency” means Legislative Administration, the Legislative Counsel Office, the Legislative Fiscal Office, the Legislative Revenue Office or the Legislative Commission on Indian Services.
- (20) “Legislative Branch” means members and employees of the Legislative Assembly, the parliamentary offices, Legislative Administration, the Legislative Counsel Office, the Legislative Fiscal Office, the Legislative Revenue Office and the Legislative Commission on Indian Services.
- (21) “Limited duration status” means an employment status that terminates at the end of a specified period, and that exists to complete work of certain or limited duration or when position reduction is anticipated.
- (22) “Member of the Legislative Assembly” or “member” means a Senator or Representative.
- (23) “Mobile work” means work performed on a regular basis at a work site other than the employee’s regular work location.
- (24) “Parliamentarian” means the Secretary of the Senate or the Chief Clerk of the House of Representatives.
- (25) “Parliamentary office” means the Office of the Secretary of the Senate or the Office of the Chief Clerk of the House of Representatives.
- (26) “Personal staff” means an employee working directly for a legislative member and paid from the member’s services and supply budget.
- (27) “Presiding officers” means the Senate President and the Speaker of the House of Representatives.
- (28) “Reclassification” means a classification change based on a significant change of position duties, authority and responsibilities, but with continuation of the same general knowledge and skills.
- (29) “Recognized service date” means the date reflecting an employee’s initial appointment to state service, and that is used to determine the employee’s vacation accrual rate.
- (30) “Red-circled” means, when a position is allocated to a lower classification, retention of the employee’s salary rate at the higher classification if the salary rate is above the maximum of the new, lower classification.
- (31) “Regular work schedule” means a work schedule of eight hours per day, 40 hours per week.
- (32) “Salary eligibility date” means the date on which an employee is eligible for consideration for a merit increase.
- (33) “Session-only status” means an employment position that occurs during a period that begins on or after December 1 preceding a regular session and ends on or before the end of the month following the month in which that regular session adjourns sine die.
- (34) “Telecommuting” or “performing mobile work” means performing the employee’s work on a regular basis at a work site other than the employee’s regular work location.
- (35) “Temporary status” means a noncompetitive employment status established to cope with short-term or unexpected workload demands when the establishment of a permanently funded position is inappropriate or unfeasible.

(36) “Underfill” means employment of a person in a classification lower than the allocated level of the position, when there is a reasonable expectation that the employee will meet minimum qualifications of the allocated level within 24 months of appointment.

(37) “Work out of class” means a temporary assignment of an employee to assume essentially all of the duties, authorities and responsibilities of a position classified at a higher salary level, for a period of 10 or more days.

Approved: 1-16-2016