

# A VIEW FROM THE TOP

*Harassment Claims Against  
Elected Officials Under  
Oregon Senate Bill 479*



February 4, 2021

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## INTRODUCTION

In 2019, the Oregon Legislature enacted Senate Bill 479, applicable to all public employers.

The bill significantly changed the current workplace harassment law under Oregon Revised Statutes Chapter 659a.

One significant change was that it expressly applied to elected public officials, who are:

- Not employees of the public employer
- Cannot be disciplined in the same manner as employees

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## WHAT WE WILL DISCUSS

PART ONE: How did we get here?

- Background regarding Oregon Legislature harassment investigation
- Recommendations by Oregon Law Commission work group

PART TWO: Which recommendations were incorporated into the new law, and what does the new law provide?

PART THREE: How does this play out in the real world when an elected official is accused?

NOTE: We will not be advising on Board governance issues.

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## Oregon State Senator Says She Was Sexually Harassed By Fellow Lawmaker

By **Chris Lehman** (OPB)

Salem, Oregon Oct. 23, 2017 1:33 p.m.



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### Oregon state senator faces second complaint

by Associated Press | Wednesday, November 22nd 2017



A second lawmaker filed a formal complaint on Tuesday accusing Sen. Jeff Kruse, R-Roseburg, of unwanted touching, even after she asked legislative lawyers to intervene.

In her complaint, Sen. Elizabeth Steiner Hayward, D-Portland, detailed a recent conversation with Kruse in which she explained why his behavior bothered her.

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In The News

Twitter bans Trump   On camera   Oregon hospitals   Tommy Lasorda   Oregon teachers   Cannabis

POLITICS

## Oregon State Senator Calls For Public Investigation, Says 15 Other Women Inappropriately Touched By Kruse

By Lauren Dake (OPB)

Nov. 15, 2017 10:30 a.m.



In her first detailed account of alleged harassment at the Oregon Capitol, state Sen. Sara Gelser says a fellow legislator touched her breasts and placed his hand on her thigh under a dais. And she says as many as 15 other women have also accused Sen. Jeff Kruse of unwanted touching.

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## ALLEGED VICTIMS

Additional persons who reported unwelcome hugging and other physical contact by Senator Kruse:

- Other Legislators
- Several Staff Members
- An Intern
- A Lobbyist



photo courtesy of Oregonlive.com

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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.

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## APPLICATION OF PERSONNEL RULE 27



### THE PERSONNEL RULE APPLIED TO:

- Legislators (elected officials)
- Legislative staff members; and
- Interns and volunteers performing services for the Legislature.

THE RULE DID NOT APPLY TO LOBBYISTS WHO WORK IN THE CAPITAL AND ARE REQUIRED TO INTERACT WITH LEGISLATORS AS PART OF THEIR JOB DUTIES.

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## REPORTING HARASSMENT UNDER THE RULE

The personnel rule provided for an *informal reporting* process:

- Within 1 year of the conduct*
- Intended to make the conduct stop without a formal process*
- Complainant could remain anonymous and request that no action be taken*
- Complaint could be resolved internally by Employee Services*

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## REPORTING HARASSMENT UNDER THE RULE

The personnel rule also provided for a *Formal Complaint* process:

- Complaint must be made in writing within 1 year of the conduct
- All persons required to keep the complaint confidential
- If accused was a legislator:
  - Complaint referred to outside investigator
  - Name of the complainant provided to the accused person's party caucus
  - Investigator's report provided to a Conduct Committee, which holds a hearing and makes a recommendation to the full legislative body.
  - Any sanction must be approved by a 2/3 vote, including:
    - ✓ Reprimand
    - ✓ Censure
    - ✓ Expulsion

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### POLITICS

## Report: Oregon State Senator Persisted With Unwanted Touching After Warnings

By **Lauren Dake** (OPB)

Portland, Ore. Feb. 6, 2018 4:59 p.m.

**Related:** Oregon Lawmakers And Lobbyists Say Sexual Harassment, Poor Behavior The Norm In Salem

**UPDATE (Feb. 6, 10:27 p.m. PST)** — An investigation into behavior by Oregon Sen. Jeff Kruse, R-Roseburg, released Tuesday states Kruse had a pattern of "engaging in unwelcome physical contact toward females in the workplace."

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# Oregon Sen. Jeff Kruse Resigns After Investigation Into Harassment Complaints

By Lauren Dake (OPB)

Portland, Ore. Feb. 8, 2018 4:59 p.m.

**Related:** Report: Oregon State Senator Persisted With Unwanted Touching After Warnings

**UPDATE (Feb. 8, 6:52 p.m. PST)** — Oregon state Sen. Jeff Kruse has resigned his post in the Legislature after an investigation revealed a pattern of unwanted touching and harassment at the Capitol.

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photo courtesy of oregonlive.com

## IN THE MEANTIME...

President Courtney and Speaker Kotek asked the Oregon Law Commission to:

- Review the Legislature's harassment rule
- Recommend changes

Oregon Law Commission appointed a work group including:

- Law professors
- Employment attorneys
- Former legislators
- Other subject matter experts

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## WORK GROUP RECOMMENDATIONS

- Form an "Equity Office" -
  - Employed by the Legislature
  - *But neutral and independent*
  - To investigate complaints of workplace harassment
  
- Intended to guard against influence by partisan politics and individuals in power
  
- Not feasible for most public employers



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## WORK GROUP RECOMMENDATIONS FOR TRAINING

- Preference for interactive training rather than recorded video training
- Record attendance of legislators at trainings and make the records publicly available
- Address the challenges associated with consensual relationships in the workplace, and that consent to intimate conduct can be withdrawn
- Encourage bystanders to intervene and oppose harassing behavior

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## WORK GROUP RECOMMENDATIONS

### SAFEGUARDS FOR VULNERABLE INDIVIDUALS

- The name and contact information of every interns and volunteers provided to Employee Services.
- Conduct exit interviews with interns and volunteers.
- Does this apply to your workplace?



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## WORK GROUP RECOMMENDATIONS POLICY REVISIONS

- Considered whether formal complaints against legislators should be made under penalty of perjury
- No time limit on making a complaint
- If accused person is a legislator, the Conduct Committee would determine whether there was a violation of the harassment policy.
  - In your organization, would the Board make this decision?
  - Would the accused person be excluded from voting?
  - What if there was no majority vote?

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## WORK GROUP RECOMMENDATIONS DISCIPLINE OF LEGISLATORS

- Only the legislative body could censure or expel
- Expulsion would require a 2/3 vote, otherwise a majority vote for disciplinary sanctions.
- Other sanctions could include:
  - Imposition of fines
  - Required training
  - Restricting committee assignments
  - Loss of privileges (office space or parking space)
    - Interim measures with Senator Kruse included restricting his presence in parts of the building, and removing the door in his office

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## WORK GROUP RECOMMENDATIONS

Recommendations regarding "protected classes" to be covered by the harassment rule:

- In addition to sex, race, national origin, disability, age, religion, marital status, and sexual orientation
  - Engaging in whistleblowing activity
  - Opposing unlawful conduct
  - Taking protected leaves (OFLA/FMLA)
  - Injured worker status

WERE THESE INCLUDED IN SB 479?

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END OF PART ONE

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SENATE BILL 479  
(ORS 243.317-323)



- ❖ Requires Oregon public employers to adopt written policies and procedures to prevent Workplace Harassment.
- ❖ Prohibits non-disclosure, non-disparagement and no-rehire agreements related to Workplace Harassment.
- ❖ Changed the statute of limitations for Workplace Harassment to 5 yrs.

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## WORKPLACE HARASSMENT UNDER SB 479

- ❑ Conduct that constitutes discrimination prohibited by ORS 659A.030 (i.e., discrimination because of race, color, religion, sex, sexual orientation, gender identity, national origin, marital status, age of the employee or a person associated with the employee, or the employee's expunged juvenile record), including conduct that constitutes sexual assault.
  - *Sexual Assault* means unwanted conduct of a sexual nature that is inflicted upon a person or compelled through the use of physical force, manipulation, threat or intimidation.
- ❑ Conduct that is prohibited by ORS 659A.082 (discrimination based on uniformed service), or
- ❑ Conduct that is prohibited by ORS 659A.112 (discrimination based on disability)

Also see: <https://www.oregon.gov/boli/workers/Pages/discrimination-at-work.aspx>

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## WORKPLACE HARASSMENT OCCURS WHEN:

An employee, volunteer, intern, or elected public official is subjected to:

- ❑ Unwelcome conduct of a protected status nature that is directed at an individual because of the status where:
  - Submission is a term/condition of employment (explicit / implicit)
  - Submission/rejection is a basis for employment decisions
- ❑ Unwelcome conduct of a protected nature which is sufficiently severe/pervasive to have the purpose or effect of:
  - Creating a hostile, offensive, or intimidating work environment

OR

  - Unreasonably interfering with their work

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## RETALIATION

Taking an adverse action because a covered individual:

- Raised concerns about Workplace Harassment or discrimination
- Participated in investigations or other proceedings
- Assisted in the enforcement of employer policies

Retaliation is broad and can be:

- *Employment-related or non-employment related.*
- *On-duty and off-duty.*
- *Includes employment actions against persons close to the person who complains ("zone of interest" test).*

CONDUCT THAT WOULD "CHILL" A PERSON'S WILLINGNESS TO REPORT/COOPERATE

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## MANDATORY POLICY PROVISIONS



SB 479

Employers are required to include certain provisions in Workplace Harassment policies, including:

- ✓ *Scope (Employee, Volunteer, Intern, Public Officials)*
- ✓ *Statement prohibiting harassment*
- ✓ *Explanation of rights, including:*
  - Protection from retaliation
  - To voluntarily disclose info re: WH
  - Not to be required/coerced into nondisclosure/non-disparagement agreements + option to voluntarily request one with a 7-day revocation right.

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## MANDATORY POLICY PROVISIONS



SB 479

- ✓ *Statement advising them to document incidents*
- ✓ *Explanation of rights to bring claims:*
  - Internal Employer Process
  - BOLI
  - Civil/Criminal
- ✓ *Statutes of Limitations*
  - Including Tort Claims Notice requirements
- ✓ *Available remedies*
- ✓ *Info to connect victims to resources*
  - Legal
  - EAP, other counseling and support

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## MANDATORY PROCEDURAL PROVISIONS



SB 479

- ✓ *A process for victims to file complaints within the longer of:*
  - 4 years from the alleged harassment OR
  - The statutory limitations period
- ✓ *Identification of an individual designated to receive complaints.*
  - And at least 1 alternate

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## MANDATORY *PROCEDURAL* PROVISIONS



SB 479

- ✓ *Instructions for maintaining confidential records of Workplace Harassment for at least 5 years.*
- ✓ *Process to notify & follow up with victim of alleged harassment at least 1x every 3 months for 1 year to verify:*
  - Harassment stopped
  - Has retaliation occurred

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## OTHER REQUIREMENTS UNDER SB 479

- Requirement to give all new covered individuals a copy of the policy upon hire.
- Requirement for supervisors/managers to:
  - *Document reports of discrimination/harassment/retaliation.*
  - *Give a copy of the policy to individuals who disclose any concerns about Workplace Harassment at the time of disclosure.*
- Requirement to advise those who have been subjected to discrimination/harassment/retaliation to document such incidents

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**CONCURRENT OBLIGATIONS:  
PUBLIC EMPLOYEE WHISTLEBLOWER PROTECTION**

Protects employee who discloses information that he/she reasonably believes is:

- Mismanagement,
- Gross waste of funds
- *Abuse of authority (can include harassment by supervisor)*
- *A violation of any federal, state or local law, rule or regulation by the employer*
- A substantial and specific danger to the public health and safety,
- Information on warrants related to persons receiving govt. benefits.

ORS 659A.203

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Public employers are prohibited from disclosing the identity of the employee who makes a whistleblower complaint during any investigation of the alleged conduct.

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**CONCURRENT OBLIGATION:  
PROHIBITION ON AGREEMENTS**

Senate Bill 726: Workplace Fairness Act (ORS 659A.370-380)

- Companion to SB 479
- Applies to ALL employers (including public employers)
- Allows the employer to void contract provisions for severance if:
  - *Person has authority to hire/fire or exercise control over employees, &*
  - *Person is separated for a violation of the Anti-harassment policy*

Senate Bill 478 (ORS 244.049): Prohibits use of public (or 3<sup>rd</sup> party) money

- For a non-disclosure agreement relating to Workplace Harassment
- By a holder of public office (elected or appointed to pilot education service district)

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END OF PART TWO

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## PART THREE

### REAL LIFE SCENARIO

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### COMPLAINT AGAINST CITY COUNCILOR

- City Council comprised of Mayor and 4 Councilors
- Two Councilors accused a third Councilor of making age-based comments that created a hostile environment
- One of the complainants, and the accused person, were running against each other for Mayor
- HR Director and City Attorney were potential witnesses to the alleged conduct
- No City Manager, and Interim City Manager was a candidate for that position.

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## COMPLAINT AGAINST CITY COUNCILOR

Fortunately:

- ✓ *The City had revised the harassment policy to comply with SB 479*
- ✓ *The Council had made the harassment policy applicable to Council members*
- ✓ *The Council's Code of Conduct rule addressed discipline of Council members*

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## CITY COUNCIL'S CODE OF CONDUCT RULE



The description of "Prohibited Conduct," as set forth in the Policy Against Harassment of the City's Personnel Policies, will be applied to determine whether harassment occurred.

Upon a finding that a violation has occurred, the Council may, upon unanimous vote of the balance of the Council not accused, proceed with censure or other appropriate sanctions.

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## ADDRESSING THE COMPLAINT

- ❑ City had an obligation to investigate under SB 479
- ❑ Question: who was going to manage that process?
  - *Deciding whether to retain outside investigator*
  - *Selecting an outside investigator*
  - *Defining the scope and instructions for investigator*
  - *Determining if the investigation report would be covered by attorney-client privilege*
  - *Did City Council need to vote on any of these decisions?*
    - *If so, could the accused person and the complainants vote?*

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## CONFIDENTIALITY OF COMPLAINT AND INVESTIGATION



- ❑ Can't prohibit a victim of harassment from disclosing information about a complaint under SB 479
- ❑ Public body may have an obligation to disclose information about the investigation under Public Records Law
  - ❑ Likely a public interest if the accused person is an elected official
  - ❑ Executive session notes or recordings are generally exempt under ORS 192.650(2)

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## CONFIDENTIALITY OF COMPLAINT AND INVESTIGATION



- ❑ Attorney-client privileged records are strictly exempt under Public Records Law
  - Investigation report may be covered by attorney-client privilege until you are ready to release it
  - Decision regarding attorney-client privilege must be made at the very beginning of the process – seek legal advice
  - Privilege does not apply to the complaint
  - Making a public statement characterizing or disclosing information in the report can result in a waiver of the privilege. ORS 192.355(9)

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## OUTCOME OF COMPLAINT AGAINST CITY COUNCILOR

WHAT HAPPENED IN THIS CASE?

TUNE IN TO FIND OUT!

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