

## CHAPTER TEN

### SPECIAL CLAUSES

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#### **1. CLAUSES RELATING TO BILL'S APPLICATION (SAVING CLAUSES).**

Many bills raise issues relating to the application of the bill. These issues may involve deciding whom the bill applies to, the circumstances the bill applies to, and the time period the bill applies to. These issues are frequently considered in court cases interpreting whether or not a bill was intended to have “retroactive” effect. “Retroactivity” is really just another way of expressing the issue. (Does the bill apply to persons licensed before the effective date of the bill? Does the bill apply to conduct that occurs before the effective date of the bill?) The drafter must be aware of the issues of application raised by the draft and deal with those issues by an appropriate clause. The alternative is confusion about the draft's application and the very real possibility of litigation that would not otherwise be necessary. Justice Linde made this point very succinctly in his concurring opinion in Whipple v. Howser, 291 Or. 475, 488 (1981):

The question of the so-called “retroactive” or “retrospective” effect of a new law is not, or should not be, a question of adjudication. Its answer is not to be sought in judicial precedents. “Retroactivity” is in the first instance a question of legislative draftsmanship. When it becomes a problem, the problem is a failure of drafting, probably reflecting in turn a failure to give adequate attention to the policy choices involved.

The drafter must consider existing conditions in drafting a bill. If a request is based on a situation of a named person, or a case that is currently in litigation, or any other set of specific circumstances, the drafter needs to ask the requester if the bill is intended to cover the person, litigation or other specific circumstances. If the requester wants to affect existing conditions, the failure of the drafter to include an appropriate clause designed to ensure application to those existing conditions may result in a bill that does not accomplish the requester's goals.

Even if the request is not based on a set of specific circumstances, the decision on a bill's application is almost always a policy decision that must be made by the requester. The drafter can alert the requester to the issue by including a clause in the draft that reflects the “normal” application of the bill (prospective application only for all persons and events). Mentioning the clause in a cover letter or memorandum should eliminate any subsequent question about the requester's intent with respect to the bill's application.

Clauses designed to deal with application of the bill have traditionally been referred to as “saving clauses.” This terminology arose from the frequent use of these clauses to “save” rights and obligations that existed before the bill’s effective date. As can be seen from the many examples given in this chapter, the term is somewhat misleading since clauses relating to the application of a bill can either “save” or extinguish existing rights, subject only to constitutional limitations on the legislature’s power to retroactively change the rules (e.g., prohibitions on ex post facto laws and laws impairing the obligations of contracts).

#### **a. Rules of Construction in Absence of Clause.**

Chapter 20 of this manual cites several cases establishing rules of construction that are used by the courts in determining whether or not the Legislative Assembly intended that a particular bill be applied retroactively. In each of these cases, the law in question did not contain language indicating the intent of the Legislative Assembly. The general rule found in these cases is that a bill will usually only be applied prospectively, but there are enough qualifications to this rule that it would be unwise for the drafter to place much reliance on the general rule. For instance, the Oregon Court of Appeals has found that even the use of the past tense by a drafter may indicate legislative intent that a law be applied retroactively. State ex rel. Dwight v. Justice, 16 Or. App. 336 (1974). In addition, several cases have allowed retroactive application for “procedural” laws. See, e.g., Fish and Wildlife Dept. v. Land and Conservation Development Commission, 288 Or. 203 (1979).

As already noted, there are some constitutional provisions that automatically limit the application of a new law. For example, existing insurance policies may be immune from the application of a new law by reason of the Contract Clauses of the Oregon and U.S. Constitutions. The new law need not contain any provision to produce that result. However, there are two good reasons why a drafter should never rely on the Constitution to determine the application of a bill. First, failure to include an application clause may mean that the resulting law will generate extended litigation to determine the impact of the constitutional provision, litigation that could be avoided by the inclusion in the bill of a short clause on application. Second, including the clause will alert the requester to the limitations imposed by the Constitution on the retroactive effect of the bill.

In addition to the constitutional provisions, there are several statutes that generally regulate the application of certain new laws. Unlike the constitutional provisions, the statutory provisions eliminate the need for special clauses if the bill being drafted falls in the described categories. The statutory provisions include ORS 161.035 (amendment or repeal of criminal statute as affecting prosecution and punishment of persons who violated the law); ORS 182.080 (effect of repeal or amendment of statute authorizing state agency to collect, receive and expend moneys); ORS 174.070 (effect of repeal of validating or curative Act); ORS 174.080 (effect of repeal of repealing Act); and ORS 174.090 (effect of repeal of repealing constitutional provision).

These statutory saving clauses automatically apply to any bill that is drafted, unless the bill expressly provides otherwise. In addition, ORS 174.520 provides a saving clause for preexisting law repealed when *Oregon Revised Statutes* was enacted in 1953, in case any

provision of *Oregon Revised Statutes* derived from a preexisting statute is held unconstitutional. Another statute (ORS 174.530) saves the Acts from which ORS sections were derived for the purpose of applying rules of construction relating to repeal or amendment by implication or for the purpose of resolving any ambiguity.

With the exception of bills that will be covered by one of the statutory provisions listed above, the only safe course for the drafter is to address problems relating to a bill's application by including an appropriate clause in the draft.

#### **b. General Form of Clause.**

The Oregon Supreme Court has noted with disapproval the use of an application clause that tells the reader what the Act does not apply to without indicating what the Act does apply to. Whipple v. Howser, 291 Or. 475 (1981). For instance:

**SECTION \_\_\_\_.** Section \_\_\_\_ of this (year) Act does not apply to an action, suit or other proceeding commenced before the effective date of this (year) Act.

This language tells the reader only what the new law does not apply to without giving any idea as to what other restrictions might apply to the application of the new law. For instance, does the law apply to an action commenced after the effective date of the Act, but based on conduct that occurred before the effective date of the Act? The better approach is to make a positive statement that limits the application of the bill. For instance: <spm savings>

**SECTION \_\_\_\_.** Section \_\_\_\_ of this (year) Act applies only to actions, suits or other proceedings commenced on or after the effective date of this (year) Act.

Note that clauses relating to application of a bill are almost always included in a separate section. These clauses are usually temporary in nature and will not be codified in ORS.

Clauses relating to the application of a bill should not be prepared until the other sections of the bill have been drafted, including any repealer clause. The entire bill must be considered when drafting an adequate clause on the application of the bill's provisions.

The use of broad statements as to the effect of a law should almost always be avoided. For instance:

**SECTION \_\_\_\_.** Section \_\_\_\_ of this (year) Act does not affect any duty or right accruing, accrued or acquired, or liability incurred, before the effective date of this (year) Act.

This type of clause is so general in nature that it is difficult to determine what it does. Litigation could easily result from efforts to determine what is (and what is not) a "duty or right accruing, accrued or acquired" before the effective date of the Act.

**c. Repeals (Express and Implied).**

It may be necessary to include a saving clause indicating the effect of the repeal of an Act. If the Act repealed is a “criminal statute,” ORS 161.035 usually is adequate. If the Act repealed is not a “criminal statute” and a specific saving clause is needed, one of the following examples may help:

**SECTION \_\_\_\_\_.** Section \_\_\_ of this (year) Act does not relieve a person of any obligation with respect to a tax, fee, fine or other charge, interest, penalty, forfeiture or other liability, duty or obligation accruing under the law repealed by this (year) Act. After the operative date of the repeals made by this (year) Act, the Department of \_\_\_\_\_ may undertake the collection or enforcement of such tax, fee, fine, charge, interest, penalty, forfeiture or other liability, duty or obligation.

**OR**

**SECTION \_\_\_\_\_.** If section \_\_\_ of this (year) Act is repealed, unless otherwise specifically provided in the repealing Act, section \_\_\_ of this (year) Act remains in force for the assessment, imposition and collection of the tax and all interest, penalties or forfeitures that have accrued or may accrue in relation to the tax for the calendar year in which the tax is repealed.

**OR**

**SECTION \_\_\_\_\_.** The repeal of ORS \_\_\_\_\_ by section \_\_\_\_\_ of this (year) Act does not relieve a person of any obligation with respect to a contribution, tax, fine, interest, penalty or other liability, duty or obligation accruing under ORS \_\_\_\_\_ prior to the effective date of the repeal by section \_\_\_\_\_ of this (year) Act.

**OR**

**SECTION \_\_\_\_\_.** Notwithstanding the repeal of ORS \_\_\_\_\_ by section \_\_\_ of this (year) Act, that statute remains in force for the purpose of collecting all withholding taxes and all interest, penalties or forfeitures that have accrued or may accrue in relation to the taxes in the period before such repeal.

If an Act is enacted that is inconsistent with a prior Act, the prior Act may be repealed impliedly to the extent of the inconsistency. If a bill is intended to be supplementary to an existing law, but the court might find that the existing law was repealed impliedly by the enactment of the bill, a specific clause in the bill stating its intent to save the existing law is necessary.

**SECTION \_\_\_\_\_.** Section \_\_\_ of this (year) Act is intended to be supplementary to, and is not intended to repeal, any law relating to the surface waters of this state.

**OR**

**SECTION \_\_\_\_\_.** Section \_\_\_ of this (year) Act is intended to be supplementary to any other law enacted before, on or after the effective date of this (year) Act providing for vocational education, and is intended to provide additional powers not in conflict with or exclusive of existing laws on the same subject.

OR

**SECTION \_\_\_\_.** The remedies provided in sections \_\_\_\_ to \_\_\_\_ of this (year) Act are cumulative, and no action taken by the Department of \_\_\_\_ constitutes an election by the state to pursue a remedy to the exclusion of any other remedy for which provision is made in this (year) Act or any other law.

OR

**SECTION \_\_\_\_.** The remedies provided in sections \_\_\_\_ to \_\_\_\_ of this (year) Act are in addition to all other remedies, civil or criminal, existing under the laws of this state.

**d. Temporary Law.**

A special clause is essential for the success of temporary Acts. Without a special clause, a person affected by the Act may choose to disobey the Act in the hope that the final judgment based upon the failure to comply can be postponed until the Act lapses. The following, based on 1 U.S.C. §109, indicates the type of provision that can be written:

**SECTION \_\_\_\_.** The expiration of section \_\_\_\_ of this (year) Act does not release or extinguish any penalty, forfeiture or liability incurred under section \_\_\_\_ of this (year) Act. Section \_\_\_\_ of this (year) Act remains in force for the purpose of maintaining an action or prosecution for the enforcement of such a penalty, forfeiture or liability.

For provisions that may be helpful when a sunsetted law is extended, see “EXTENDING DURATION OF SUNSETTED LEGISLATION,” chapter 12.

**e. Specific Types of Clauses by Subject Matter.**

The following listing attempts to provide helpful samples based on the subject matter of the bill. These samples may be adapted to address application issues under most subject matter areas. In general, the samples should not be considered as a way to avoid drafting a specific clause that is keyed to the issues raised by a bill. The samples are only for the purpose of providing some language that may be cannibalized to fit a more specialized clause.

**A. Actions and Proceedings; Changes in Procedures.**

Changes to a statutory procedure almost always raise questions on application and retroactivity because the drafter must assume that proceedings under the preexisting law will be in progress at the time the bill becomes effective. The issue then becomes whether the new procedure applies only to proceedings commenced on or after the effective date of the Act, or if the procedure applies to pending proceedings as well. The same issues arise when a bill changes the nature of the conduct that will allow a person to pursue a claim, whether through judicial or administrative proceedings. Again, it is necessary to determine whether the change applies only to conduct that occurs on and after the effective date of the Act, or also applies to conduct that occurs before the effective date of the Act. The following examples may be helpful:

**SECTION \_\_\_\_\_.** Sections 1 to 29 of this (year) Act are first operative January 1, (year+1), and apply only to actions and proceedings that are commenced on or after that date. Actions and proceedings that are commenced before January 1, (year+1), shall continue to be governed by the law applicable to those actions and proceedings in effect immediately before that date.

**OR**

**SECTION \_\_\_\_\_.** The amendments to ORS \_\_\_\_\_ by section \_\_\_ of this (year) Act do not affect an act done or proceeding begun, or right accruing, accrued or acquired, or liability incurred, before the effective date of this (year) Act, under the law then in effect. A proceeding begun before the effective date of this (year) Act in accordance with the law then in effect may be completed after the effective date of this (year) Act as if this (year) Act had not been enacted.

**OR**

**SECTION \_\_\_\_\_.** Section \_\_\_ of this (year) Act applies only to conduct giving rise to a cause of action under section 1 of this (year) Act that occurs on or after the effective date of this (year) Act.

**OR**

**SECTION \_\_\_\_\_.** Section \_\_\_ of this (year) Act applies to all actions and proceedings, whether commenced before, on or after the effective date of this (year) Act.

**OR**

**SECTION \_\_\_\_\_.** Section \_\_\_ of this (year) Act applies both to petitions filed within the time allowed by ORS 116.253, and not finally adjudicated or decided before the effective date of this (year) Act, and to petitions filed on or after the effective date of this (year) Act.

A clause that preserves an existing cause of action, in an Act amending or repealing a statute that authorizes the cause of action, also may require that the cause of action preserved be sued upon within a specified period after the effective date of the amending or repealing Act (in effect, creating a “window of opportunity” for a party to bring an action). For example:

**SECTION \_\_\_\_\_.** An employees’ trust created before the effective date of this (year) Act is not invalid as violating any rule of law against perpetuities or the suspension of the power of alienation of title to property, unless the trust is terminated by a decree of a court of competent jurisdiction in a suit begun within one year after the effective date of this (year) Act.

**OR**

**SECTION \_\_\_\_\_.** Unless an action to contest the validity of the consolidation is brought in the circuit court not later than the 60th day after the date on which the district boundary board declared the districts consolidated, it is presumed conclusively that all election procedure was correct and that the district was consolidated regularly.

Requests for changes to statutes of limitations or other statutory deadlines present particular problems. The following examples cover some of the possible alternatives:

**SECTION \_\_\_\_\_**. The amendments to ORS 12.110 by section 1 of this (year) Act apply only to causes of action arising on or after the effective date of this (year) Act.

OR

**SECTION \_\_\_\_\_**. The amendments to ORS 12.110 by section 1 of this (year) Act apply to all causes of action, whether arising before, on or after the effective date of this (year) Act, but do not operate to revive a cause of action barred by the operation of ORS 12.110 ((year-2) Edition) before the effective date of this (year) Act.

OR

**SECTION \_\_\_\_\_**. The amendments to ORS 12.110 by section 1 of this (year) Act apply to all causes of action, whether arising before, on or after the effective date of this (year) Act, and operate to revive a cause of action barred by the operation of ORS 12.110 (2001 Edition) before the effective date of this (year) Act if an action is commenced within the time allowed by ORS 12.110 as amended by section 1 of this (year) Act.

## **B. Contracts.**

Constitutional limitations on impairing the obligations of contracts must be borne in mind when attempting to give retroactive effect to bills that impact contracts. However, as noted above, the inclusion of a clause that indicates that the law does not impact existing contracts is almost always a good idea. Examples of clauses that may be useful follow:

**SECTION \_\_\_\_\_**. Section \_\_\_ of this (year) Act do not apply to a sale, or to a contract to sell, made before the effective date of this (year) Act.

OR

**SECTION \_\_\_\_\_**. Section \_\_\_ of this (year) Act does not affect a contract made before the effective date of this (year) Act. However, section \_\_\_ of this (year) Act applies to a renewal or extension of an existing contract on or after the effective date of this (year) Act as well as to a new contract made on or after the effective date of this (year) Act.

OR

**SECTION \_\_\_\_\_**. Section \_\_\_ of this (year) Act does not confer or impair a right or defense created by or arising out of a contractor's bond executed before the effective date of this (year) Act.

OR

**SECTION \_\_\_\_\_**. ORS \_\_\_\_\_, as amended by section 2 of this (year) Act, does not affect a contract, sales agreement or security agreement made before the effective date of this (year) Act. However, ORS \_\_\_\_\_, as amended, applies to a renewal or extension of an existing contract, sales agreement or security agreement on or after the effective date of this (year) Act as well as to a new contract, sales agreement or security agreement made on or after the effective date of this (year) Act.

A requester may wish to declare in statute form what is believed to be an existing common law rule. If this is the case, constitutional provisions prohibiting the impairment of contracts would not apply. For example:

**SECTION \_\_\_\_\_**. (1) Section \_\_\_ of this (year) Act, being declaratory of existing law, applies to contracts of sale of real property executed before, on or after the effective date of this (year) Act.

(2) It is the intent of the Legislative Assembly that if section \_\_\_ of this (year) Act is held to be unconstitutional as applied to contracts of sale of real property executed before the effective date of this (year) Act, section \_\_\_ of this (year) Act nevertheless is effective with respect to contracts executed on or after the effective date of this (year) Act.

### **C. Licenses.**

Changes in laws relating to licenses usually raise questions about the application of the new law to existing licenses. The following examples provide some ideas on dealing with these problems:

**SECTION \_\_\_\_\_**. Section \_\_\_ of this (year) Act does not apply to an individual who was practicing psychiatry lawfully in this state on the effective date of this (year) Act.

**OR**

**SECTION \_\_\_\_\_**. The board shall issue a license to practice massage to an applicant who does not have a diploma from a school of massage but who has been practicing massage in this state continuously for at least one year immediately before the effective date of this (year) Act, who can furnish satisfactory evidence of good moral character and ethical practice and who makes application for a license and pays the fee required by section \_\_\_\_\_ of this (year) Act not later than the 90th day after the effective date of this (year) Act.

**OR**

**SECTION \_\_\_\_\_**. An individual licensed under ORS chapter 603 as of the day immediately preceding the effective date of this (year) Act, who is subject to ORS chapter 603 on and after the effective date of this (year) Act, need not obtain a license under ORS 603.025, as amended by section \_\_\_ of this (year) Act, until the license issued to the individual before the effective date of this (year) Act under ORS chapter 603 has expired. The individual is considered to be licensed under and subject to ORS chapter 603 on and after the effective date of this (year) Act, according to the nature and character of the business conducted by the individual, until the expiration of the license.

**OR**

**SECTION \_\_\_\_\_**. A person licensed under ORS chapter 725 as of the day immediately preceding the effective date of this (year) Act is considered to be licensed under and subject to ORS chapter 725 during the period beginning on the effective date of this (year) Act and ending July 1, (year+1). A person not licensed under ORS chapter 725 but who holds a license under ORS chapter 727 as of the day immediately preceding the effective date of this (year) Act is considered to be licensed under and subject to ORS chapter 725 during the period beginning on the effective date of this (year) Act and ending July 1, (year+1). After the effective date of this (year) Act, only one license may be issued for each office, regardless of whether that office was licensed under both ORS chapters 725 and 727 and whether the two licenses were held by different individuals. In every case the board shall investigate the facts to determine if a person is entitled to a continuation of a license. Every license in effect on June 30, (year+1), shall be continued in force as long as the standards are maintained under ORS chapter 725.

**OR**

**SECTION \_\_\_\_\_.** (1) Section \_\_\_ of this (year) Act is not intended to apply retroactively, and nothing in section \_\_\_ of this (year) Act affects the validity or authorizes cancellation of a license issued before the effective date of this (year) Act to any practitioner of medicine and surgery or osteopathy and surgery, on account of anything that occurred before the effective date of this (year) Act. However, this section does not prevent the revocation of a license on any ground that was a cause for revocation before the effective date of this (year) Act.

(2) The repeal of ORS chapter 681 ((year-2) Edition) by section \_\_\_ of this (year) Act does not affect the validity of a license issued under that chapter before the effective date of this (year) Act. On and after the effective date of this (year) Act, licenses issued under that chapter are governed by section \_\_\_ of this (year) Act.

The following examples are useful for converting a licensing period from one period to another, e.g., from a calendar year to a fiscal year. Another example of an amendment to such a section, made several years later to extend its application, may be found in section 5, chapter 314, Oregon Laws 1965.

**SECTION \_\_\_\_\_.** Licenses issued by the board under ORS \_\_\_\_\_ that are effective on June 30, (year-1), expire on July 1, (year+1). The board shall credit on the fee for a license renewed under ORS \_\_\_\_\_ for the fiscal year beginning July 1, (year+1), the sum of \$2.50, representing part of the fee for the license issued or renewed for the calendar year (year+1) under ORS \_\_\_\_\_ as that section read before its amendment by section \_\_\_\_\_ of this (year) Act.

**OR**

**SECTION \_\_\_\_\_.** Notwithstanding ORS \_\_\_ and \_\_\_, for those persons to whom a license was issued under ORS \_\_\_\_\_ prior to the effective date of this (year) Act, the expiration date of which is before June 30, \_\_\_\_, the State Department of \_\_\_\_\_ shall issue on that expiration date, upon application therefor by the licensee, a license that is valid until June 30, \_\_\_\_\_. The department shall charge for such a license a prorated portion of the annual license fee based upon the period of time from the date of license issuance until June 30, \_\_\_\_\_.

To provide that some section, such as a section increasing license fees, does not apply to a particular licensing period, the following may be useful:

**SECTION \_\_\_\_\_.** The amendments to ORS 633.700 by section \_\_\_\_\_ of this (year) Act do not apply to the license year ending December 31, (year+1).

#### **D. Permits.**

Changes in laws relating to permits raise the same problems as changes in laws relating to licenses. The following examples may help:

**SECTION \_\_\_\_\_.** Section \_\_\_ of this (year) Act does not affect any right to waters or to the use of any waters vested or inchoate before the effective date of this (year) Act.

**OR**

**SECTION \_\_\_\_\_.** Section \_\_\_ of this (year) Act controls applications for permits to appropriate water made to the Water Resources Department under ORS 537.130 before, and not yet approved on, the effective date of this (year) Act.

## OR

**SECTION \_\_\_\_.** Any person or public agency claiming a right to appropriate ground water under section \_\_\_\_ of this (year) Act is entitled to receive from the Water Resources Department within three years after the effective date of this (year) Act a certificate of registration as evidence of a right to appropriate ground water under section \_\_\_\_ of this (year) Act. Failure of a person or public agency to request registration within such period creates a presumption that the person or public agency has abandoned the claim.

### **E. Taxation.**

In amending personal and corporation income and excise tax laws, saving existing rights under former law may be desired. There are many forms that have been followed in writing such clauses. The notes following some of the sections compiled in ORS chapters 305 to 323 may suggest appropriate language. In the corporation tax laws, the term “taxable year” is used in place of “tax year.” For provisions that preserve the obligation to pay taxes after the repeal or amendment of a tax law, see “Repeals (Express and Implied)” earlier in this chapter.

### **F. Boards, Commissions and Other State Agencies.**

In connection with the transfer of functions from one agency to another, several saving clauses may be needed. These are discussed in Appendix A.

When terms of board members or other officers are reduced, an example of a savings clause is found in section 50, chapter 792, Oregon Laws 1973.

**SECTION 50.** Nothing in this (year) Act that reduces the term of office of a person to four years is intended to affect the term of any person appointed for a complete term prior to and holding office on the effective date of this (year) Act. However, any person appointed prior to the effective date of this (year) Act to fill a vacancy in office, the term of which is reduced by this (year) Act to four years, shall serve for a term not longer than four years.

When qualifications for board members are changed, the term of incumbents may be “saved” as follows:

**SECTION \_\_\_\_.** Nothing in the amendments to ORS \_\_\_\_ by section \_\_\_\_ of this (year) Act affects the term of office of any member of the \_\_\_\_ Board appointed prior to and serving on the effective date of this (year) Act. However, as vacancies occur, appointments shall be made in accordance with the qualifications specified in ORS \_\_\_\_, as amended by section \_\_\_\_ of this (year) Act.

## **2. CONSTRUCTION CLAUSES.**

A provision that an Act receive a liberal interpretation to carry out the purpose expressed therein is found in some bills. The provision for liberal interpretation ordinarily is superfluous. To effectuate the intention of the Legislative Assembly and obtain the most beneficial operation is a familiar rule of construction. About the only place that such a clause is justified is in situations where the provision indicates that the law is to be interpreted in favor of one group and against another (e.g., in favor of employees and against employers). The following is an example of the more traditional clause:

**SECTION \_\_\_\_\_. This (year) Act shall be liberally construed to accomplish its purpose so that all service voters may be afforded an opportunity to exercise fully the voting rights granted to them by this (year) Act.**

If construction of a constitutional provision is in doubt, the drafter may wish to specify how a court test can be implemented. See ORS 250.044 for an example that provides for expedited Supreme Court review.

### **3. INTERPRETATION CLAUSES.**

There are some recognized rules as well as general statutory provisions relating to interpretation of legislative Acts, words and phrases with which a drafter must become familiar. See chapter 20 of this manual. Too often these rules are needlessly repeated in the draft.

However, if the requester desires an interpretation different from that reached by the rules of construction, the draft should contain a section setting forth the desired interpretation.

Every Uniform Act contains an interpretation provision, somewhat as follows:

**SECTION \_\_\_\_\_. This (year) Act shall be so interpreted as to effectuate its general purpose to make uniform the law of those states that enact it.**

### **4. GENERAL REPEALS.**

A draft should never contain a general repeal clause providing that “all laws and parts of laws in conflict with this (year) Act are repealed.” Such a provision is useless because such laws and parts of laws are repealed by implication in any event. Moreover, the difficulty with a general repeal clause or repeals by implication is that of determining whether an irreconcilable conflict exists between a subsequent Act and a prior Act or part of the prior Act. A general repealing clause fails to disclose the legislative purpose as to an earlier Act and thereby adds to the burden of construction a question that properly should be settled by the Legislative Assembly. The drafter must determine whether a bill requires or makes desirable the repeal of an existing statute. That issue should not be left up to the courts, which can resolve the question only after expensive and time-consuming litigation. If the repeal of one or more existing sections is necessary or desirable, the draft should include a specific repeal provision that specifies the sections repealed. Only as a last resort should a drafter use the phrase “Notwithstanding any other provision of law,” a phrase that impliedly amends or repeals any number of unspecified statutes. This phrase is an indication of inadequate research and lazy drafting.

To protect a specific existing law or all existing laws from possible implied repeal, a bill may state that no conflict is intended. An example of this type of provision is found earlier in this chapter under “Repeals (Express and Implied)”.

Chapter 13 contains a discussion of specific repeals.

## **5. SEVERABILITY CLAUSES.**

A severability clause provides in effect that if any part of a bill is held unconstitutional, the remainder shall not be affected. The inclusion of a severability clause in a bill is not needed; a severability provision is made applicable by ORS 174.040 to all Acts passed in Oregon. Further, the courts in Oregon generally have followed this principle. Standard Lumber Co. v. Pierce, 112 Or. 314 (1924); Wadsworth v. Brigham, 125 Or. 428 (1928); Gilbertson v. Culinary Alliance, 204 Or. 326 (1955); State v. Hunter, 208 Or. 282 (1956); Foltz v. State Farm Mutual Auto Insurance Co., 326 Or. 294 (1998); however, see 33 Op. Att’y Gen. 311 (1967).

On the other hand, it may be the legislative intent that an entire Act be declared invalid if any part of it is held unconstitutional. In such an instance, a nonseverability clause should be included. City University v. State, Educational Policy and Planning, 320 Or. 422 (1994).

The following are examples of the two types:

**SECTION \_\_\_\_. It is the intent of the Legislative Assembly that each part of this (year) Act be considered as essentially and inseparably connected with and dependent upon every other part. The Legislative Assembly does not intend that any part of this (year) Act be the law if any other part is held unconstitutional.**

**OR**

**SECTION \_\_\_\_. If this (year) Act is declared unconstitutional, it is the intent of the Legislative Assembly that all sections amended or repealed by this (year) Act shall remain in effect the same as if this (year) Act had not been enacted.**

## **6. UNIT AND SECTION CAPTIONS.**

In the case of a very long bill, the use of unit and section captions makes the bill more understandable. Examples are chapters 33 and 615, Oregon Laws 1993. If unit and section captions are used, the drafter must be sure they accurately represent the substance of the units and sections of the bill. An amendment to a captioned bill may require amendment of the unit and section captions.

If captions are used, it is ESSENTIAL IN ALL CASES that a section substantially as follows be inserted near the end of the bill: <spm captions>

**SECTION \_\_\_\_. The unit and section captions used in this (year) Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this (year) Act.**

A section like this is necessary because in its absence the captions become law and must be amended in future bills rather than being adjusted by ORS editors if the section is subsequently amended. See State ex rel. Penn v. Norblad, 323 Or. 464 (1996), in which the court relied on unit and section captions in discerning legislative intent because the section

in the Act (section 357, chapter 836, Oregon Laws 1973) relating to those captions provided that they were used only for convenience in “*locating or explaining*” (court’s emphasis) provisions of the Act.

ORS 174.540 provides that, as used in ORS, title heads, chapter heads, division heads, section and subsection heads or titles, and explanatory notes and cross-references, are not a part of the law. An exception occurs with the Oregon Rules of Civil Procedure in which the headings and captions become part of the law. Also, certain constitutional sections were adopted with captions, a fact noted in the source notes following such sections.

## **7. STATUTE OF LIMITATIONS.**

If the requester wishes to create a new cause of action, the drafter must establish a statute of limitations. If the drafter fails to provide a statute of limitations, ORS 12.140 will probably provide a 10-year statute of limitations. ORS 30.275 (Oregon Tort Claims Act) provides a good example:

(9) Except as provided in ORS 12.120, 12.135 and 659A.875, but notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action, an action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300 shall be commenced within two years after the alleged loss or injury.

