

DIVISION 1

**RULES FOR WAGE CLAIM ENFORCEMENT,
MAXIMUM HOURS OF WORK IN MILLS, FACTORIES
AND MANUFACTURING ESTABLISHMENTS AND RULES
PERTAINING TO MONEYS COLLECTED FROM
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DIVISION 51

**CONFIDENTIALITY AND INADMISSIBILITY OF
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DIVISION 1

**RULES FOR WAGE CLAIM ENFORCEMENT,
MAXIMUM HOURS OF WORK IN MILLS, FACTORIES
AND MANUFACTURING ESTABLISHMENTS AND RULES
PERTAINING TO MONEYS COLLECTED FROM
EMPLOYEES FOR GROUP HEALTH INSURANCE
COVERAGE AND NOTIFICATION OF VARIOUS
PARTIES ON TERMINATION OF GROUP
HEALTH INSURANCE COVERAGE**

839-001-0000

Notice of Proposed Rule

Prior to the permanent adoption, amendment, or repeal of any rule relating to wage claims enforcement matters, any rule relating to interpretive rules regarding maximum hours of work, and any rules pertaining to money collected from employees for group health insurance coverage and notification of various parties on termination of group health insurance coverage the Wage and Hour Division of the Bureau of Labor and Industries will give notice of the intended action as required in OAR 839-002-0002.

Stat. Auth.: ORS 183.335, 651.060(4) & 652

Stats. Implemented: ORS 652

Hist.: BL 184, f. & ef. 1-21-76; BL 190, f. & ef. 5-7-76; BL 1-1982, f. & ef. 1-13-82; BL 8-1990, f. & cert. ef. 5-11-90; BL 10-1992, f. & cert. ef. 7-1-92; BL 9-1996, f. & cert. ef. 10-8-96; BLI 1-2002, f. & cert. ef. 1-9-02; BLI 9-2004, f. 7-26-04, cert. ef. 7-27-04

Interpretive Rules Regarding Maximum Hours to Work

**Maximum Hours of Work in Mills, Factories,
Manufacturing Establishments**

839-001-0100

Definitions

As used in ORS 652.010 to 652.030 and in OAR 839-001-0100 to 839-001-0200, unless the context requires otherwise:

(1) "Agent of the Employer" includes any person acting as the employer's agent for purposes of assigning work, assigning hours of work, or authorizing overtime payments to employees.

(2) "Bureau" means the Bureau of Labor and Industries of the State of Oregon.

(3) "Commissioner" means the Commissioner of the Bureau of Labor and Industries.

(4) "Day" or "Day of 24 Hours" means any time period of 24 consecutive hours as determined by the employer.

(5) "Employ" includes to suffer or permit to work.

(6) "Employed in" refers to employment of employees in the actual place specified in ORS 652.010 to 652.030. Employees who are not performing duties in the named places are not "employed in" those places.

(7) "Employee" means any individual employed by an employer.

(8) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee.

(9) "Factory" means a building or set of buildings with facilities for manufacturing; the seat of some kind of production. "Factory" in the context used in these rules is a "manufacturing establishment."

(10) "Finished Forest Products" means a forest product ready for sale to a wholesaler or retailer of finished products.

(11) "Manufacturing Establishment" means any place where machinery is used for manufacturing purposes:

(a) "Manufacturing" in the context used in these rules means the process of making goods or any material produced by machinery; anything made from raw materials by machinery; the production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations, by the use of machinery;

(b) As used in this subsection, "machinery" means power driven machinery by electricity, nuclear and fossil fuels, hydroelectric, geothermal, or some power source other than by human hand, foot, breath or otherwise.

(12) "Mill" means a building or collection of buildings with machines for manufacturing. "Mills" in the context used in these rules are "manufacturing establishments."

(13) "Primary Duty" means duties the employee is engaged in over 50 percent of the time the employee is employed in any work week.

Stat. Auth.: ORS 651.060(4) & 652

Stats. Implemented: ORS 652.010 - 652.030

Hist.: BL 8-1990, f. & cert. ef. 5-11-90

Exemptions

839-001-0125

Individual Exemptions

(1) The following employees are exempt from the provisions of ORS 652.020:

(a) Any employee whose primary duty is that of a member of a logging train crew;

(b) Any employee whose primary duty is that of watchman/woman;

(c) Any employee whose primary duty is that of fireman/woman. As used in this rule, the term "fireman" means a person whose primary duty is to operate and clean boilers or to maintain fuel and steam pressure levels in those boilers;

(d) Any employee who as one of his/her regular duties is engaged in the transportation of other employees to and from work;

(e) Any employee whose primary duty is that of making necessary repairs. This includes employees conducting maintenance on buildings, equipment or machinery;

(f) Employees engaged in emergency work pursuant to section (2) of this rule;

(g) Any employee whose primary duty is that of cleaning, guarding, repairing and otherwise caring for the living quarters and immediate surrounding areas of other employees;

(h) Any employee whose primary duty is that of feeding, grooming, guarding or otherwise caring for livestock by, among other things, cleaning and repairing the areas in which the livestock is kept;

(i) Any employee whose primary duty is to be employed in messhalls where meals are served to other employees. This would include any and all employment necessary to conduct the messhall operations;

(j) Any employee whose primary duty is that of supervising and directing work. This includes supervisors, managers, foremen/women and persons who are temporarily acting in these capacities in the absence of the named employees;

(k) Any employee whose primary duty is the loading and removal of finished forest products. This includes employees engaged in shipping or otherwise removing the final finished forest product from the establishment's premises. This applies to finished products only and not to products shipped for further processing at another location.

(2) Employees engaged in activities under emergency situations are only exempt when the emergency puts life or property in imminent danger. In order to be exempt, therefore, employees must be employed in an emergency situation which threatens to harm or destroy life or property. When the normal production process is interrupted by a breakdown of machinery or unexpected absences of employees, life and property are not normally threatened with harm or destruction. For this reason, the exemption is not applicable to normal routine operational occurrences.

(3) Employees who are party to a collective bargaining agreement are not subject to ORS 652.020, provided that:

(a) The agreement is in effect at the employee's work site;

(b) The agreement contains a provision which limits the employee's required hours of work; and

(c) The agreement contains a provision for the payment of overtime hours of work.

(4) Except as provided in section (5) of this rule, employees who are party to a collective bargaining agreement which, for any reasons, was not renewed, extended or not otherwise in force are not subject to ORS 652.020, provided that:

(a) The agreement was in effect at the employee's work site;

(b) The limits on the employee's required hours of work continue as if the agreement were still in effect; and

(c) The payment of overtime continues as if the agreement were still in effect.

(5) Section (4) of this rule does not apply under the following circumstances:

(a) Employees who are party to the collective bargaining agreement are locked out;

(b) Employees who are party to the collective bargaining agreement are engaged in a strike; or

(c) The employer has unilaterally implemented new terms and conditions of employment.

Stat. Auth.: ORS 651.060(4) & 652

Stats. Implemented: ORS 652.020

Hist.: BL 8-1990, f. & cert. ef. 5-11-90

839-001-0127

Establishment Exemptions

Until the states of Washington, Idaho, and California enact legislation similar to ORS 652.020, the provisions of that statute do not apply to employees employed in the following establishments:

(1) A sawmill. As used in this rule, a sawmill means a mill that is exclusively engaged in the manufacture and distribution of lumber made from logs by use of saws to cut the logs into various size boards.

(2) A shingle mill. As used in this rule, a shingle mill means a mill exclusively engaged in the manufacture and distribution of wooden shingles.

(3) A planing mill. As used in this rule, a planing mill means a mill exclusively engaged in the planing of lumber so as to finish the boards cut in the sawmill and in the distribution of the finished forest product.

(4) A logging camp. As used in this rule, a logging camp means an establishment which provides support for logging operations by means of housing, feeding and otherwise caring for employees engaged in logging operations by means of maintaining supplies and equipment necessary to continue logging operations.

Stat. Auth.: ORS 651.060(4) & 652

Stats. Implemented: ORS 652.030

Hist.: BL 8-1990, f. & cert. ef. 5-11-90

839-001-0130

Exempt and Non-exempt Work

(1) The exempt status of an employee is determined by the type of work the individual performs and the location of the work performed in any one day. As indicated in sections (2) and (3) of this rule,

the exempt status of individual employees may vary from day to day.

(2) Employees performing exempt and nonexempt work are exempt from the provisions of ORS 652.020 only when they are engaged in exempt work more than 50 percent of their working time in any one day.

(3) Where a mill, factory or manufacturing establishment is a combination of an exempt and non-exempt establishment, employees who are exclusively engaged in the sawmill, shingle mill, planing mill, or logging camp areas of the establishment are exempt. However, when an employee is engaged in both exempt and non-exempt areas of the establishment, the employee is not exempt.

Stat. Auth.: ORS 651.060(4) & 652

Stats. Implemented: ORS 652.020

Hist.: BL 8-1990, f. & cert. ef. 5-11-90; BLI 13-1999, f. 9-28-99, cert. ef. 10-23-99

Determination of Certain Terms

839-001-0140

Determination of the Day; Failure to Make Determination

(1) The employer shall establish the beginning time and the ending time of the day to be used by the employer for purposes of complying with these rules.

(2) Once established, the beginning time of the day shall not be changed unless the change is intended to be permanent and is not designed to circumvent the provisions of ORS 652.020.

(3) If the employer fails to establish the beginning and ending times of day as provided for in section (1) of this rule, the Bureau shall consider the day to begin at the time the individual employee commences work and to end 24 consecutive hours after the work began.

Stat. Auth.: ORS 651.060(4) & 652

Stats. Implemented: ORS 652.020

Hist.: BL 8-1990, f. & cert. ef. 5-11-90

839-001-0143

Determination of the Work Week; Failure to Make Determination

(1) As used in OAR 839-001-0100, "work week" means any seven consecutive days as determined by the employer. The employer shall establish the beginning day and the ending day to be used by the employer for purposes of determining the "primary duty" of the employee.

(2) Once established, the beginning day shall not be changed unless the change is intended to be permanent and is not designed to circumvent the provisions of ORS 652.020 or these rules.

(3) If an employer fails to establish the beginning day of the work week as provided for in section (1) of this rule, the Bureau shall consider the work week to begin on the day the individual employee commences work and to end seven consecutive days after the work began.

Stat. Auth.: ORS 651.060(4) & 652

Stats. Implemented: ORS 652.020

Hist.: BL 8-1990, f. & cert. ef. 5-11-90

839-001-0145

Determination of Employees "Employed in" a Named Establishment

(1) As used in ORS 652.020, the term "employed in" refers to employees who are actually employed in the mill, factory or manufacturing establishment. Employees who are employed by the same employer but not employed to perform duties in a mill, factory, or manufacturing establishment are not covered by ORS 652.020 because they are not "employed in" the establishment.

(2) Employees who are employed to perform duties that do not include work in connection with production machinery in a mill, factory, or manufacturing establishment but perform their duties in a location that is physically separated from the actual production process by means of an architectural barrier, are not covered by ORS 652.020 because they are not "employed in" the establishment.

Stat. Auth.: ORS 651.060(4) & 652

Stats. Implemented: ORS 652.020

Hist.: BL 8-1990, f. & cert. ef. 5-11-90

839-001-0150

Civil Penalties for Violation of ORS 652.020, Maximum Working Hours in Mills, Factories and Manufacturing Establishments: Overtime Hours and Pay

As used in ORS 652.020, 652.900 and OAR 839-001-0150 to 839-001-0160:

(1) "Person" means any individual, sole proprietorship, partner-

ship, corporation, or other business or legal entity.

(2) "Violation" means a transgression of any statute or rule, or any part thereof and includes both acts and omissions.

(3) "Knowingly" or "Willfully" means action undertaken with actual knowledge of a thing to be done or omitted. A person "should have known the thing to be done or omitted" if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done.

Stat. Auth.: ORS 651.060(4) & 652

Stats. Implemented: ORS 652.020

Hist.: BL 8-1990, f. & cert. ef. 5-11-90

839-001-0153

Violations Separate and Distinct

Each violation is a separate and distinct offense. In the case of continuing violations, each day's continuance is a separate and distinct violation.

Stat. Auth.: ORS 651.060(4) & 652

Stats. Implemented: ORS 652.020

Hist.: BL 8-1990, f. & cert. ef. 5-11-90

839-001-0155

Violations for Which a Civil Penalty May Be Imposed

Pursuant to ORS 652.900, the Commissioner may assess a civil penalty for violations of ORS 652.020 or of these rules as follows:

(1) Failure to pay employees subject to ORS 652.020 time and one-half their regular rate of pay for all hours worked over ten in any day of 24 hours.

(2) Requiring or permitting any agent of the employer to require to permit employees to work over ten hours in any day of 24 hours when the employees are not paid time and one-half their regular rate of pay for such hours worked over ten in a day.

(3) Requiring or permitting an employee subject to ORS 652.020 to work more than 13 hours in any day of 24 hours.

(4) Requiring or permitting any agent of the employer to require or permit employees to work more than 13 hours in any day of 24 hours.

Stat. Auth.: ORS 651.060(4) & 652

Stats. Implemented: ORS 652.900

Hist.: BL 8-1990, f. & cert. ef. 5-11-90

839-001-0157

Criteria for Determining a Civil Penalty

(1) The Commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed and cite those the Commissioner finds to be appropriate:

(a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes or rules;

(b) Prior violations, if any, of statutes or rules;

(c) The magnitude and seriousness of the violation;

(d) Whether the employer knew or should have known of the violation.

(2) It shall be the responsibility of the employer to provide the Commissioner any mitigating evidence concerning the amount of the civil penalty to be assessed.

(3) Notwithstanding any other section of this rule, the Commissioner shall consider all mitigating circumstances presented by the employer for the purpose of reducing the amount of the civil penalty to be assessed.

Stat. Auth.: ORS 651.060(4) & 652

Stats. Implemented: ORS 652.900

Hist.: BL 8-1990, f. & cert. ef. 5-11-90

839-001-0160

Schedule of Civil Penalties

(1) The civil penalty for any one violation shall not exceed \$1,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

(2) When the Commissioner determines to assess a civil penalty for requiring or permitting an employee to work over ten hours in a day when the employee is not paid time and one-half the regular rate of pay in violation of ORS 652.020, the minimum civil penalty to be assessed shall be \$50 per day for each employee affected. For example, when the employer or an employer's agent requires or permits five employees to work over ten hours in a day for four days without pay-

ing the employees time and one-half their regular rate of pay for the hours worked over ten in a day, the minimum civil penalty to be assessed shall be \$1,000 (5 employees x 4 days x \$50 per day per employee = \$1,000).

(3) When the Commissioner determines to assess a civil penalty for requiring or permitting an employee to work more than 13 hours in any day of 24 hours, the minimum civil penalty shall be \$500 per day for the first offense. For example, when an employer or an employer's agent requires or permits any number of employees to work over 13 hours in a day for four days, the minimum civil penalty shall be \$2,000 (4 days x \$500/day = \$2,000). When the Commissioner determines to assess a civil penalty for subsequent offenses, the Commissioner may assess up to \$1,000 for each such offense.

(4) The civil penalties set out in sections (2) and (3) of this rule shall be in addition to any other penalty imposed by law or rule.

(5) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR 839-001-0157.

Stat. Auth.: ORS 651.060(4) & 652
Stats. Implemented: ORS 652.900
Hist.: BL 8-1990, f. & cert. ef. 5-11-90

Deductions from Wages

839-001-0200

Deductions for Garnishment Processing Fee

(1) Pursuant to HB 3544 (2003 Legislature), if a garnishee that employs a debtor is required to make any payment under a writ of garnishment by reason of wages payable to the debtor, the garnishee may collect a \$1 processing fee for each week of wages, or fraction of a week of wages, for which a payment is made under the provisions of ORS 18.735. The processing fee must be collected after the last payment is made under the writ. The fee shall be withheld from the wages of the debtor, and is in addition to the amounts withheld for payment to the garnishor under the writ or under any other writ delivered to the garnishee.

(2) The fee provided for in this section may not be collected if withholding of the fee would reduce the debtor's net disposable income below the minimum amount prescribed by ORS 23.186.

Stat. Auth.: ORS 651.060(4), 652, 653 & HB 3544 (2003 OL)
Stats. Implemented: ORS 18.838, 652.150 & 653.261(1)
Hist.: BLI 7-2003, f. 12-31-03, cert. ef. 1-1-04

839-001-0250

Deductions for Costs of Benefits Paid by the Employer While the Employee is on OFLA Leave.

The Oregon Family Leave Act (ORS 659.470 to 659.494) provides that notwithstanding ORS 652.610(3), when an employer pays the employee's portion of the cost of providing health, disability, life or other insurance coverage for an employee while the employee is on family leave, the employer may recover such cost under the following circumstances:

(1) Upon the employee's return to work, the employer may deduct from the employee's pay the amount of the costs it paid, provided, however, that the total amount deducted from any paycheck may not exceed 10% of the employee's gross wages earned in the pay period covered by the paycheck.

(2) If an employee does not return to work, the employer may deduct all of the costs it paid from amounts due and owing to the employee, provided, however, that no deduction may be made if the employee fails to return to work for the following reasons:

(a) The employee's absence from work is caused by a continuation, recurrence or onset of a serious health condition that would entitle the employee to family leave as provided for in ORS 659.470 to 659.494; or

(b) The employee's absence from work is caused by circumstances beyond the control of the employee.

(3) If an employee does not return to work the employer may seek to recover amounts paid for insurance coverage on behalf of the employee by any other legal means provided however, that no legal action may be initiated if the employee failed to return to work for the reasons set out in subsections (2)(a) or (2)(b) of this rule.

(4) The deduction provided for in this rule may be made with or without the employee's authorization. The employer shall notify the employee of the deduction before the deduction is made.

Stat. Auth.: ORS 651.060(4)

Stats. Implemented: ORS 659.484
Hist.: BL 9-1996, f. & cert. ef. 10-8-96

Payment of Wages at Termination of Employment

839-001-0410

Definitions

As used in ORS 652.140 to 652.165 and in OAR 839-001-0410 to 839-001-0480, unless the context requires otherwise;

(1) "Business day" includes Monday through Friday, exclusive of state holidays as provided in ORS 187.010, in which the business operations of the employer is conducted.

(2) "Seasonal farmworker" means any person who, for an agreed remuneration or rate of pay, performs temporary labor for another to work in the production of farm products or planting, cultivating or harvesting of seasonal agricultural crops or in the forestation or reforestation of lands, including but not limited to, the planting, transplanting, tubing, pre-commercial thinning and thinning of trees and seedlings, the clearing, piling and disposal of brush and slash and other related activities.

(3) "Seasonal reforestation worker" means "seasonal farmworker" as defined in subsection (2) of this rule.

(4) "Willfully," as used in ORS 652.150, means that which is done or omitted is done or omitted intentionally. When a person knows what the person is doing, intends to do what the person is doing and is a free agent, the person is acting willfully. An act or omission is willful even if the person did not know the act or omission was a violation of ORS 652.140 or 652.145.

(5) "Wages" means all compensation for performance of service by an employee for an employer whether paid by the employer or another person. Wages include the cash value of all compensation paid in any medium other than cash and all compensation owed an employee by an employer.

Stat. Auth.: ORS 652.165
Stats. Implemented: ORS 652.140 - 652.160
Hist.: BL 9-1996, f. & cert. ef. 10-8-96; BLI 1-2002, f. & cert. ef. 1-9-02

839-001-0420

Payment of Wages at Termination of Employment

(1) Except as provided in OAR 839-001-0440 and 839-001-0490, when an employer unilaterally discharges an employee or when the employee and the employer mutually agree to the termination of employment, all of the wages that have been earned but not paid, become due and payable not later than the end of the first business day after the discharge or termination. Except as provided in subsections (3) and (5) of this rule, when the employment terminates because of discharge or mutual agreement on a Saturday, Sunday or holiday, all wages earned and unpaid must be paid by not later than the end of the first business day after the employment termination.

(2) When the employee gives the employer notice of 48 hours or more (not including Saturday, Sunday and holidays) that the employee intends to quit employment, all wages that have been earned but not paid become due and payable on the last day of the employee's employment.

(3)(a) Except as provided in subsections (b) and (c), when the employee fails to give the employer notice as provided in subsection (2) of this rule, all wages that have been earned but not paid, become due and payable within five days, excluding Saturdays, Sundays and holidays, of the date the employee quit or at the next regularly scheduled payday, whichever occurs first.

(b) If an employee has not given to the employer the notice described in subsection (2) of this rule, and if the employee is regularly required to submit time records to the employer to enable the employer to determine the wages due the employee, within five days after the employee has quit, the employer shall pay the employee the wages the employer estimates are due and payable.

(c) In the event an employee whose final payment of wages are subject to the provisions of subsection (b) submits required time records after the last day of the employee's employment, then any additional wages due to the employee and not paid pursuant to subsection (b) must be paid within five days after the employee submits the required time records.

(4) When an employee employed pursuant to an unexpired contract which provides for a definite period of work, quits with or without notice, all wages earned but not paid become due and payable at the

next regularly scheduled payday.

(5) When the employment terminates because of discharge, mutual agreement or the employee quits (with or without notice) and the employer is the Oregon State Fair and Exposition Center, a county fair or show, the County Fair Commission or other employer engaged in activities authorized by ORS 565.010 to 565.990, all wages earned and unpaid must be paid not later than the end of the second business day after the employment termination. This subsection does not apply to contractors, exhibitors or others which are not agencies, boards or commissions established in ORS 565.010 to 565.990.

(6) The provisions of this rule do not apply when the employee's employment with the employer is covered by a collective bargaining agreement, the terms of which provide for the payment of wages at termination of employment. However, if the collective bargaining agreement does not contain provisions for the payment of wages at termination of employment, the provisions of this rule are applicable.

Stat. Auth.: ORS 652.165

Stats. Implemented: ORS 652.140

Hist.: BL 9-1996, f. & cert. ef. 10-8-96; BLI 7-2003, f. 12-31-03, cert. ef. 1-1-04; BLI 27-2005, f. 12-29-05, cert. ef. 1-1-06

839-001-0430

When Layoff is Considered Termination of Employment

(1) When an employee is laid off with no reasonable expectation that the employee will return to work, the layoff is considered to be a termination of employment for purposes of OAR 839-001-0420 and 839-001-0440 and the wages earned and unpaid shall become due and payable in accordance with OAR 839-001-0420 and 839-001-0440.

(2) When an employee is laid off and the employee returns to work within 35 days, the layoff is not considered to be a termination of employment for purposes of OAR 839-001-0420 and 839-001-0440 and all wages earned and unpaid shall become due and payable at the next regularly scheduled payday following the layoff. If the layoff occurs on a regularly scheduled payday, the wages become due and payable on the same day.

(3) This rule applies to all layoffs regardless of whether an employee is subject to recall to work.

Stat. Auth.: ORS 652.165

Stats. Implemented: ORS 652.140

Hist.: BL 9-1996, f. & cert. ef. 10-8-96

839-001-0440

Special Provisions for Payment of Wages at Termination for Seasonal Farmworkers and Seasonal Reforestation Workers

(1) When a seasonal farmworker or seasonal reforestation worker terminates employment because of discharge or mutual consent, all wages earned and unpaid become due and payable on the last day the employee works.

(2) When a seasonal farmworker or seasonal reforestation worker quits employment and gives the employer at least 48 hours notice of intent to quit, all wages earned and unpaid become due and payable on the last day the employee works.

(3) When a seasonal farmworker or seasonal reforestation worker quits employment and fails to give the employer at least 48 hours notice, all wages earned and unpaid become due and payable within 48 hours after the employee quits or on the next regularly scheduled payday, whichever comes first.

Stat. Auth.: ORS 652.165

Stats. Implemented: ORS 652.145

Hist.: BL 9-1996, f. & cert. ef. 10-8-96

839-001-0450

Forwarding Wages and Direct Deposit of Wages at Termination of Employment

(1) All wages due and payable at termination of employment shall be forwarded by the employer to the employee to any address designated by the employee when the employee requests the employer to forward the wages.

(2) When the employee and the employer agree, all wages due and payable at termination of employment may be deposited, without discount, in the employee's account in a bank, national bank, mutual savings bank, credit union or savings and loan association located in Oregon.

Stat. Auth.: ORS 652.165

Stats. Implemented: ORS 652.140

Hist.: BL 9-1996, f. & cert. ef. 10-8-96

839-001-0460

Payment in Case of a Dispute Over the Amount of Wages Due at Termination of Employment/Employee Rights and Remedies

(1) In case of a dispute over the amount of wages due and payable at termination of employment, the employer shall pay the amount of wages that the employer concedes to be due and payable to the employee. Such payment shall be made unconditionally and within the time set out in OAR 839-001-0420, 839-001-0430 and 839-001-0440.

(2) An employee may use all remedies available to the employee for the balance of wages that the employee claims are due and payable.

Stat. Auth.: ORS 652.165

Stats. Implemented: ORS 652.160

Hist.: BL 9-1996, f. & cert. ef. 10-8-96

839-001-0470

Penalty for Failure to Pay Wages on Termination of Employment

(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer will be subject to the following penalty:

(a) The wages of the employee will continue to accrue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

(b) The employee's wages will continue to accrue at the employee's hourly rate of pay times eight (8) hours for each day the wages are unpaid;

(c) The maximum penalty will be no greater than the employee's hourly rate of pay times 8 hours per day times 30 days.

(d) Except as provided in subsection (e), the wages of an employee that are computed at a rate other than an hourly rate (e.g. salaries) will be reduced to an hourly rate for penalty computation purposes by dividing the total wages earned during the wage claim period (the period for which wages are owed and upon which the wage claim is based) by the total number of hours worked during the wage claim period.

(e) Notwithstanding subsection (d), when wages are earned based on commission, bonus, piece rate, or other methods not based on hours worked, the wages will be reduced to an hourly rate for penalty computation purposes by dividing the total wages earned in the last 30 calendar days of employment by the total number of hours worked in the last 30 calendar days of employment. If the employee was employed for less than 30 days, the total wages earned during the entire period of employment will be divided by the number of hours worked during the entire period of employment.

(2) If the employer pays the full amount of unpaid wages within 12 calendar days after the written notice of such unpaid wages is sent by the employee or a person on behalf of the employee, the penalty may not exceed 100 percent of the employee's unpaid wages.

(a) If the employee or person on behalf of the employee fails to send the written notice of unpaid wages to the employer, the penalty may not exceed 100 percent of the employee's unpaid wages.

(b) Subsection (2) does not apply when the employer has violated ORS 652.140, 652.145 one or more times in the year before the employee's employment ceased or the employer terminated one or more other employees on the same date that the employee's employment ceased.

(c) For purposes of determining when an employer has paid wages or compensation under this subsection, payment occurs on the date the employer delivers the payment to the employee or sends the payment by first class mail, express mail or courier service to the employee's last-known address.

(3) Additional actual wages owed to an employee in any pay period for which the employer has timely paid the employee any estimated wages due and payable in compliance with OAR 839-001-0420(3)(b) are not considered unpaid wages subject to the penalty provisions of section (1) of this rule unless the employer fails to pay the employee the additional actual wages owed for such pay period within the time required under OAR 839-001-0420(3)(c).

(4) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$1000 against any person who violates ORS 652.140 and 652.145 or any rule adopted pursuant thereto.

(5) When an employer shows that it was financially unable to pay the wages at the time the wages accrued, the employer will not be subject to the penalty provided for in OAR 839-001-0470. If an employer

continues to operate a business or chooses to pay certain debts and obligations in preference to an employee's wages, there is no financial inability.

Stat. Auth.: ORS 652.165
Stats. Implemented: ORS 652.150
Hist.: BL 9-1996, f. & cert. ef. 10-8-96; BLI 1-2002, f. & cert. ef. 1-9-02; BLI 7-2003, f. 12-31-03, cert. ef. 1-1-04; BLI 27-2005, f. 12-29-05, cert. ef. 1-1-06

839-001-0490

Special Provisions for Payment of Wages at Termination for Employees of Businesses Primarily Engaged in the Sale of Motor Vehicles or Farm Implements Who are Paid on a Commission Basis

(1) When an employee of a business primarily engaged in the sale of motor vehicles or farm implements who is paid on a commission basis is terminated, unpaid commissions are not owed to the employee until all the terms and conditions of any agreement between the employer and employee concerning the method of payment of commissions are fulfilled. If no such agreement exists, the commission is due with all other earned and unpaid wages or compensation as provided in ORS 652.140.

(2) Notwithstanding the provisions of OAR 839-001-0470, when an employee who is paid on a commission basis is terminated by a business that primarily sells motor vehicles or farm implements and there is a dispute between the employer and employee concerning the amount of commission due upon termination, if the amount of unpaid commission is found to be less than 20 percent of the amount of unpaid commission claimed by the employee, the penalty wage may not exceed the amount of the unpaid commission or \$200, whichever is greater.

Stat. Auth.: ORS 651.060(4), 652 & 653; Other Auth HB 3544(2003 legislature)
Stats. Implemented: ORS 18.838, 652.150 & 653.261(1)
Hist.: BLI 7-2003, f. 12-31-03, cert. ef. 1-1-04

Administration of the Wage Security Fund

839-001-0500

Definitions

As used in OAR 839-001-0500 to 839-001-0560 unless the context requires otherwise:

(1) "Assets" include real and personal property of whatsoever nature, excluding such property which the employer has a right to claim exempt.

(2) "Bureau" means Bureau of Labor and Industries.

(3) "Commissioner" means the Commissioner of the Bureau of Labor and Industries.

(4) "Division" means the Wage and Hour Division of the Bureau of Labor and Industries.

(5) "Employee" has the same meaning given it in ORS 652.310(2), except "employee" does not include a principal officer or director of a corporation who is also a stockholder.

(6) "Employer" has the same meaning given it in ORS 652.310(1).

(7) "Fringe Benefits" means the amount of compensation which accompanies or is in addition to a person's regular salary or wages and includes, but is not limited to, payment for profit sharing plans, retirement or pension plans, insurance, sick leave, holidays, severance, or vacation.

(8) "Fund" means the Wage Security Fund established by ORS 652.409(1); income earned on moneys in the Wage Security Fund, as provided for in ORS 652.409(1); amounts recovered by the Commissioner on wage claims paid out of the "Fund"; and amounts of eligible wage claim payments which are disallowed because of the inability to locate the wage claimant.

(9) "Promptly," as used in OAR 839-001-0500 to 839-001-0560, means the next regular payday established by the employer, or 35 days from the last payday, whichever is sooner.

(10) "Successor" means one who follows an employer in ownership or control of a business so far as such employer has not paid employees in full. A successor employer may be any successor to the business of any employer, or any lessee or purchaser of any employer's business property for the continuation of the same business.

(11) "Wage Claim" has the same meaning given it in ORS 652.320(9). However, in the case of claims against the Fund, "wage claim" refers to actual wages earned only. It does not include any other item of compensation considered to be a fringe benefit, nor does it

include any damages, civil penalties or interest otherwise provided by law.

Stat. Auth.: ORS 652.414(6)
Stats. Implemented: ORS 652.414
Hist.: BL 5-1986, f. 6-20-86, ef. 7-1-86; BL 8-1989, f. & cert. ef. 10-12-89; BL 9-1996, f. & cert. ef. 10-8-96

839-001-0510

Eligibility for Wage Payment

An employee is eligible for the payment of a wage claim from the Fund when the Commissioner makes the following determinations:

- (1) The employer has ceased doing business in Oregon; and
- (2) The employer is without sufficient assets to fully and promptly pay the wage claim at the cessation of doing business; and
- (3) The wage claim cannot otherwise be fully and promptly paid; and

(4) The wage claim is valid; and

(5) The amount claimed was earned within 60 days of the date of the cessation of business or if the claimant filed a wage claim before the cessation of business, the amount claimed was earned within 60 days before the last day the claimant was employed.

Stat. Auth.: ORS 651.060(4) & 652
Stats. Implemented: ORS 652.414
Hist.: BL 5-1986, f. 6-20-86, ef. 7-1-86; BL 8-1989, f. & cert. ef. 10-12-89; BL 9-1993(Temp), f. & cert. ef. 9-13-93; BL 2-1994, f. & cert. ef. 5-27-94; BL 9-1996, f. & cert. ef. 10-8-96; BLI 13-1999, f. 9-28-99, cert. ef. 10-23-99

839-001-0515

Matters to Be Considered in Making Determinations

(1) In determining that an employer has ceased doing business the Commissioner shall consider:

(a) Whether the business premises are no longer occupied by the employer;

(b) Whether business operations are being conducted;

(c) Whether customers of the employer are being served;

(d) Whether the employer is employing employees;

(e) Any other information indicating whether the business has ceased its operations.

(2) In determining that an employer is without sufficient assets to fully and promptly pay the wage claim at the cessation of business, the Commissioner shall consider:

(a) Whether the debts of the employer exceed the total amount of assets;

(b) Whether the liquid assets of the employer are not sufficient to pay the wages due;

(c) Whether the accounts receivable of the employer are not sufficient to pay the wages due;

(d) Whether the claims of a secured creditor on the assets of the employer would exceed the amount due in wages;

(e) Whether the employer has filed for protection under the **Bankruptcy Code** (The filing of bankruptcy in and of itself does not determine the insufficiency of assets);

(f) Whether the assets of the employer are in the process of being involuntarily liquidated;

(g) Any other information indicating that the assets of the employer are insufficient to promptly pay the wage claim at the cessation of business.

(3) In determining that a wage claim cannot otherwise be fully and promptly paid the Commissioner shall consider:

(a) Whether the employee has a right of claim against a bond or deposit held by the employer, which may be used for the purpose of paying wage claims;

(b) Whether the business is in receivership and the type of receivership;

(c) Whether there is a successor to the employer's business;

(d) Any other information indicating that the wage claim cannot otherwise be fully and promptly paid.

(4) In determining that the wage claim is valid the Commissioner shall consider:

(a) Whether there is judgment of the court;

(b) Whether there is a final administrative order issued pursuant to statute or rule;

(c) Whether the employer acknowledges the amount of wages owed;

(d) The results of the Division's investigation of the wage claim;

(e) Any other information indicating that the wage claim is valid.

[Publications: Publications referenced are available from the agency.]
 Stat. Auth.: ORS 409, OL 1985, Sec. 7(4) (Amended 6/94)
 Stats. Implemented: ORS 409, OL 1985, Sec. & (Amended 6/94)
 Hist.: BL 5-1986, f. 6-20-86, ef. 7-1-86

839-001-0520

Amount of Claim to Be Paid

(1) Except as provided in section (2) of this rule, after a wage claim is determined to be eligible for payment from the Fund, the amount to be paid shall be the lesser of:

- (a) The amount of wages earned but unpaid up to \$4,000; or
- (b) The amount of wages earned, but unpaid during the 60 day period preceding the date the employer ceased doing business or if the claimant filed a wage claim before the cessation of business, the amount of wages earned, but unpaid within 60 days before the last day the claimant was employed.

(2) When the amount of a valid wage claim determined to be eligible for payment is greater than the amount available in the Fund for paying such claims, payments on wage claims shall be prorated in accordance with OAR 839-001-0530.

Stat. Auth.: ORS 651.060(4) & 652
 Stats. Implemented: ORS 652.414
 Hist.: BL 5-1986, f. 6-20-86, ef. 7-1-86; BLI 13-1999, f. 9-28-99, cert. ef. 10-23-99

839-001-0525

Priority of Payments from the Fund

The Bureau shall pay from or encumber the Fund, on a monthly basis, the administrative and operating expenses incurred while carrying out the provisions of ORS 652.414, and these rules before paying wage claims.

Stat. Auth.: ORS 652.414(6)
 Stats. Implemented: ORS 652.414
 Hist.: BL 5-1986, f. 6-20-86, ef. 7-1-86; BL 9-1996, f. & cert. ef. 10-8-96

839-001-0530

Fund Amount Available for Claim Payment: Prorating Claims When Insufficient Funds Are Available

(1) When the amount in the Fund is determined to be insufficient to pay in full all accumulated wage claims determined to be eligible for payment, such wage claims will be prorated.

(2) The computation of prorated amount shall be made according to the following formula:

(a) Amount Available for Payments divided by Total Amount of Eligible Wage Claims = Z

(b) Eligible Amount of Individual Wage Claim times Z = Prorated Amount to Be Paid to Wage Claimant

(3) Wage claims paid from the Fund on a prorated basis are limited to prorated amount paid, and no employee will be paid any additional amount on the same wage claim from the Fund.

Stat. Auth.: ORS 652.414(6)
 Stats. Implemented: ORS 652.414
 Hist.: BL 5-1986, f. 6-20-86, ef. 7-1-86; BL 9-1996, f. & cert. ef. 10-8-96

839-001-0550

Procedure for Timely and Cost Efficient Method for the Payment of Wages from the Wage Security Fund

(1) The Division shall approve or deny payment from the Fund within 30 days of the date the completed wage claim has been filed or the employer has ceased doing business, whichever is later. At the Division's discretion, the 30 day time period may be extended to 45 days.

(2) Payments from the Fund for wage claims shall be made not less than once in any month.

(3) It is the responsibility of the employee to provide and keep the Division advised of the employee's current mailing address and telephone number and the name, mailing address, and telephone number of another individual who will generally always be able to advise the Division of the employee's whereabouts and current address and phone number.

(4) The Division will mail payments from the Fund to the last known address of the employee as reflected in the Division's records. If the mail is returned, the Division will make one attempt to locate the employee by contacting the individual reflected in the Bureau's records as the person who will generally always know the employee's whereabouts.

(5) If the employee cannot be located within 45 days after the payment was first mailed to the employee's last known current address

as reflected in the Division's records, the wage claim shall be disallowed as eligible for payment from the Fund and the amount of the payment shall revert and be irrevocably added back into the Fund.

(6) Notwithstanding the provisions of section (5) of this rule, an employee whose claim has been disallowed because the employee could not be located within the time provided for in section (5) of this rule may refile the wage claim with the Division; provided, however, that such refiled wage claim shall be deemed and treated for all purposes as a newly filed wage claim.

Stat. Auth.: ORS 652.414(6)
 Stats. Implemented: ORS 652.414
 Hist.: BL 5-1986, f. 6-20-86, ef. 7-1-86; BL 9-1996, f. & cert. ef. 10-8-96

839-001-0560

Recovery from Employers

The Commissioner may perfect a security interest in the personal property of the employer in the amount of the sums paid from the Fund on a wage claim and in an additional amount of the penalty provided for in ORS 652.414(3). Action to perfect a security interest shall be taken in accordance with ORS 652.414(3) and (4).

Stat. Auth.: ORS 652.414(6)
 Stats. Implemented: ORS 652.414
 Hist.: BL 5-1986, f. 6-20-86, ef. 7-1-86; BL 8-1989, f. & cert. ef. 10-12-89; BL 9-1996, f. & cert. ef. 10-8-96

Rules Pertaining to Moneys Collected from Employees for Group Health Insurance Coverage and Notification of Various Parties on Termination of Group Health Insurance Coverage

839-001-0700

Definitions

As used in ORS 652.710 and in OAR 839-001-0700 to 839-001-0800, unless the context requires otherwise:

(1) "Bureau" means the Bureau of Labor and Industries of the State of Oregon.

(2) "Commissioner" means the Commissioner of the Bureau of Labor and Industries.

(3) "Contract" includes a group health insurance policy.

(4) "Contractor" includes any person who enters into an agreement with an employer to provide health care services to employees. "Contractor" also includes any person who enters into an agreement with an employer to provide insurance coverage pursuant to the terms of a group health insurance policy.

(5) "Department" means the Department of Insurance and Finance.

(6) "Employ" includes to suffer or permit to work.

(7) "Employee" means any individual employed by an employer.

(8) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee.

(9) "Group Health Insurance Policy" as used in ORS 652.710(3) has the same meaning as that defined in ORS 743.522.

(10) "Health Care Services" includes services that provide medical and surgical attention, hospital care, x-rays, ambulance, nursing or other related service or care for sickness or injury. Health care services also include services that are provided under the terms of a group health insurance policy.

(11) "Home Address" means the last known mailing address as recorded in the employer's records.

(12) "Insurer" as used in ORS 652.710(3) has the same meaning as that defined in ORS 731.106 and includes a contractor as defined in section (4) of this rule.

(13) "Promptly be Paid" or "Promptly Pay" means that trust funds are paid no later than the date agreed to by the employer and the contractor.

(14) "Termination" or "Terminated," as used in ORS 652.710(3), means the cessation of coverage on the last day of the period through which coverage is paid up; provided, however, that a group health insurance policy that provides for a grace period for paying premium on the policy terminates on the final day of the grace period. Termination of coverage under a group health insurance policy also includes the amendment or reissuance of a policy to delete one or more classes of certificate holders from coverage.

(15) "Trust Funds" means all moneys collected by an employer from employees of the employer or moneys retained from the employee's wages for the purposes of providing or furnishing to the employees health care services pursuant to a contract.

(16) "Violation" means a transgression of any statute or rule or any part thereof and includes both acts and omissions.

(17) "Working Day" means any day the business of the employer is open for business to its customers or day the employees of the employer are actually working on the employer's business.

Stat. Auth.: ORS 652.710(7) & 652.710(11)
Stats. Implemented: ORS 652.710
Hist.: BL 10-1992, f. & cert. ef. 7-1-92

839-001-0710

Effective Dates

(1) The civil penalty provisions become effective on the following dates:

(a) The civil penalty provisions of ORS 652.710 for violations of 652.710(1) are effective September 29, 1991;

(b) The civil penalty provisions of ORS 652.710 for violations of 652.710(3) are effective July 1, 1992.

(2) The notification requirements of ORS 652.710(3) are effective July 1, 1992.

(3) The provisions of ORS 652.710(1) have been effective since June 14, 1941.

Stat. Auth.: ORS 652.710(7) & 652.710(11)
Stats. Implemented: ORS 652.710
Hist.: BL 10-1992, f. & cert. ef. 7-1-92

Termination of Group Health Insurance Coverage

839-001-0720

Notification of Termination of Group Health Insurance Policy

(1) When an employer receives notice from a contractor or insurer who is providing or has provided the employer with a group health insurance policy that the policy is terminated by the insurer and when the employer does not replace the group health insurance coverage with another group health insurance policy, the employer shall notify all employees who were covered under the terminated policy.

(2) The employer shall notify the employees in writing no later than ten working days from the date the employer has received notice from the contractor or insurer that the group health insurance policy is terminated.

(3) The employer shall deliver the notice to each employee who was covered by the terminated group health insurance policy as follows:

(a) The employer shall deliver the notice to each employee affected in person; or

(b) The employer shall deliver the notice to each employee affected by mailing the notice to the employee's home address as recorded in the employer's records.

(4) If the employer mails the notice, the employer shall complete a certificate of mailing for each notice mailed.

(5) If the employer delivers the notice in person, the employer shall request the employee to acknowledge in writing that the employee received the notice.

(6) The notice to employees shall contain the following information:

(a) A statement to the effect that the group health insurance policy covering the employees has been terminated;

(b) A statement to the effect that the employer will no longer provide group health insurance coverage for its employees;

(c) The date the termination of the group health insurance policy takes effect;

(d) An exact and clearly legible copy of the information supplied to the employer by the contractor or insurer pursuant to ORS 743.560.

Stat. Auth.: ORS 652.710(7) & 652.710(11)
Stats. Implemented: ORS 652.710
Hist.: BL 10-1992, f. & cert. ef. 7-1-92

839-001-0730

Record to Be Kept/Availability of Record

(1) The employer shall keep and make available for inspection by the Commissioner of the Bureau of Labor and Industries or representatives of the commissioner the following documents:

(a) A true copy of the notice delivered to employees pursuant to these rules;

(b) If the notice was mailed, the certificate of mailing for each employee to whom a notice was mailed;

(c) If the notice was distributed in person, a written acknowledgment,

signed by the employee, that the employee received the notice.

(2) The documents required to be kept in section (1) of this rule shall be maintained for a period of two years from the date the notice was delivered.

Stat. Auth.: ORS 652.710(7) & 652.710(11)
Stats. Implemented: ORS 652.710
Hist.: BL 10-1992, f. & cert. ef. 7-1-92

839-001-0740

Employee Notification Form

(1) For purposes of complying in ORS 652.710(3) and OAR 839-001-0720, there is no specific form required. The document used by the employer to notify its employees must contain all the information provided for in OAR 839-001-0720(6).

(2) When the form supplied to the employer by the contractor or insurer contains the required information and when an exact and clearly legible copy of the form is delivered to employees within the time required in ORS 652.710(3) and OAR 839-001-0720(3), the notification requirements are satisfied.

Stat. Auth.: ORS 652.710(7) & 652.710(11)
Stats. Implemented: ORS 652.710
Hist.: BL 10-1992, f. & cert. ef. 7-1-92

839-001-0750

Employer Notification Form

ORS 743.560(1) requires the Commissioner of the Bureau of Labor and Industries and the Director of the Department of Insurance and Finance to establish the form of the notice that an insurer is to send to the employer. The notice is established in OAR 836-052-0860, administrative rules of the Department of Insurance and Finance, Insurance Division, and reflects the agreement of the two agencies.

Stat. Auth.: ORS 652.710(7) & 652.710(11)
Stats. Implemented: ORS 652.710
Hist.: BL 10-1992, f. & cert. ef. 7-1-92

Civil Penalty for Violation of ORS 652.710(10) and (3) — Moneys Collected from Employees for Group Health Insurance Coverage and Notification of Various Parties on Termination of Group Health Insurance Coverage

839-001-0760

Violations Separate and Distinct

Each violation is a separate and distinct offense. In the case of continuing violations, each day's continuance is a separate and distinct violation.

Stat. Auth.: ORS 652.710(7) & 652.710(11)
Stats. Implemented: ORS 183.090 & 652.710
Hist.: BL 10-1992, f. & cert. ef. 7-1-92

839-001-0770

Violations for Which a Civil Penalty May Be Assessed

Pursuant to ORS 652.710(4), the Commissioner may assess a civil penalty for violations of ORS 652.710(1) and (3) as follows:

(1) Violations of ORS 652.710(1):

(a) Failure of the employer to keep trust funds in accounts separate of other accounts maintained by the employer;

(b) Failure of the employer to promptly pay the trust funds over to the contractor pursuant to a contract for health care services;

(c) Allowing trust funds to become part of the employer's assets.

(2) Violations of ORS 652.710(3):

(a) Failure to deliver the notification required in ORS 652.710(3) to each employee covered by the terminated group health insurance policy in person or by delivering the notice by mail to the employee's home address;

(b) Failure to deliver the notice no later than ten (10) working days to each employee after the employer has received notice from the contractor or insurer pursuant to ORS 743.560;

(c) Failure to provide in the notice to each employee the information required in OAR 839-001-0720(6).

Stat. Auth.: ORS 652.710(7) & 652.710(11)
Stats. Implemented: ORS 183.090 & 652.710
Hist.: BL 10-1992, f. & cert. ef. 7-1-92

839-001-0780

Criteria for Determining a Civil Penalty

(1) The Commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed and cite those the Commissioner finds to be

appropriate:

- (a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes or rules;
- (b) Prior violations, if any, of statutes or rules;
- (c) The magnitude and seriousness of the violation;
- (d) Whether the employer knew or should have known of the violation;
- (e) Whether the employer's action or inaction has resulted in the loss of a substantive right of an employee.

(2) It will be the responsibility of the employer to provide the commissioner any mitigating evidence concerning the amount of the civil penalty to be assessed.

(3) Notwithstanding any other section of this rule, the commissioner will consider evidence of all mitigating circumstances presented by the employer for the purpose of reducing the amount of the civil penalty to be assessed.

Stat. Auth.: ORS 652.710(7), 652.710(11) & 673

Stats. Implemented: ORS 183.090 & 652.710

Hist.: BL 10-1992, f. & cert. ef. 7-1-92; BLI 1-2002, f. & cert. ef. 1-9-02

839-001-0790

Schedule of Civil Penalties for Violation of ORS 652.710(1)

(1) The civil penalty for any one violation shall not exceed \$1,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

(2) When the Commissioner determines to assess a civil penalty for violation(s) of ORS 652.710(1), the minimum civil penalty to be assessed shall be \$50 for each employee affected; provided, however, that if the violation(s) of ORS 652.710(1) result(s) in a lapse of health care insurance coverage or otherwise in the unavailability of health care services through the employer's contract, the minimum civil penalty to be assessed shall be \$500 for each employee affected.

(3) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR 839-001-0780.

(4) When the Commissioner determines to assess a civil penalty for any violation of ORS 652.710(1) by an employer who has previously been assessed a civil penalty for violation of ORS 652.710(1), the minimum civil penalty shall be as follows:

- (a) For a second offense, double the amounts specified in sections (2) and (3) of this rule;
 - (b) For third and subsequent offenses, \$1,000 for each violation.
- (5) The civil penalties set out in this rule shall be in addition to any other penalty imposed by law or rule.

Stat. Auth.: ORS 652.710(7) & 652.710(11)

Stats. Implemented: ORS 183.090 & 652.710

Hist.: BL 10-1992, f. & cert. ef. 7-1-92

839-001-0800

Schedule of Civil Penalties for Violation of ORS 652.710(3)

(1) The civil penalties for any one violation shall not exceed \$1,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

(2) When the Commissioner determines to assess a civil penalty for violation(s) of ORS 652.710(3), if delivery of notice satisfying the requirements of ORS 652.710(3) occurred no later than three working days prior to the date upon which employee rights to conversion coverage terminate, a minimum civil penalty of \$50 per employee shall be assessed. However, if delivery of notice as required by ORS 652.710(3) is not made at least three days prior to the expiration of conversion rights, a minimum civil penalty of \$500 per employee shall be assessed.

(3) When the Commissioner determines to assess a civil penalty for the failure to provide all required information in the notice, a minimum civil penalty of \$25 per employee for each notice not containing the required information.

(4) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR 839-001-0780.

(5) When the Commissioner determines to assess a civil penalty for any violation of ORS 652.710(3) by an employer who has previously been assessed a civil penalty for violation of ORS 652.710(3), the minimum civil penalty shall be as follows:

- (a) For a second offense, double the amounts specified in sections (2), (3), and (4) of this rule;

- (b) For third and subsequent offenses, \$1,000 for each violation.
- (6) The civil penalties set out in this rule shall be in addition to any other penalty assessed or imposed by law or rule.

Stat. Auth.: ORS 652.710(11)

Stats. Implemented:

Hist.: BL 10-1992, f. & cert. ef. 7-1-92

DIVISION 2

PROCEDURAL RULES

839-002-0001

Purpose of These Rules

The Bureau of Labor and Industries is responsible for the development of administrative rules necessary for enforcement of statutes for which it is responsible. The purpose of these rules is to guide the bureau in the rule-making process.

Stat. Auth.: ORS 183

Stats. Implemented: ORS 183.335

Hist.: BLI 1-2000, f. & cert. ef. 1-11-00

839-002-0002

Proposed Rule Notice

Prior to the permanent adoption, amendment or repeal of any rule for the Bureau of Labor and Industries, the bureau shall give notice of intended action:

(1) In the Secretary of State's Bulletin, referred to in ORS 183.360, at least 21 days prior to the rule's effective date.

(2) To persons on the bureau's mailing list and email list established pursuant to ORS 183.335(8).

(3) To the legislature, by mailing a copy of the notice to the legislators specified in ORS 183.335(15) at least 49 days before the effective date of the rule.

(4) To the general public, by posting the notice to the bureau's Website.

Stat. Auth.: ORS 183

Stats. Implemented: ORS 183.335

Hist.: BLI 1-2000, f. & cert. ef. 1-11-00; BLI 8-2004, f. 7-26-04, cert. ef. 7-27-04; BLI 7-2006, f. 3-16-06 cert. ef. 3-20-06

839-002-0005

Model Rules of Procedure

(1) The Attorney General's Model Rules of Procedure under the Administrative Procedures Act, are hereby adopted to govern the operations of the Bureau of Labor and Industries.

(2) The Model Rules of Procedure shall govern operations of the Contested Case Hearings Unit of the Bureau of Labor and Industries except to the extent they conflict with or are modified by rules in any division of chapter 839 of the Oregon Administrative Rules. The rules for contested case proceedings are set forth in OAR 839, division 50.

[ED. NOTE: The full text of the Attorney General's Model Rules of Procedure is available from the office of the Attorney General or the Bureau of Labor and Industries.]

Stat. Auth.: ORS 183

Stats. Implemented: ORS 183.341

Hist.: BL 5-1980, f. & cf. 8-4-80; BL 2-1981, f. & cf. 1-8-81; BL 3-1982, f. & cf. 2-9-82; BL 4-1996, f. & cert. ef. 3-12-96; BLI 1-2000, f. & cert. ef. 1-11-00; BLI 7-2006, f. 3-16-06 cert. ef. 3-20-06

DIVISION 3

CIVIL RIGHTS COMPLAINT PROCEDURES

839-003-0000

Purpose and Scope

(1) The policy of the State of Oregon guarantees all citizens of the state the right to employment, housing, public accommodation and private vocational, professional or trade schools without unlawful discrimination.

(2) These rules govern the Civil Rights Division procedures for processing all complaints filed with the division.

(3) In any matter not governed by these rules, the Commissioner of the Bureau of Labor and Industries will exercise discretion under the law.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.003 & 659A.805

Hist.: BL 7-1981, f. & cf. 6-25-81; BL 4-1996, f. & cert. ef. 3-12-96; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-003-0005

Definitions

Except where otherwise required by ORS 654.005 and except as provided below, definitions for terms used in these rules are found in ORS 659A.001 and 659A.100:

(1) "Administrator" means the Administrator of the Civil Rights Division of the Bureau of Labor and Industries or a designee of the administrator.

(2) "Bureau" means the Bureau of Labor and Industries.

(3) "Commissioner" means the Commissioner of the Bureau of Labor and Industries or a designee of the commissioner.

(4) "Complaint" means for the purpose of ORS Chapter 659A, a written, verified statement signed by the complainant or the complainant's attorney that:

(a) Gives the name and address of the complainant and the respondent;

(b) Identifies the protected class basis of the complaint;

(c) Describes the actions complained of, including:

(A) The date(s) of occurrence;

(B) What the action was and how it harmed the complainant; and

(C) The causal connection between the complainant's protected class and the alleged harm.

(5) "Complainant" means a person filing a complaint personally or through an attorney.

(6) "Days," unless otherwise stated in the text of a document, means calendar days. "Work days" means Monday through Friday, except holidays officially recognized by the State of Oregon or the federal government.

(7) "Division" means the Civil Rights Division of the Bureau of Labor and Industries.

(8) "EEOC" means the Equal Employment Opportunity Commission of the federal government.

(9) "Notice" means written information delivered personally or sent by mail to the person's last known personal or business address or business address of the person's designated representative.

(10) "OSEA" means the Oregon Safe Employment Act, ORS 654.001 et seq.

(11) "Protected class" means a group of people protected by law from discrimination on the basis of a shared characteristic, or a perception of that characteristic, such as race, sex, age, disability or other.

(12) "Formal Charges" are formal charges drafted and issued by the bureau's Hearings Unit.

(13) "Substantial evidence" means proof that a reasonable person would accept as sufficient to support the allegations of the complaint.

(14) "Substantial Evidence Determination" means the division's written findings of substantial evidence.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.001

Hist.: BL 7-1981, f. & ef. 6-25-81; BL 7-1982, f. & ef. 4-22-82; BL 4-1996, f. & cert. ef. 3-12-96; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-003-0010

Who May File

(1) Any person claiming to be harmed by an act prohibited by statutes enforced by the Civil Rights Division may file a complaint with the division personally or through an attorney.

(2) Any employee, or a representative authorized to do so by ORS 654.062(2), may file a complaint with the division alleging discrimination by an employer against the employee for raising issues of employee safety or health in the workplace.

(3) The commissioner or Attorney General of Oregon may file a complaint whenever there is reason to believe that a person or entity has violated statutes enforced by the division.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.820 & 659A.825

Hist.: BL 7-1981, f. & ef. 6-25-81; BL 7-1982, f. & ef. 4-22-82; BL 4-1996, f. & cert. ef. 3-12-96; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-003-0015

Equal Employment Opportunity Commission

If a complainant wants to file a complaint alleging facts that would also violate federal discrimination statutes administered by the Equal Employment Opportunity Commission (EEOC) and the complaint meets federal filing requirements, the division may accept it on behalf of EEOC and co-file the complaint with EEOC. Under a work-sharing agreement between the division and EEOC the division in

most instances, will process the complaint for both agencies.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.820, 42 USC Sec. 706(c) & (d) (Title VII of the Civil Rights Act of 1964, as amended), 42 USC Sec. 101-108 (Title I of the Americans with Disabilities Act) & 29 USC Sec. 621-634 (The Age Discrimination in Employment Act of 1967)

Hist.: BL 7-1981, f. & ef. 6-25-81; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-003-0020

Civil Suit

(1) A person alleging unlawful discrimination under state law may file a civil suit as provided in ORS 659A.870 to 659A.885, or 30.680.

(a) A person is not required to file a complaint of a violation of state law with the division before filing a civil suit.

(b) A person filing a civil suit in state or federal court waives the right to file a complaint with the division with respect to those matters alleged in the civil suit.

(2) After filing a complaint with the division, a complainant may file a civil suit in state or federal court alleging the same matters as those alleged in the complaint filed with the division. The complainant should notify the division of the civil suit. When the division receives notice from the complainant or complainant's attorney, or court documents indicating that such a suit has been filed, the division will dismiss the complaint. The division will notify the complainant and respondent that the division has dismissed the complaint and will take no further action.

(3) A civil suit alleging a violation of ORS 659A.145 or 659A.421, regarding discrimination in real property transactions, may be filed no later than two years after the occurrence or termination of an alleged discriminatory housing practice. The two-year period may not include any time during which an administrative proceeding was pending with respect to the housing practice.

(4) Notwithstanding OAR 839-003-0020(2), if a complainant files a complaint with the division alleging a violation of ORS 659A.145 or 659A.421 regarding discrimination in real property transactions:

(a) And the complainant also files a civil suit with respect to such allegations, the division will not dismiss the complaint until the civil trial commences;

(b) If Formal Charges have been issued with respect to a housing discrimination complaint, and an administrative law judge has commenced a hearing on the record under ORS Chapter 659A, the complainant may not commence a civil action in court that alleges the same matters.

(5) The commissioner will notify the complainant in writing of the right to file suit in state court, as provided in ORS 659A.870 to 659A.885, when a complaint is dismissed by the division or on the one-year anniversary of the complaint filing, whichever occurs first. The complainant will have 90 days from the notice mailing date to file a civil suit. A complainant filing suit against a public body must also file a tort claim notice as required by ORS 30.275.

(6) A civil action under ORS 659A.885 against a public body, as defined in ORS 30.260, or any officer, employee or agent of a public body as defined in ORS 30.260, based on an unlawful employment practice must be commenced within one year after the occurrence of the unlawful employment practice unless a complaint has been timely filed under ORS 659A.820.

(7) An action alleging breach of a division settlement agreement, entered into under ORS 659A.001 to 659A.030, 659A.233, 659A.303, 659A.409, 659A.420, 659A.421, 659A.150 to 659A.224 and 659A.800 to 659A.890, may be filed under 659A.860 in accordance with the applicable statute of limitations.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 30.275, 30.680, 659A.001 - 659A.030, 659A.233, 659A.303, 659A.409, 659A.420, 659A.421, 659A.150 - 659A.224 & 659A.800 - 659A.890

Hist.: BL 7-1981, f. & ef. 6-25-81; BL 12-1982, f. & ef. 8-10-82; BL 4-1996, f. & cert. ef. 3-12-96; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 9-2006, f. 3-16-06, cert. ef. 3-20-06; BLI 24-2006(Temp), f. 7-5-06, cert. ef. 7-7-06 thru 1-3-07; BLI 38-2006, f. 10-25-06, cert. ef. 10-27-06

839-003-0025

Filing a Complaint

(1) A person or the person's attorney may file a complaint, in person or by mail, with the division at any bureau office in the state of Oregon. The complaint must meet the standards provided in OAR 839-

003-0005(4).

(2) The filing date is the date the division receives a complaint that meets the standards contained in OAR 839-003-0005(4).

(3) Except as provided in section (5) of this rule, a person must file a complaint with the division no later than one year after the alleged unlawful practice. If the alleged unlawful practice is of a continuing nature, the right to file a complaint exists so long as the person files the complaint within one year of the most recent date the unlawful practice occurred.

(4) A person alleging constructive discharge must file a discrimination complaint with the division within one year of the date the discharge occurred.

(5) A person alleging discrimination for reporting or opposing unsafe or unhealthy work conditions under ORS 654.062 must contact the division within 90 days of having reasonable cause to believe that such violation has occurred. An employee would have reasonable cause to believe a violation has occurred on the earliest date that the employee:

(a) Believed retaliation had occurred against the employee for opposing employee health and safety hazards; and

(b) Knew or should have known of the right to file a complaint with the division and of the requirement that the complaint be filed within 90 days of the alleged retaliation.

(A) If a notice required by OSEA, as provided in OAR 437-001-0275(2)(a), was properly posted in the employee's workplace, continuously on and following the date of the alleged retaliation, the division will find that the employee knew or should have known of the 90-day filing requirement.

(B) If the employer failed to post the required OSEA poster, the 90-day filing requirement will begin on the date the employee learned of the right to file a complaint and of the 90-day filing requirement. The employee may establish this date based on the employee's own statement or other evidence offered by the employee.

(C) If the employer disagrees with the employee's presented date as the date the employee learned of the right to file a complaint, the burden is on the employer to show that the employee knew or should have known on an earlier date.

(D) If extenuating circumstances exist, the division may extend the 90-day period as provided in 29 CFR Part 15(d)(3).

(6) The procedures for filing a complaint are as follows:

(a) A person or the person's attorney makes an inquiry to the division;

(b) The division may provide the person or the person's attorney with a letter of information and/or questionnaire to assist in determining if there is a basis for filing a complaint;

(c) If the division determines the person has a basis for filing a complaint, the division will draft a complaint based upon the information provided by the person and send or give the complaint to the person or the person's attorney for verification. The person or the person's attorney will request any necessary changes to the complaint.

(d) The person or the person's attorney will verify and sign the complaint. The complaint will then be submitted to the division.

(e) If the person is an unemancipated minor the complaint must be signed by the minor and the parent or legal guardian of the minor.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 654.062, 659A.820 & 29 CFR Part 15(d)(3)

Hist.: BL 7-1981, f. & ef. 6-25-81; BL 4-1996, f. & cert. ef. 3-12-96; BL 2-1998, f. & cert. ef. 2-3-98; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 12-2004, f. 10-22-04 cert. ef. 10-25-04; BLI 19-2007(Temp), f. & cert. ef. 7-18-07 thru 1-1-08; BLI 29-2007, f. 9-27-07 cert. ef. 10-1-07

839-003-0040

Amendment of Complaints

(1) The division may amend a complaint to correct technical defects and to add additional persons as respondents. The division may amend a complaint on its own initiative or at the complainant's request (with the division's agreement) at any time prior to the issuance of Formal Charges, except that respondents may only be added during the course of investigation. Examples of technical defects include: clerical errors, additions or deletions, name and address corrections, and statute citation errors.

(2) A complaint may be amended to add a protected class only if the addition is supported by facts already alleged. New facts may not be added. If new facts are alleged, the complainant must file a new complaint meeting the standards provided in OAR 839-003-0005(4).

(3) Amended complaints need not be verified or signed by the complainant or the complainant's attorney.

(4) The division will send a copy of the amended complaint to the complainant and all respondents.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.820

Hist.: BL 7-1981, f. & ef. 6-25-81; BL 4-1996, f. & cert. ef. 3-12-96; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 2-2005, f. 1-6-05, cert. ef. 1-7-05

839-003-0045

Withdrawal of Complaint

A complainant may voluntarily withdraw a complaint at any time by giving the division written notice of the complainant's decision to withdraw. If the complainant wants a federal "right to sue letter," the complainant must provide a written request to EEOC or to the division. If the complainant makes the request to the division, the division will forward the request to EEOC.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A

Hist.: BL 7-1981, f. & ef. 6-25-81; BL 4-1996, f. & cert. ef. 3-12-96; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-003-0050

Administrative Dismissal

(1) The division will dismiss the complaint if it determines that the bureau has no jurisdiction over the allegations of the complaint.

(2) The division may dismiss the complaint if the complainant files a proceeding, based on the same set of facts, with another agency having the authority to provide remedy to the complainant for the alleged discrimination.

(3) If a complainant or the complainant's attorney fails to cooperate with the division, the division may dismiss the complaint.

(4) The complainant must notify the division in writing of address and telephone number changes. When a complainant cannot be located by reasonable efforts, the division may dismiss the complaint.

(5) The division will dismiss a complaint unless substantial evidence of unlawful discrimination is found. Such dismissal notice will include a statement that the complaint has been dismissed and a notice of complainant's right to file a civil suit, if such right exists.

(6) The division will dismiss complaints alleging violation of federal discrimination statutes administered by EEOC (OAR 839-003-0015) in accordance with federal requirements.

(7) The division may elect to administratively dismiss a complaint without investigation. In such instances, the division will notify the complainant and respondent of the dismissal and issue notice of the complainant's right to file a civil suit, if such right exists.

(8) The division will dismiss a complaint if it learns that the complainant has filed a civil suit alleging the same matters, as provided in OAR 839-003-0020.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 30.680, 659A.835, 659A.850 & 659A.870 - 659A.885

Hist.: BL 7-1981, f. & ef. 6-25-81; BL 4-1996, f. & cert. ef. 3-12-96; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-003-0055

Conciliation Agreements Prior to Completion of the Investigation

(1) The division encourages complainants and respondents to resolve complaints by mutual agreement at any time. The division will facilitate settlement negotiations between the complainant and respondent, as provided in this rule, at any time during the investigation. The division may terminate negotiations that become lengthy or appear unlikely to result in conciliation.

(2) If the complainant and respondent agree upon settlement, the division will draft a settlement agreement that states:

(a) That a "no fault" settlement has been reached;

(b) That the complainant, the respondent and the Civil Rights Division accept the terms of the agreement as a resolution of the complaint;

(c) The specific action(s) the complainant and respondent will take as a result of the complaint settlement and the time within which the action(s) will be taken; and

(d) That the division may investigate any alleged breach of the agreement.

(3) The settlement agreement will not include release language that applies to any forum other than the Civil Rights Division.

(4) The complainant, the respondent and a representative of the

division will sign the division's settlement agreement. The complainant and respondent will receive copies of the signed agreement. Upon execution of this agreement, the division will notify the complainant and respondent that the complaint is dismissed.

(5) The division may allow the complainant and the respondent to enter into a private agreement with release language in addition to the division's agreement. The division will not be a party to nor enforce private agreements.

(6) Nothing in these rules is intended to preclude private settlement between the complainant and the respondent.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.835, 659A.840 & 659A.850

Hist.: BL 7-1981, f. & ef. 6-25-81; BL 4-1996, f. & cert. ef. 3-12-96; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-003-0060

Fact-Finding Conference

(1) At its discretion, the division may hold a fact-finding conference. This conference may encompass part or all of the division's investigation of the complaint. The complainant and the respondent will attend the conference and a division representative will conduct the conference. The purposes of the conference will be to:

- (a) Review evidence regarding the complaint;
- (b) Identify the undisputed elements of the complaint;
- (c) Define and, if possible, resolve the disputed elements of the complaint; and
- (d) Attempt to settle the complaint.

(2) The division will schedule the conference, notifying the complainant and the respondent of the time and place. The division may require the complainant and the respondent to provide information and documents relevant to the complaint. The division may issue subpoenas ad testificandum to compel the respondent's representatives to attend the conference and issue subpoenas duces tecum to compel the production of documents at the conference.

(3) The conference may be rescheduled, subject to the division's approval, at the request of the complainant or the respondent, or at the division's discretion.

(4) The complainant's failure to attend the conference may cause the complaint to be administratively dismissed if the division determines that the complainant has failed to cooperate pursuant to OAR 839-003-0050(3).

(5) If the complainant attends the conference but the respondent's representatives fail to attend, the division representative may proceed based on the information in the division's possession.

(6) The respondent's representatives at a fact-finding conference should include persons with:

- (a) Knowledge of the facts bearing on the complaint; and
- (b) Authority to negotiate a settlement agreement.

(7) The complainant and the respondent may be accompanied by legal counsel, but counsel's role is strictly limited to providing legal advice to the counsel's client.

(8) Division's representative conducting the conference may:

- (a) Question the participants about their knowledge of the situation;
- (b) Ask for additional statements and documentation from the complainant and the respondent;
- (c) Terminate discussion of a particular point when further discussion would be irrelevant or repetitive;
- (d) Exclude witnesses with the exception of the complainant, the respondent and counsel;
- (e) Order unruly participants to leave the conference;
- (f) Tape-record the conference with the knowledge of the participants;
- (g) Attempt to negotiate a settlement agreement between the parties; and
- (h) Recess or terminate the conference at any time.

(9) If the conference does not result in settlement, the division will either continue the investigation or dismiss the complaint.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.800, 659A.850 & 659A.860

Hist.: BL 7-1981, f. & ef. 6-25-81; BL 1-1993, f. 3-25-93, cert. ef. 4-1-93; BL 4-1996, f. & cert. ef. 3-12-96; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-003-0065

Investigations

(1) The division may investigate the allegations contained in a

complaint to determine objectively whether there is substantial evidence of unlawful discrimination. The division will determine the method by which complaints will be investigated or otherwise processed. The division will not investigate allegations occurring more than one year prior to the date the complaint was filed unless the allegations constitute a continuing violation or the circumstances occurring more than one year prior to the date the complaint was filed pertain to timely allegations.

(2) The investigation may include interviews with the complainant, the respondent representatives, and any other persons whom the division chooses to interview. The investigation may also involve the examination and analysis of written documents.

(3) The investigator may tape-record statements with the knowledge of the participants.

(4) The respondent has the right to have a representative present during interviews of current supervisory employees.

(5) The respondent's current, non-supervisory, or former employees, may request that a representative for the respondent be present during interviews by a division representative.

(6) A complainant, respondent or witness interviewed by the division may request a copy of the summary report of the individual's own interview. The division may request that the complainant, respondent or witness confirm by signature that the summary report is an accurate representation of the interview. The complainant, respondent or witness may submit to the division additional comments regarding the interview.

(7) The division representative may make written request to the respondent for documents, records, files or other sources of evidence. The respondent will provide such information within 21 days of the date of the division's written request. The division may grant the respondent additional time in which to respond.

(8) The division may issue subpoenas compelling division access to premises, records and witnesses. Failure to respond to a subpoena may result in the division making a determination based on available information.

(9) Upon conclusion of the investigation, the division will either issue a Substantial Evidence Determination or will dismiss the complaint. The division will mail a copy of the Substantial Evidence Determination or dismissal notice to the complainant and respondent.

(10) If the division does not find substantial evidence of unlawful discrimination, the division will dismiss the complaint, notify the complainant and respondent of the dismissal and notify the complainant of the right to file a civil suit, if such right exists.

(11) If the division finds substantial evidence of unlawful discrimination, the complaint may be assigned to a division representative for settlement. However, the commissioner may proceed directly to a contested case hearing if the interests of justice so require.

(12) A Substantial Evidence Determination or dismissal may not be appealed to the division.

(13) The division may reopen a case at its own discretion.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.800, 659A.805, 659A.835 & 659A.870 - 659A.885

Hist.: BL 7-1981, f. & ef. 6-25-81; BL 13-1981, f. & ef. 11-18-81; BL 12-1982, f. & ef. 8-10-82; BL 12-1992(Temp), f. & cert. ef. 11-3-92; BL 2-1993, f. 3-25-93, cert. ef. 4-1-93; BL 4-1996, f. & cert. ef. 3-12-96; BL 2-1998, f. & cert. ef. 2-3-98; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-003-0070

Settlement Process After Substantial Evidence Determination

(1) If the division finds substantial evidence of unlawful discrimination, the division may seek to eliminate the effects of the unlawful discriminatory act(s) by conference, settlement and persuasion. The division will facilitate settlement negotiations between the complainant and respondent as provided in OAR 839-003-0055.

(2) If no settlement agreement is reached in the period of time set aside for settlement after a Substantial Evidence Determination, the division retains the discretion to further negotiate settlement, administratively dismiss the complaint, or proceed to a contested case hearing.

(3) The complainant may withdraw the complainant's own complaint at any time.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.835 & 659A.840

Hist.: BL 7-1981, f. & ef. 6-25-81; BL 4-1996, f. & cert. ef. 3-12-96; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-003-0080

Access to Records/Confidentiality

(1) During an investigation, the contents of the investigative file and related records, other than the complaint, are confidential. However, any individual may inspect and copy information or statements that the individual has given to the division. The division may charge a fee for inspection or to copy information.

(2) After the complaint is closed, a copy of the closed file will be available for a fee. To obtain a copy of a closed file a person must make a written request to the division. The request must include the person's name, address and telephone number, the complainant's and the respondent's names and payment of the fee, as determined by the division.

(3) The division will not at any time disclose any information that is required to be kept confidential by any state or federal law or under any contractual agreement between the bureau and federal, state and local agencies.

(4) A complainant's or respondent's designation of information as confidential will not supercede the State of Oregon Public Records Law.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 192.440(3) & 192.501(8)

Hist.: BL 7-1981, f. & ef. 6-25-81; BL 10-1984(Temp), f. & ef. 9-6-84; BL 4-1996, f. & cert. ef. 3-12-96; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-003-0085

Subpoenas

(1) The commissioner or the commissioner's designee may issue a subpoena to require:

(a) The presence and testimony of witnesses;

(b) The production of evidence, including but not limited to books, records, correspondence or documents in the possession or under the control of the person subpoenaed; and

(c) Access to evidence to be examined or copied.

(2) If any person fails to comply with a subpoena issued under this rule, the commissioner may initiate the legal procedures necessary to enforce compliance.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.800(4)

Hist.: BL 7-1981, f. & ef. 6-25-81; BL 4-1996, f. & cert. ef. 3-12-96; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-003-0090

Remedy

(1) In cases of employment discrimination remedy includes, but is not limited to:

(a) Employment or reemployment;

(b) Wages or other benefits lost due to the practice;

(c) Out-of-pocket expenses attributable to the practice;

(d) Compensation for emotional distress and impaired personal dignity; and

(e) Interest.

(2) Consideration of all acts alleged to comprise a hostile work environment in a complaint, including alleged acts occurring outside the one year statute of limitations for filing a complaint, is permissible for the purposes of assessing liability, so long as any act contributing to that hostile work environment takes place within the statutory period.

(3) In cases of housing discrimination or discrimination by places of public accommodation remedy includes, but is not limited to:

(a) Rental, lease or sale of real property;

(b) Service lost;

(c) Expenses or lost benefits attributable to the practice;

(d) Compensation for emotional distress and for impaired personal dignity; and

(e) Interest.

(4) In order to recover damages for lost wages, the complainant will generally be required to mitigate damages by seeking employment.

(a) Earned income from employment may be deducted from lost wage damages.

(b) In most cases, unearned income such as unemployment or public assistance benefits will not be deducted from lost wage damages.

(5) Settlements of complaints and the awards in commissioner's

Final Orders do not necessarily include all possible remedies named in sections (1) and (2) of this rule. Nothing in this rule will be construed to limit or alter the statutory powers of the commissioner to protect the rights of persons similarly situated to the complainant or to order the performance of an act or a series of acts designed to eliminate the effect of any unlawful practice found.

(6) The commissioner may order the respondent to eliminate the effects of any unlawful practice found and may require respondent to:

(a) Perform a designated act or series of acts that are calculated to carry out the policy of these rules in order to eliminate the effects of an unlawful practice and to protect the rights of those affected;

(b) Take action and submit reports to the commissioner on the manner of compliance with the terms and conditions specified in the commissioner's order or agreement;

(c) Refrain from any action prohibited by the order or agreement that would jeopardize the rights of the individuals or groups named in the complaint or would frustrate the purpose and the policy of these rules and relevant statutes.

(7) When the respondent makes an offer of remedy, the division will inform the complainant of the offer. If the complainant does not accept an offer that the division has determined will eliminate the effects of the unlawful practice, the division may dismiss the complaint.

(8) Any agreement or order issued by the commissioner may be enforced by mandamus or injunction or by suit in equity to compel specific performance.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.800, 659A.850, 659A.860, 659A.865 & 659A.885

Hist.: BL 7-1981, f. & ef. 6-25-81; BL 4-1996, f. & cert. ef. 3-12-96; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 20-2005, f. 10-20-05, cert. ef. 10-21-05; BLI 8-2006, f. 3-16-06 cert. ef. 3-20-06

839-003-0095

Enforcement of Settlement Agreements and Orders

(1) Any agreement or order issued by the commissioner may be enforced by mandamus or injunction or by suit in equity to compel specific performance, as provided in ORS 659A.860.

(2) If the complainant believes the terms of a bureau settlement agreement have been breached, the complainant may file a complaint with the division alleging retaliation, or file a new complaint re-alleging the original violation if it is still occurring. The division may review the provisions of the settlement agreement and investigate.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.850, 659A.860 & 659A.865

Hist.: BL 7-1981, f. & ef. 6-25-81; BL 4-1996, f. & cert. ef. 3-12-96; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-003-0100

Commissioner's Complaint

(1) The Commissioner of the Bureau of Labor and Industries may make, sign and file a complaint whenever the commissioner has reason to believe that any person or group of persons has been denied rights due to an unlawful practice or employment practice. The complaint will be processed in the same manner as any other complaint filed under OAR 839-003-0005.

(2) In the matter of concurrent complaints, nothing in these rules will be construed to:

(a) Require or prohibit the filing of a commissioner's complaint involving the same or similar issues or allegations stated in any other complaint filed with the division or circuit court by an individual under ORS 659A.820, 659A.825, or 659A.885;

(b) Require or prohibit the continued processing or initiation of a commissioner's complaint in the event that a complaint filed with the division or circuit court by an individual under ORS 659A.820, 659A.825, or 659A.885, is resolved or dismissed, with or without remedy to the individual; or

(c) Alter or limit an individual's private right of action provided under ORS 659A.870 to 659A.885.

Stat. Auth.: ORS 183 & 659A.805

Stats. Implemented: ORS 659A.820, 659A.825 & 659A.870 - 659A.885

Hist.: BL 7-1985(Temp), f. & ef. 10-17-85; BL 11-1986, f. & ef. 10-29-86; BL 4-1996, f. & cert. ef. 3-12-96; BLI 11-2000, f. & cert. ef. 3-24-00; BLI 10-2002, f. & cert. ef. 5-17-02

DIVISION 4

RETALIATION FOR OPPOSITION TO HEALTH
AND SAFETY HAZARDS

839-004-0001

Purpose and Scope

(1) The Oregon Safe Employment Act (OSEA) recognizes the right of employees to have a safe and healthy workplace. In addition to the OSEA health and safety provisions enforced by the Oregon Occupational Safety and Health Division (OR-OSHA), OSEA prohibits discrimination against employees because of an employee's complaint about or opposition to health and safety hazards in the workplace. The Bureau of Labor and Industries, through its Civil Rights Division, is responsible for enforcing the prohibitions against discrimination for opposition to health and safety hazards, pursuant to ORS 654.062(5). The purpose of these rules is to clarify the interpretations of ORS 654.062(5) that guide the division in implementing this statute. Provisions of OSEA should be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Occupational Safety and Health Act of 1970 (OSHA), 29 USC 651 (1999).

(2) It is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee because that employee has opposed any practice forbidden under or related to OSEA.

(3) Employees or prospective employees having reason to believe they have been discriminated against may file a complaint with the division, as described in OAR 839-003-0025.

(4) Health and safety discrimination complaints must be filed with the division within 90 days of the date the employee has reasonable cause to believe that a violation has occurred.

Stat. Auth.: ORS 654.062(5)

Stats. Implemented: ORS 654.062(5) & 659A.820

Hist.: BLI 14-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 19-2007(Temp), f. & cert. ef. 7-18-07 thru 1-1-08; BLI 29-2007 f. 9-27-07 cert. ef. 10-1-07

839-004-0003

Definitions

(1) "Bureau" means the Bureau of Labor and Industries.

(2) "Division" means the Civil Rights Division of the Bureau of Labor and Industries.

(3) "Employee" means any individual, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, financial or otherwise, subject to the direction and control of an employer, and includes salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, or any individual who is provided with workers' compensation coverage as a subject worker pursuant to ORS Chapter 656, whether by operation of law or by election.

(4) "Employer" means any person who has one or more employees, or any sole proprietor or member of a partnership who elects workers' compensation coverage as a subject worker pursuant to ORS 656.128.

(5) "Person" means one or more individuals, legal representatives, partnerships, joint ventures, associations, corporations (whether or not organized for profit), business trusts, or any organized group of persons, and includes the state, state agencies, counties, municipal corporations, school districts and other public corporations or subdivisions.

Stat. Auth.: ORS 654.062(5) & 659A.001

Stats. Implemented: ORS 654.005, 654.062 & 659A.001

Hist.: BLI 14-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-004-0004

Prohibited Discrimination by Employers

(1) OSEA provides that no person may discriminate against an employee or prospective employee for engaging in activities protected under the act. Discrimination for this purpose includes:

(a) Refusing to hire or employ, or barring or discharging an individual from employment; or

(b) Discriminating against an employee or prospective employee in compensation, terms, conditions or privileges of employment.

(2) Protected activities include, but are not limited to:

(a) Opposing any practice forbidden by OSEA;

(b) Making any complaint under or related to OSEA;

(c) Instituting or causing to be instituted any proceeding under or related to OSEA;

(d) Testifying or being about to testify in any such proceeding; or

(e) Exercising on behalf of the employee, other employees or prospective employees any right afforded by OSEA.

Stat. Auth.: ORS 654.062(5)

Stats. Implemented: ORS 654.062(5) & 659A.820

Hist.: BLI 14-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-004-0011

Prohibited Discrimination by Unions, Employment Agencies and Persons Other than Employers

Discrimination prohibited by OSEA is not limited to actions taken by employers against the employer's own employees. This prohibition also includes actions taken against an employee or prospective employee by unions, employment agencies, or any other person in a position to discriminate against another person's employee or prospective employee.

Stat. Auth.: ORS 654.062(5)

Stats. Implemented: ORS 654.062(5)

Hist.: BLI 14-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-004-0016

Persons Protected from Discrimination Under OSEA

(1) ORS 654.062(5) protects employees and prospective employees exercising rights under OSEA. Such employees are protected whether they are exercising these rights on their own behalf or on the behalf of other employees or prospective employees. "Employees" include volunteers who are covered under the Oregon workers' compensation system. Employees or prospective employees on whose behalf another employee or person acts are also protected if:

(a) The employee or prospective employee is perceived to be complaining about or opposing an unsafe or unhealthy workplace;

(b) The complaint was, in fact, the employee's or prospective employee's, but was made by another person.

(2) ORS 654.062(5) protects employees from employer retaliation in instances where the employer does not know the identity of the employee making a health or safety complaint, but takes action against those the employer perceives to have made the complaint or against employees who may have complained.

(3) ORS 654.062(5) does not protect an employee who refuses to comply with OSEA or the employer's legitimate safety rules.

Stat. Auth.: ORS 654.062(5)

Stats. Implemented: ORS 654.062(5)

Hist.: BLI 14-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-004-0021

Employee Opposition to Health and Safety Hazards

(1) ORS 654.062(5) prohibits discrimination against an employee because the employee "opposed" health and safety hazards in the workplace. OSEA does not specify to whom or in what manner an employee must oppose health and safety hazards and be protected. The concern is not with how the opposition is communicated, but with the employer's reaction to the opposition. What constitutes opposition covers a broad range of activities including, but not limited to the following:

(a) An employee opposing health and safety hazards in a co-worker discussion that is overheard by management;

(b) An employee opposing employee health and safety hazards in a letter to a newspaper read by management; or

(c) An employee opposing employee health and safety hazards by written or verbal protest to the employer.

(2) OSEA does not normally cover an employee opposing health and safety hazards if the employee refuses to work or walks off the job. If an employee, however, refuses to perform work that presents risk of serious injury or death, the employee would have OSEA protection under the following conditions:

(a) The employee has reasonable cause to believe the work or work area poses an imminent risk of serious injury or death due to hazardous conditions not inherent in the job; and

(b) The employee has reasonable cause to believe there is insufficient time or opportunity to seek employer redress or to resort to regulatory enforcement channels. (For example, the employer refuses to correct the hazard, denies the danger exists, is not available, or no

regulatory representative is available.)

(3) A person alleging discrimination for reporting or opposing unsafe or unhealthy work conditions under ORS 654.062 must contact the division within 90 days of having reasonable cause to believe that such violation has occurred. An employee would have reasonable cause to believe a violation has occurred on the earliest date that the employee:

(a) Believed retaliation had occurred against the employee for opposing employee health and safety hazards; and

(b) Knew or should have known of the right to file a complaint with the division and of the requirement that the complaint be filed within 90 days of the alleged retaliation.

Stat. Auth.: ORS 654.062(5)

Stats. Implemented: ORS 654.005 & 654.062(5)

Hist.: BLI 14-2000, f. & cert. ef. 8-11-00; BLI 5-2005, f. 1-13-05, cert. ef. 1-19-05; BLI 19-2007(Temp), f. & cert. ef. 7-18-07 thru 1-1-08; BLI 29-2007, f. 9-27-07 cert. ef. 10-1-07

DIVISION 5

DISCRIMINATION

839-005-0000

Purpose and Scope

(1) It is the policy of the State of Oregon that discrimination because of race, religion, color, sex, marital status, national origin, age, disability and other classes protected under Oregon statutes is a matter of state concern and that such discrimination threatens individual rights and privileges and menaces the institutions and foundations of a free democratic state.

(2) Prohibited discrimination is a basis of unlawful practices and unlawful employment practices described in ORS Chapter 659A and other chapters of the Oregon statutes.

(3) The Civil Rights Division of the Bureau of Labor and Industries is responsible for protecting individual rights through the enforcement of civil rights statutes prohibiting unlawful practices and unlawful employment practices over which the bureau has jurisdiction.

(4) The purpose of these rules is to implement, interpret and describe the division's approach to enforcement of civil rights statutes under the jurisdiction of the bureau.

(5) These rules apply to all inquiries and complaints received by the division on or after the effective date of these rules.

(6) An individual claiming a violation of the civil rights statutes may file a complaint with the Civil Rights Division as provided in OAR 839-003-0025.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A

Hist.: BL 9-1982, f. & ef. 6-11-8; BL 4-1996, f. & cert. ef. 3-12-96; BLI 19-2000, f. & cert. ef. 9-15-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-005-0003

Definitions

(1) "Bureau" means the Bureau of Labor and Industries.

(2) "Complainant" means an individual who files a complaint with the division, personally or through the individual's attorney, pursuant to the guidelines provided in OAR 839-003-0025.

(3) "Division" means the Civil Rights Division of the Bureau of Labor and Industries.

(4) "Employee" does not include any individual employed by that individual's parents, spouse or child or in the domestic service of any person.

(5) "Employer" means any person in this state who, directly or through an agent, engages or utilizes the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed. Employer also includes any public body that, directly or through an agent, engages or utilizes the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed, including all officers, agencies, departments, divisions, bureaus, boards and commissions of the legislative, judicial and administrative branches of the state, all county and city governing bodies, school districts, special districts, municipal corporations and all other political subdivisions of the state.

(6) "Employment agency" includes any person undertaking to procure employees or opportunities to work.

(7) "Labor organization" includes any organization that is constituted for the purpose, in whole or in part, of collective bargaining or in dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employees.

(8) "Protected class" means a group of people protected by law from discrimination on the basis of a shared characteristic, such as race, sex, age, disability or other, or a perception of that characteristic.

(9) "Respondent" includes any person against whom a complaint or charge of unlawful practices is filed with the division or whose name has been added to such complaint or charge pursuant to ORS 659A.835(1).

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A

Hist.: BLI 19-2000, f. & cert. ef. 9-15-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-005-0005

Unlawful Discrimination

(1) To discriminate means to make a distinction between individuals or groups based on common characteristics, real or perceived. Certain kinds of discrimination are unlawful. Oregon civil rights laws generally forbid making decisions in employment, housing, places of public accommodation and career schools because an individual is a member of a class protected by these statutes.

(2) When an individual files a complaint with the division alleging unlawful discrimination, the division must determine whether substantial evidence of such discrimination exists.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A

Hist.: BL 9-1982, f. & ef. 6-11-82; BL 4-1996, f. & cert. ef. 3-12-96; BLI 19-2000, f. & cert. ef. 9-15-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-005-0010

Discrimination Theories

(1) Substantial evidence of intentional unlawful discrimination exists if the division's investigation reveals evidence that a reasonable person would accept as sufficient to support the following elements:

(a) The respondent is a respondent as defined by ORS 659A.001(10) and OAR 839-005-0003(9) of these rules;

(b) The complainant is a member of a protected class;

(c) The complainant was harmed by an action of the respondent; and

(d) The complainant's protected class was the reason for the respondent's action. In determining whether the complainant's protected class was the reason for the respondent's action, the division uses whichever of the following theories applies:

(A) Specific Intent Theory: The respondent knowingly and purposefully discriminates against an individual because of that individual's membership in a protected class. Unless the respondent can show that a bona fide occupational qualification or a bona fide voluntary or court-ordered affirmative action plan (OAR 839-005-0045) allows the action, the respondent has unlawfully discriminated.

(B) Different or Unequal Treatment Theory: The respondent treats members of a protected class differently than others who are not members of that protected class. When the respondent makes this differentiation because of the individual's protected class and not because of legitimate, non-discriminatory reasons, unlawful discrimination exists. In establishing a case of different or unequal treatment:

(i) There must be substantial evidence that the complainant was harmed by an action of the respondent under circumstances that make it appear that the respondent treated the complainant differently than comparably situated individuals who were not members of the complainant's protected class. Substantial evidence of discrimination exists if the division's investigation reveals evidence that a reasonable person would accept as sufficient to support that protected class membership was the reason for the respondent's alleged unlawful action. If the respondent fails to rebut this evidence with evidence of a legitimate non-discriminatory reason, the division will conclude that substantial evidence of unlawful discrimination exists.

(I) Pretext: If the respondent does rebut the evidence with evidence of a legitimate non-discriminatory reason, but there is substantial evidence that the reasons the respondent presents for its actions are a pretext for discrimination, the division will conclude that substantial evidence of unlawful discrimination exists.

(II) Mixed Motive: If the respondent presents substantial evidence that legitimate, non-discriminatory reasons contributed to the

respondent's action, but the division finds the individual's protected class membership was also a substantial factor in the respondent's action, the division will determine that substantial evidence of discrimination exists.

(ii) The complainant at all times has the burden of proving that the complainant's protected class was the reason for the respondent's unlawful action.

(2) Adverse Impact Discrimination: Substantial evidence of adverse impact discrimination does not require establishment of intentional discrimination as provided in (1) of this rule. Adverse impact discrimination exists if the division's investigation reveals evidence that a reasonable person would accept as sufficient to support the following elements:

(a) The respondent is a respondent as defined by ORS 659A.001(10) and OAR 839-005-0003(9) of these rules;

(b) The respondent has an employee standard or policy that is applied equally to all employees or applicants;

(c) The standard or policy has the effect of screening out or otherwise affecting members of a protected class at a significantly higher rate than others who are not members of that protected class; and

(d) The complainant is a member of the protected class adversely affected by the respondent's standard or policy and has been harmed by the respondent's application of the standard or policy.

(3) Discrimination based on disability may involve intentional discrimination, including harassment, or discrimination that need not be intentional, including adverse impact or failure to accommodate a disability. To be protected from discrimination based on disability, an individual must have a disability, as defined in ORS 659A.100(1) and (2) and the relevant rules. Reasonable accommodation for purposes of employment is defined in ORS 659A.118 and OAR 839-006-0206. Reasonable accommodation in real property transactions is covered by ORS 659A.145 and OAR 839-006-0410. Reasonable modifications in services, programs or activities and provision of auxiliary aids and services by state government are covered by ORS 659A.142, OAR 839-006-0270 and 0295. Removal of barriers to facilities, goods and services and provision of auxiliary aids by public accommodations are covered by ORS 659A.142 and OAR 839-006-0310 to 0330.

(4) An employer must reasonably accommodate an employee or applicant's religious belief, observance or practice unless the employer can demonstrate that such accommodation would cause undue hardship on the employer's business.

(5) Harassment in employment based on an individual's protected class is a type of intentional unlawful discrimination. In cases of alleged unlawful sexual harassment in employment see OAR 839-005-0030.

(a) Conduct of a verbal or physical nature relating to protected classes other than sex is unlawful when substantial evidence of the elements of intentional discrimination, as described in section (1) of this rule, is shown and:

(A) Such conduct is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment;

(B) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or

(C) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.

(b) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.

(c) Employer Proxy: An employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the employer's president, owner, partner or corporate officer.

(d) Harassment by Supervisor plus Tangible Employment Action: An employer is liable for harassment by a supervisor with immediate or successively higher authority over an individual when the harassment results in a tangible employment action that the supervisor takes or causes to be taken against the individual. A tangible employment action includes, but is not limited to, any of the following:

(A) Terminating employment, including constructive discharge;

(B) Failing to hire;

(C) Failing to promote; or

(D) Changing a term or condition of employment, such as work assignment, work schedule, compensation or benefits or making a decision that causes a significant change in an employment benefit.

(e) Harassment by Supervisor, No Tangible Employment Action: When harassment by a supervisor with immediate or successively higher authority over the individual is found to have occurred, but no tangible employment action was taken, the employer is liable if:

(A) The employer knew of the harassment, unless the employer took immediate and appropriate corrective action.

(B) The employer should have known of the harassment. The division will find that the employer should have known of the harassment unless the employer can demonstrate:

(i) That the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and

(ii) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

(f) Harassment by Coworkers or Agents: An employer is liable for harassment by the employer's employees or agents who do not have immediate or successively higher authority over the complaining individual when the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action.

(g) Harassment by Non-Employees: An employer is liable for harassment by non-employees in the workplace when the employer or the employer's agents knew or should have known of the conduct unless the employer took immediate and appropriate corrective action. In reviewing such cases, the division will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees.

(h) Withdrawn Consent: An employer may be liable for harassment by the employer's supervisory or non-supervisory employees, agents or non-employees even if the acts complained of are of a kind previously consented to by the offended individual, if the employer knew or should have known that the offended individual had withdrawn consent to the offensive conduct.

(i) When employment opportunities or benefits are granted because of an individual's submission to an employer's harassment, the employer is liable for unlawful discrimination against other individuals who were qualified for but denied that opportunity or benefit.

(6) Harassment in Housing and Public Accommodations: Harassment on the basis of a protected class, including sexual harassment, is an unlawful practice in housing and in places of public accommodation when:

(a) Substantial evidence of the elements of OAR 839-005-0010(1) is shown; and

(b) Such conduct has the purpose or effect of creating an intimidating, hostile or offensive environment. The standard for determining whether harassment in housing and in places of public accommodation creates an intimidating, hostile or offensive environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A

Hist.: BL 9-1982, f. & ef. 6-11-82; BL 4-1996, f. & cert. ef. 3-12-96; BLI 6-1998, f. & cert. ef. 10-22-98; BLI 19-2000, f. & cert. ef. 9-15-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 3-2007, f. 1-29-07, cert. ef. 2-2-07

839-005-0021

Gender Discrimination

(1) Employers are not required to treat all employees exactly the same, but are prohibited from using gender as the basis for employment decisions with regard to hiring, promotion or discharge; or in terms, conditions or privileges of employment such as benefits and compensation.

(2) Discrimination because of sex or gender includes sexual harassment, discrimination based on pregnancy, childbirth and medical conditions and occurrences related to pregnancy and childbirth.

(3) In very rare instances, gender may be a bona fide occupational qualification (BFOQ), as defined in OAR 839-005-0045.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.029 & 659A.030

Hist.: BLI 19-2000, f. & cert. ef. 9-15-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-005-0026

Protections and Rights Relating to Pregnancy

(1) Pregnant women are protected from sex discrimination in employment.

(2) In judging the physical ability of an individual to work, pregnant women must be treated the same as males, non-pregnant females and other employees with off-the-job illnesses or injuries.

(3) The statutes prohibit discrimination regarding employee and dependent spouse benefits for pregnancy when employee and dependent spouse benefits exist for other medical conditions.

(4) Women needing to be absent from work because of pregnancy or childbirth may have rights under the Oregon Family Leave Act, as provided in ORS 659A.150 to 659A.186 and OAR 839-009-0200 to 839-009-0320.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.029, 659A.030 & 659A.150 - 659A.186

Hist.: BLI 19-2000, f. & cert. ef. 9-15-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-005-0030

Sexual Harassment

(1) Sexual harassment is unlawful discrimination on the basis of gender and includes the following types of conduct:

(a) Unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's gender and:

(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or

(B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.

(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating a hostile, intimidating or offensive working environment.

(2) The standard for determining whether harassment based on an individual's gender is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.

(3) Employer proxy: A employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer.

(4) Harassment by Supervisor plus Tangible Employment Action: An employer is liable for sexual harassment by a supervisor with immediate or successively higher authority over an individual when the harassment results in a tangible employment action that the supervisor takes or causes to be taken against that individual. A tangible employment action includes but is not limited to the following:

(a) Terminating employment, including constructive discharge;

(b) Failing to hire;

(c) Failing to promote; or

(d) Changing a term or condition of employment, such as work assignment, work schedule, compensation or benefits or making a decision that causes a significant change in an employment benefit.

(5) Harassment by Supervisor, No Tangible Employment Action: When sexual harassment by a supervisor with immediate or successively higher authority over an individual is found to have occurred, but no tangible employment action was taken, the employer is liable if:

(a) The employer knew of the harassment, unless the employer took immediate and appropriate corrective action.

(b) The employer should have known of the harassment. The division will find that the employer should have known of the harassment unless the employer can demonstrate:

(A) That the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and

(B) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

(6) Harassment by Co-Workers or Agents: An employer is liable for sexual harassment by the employer's employees or agents who do not have immediate or successively higher authority over the complaining individual when the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action.

(7) Harassment by Non-Employees: An employer is liable for sexual harassment by non-employees in the workplace when the employer or the employer's agents knew or should have known of the conduct unless the employer took immediate and appropriate corrective action. In reviewing such cases the division will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees.

(8) Withdrawn Consent: An employer is liable for sexual harassment of an individual by the employer's supervisory or non-supervisory employees, agents or non-employees, even if the acts complained of were of a kind previously consented to by the complaining individual, if the employer knew or should have known that the complaining individual had withdrawn consent to the offensive conduct.

(9) When employment opportunities or benefits are granted because of an individual's submission to an employer's sexual advances, requests for sexual favors, or other sexual harassment, the employer is liable for unlawful sex discrimination against other individuals who were qualified for but denied that opportunity or benefit.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.029 & 659A.030

Hist.: BLI 19-2000, f. & cert. ef. 9-15-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 46-2006, f. 12-29-06, cert. ef. 1-3-07

839-005-0035

Constructive Discharge

Constructive discharge occurs when an individual leaves employment because of unlawful discrimination. The elements of a constructive discharge are:

(1) The employer intentionally created or intentionally maintained discriminatory working conditions related to the individual's protected class status;

(2) The working conditions were so intolerable that a reasonable person in the complaining individual's circumstances would have resigned because of them;

(3) The employer desired to cause the complaining individual to leave employment as a result of those working conditions, or knew or should have known that the individual was certain, or substantially certain, to leave employment as a result of the working conditions; and

(4) The complaining individual left employment as a result of the working conditions.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A

Hist.: BLI 19-2000, f. & cert. ef. 9-15-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-005-0045

Bona Fide Occupational Qualification (BFOQ) and Affirmative Action Plan Exceptions

(1) Discrimination is not unlawful if it is based on a bona fide occupational qualification (BFOQ), as provided in ORS 659A.030(1)(a). To prove a BFOQ, the employer must show that the BFOQ is reasonably necessary to the normal operation of the business. If so, the employer must then show:

(a) A factual basis exists for believing that all or substantially all individuals in the protected class adversely affected by the BFOQ would be unable to perform safely and efficiently the tasks required in the job; or

(b) It is impossible or highly impractical to screen applicants on an individual basis.

(2) An employer may not claim a BFOQ for such reasons as:

(a) Customer, co-worker or employer preference;

(b) Stereotypes or assumed characteristics of a protected class.

(3) When discrimination is based on a bona fide voluntary affirmative action plan, it is not unlawful if the plan:

(a) Is a temporary measure;

(b) Has the purpose of eliminating the effects of past discrimination; and

(c) Does not unnecessarily trammel the interests of other protected classes.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.030

Hist.: BLI 19-2000, f. & cert. ef. 9-15-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-005-0050

Successors in Interest

An employer's liability for unlawful discrimination under ORS

659A.030 and OAR 839-005-0010 to 839-005-0045 extends to a successor employer. Determining whether a respondent is a successor employer involves a nine-part test. Not every element of the test need be present to find an employer to be a successor; the facts must be considered together to reach a determination:

- (1) Whether respondent had notice of the charge at the time of acquiring or taking over the business;
- (2) The ability of the predecessor to provide relief;
- (3) Whether there has been a substantial continuity of business operations;
- (4) Whether the respondent uses the same plant as the predecessor;
- (5) Whether respondent uses the same or substantially the same work force as the predecessor;
- (6) Whether respondent uses the same or substantially the same supervisory personnel as the predecessor;
- (7) Whether under respondent the same jobs exist under substantially the same working conditions as under the predecessor;
- (8) Whether respondent uses the same machinery, equipment and methods of production as the predecessor;
- (9) Whether respondent produces the same product as the predecessor.

Stat. Auth.: ORS 659A.805
 Stats. Implemented: ORS 659A
 Hist.: BLI 10-2002, f. & cert. ef. 5-17-02

DIVISION 6

INJURED WORKER AND DISABILITY DISCRIMINATION

Injured Worker Discrimination

839-006-0100

Purpose and Scope

(1) The Civil Rights Division of the Bureau of Labor and Industries enforces the provisions of ORS 659A.040 to 659A.052, prohibiting discrimination against employees who use the Workers' Compensation statutes and providing specific reinstatement and reemployment requirements.

(2) It is an unlawful employment practice for an employer to discriminate against a worker injured on the job who applies for benefits under or in other ways invokes or uses the Oregon Workers' Compensation system. An employer may not discriminate against workers who have testified, are about to give testimony, or who are perceived as having testified in connection with Oregon Workers' Compensation procedures or civil procedures pursuant to ORS 659A.040, 659A.043, 659A.046.

(3) A worker or injured worker claiming a violation under Oregon's injured worker statutes may file a complaint with the Civil Rights Division as provided in OAR 839-003-0025.

Stat. Auth.: ORS 659A.805
 Stats. Implemented: ORS 659A.040 - 659A.052
 Hist.: BL 1-1983, f. & ef. 1-26-83; BL 4-1996, f. & cert. ef. 3-12-96; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0105

Definitions

(1) "Attending physician" means a physician primarily responsible for the treatment of a worker's on-the-job injury as described in ORS 656.005(12).

(2) "Bureau" means the Bureau of Labor and Industries.

(3) "Demand" means the injured worker informing the employer that the worker seeks reinstatement or reemployment.

(4) "Division" means the Civil Rights Division of the Bureau of Labor and Industries.

(5) "Injured worker" means a worker who has a compensable injury as defined in ORS 656.005(7)(a). Injured worker, for purposes of ORS 659A.040, includes a worker who has invoked the protection of the Oregon Workers' Compensation statutes. Injured worker, for the purposes of reinstatement rights under ORS 659A.043, does not include:

(a) A worker hired on a temporary basis as a replacement for an injured worker;

(b) A seasonal worker hired for and actually employed for less

than six months in a calendar year; or

(c) A worker whose employment at the time of the injury resulted from working short terms of employment as the result of referral by a hiring hall operating pursuant to a collective bargaining agreement.

(6) "Invoke," as used in ORS 659A.040, includes, but is not limited to, a worker's reporting of an on-the-job injury or a perception by the employer that the worker has been injured on the job or will report an injury.

(7) "Release to the former position" means a release to the position a worker held prior to an on-the-job injury as provided in ORS 659A.043.

(8) "Release to an available, suitable position" means a release to work that meets an injured worker's medical restrictions and for which the worker possesses the necessary skills and abilities as provided in ORS 659A.046. An available, suitable position may vary in duties or hours from the worker's former position and may be a different position or a modified version of the injured worker's former position. An available, suitable position is paid at the rate normally paid by the employer for that position.

(9) "Physician" means a person duly licensed to practice medicine or osteopathy and includes the services of a chiropractor for up to 30 days from the date of the injured worker's first visit on a claim or for 12 visits, whichever occurs first.

(10) "Supervisor" means a person exercising direct supervisory authority over a worker's position.

(11) "Worker" means any person, including a minor, whether lawfully or unlawfully employed, engaged to furnish services for remuneration, subject to the direction and control of an employer. A worker also includes salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, whether or not the worker is supervised by the employer. For the purposes of ORS 659A.040, worker also includes an applicant for a job. A worker does not include any person whose services are performed as an inmate or ward of a state institution or any person whose services are performed as part of the eligibility requirements for a public assistance grant, as provided in ORS 656.005(30).

Stat. Auth.: ORS 659A.805
 Stats. Implemented: ORS 659A.040 - 659A.052
 Hist.: BL 1-1983, f. & ef. 1-26-83; BL 13-1990(Temp), f. & cert. ef. 9-4-90; BL 3-1991, f. 2-12-91, cert. ef. 2-15-91; BL 4-1996, f. & cert. ef. 3-12-96; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0115

Covered Employees and Employers

(1) As provided in ORS 659A.040, an employer may not discriminate against employees or applicants with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in ORS Chapter 656 or ORS 659A.040 to 659A.052 or has given testimony, is about to give testimony or is perceived as having testified under the provisions of such sections. As provided in ORS 659A.046, an employer must reemploy an injured worker who is unable to perform the duties of the worker's former position to an available, suitable position. "Employer" for the purposes of ORS 659A.040 and 659A.046 includes persons employing six or more employees on a full-time, part-time or seasonal basis at one of the following times:

(a) At the time of the worker's on-the-job injury;

(b) At the time of the injured worker's demand for reemployment under ORS 659A.046; or

(c) At the time of the discriminatory act alleged under ORS 659A.040.

(2) As provided in ORS 659A.043, an employer must reinstate an injured worker to the worker's former position. If the former position no longer exists the employer must offer the worker a vacant, suitable position. "Employer" for the purposes of ORS 659A.043 are those employing 21 or more workers at one of the following times:

(a) At the time of the worker's on-the-job injury; or

(b) At the time of the worker's demand for reinstatement to the worker's former position under ORS 659A.043.

(3) The "six or more persons" referred to in section (1) and the "21 or more employees" referred to in section (2) need not be employed within Oregon.

Stat. Auth.: ORS 659A.805
 Stats. Implemented: ORS 659A.100, 659A.040, 659A.043 - 659A.046 & 659A.049

Hist.: BL 1-1983, f. & cf. 1-26-83; BL 13-1990(Temp), f. & cert. ef. 9-4-90; BL 3-1991, f. 2-12-91, cert. ef. 2-15-91; BL 4-1996, f. & cert. ef. 3-12-96; BL 10-1996, f. & cert. ef. 12-4-96; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0117

Prohibited Discrimination

(1) Pursuant to ORS 659A.040, unlawful employment practices include:

(a) Refusal to hire or promote, to bar or discharge from employment or to discriminate in compensation, terms, conditions or privileges of employment because a person applies for benefits under or in other ways invokes or uses Oregon Worker's Compensation system as provided for in ORS Chapter 656.

(b) Discriminating against a person who has testified, is about to give testimony, or who is perceived as having testified in connection with Oregon Worker's Compensation procedures or civil procedures pursuant to ORS 659A.040, 659A.043 and 659A.046.

(2) Pursuant to ORS 659A.030(1)(g), it is an unlawful employment practice for a person, whether an employer or employee, to aid, abet, incite, compel or coerce an individual to do any of the acts forbidden by ORS 659A.040 to 659A.052, or attempt to do so.

(3) When disciplining workers for excessive absenteeism, an employer cannot count the time an injured worker is off the job because of a compensable injury when calculating the injured worker's absenteeism rate, as long as the time off the job is covered by time loss compensation or are absences medically certifiable by the attending physician in connection with the compensable injury.

(4) A person claiming a violation under Oregon's injured worker statutes may file a complaint with the Civil Rights Division as provided in OAR 839-003-0025.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.030(1)(g), 659A.040 & 659A.820

Hist.: BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0130

Injured Worker Reinstatement Under ORS 659A.043

(1) An employer with 21 or more employees at the time of a worker's on-the-job injury or at the time an injured worker demands reinstatement to the former position must reinstate the worker to the worker's former position if:

(a) The injured worker's former position still exists (has not been eliminated for bona fide reasons). The former position "exists" even though the position may have been renamed or reclassified;

(b) The injured worker's former position is available. A worker's former position is "available" even if that position has been filled by a replacement worker while the injured worker was absent and regardless of the employer's possible preference for the replacement worker;

(c) The injured worker is physically able to perform the duties of the former position; and

(d) Timely demand is made as provided in OAR 839-006-0130(5)(d).

(2) If the former position exists but is not available (due to seniority or other employment restrictions contained in a valid collective bargaining agreement that the injured worker does not meet), the employer must offer the injured worker a vacant, suitable position.

(a) For the purposes of ORS 659A.043, a suitable position is one that is most similar to the former position in compensation, duties, responsibilities, skills, location, duration (full or part-time, temporary or permanent), and shift.

(b) If a suitable position is not available at the worker's normal work location the employer must consider vacant, suitable positions in all the employer's facilities within reasonable commuting distance, not just the facility where the injured worker was previously employed.

(c) Prior to beginning a vacant, suitable position, the injured worker has the right to discuss position duties with the employer and to receive written clarification of the specific duties.

(3) At the time of the injured worker's demand for reinstatement, if the worker's former position no longer exists and no other position exists that is vacant and suitable, the injured worker must follow the employer's reporting policy until the employer offers the worker the former position or a vacant, suitable position. The employer's reporting policy must be written, non-discriminatory and effectively made known to the employer's work force. If the employer has no such reporting policy, the employer may require the injured worker to

inform the employer of any change in address and telephone number within ten days of the change, provided the employer gives prior written notice of this requirement to the injured worker.

(4) An attending physician's approval for an injured worker's return to the former position is prima facie evidence of the injured worker's physical ability to perform the duties of the former position. The employer may require the worker to provide physician approval in writing prior to reinstatement.

(a) In addition to physician approval, the employer may require, within a reasonable period of time and at the employer's expense, further evidence of the injured worker's physical ability to perform the duties of the former position. The employer may, in a manner consistent with worker's compensation regulations, consult the worker's attending physician regarding the worker's condition as it relates to the worker's ability to perform the duties of the former position.

(b) The employer may not question the attending physician's release as a subterfuge to avoid employer responsibilities under ORS 659A.043.

(5) The injured worker must make demand for reinstatement to the former position according to the employer's written policy effectively made known to the employer's workforce. If the employer has no such policy, the injured worker's demand:

(a) May be oral or written;

(b) Must be made to a supervisor, personnel officer or person in management;

(c) May be made by the injured worker or the injured worker's attorney; and

(d) May be made at any time after the attending physician has released the injured worker for reinstatement to the former position, but no later than seven calendar days after receiving certified mail notice from the insurer or self-insured employer that the worker's attending physician has released the worker for return to the worker's former position. For purposes of this section, receipt of notice is deemed to have occurred on the day the worker signs a receipt for the mailing or three days following the deposit of the certified mail with the U.S. Postal Service, whichever occurs first, provided such mail is sent to the worker's last known address and that address is within the state. If the worker's last known address is outside of the state, the date of notice is the date the worker signs a receipt for the mailing or seven days after the mailing, whichever occurs first.

(6) Extenuating circumstances may, in very rare instances, extend the time allowed for timely demand for reinstatement.

(7) When the injured worker has not made demand for reinstatement to the former position because the employer has made it known to the worker that reinstatement will not be considered, even if a suitable position is vacant, and that an actual demand would therefore be futile, the division will deem the worker to have made timely demand.

(8) The right of reinstatement is guaranteed by ORS 659A.043. Conditions of reinstatement are subject to seniority and other employment restrictions contained in a valid collective bargaining agreement.

(9) If the injured worker's former position no longer exists, and there is no vacant, suitable position, the employer has no obligation to create a position for a returning injured worker. If the employer creates such a position, the position may be discontinued at any time.

(10) Except as provided in these rules, an injured worker has no greater right to a position or other employment benefit than if the worker had not been injured.

(11) The duty under ORS 659A.043 to reinstate an injured worker to the worker's former position extends to a successor employer to the worker's employer at the time of injury. Determining whether a respondent is a successor employer involves a nine-part test. Not every element of the test need be present to find an employer to be a successor; the facts must be considered together to reach a determination:

(a) Whether respondent had notice of the injured worker at the time of acquiring or taking over the business;

(b) The ability of the predecessor to reinstate the injured worker;

(c) Whether there has been a substantial continuity of business operations;

(d) Whether the respondent uses the same plant as the predecessor;

(e) Whether respondent uses the same or substantially the same work force as the predecessor;

(f) Whether respondent uses the same or substantially the same supervisory personnel as the predecessor;

- (g) Whether under respondent the same jobs exist under substantially the same working conditions as under the predecessor;
- (h) Whether respondent uses the same machinery, equipment and methods of production as the predecessor;
- (i) Whether respondent produces the same product as the predecessor.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.043

Hist.: BL 1-1983, f. & ef. 1-26-83; BL 3-1986, f. & ef. 4-7-86; BL 13-1990(Temp), f. & cert. ef. 9-4-90; BL 3-1991, f. 2-12-91, cert. ef. 2-15-91; BL 4-1996, f. & cert. ef. 3-12-96; BL 10-1996, f. & cert. ef. 12-4-96; BL 2-1998, f. & cert. ef. 2-3-98; BL 15-2000, f. & cert. ef. 8-11-00; BL 10-2002, f. & cert. ef. 5-17-02

839-006-0131

Loss of Reinstatement Rights Under ORS 659A.043

(1) An injured worker meeting the requirements for reinstatement under ORS 659A.043 loses the right to reinstatement to the worker's former position when any of the following occurs:

- (a) An attending physician or a medical arbiter determines the injured worker is medically stationary, but not physically able to return to the worker's former position;
- (b) The worker is eligible for and participates in vocational assistance under ORS 656.340;
- (c) The worker accepts suitable employment with another employer after becoming medically stationary;
- (d) The worker refuses a bona fide offer from the employer of light duty of modified employment which is suitable prior to becoming medically stationary;
- (e) The worker fails to make demand for reinstatement to the former position within seven days of receiving certified notice from the insurer or self-insured employer that the worker's attending physician has released the worker to the former position, as provided in OAR 839-006-0130(5)(d);

(f) Three years have elapsed from the date of injury;

(g) The worker is discharged for bonafide reasons not connected with the injury and for which others are or would be discharged; or

(h) The worker clearly and unequivocally abandons employment with the employer.

(2) The right to reinstatement does not apply to:

(a) A worker hired on a temporary basis as a replacement for an injured worker;

(b) A seasonal worker hired for and actually employed for less than six months in a calendar year; or

(c) A worker whose employment at the time of injury resulted from referral to short-term employment from a hiring hall operating pursuant to a collective bargaining agreement.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A

Hist.: BL 4-1996, f. & cert. ef. 3-12-96; BL 15-2000, f. & cert. ef. 8-11-00; BL 10-2002, f. & cert. ef. 5-17-02; BL 11-2006(Temp), f. 3-16-06, cert. ef. 3-17-06 thru 9-8-06; Administrative correction 9-21-06; BL 34-2006, f. 10-3-06, cert. ef. 10-4-06

839-006-0135

Injured Worker Reemployment Under ORS 659A.046

(1) An employer with six or more employees at the time of the worker's on-the-job injury or at the time of the injured worker's demand for reemployment must reemploy an injured worker not physically able to perform the worker's former position to an available, suitable position if:

(a) The injured worker is medically released to perform the duties of the available, suitable position; and

(b) Timely demand is made as provided in OAR 839-006-0135(8)(d).

(2) For the purposes of ORS 659A.046, an available position is one that is vacant and for which the worker meets seniority or other employment restrictions contained in any applicable valid collective bargaining agreement.

(3) For the purposes of ORS 659A.046, a suitable position is one that meets the injured worker's medical restrictions and for which the worker possesses the necessary skills and abilities. A suitable position is as similar as practicable to the worker's former position in compensation, duties, responsibilities, skills, location, duration (full or part-time, temporary or permanent) and shift. A suitable position under ORS 659A.046 is paid at the rate normally paid by the employer for that position.

(4) Prior to beginning an available, suitable position, the injured

worker has the right to discuss the duties of the available, suitable position with the employer and to receive written clarification of the specific duties.

(5) Notwithstanding OAR 839-006-0136(6), an injured worker who meets the requirements of ORS 659A.046 and who has been placed in an available, suitable position is entitled to remain in the position, provided the worker's restrictions continue to allow the worker to perform the duties of the position and the position is not eliminated for bonafide reasons. If an injured worker recovers to the point that the worker can perform the duties of the worker's former position, the worker must make timely demand for reinstatement to the former position, subject to OAR 839-006-0130.

(6) At the time of the injured worker's demand for reemployment, a suitable position may not be available. When this occurs, the injured worker must follow the employer's reporting policy until the employer offers the injured worker an available, suitable position. The employer's reporting policy must be written, non-discriminatory, and effectively made known to the employer's work force. If the employer has no such reporting policy, the employer may require the injured worker to inform the employer of any change in address and telephone number within ten days of the change, provided the employer gives prior written notice of this requirement to the injured worker.

(a) If an employer has no suitable position available, the employer has no obligation to create a position for a returning injured worker. If the employer creates such a position, the position may be discontinued at any time. A modified version of the worker's former position is not a created position.

(b) If a suitable position is not available at the time an injured worker's attending physician finds the worker to be medically stationary but unable to perform the duties of the former position, the injured worker continues to retain the right to be reemployed in an available, suitable position for three years from the date of the injury, provided no other conditions of OAR 839-006-0136 have occurred.

(7) An attending physician's approval for an injured worker's return to an available, suitable position is prima facie evidence of the injured worker's physical ability to perform the available, suitable position. The employer may require the worker to provide physician approval in writing prior to reemployment to the available, suitable position.

(a) The employer may require, within a reasonable period of time and at the employer's expense, further evidence of the worker's physical ability to perform the available, suitable position. The employer may, consistent with worker's compensation regulations, consult the worker's attending physician regarding the worker's condition as it relates to the worker's ability to perform the available, suitable position.

(b) The employer may not question the attending physician's release as a subterfuge to avoid employer responsibilities under ORS 659A.046.

(8) The injured worker must make demand for reemployment to an available, suitable position according to the employer's written policy effectively made known to the employer's workforce. If the employer has no such policy, the injured worker's demand:

(a) May be oral or written;

(b) Must be made to a supervisor, personnel officer or person in management;

(c) May be made by the injured worker or the injured worker's attorney; and

(d) May be made any time after the attending physician has released the injured worker to an available, suitable position, but no later than seven calendar days after receiving certified mail notice from the insurer or self-insured employer that the worker's attending physician has released the worker for reemployment to an available, suitable position. For purposes of this section, receipt of notice is deemed to have occurred on the day the worker signs a receipt for the mailing or three days following the deposit of the certified mail with the U.S. Postal Service, whichever occurs first, if such mail is sent to the worker's last known address and that address is within the state. If the worker's last known address is outside the state, the date of notice is the date the worker signs a receipt for the mailing or seven days after the mailing, whichever occurs first;

(9) Extenuating circumstances may, in very rare instances, extend the time allowed for timely demand for reemployment.

(10) When the injured worker has not made demand for reem-

ployment to an available, suitable position because the employer has made it known to the worker that reemployment will not be considered even if a suitable position is available and that an actual demand would therefore be futile, the division will deem the worker to have made timely demand.

(11) The right of reemployment is guaranteed by ORS 659A.046. Conditions of reemployment are subject to seniority and other employment restrictions contained in a valid collective bargaining agreement.

(12) Except as provided in these rules, an injured worker has no greater right to a position or other employment benefit than if the worker had not been injured.

(13) The duty under ORS 659A.046 to reemploy an injured worker to an available, suitable position extends to a successor employer to the worker's employer at the time of injury. Determining whether a respondent is a successor employer involves a nine-part test. Not every element of the test need be present to find an employer to be a successor; the facts must be considered together to reach a determination:

- (a) Whether respondent had notice of the injured worker at the time of acquiring or taking over the business;
- (b) The ability of the predecessor to reemploy the injured worker;
- (c) Whether there has been a substantial continuity of business operations;
- (d) Whether the respondent uses the same plant as the predecessor;
- (e) Whether respondent uses the same or substantially the same work force as the predecessor;
- (f) Whether respondent uses the same or substantially the same supervisory personnel as the predecessor;
- (g) Whether under respondent the same jobs exist under substantially the same working conditions as under the predecessor;
- (h) Whether respondent uses the same machinery, equipment and methods of production as the predecessor;
- (i) Whether respondent produces the same product as the predecessor.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.046

Hist.: BL 1-1983, f. & ef. 1-26-83; BL 3-1986, f. & ef. 4-7-86; BL 13-1990(Temp), f. & cert. ef. 9-4-90; BL 3-1991, f. 2-12-91, cert. ef. 2-15-91; BL 4-1996, f. & cert. ef. 3-12-96; BL 2-1998, f. & cert. ef. 2-3-98; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0136

Loss of Reemployment Rights Under ORS 659A.046

An injured worker meeting the requirements for reemployment under ORS 659A.046 loses the right to reemployment to an available, suitable position when any of the following occurs:

- (1) The worker's attending physician or a medical arbiter determines, after the worker is medically stationary, that the worker cannot return to reemployment at any position with the employer;
- (2) The worker is eligible for and participates in vocational assistance under ORS 656.340;
- (3) The worker accepts suitable employment with another employer after becoming medically stationary;
- (4) The worker refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary.
- (5) The worker fails to make demand for reemployment to an available, suitable position within seven days of receiving certified mail notice from the insurer or self-insured employer that the worker's attending physician has released the worker for reemployment to an available, suitable position, as provided in OAR 839-006-0135(8)(d);
- (6) Three years have elapsed from the date of injury;
- (7) The worker is discharged for bona fide reasons not connected with the injury and for which others are or would be discharged; or
- (8) The worker clearly and unequivocally abandons employment with the employer.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.046

Hist.: BL 4-1996, f. & cert. ef. 3-12-96; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 22-2005(Temp), f. 10-26-05, cert. ef. 10-27-05 thru 4-24-06; BLI 10-2006, f. 3-16-06, cert. ef. 3-20-06

839-006-0145

Suitable Employment

- (1) An employer required to return an injured worker to a vacant,

suitable position under ORS 659A.043 or an available, suitable position under 659A.046, is not required to offer the worker a selection of suitable positions.

(2) In determining whether a particular position is suitable, the division will consider the employer's size, diversity, nature and pattern of position openings and whether the injured worker is qualified to perform the position.

(3) "Qualified" means:

(a) The injured worker meets minimum standards used by the employer to fill the position;

(b) The injured worker has performed the position in an acceptable manner; or

(c) The injured worker would be qualified for the position with the same training given to another worker newly placed in the position.

(4) For the purposes of ORS 659A.043, a "suitable position" is one that is most similar to the former position in compensation, duties, responsibilities, skills, location, duration (full or part-time, temporary or permanent), and shift. For the purposes of ORS 659A.046, a "suitable position" also meets the injured worker's medical restrictions.

(a) "Similar compensation" is the normal compensation the employer pays to others of the same education, skill and seniority employed in that position. This compensation may be greater than, the same as, or less than the rate the injured worker was earning at the time of injury, provided that it is not a subterfuge for the employer to avoid responsibilities;

(b) "Similar location" means that the position is within reasonable commuting distance, except where the former work site is no longer in operation or the nature of the employer's business routinely involves the transfer of employees. A position outside of Oregon is suitable if the worker and employer mutually agree.

(5) An employer is neither required to offer nor prohibited from offering a position that would promote the returning injured worker. A managerial or supervisory position is suitable for a returning injured worker whose former position was managerial or supervisory. Should a returning injured worker compete or bid for a managerial or supervisory position, nothing in this rule allows the employer to use the injury as a reason to discriminate against the worker.

(6) The employer may assign the injured worker to different duties at the worker's regular compensation provided that:

(a) The assignment is temporary and is part of a return-to-work program;

(b) The worker is returned to available and suitable work when the worker is physically capable; and

(c) The assignment is not a subterfuge for the employer to avoid responsibilities.

(7) If an employer offers a position that the injured worker believes the worker is physically unable to perform, the worker is not required to accept the position, but must provide verbal or written notice to the employer that the worker believes the worker is physically unable to perform the duties of the position. The employer may offer a suitable position or may require the worker to provide medical evidence of the worker's inability to perform the duties of the position. If an employer requires medical verification, the employer must give the worker written notice that the worker has 20 calendar days from the receipt of the notice to provide medical evidence of the worker's physical inability to perform the duties of the position.

(8) If an injured worker accepts an offer of suitable work and, after beginning the position, the worker is physically unable to perform the duties of the position, the worker must provide verbal or written notice to the employer that the worker believes the worker is physically unable to perform the duties of the position. The employer may offer a suitable position or may require the worker to provide medical evidence of the worker's inability to perform the duties of the position. If an employer requires medical verification, the employer must give the worker written notice that the worker has 20 calendar days from the receipt of the notice to provide medical evidence of the worker's physical inability to perform the duties of the position.

(9) If an employer offers an injured worker a position that the worker considers not suitable for reasons other than physical ability, the worker must accept the offered position. The worker must then provide verbal or written notice to the employer that the worker considers the position not suitable. The employer may offer a suitable position or may require the worker to provide the reasons, under the criteria of section (4) of this rule, that the worker considers the position

not suitable. If the employer requires such information, the employer must give the worker written notice that the worker has 20 calendar days from the receipt of the notice to provide the reasons in writing.

(10) When an injured worker timely provides the evidence required in sections (7), (8) and (9) of this rule, the position will be considered not suitable and the employer must make a suitable position offer as required under ORS 659A.043 or 659A.046. If the worker fails to timely provide the information requested under sections (7), (8) and (9) of this rule, or the information is not sufficient, the position will be considered suitable.

(11) If the employer and the injured worker disagree about the suitability of an offered position, and the worker files a complaint as provided by statute and these rules, the division will determine the position's suitability.

(12) The Civil Rights Division may accept a complaint where a worker did not object to the position offered by the employer as required in sections (7), (8) and (9) of this rule when the worker had a verifiable, legitimate fear that an objection to the offered position would result in an adverse employment action.

(13) If an injured worker makes a timely demand for reemployment to an available, suitable position under ORS 659A.046, an employer is required to review all position vacancies for three years from the date of injury and to offer the injured worker the first available, suitable position provided no other conditions of OAR 839-006-0136 have occurred.

(14) If the injured worker's former position has been eliminated for bona fide reasons, and the worker makes a timely demand for reinstatement to the worker's former position under ORS 659A.043, an employer is required to review all position vacancies for three years from the date of injury and to offer the injured worker the first vacant, suitable position provided no other conditions of OAR 839-006-0131 have occurred.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.043 & 659A.046

Hist.: BL 1-1983, f. & ef. 1-26-83; BL 13-1990(Temp), f. & cert. ef. 9-4-90; BL 3-1991, f. 2-12-91, cert. ef. 2-15-91; BL 4-1996, f. & cert. ef. 3-12-96; BL 2-1998, f. & cert. ef. 2-3-98; BLI 14-1999 f. & cert. ef. 10-6-99; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 9-2006, f. 3-16-06, cert. ef. 3-20-06

839-006-0146

Injured Temporary Workers and Employer Responsibilities

Subject to these rules regarding position availability and suitability, and except as otherwise provided in a valid collective bargaining agreement:

(1) A worker serving on probationary or trial service status (whether due to initial hire, promotion or disciplinary measures) when a compensable injury occurs, has the same rights under ORS 659A.043 and 659A.046 as other injured workers. Upon return to work, however, the injured worker resumes the worker's probationary or trial service status unless the employer waives such status.

(2) A seasonal worker must be employed by an employer for at least six months in a calendar year to be eligible for reinstatement to the former position under ORS 659A.043. This requirement does not apply to seasonal workers seeking reemployment to an available, suitable position under ORS 659A.046. If the employment season ends prior to a seasonal worker's release to the former position under ORS 659A.043, or to an available, suitable position under ORS 659A.046, reinstatement or reemployment is deferred until the next season.

(3) A worker hired on a temporary basis as a replacement for an injured worker, and who is injured while in the temporary replacement position, does not have reinstatement rights under ORS 659A.043.

(4) A worker employed in a limited-duration or temporary position has reinstatement and reemployment rights under ORS 659A.043 and 659A.046 as follows:

(a) Under ORS 659A.043, a worker injured on the job while employed for a limited duration and released to the worker's former position must be reinstated to the former position, from the date of timely demand until the date the limited duration was originally set to expire;

(b) Under ORS 659A.043, a worker injured on the job while employed in a temporary position ending at the completion of a defined task, and released to the former position, must be reinstated to the former position from the date of timely demand until the task is completed;

(c) Under ORS 659A.046, a worker injured on the job while

employed for a limited duration and released to an available, suitable position must be reemployed in the next available, suitable position from the date of timely demand until the date the limited duration was originally set to expire;

(d) Under ORS 659A.046, a worker injured on the job while employed in a temporary position ending at the completion of a defined task and released to an available, suitable position must be reemployed in the next available, suitable position from the date of timely demand until the task is completed.

(5) Nothing in this rule prevents an employer from extending the original period of employment in the worker's favor.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.043 & 659A.046

Hist.: BL 1-1983, f. & ef. 1-26-83; BL 13-1990(Temp), f. & cert. ef. 9-4-90; BL 3-1991, f. 2-12-91, cert. ef. 2-15-91; BL 4-1996, f. & cert. ef. 3-12-96; BL 2-1998, f. & cert. ef. 2-3-98; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0150

Retention and Loss of Reinstatement and Reemployment Rights

(1) An injured worker does not lose the right to reinstatement or reemployment under ORS 659A.043 or 659A.046 if:

(a) An employer discharges all employees who are off the job for a certain amount of time and discharges the injured worker under this policy for time off covered by time-loss compensation or for absences medically certifiable by the attending physician in connection with the compensable injury.

(b) An employer discharges the injured worker for reasons other than for cause;

(c) An injured worker quits or resigns involuntarily or under mistake of fact;

(d) An injured worker making a timely demand for reinstatement or reemployment takes a position that is not suitable with another employer while waiting for a suitable position to become available; or

(e) An injured worker, physically unable to perform the duties of the worker's former position, accepts an available, suitable position with the same employer under ORS 659A.046 and these rules.

(2) If an injured worker recovers to the point that the worker can perform the duties of the worker's former position, the worker must make timely demand for reinstatement to the former position, subject to the requirements of OAR 839-006-0130.

(3) If an injured worker is unable to perform the duties of the former position but is released by the attending physician to perform duties that meet the workers medical restrictions, the worker must make timely demand for reemployment to an available, suitable position, subject to the requirements of OAR 839-006-0135.

(4) Compliance with the duty to mitigate damages by seeking employment with another employer will not extinguish an injured worker's reinstatement rights, except when the injured worker acquires and commences suitable employment with another employer after becoming medically stationary.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.040, 659A.043 & 659A.046

Hist.: BL 1-1983, f. & ef. 1-26-83; BL 13-1990(Temp), f. & cert. ef. 9-4-90; BL 3-1991, f. 2-12-91, cert. ef. 2-15-91; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

Disability Discrimination in Employment

839-006-0200

Purpose and Scope

(1) It is the policy of the State of Oregon to guarantee disabled persons the fullest possible participation in the social and economic life of the state, including employment. The people of Oregon have the right to employment without discrimination due to disability.

(2) It is an unlawful employment practice for any employer to refuse to hire or promote, to bar or discharge from employment or to discriminate in compensation, terms, conditions or privileges of employment because an otherwise qualified person is disabled.

(3) Prohibited discrimination includes, but is not limited to:

(a) Limiting, segregating or classifying disabled applicants or employees in a way that adversely affects opportunities or status;

(b) Participating in a contractual or other arrangement with the effect of discriminating against disabled applicants or employees, including but not limited to, relationships with employment or referral agencies, labor unions, organizations providing fringe benefits, or

training and apprenticeship programs;

(c) Utilizing standards, criteria or methods of administration that have the effect of discrimination against disabled applicants or employees;

(d) Excluding or denying equal employment or benefits to an otherwise qualified person because the person is known to have an association with a disabled person;

(e) Failing to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified disabled applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the business of the employer;

(f) Using qualification standards, tests or other criteria that screen out or tend to screen out a disabled person or a class of disabled persons unless the standard, test or other selection criterion, as used by the employer, is job related for the position in question and is consistent with business necessity;

(g) Failing to select and administer tests in a way that accurately reflects the skills and aptitude of applicants or employees with disabilities that impair sensory, manual or speaking skills. An employer may, however, administer tests measuring sensory, manual and speaking skills of applicants and employees.

(4) It is an unlawful employment practice for an employment agency to:

(a) Fail or refuse to refer for employment, or otherwise discriminate against an individual because that individual is disabled; or

(b) Classify or refer an individual for employment because that individual is disabled.

(5) It is an unlawful employment practice for a labor organization to exclude or to expel from its membership, or to discriminate in any way against an individual because that individual is disabled.

(6) It is an unlawful employment practice for any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden by ORS 659A.142 and 659A.112 to 659A.139.

(7) It is an unlawful employment practice for any person, whether an employer or an employee, to aid, abet, incite, compel or coerce an individual to do any of the acts forbidden by ORS 659A.142 and 659A.112 to 659A.139 or to attempt to do so.

(8) The Civil Rights Division of the Bureau of Labor and Industries has the responsibility to protect disabled employees' and applicants' rights through the enforcement of ORS 659A.142 and 659A.112 to 659A.139. OAR 839-006-0200 to 839-006-0265 interpret these statutes and apply to all complaints and inquiries relating to these statutes received on or after the effective date of these rules.

(9) A person claiming a violation of ORS 659A.142 and 659A.112 to 659A.139 may file a complaint with the Civil Rights Division as provided in OAR 839-003-0025.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.100, 659A.103, 659A.142 & 659A.112 - 659A.139

Hist.: BL 2-1984, f. & ef. 1-31-84; BL 4-1996, f. & cert. ef. 3-12-96; BL 2-1998, f. & cert. ef. 2-3-98; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0205

Definitions

(1) "Disability" means, with respect to a person:

(a) A physical or mental impairment that substantially limits one or more major life activities;

(b) A record of such an impairment; or

(c) Being regarded as having such an impairment.

(2) "Employer" means any person that employs six or more persons and includes the state, counties, cities, districts, authorities, public corporations and entities and their instrumentalities, except the Oregon National Guard, as provided in ORS 659A.106. The "six or more persons" need not be employed within Oregon.

(3) "Employment agency" includes any person undertaking to procure employees or opportunities to work.

(4) "Essential functions" are the fundamental duties of a position a person with a disability holds or desires.

(a) A job function may be essential for any of several reasons, including but not limited to, the following:

(A) The position exists to perform that function;

(B) A limited number of employees is available to carry out the essential function; or

(C) The function is highly specialized so that the position incumbent was hired for the expertise or ability required to perform the function.

(b) Evidence of whether a particular function is essential includes but is not limited to:

(A) The amount of time spent performing the function;

(B) The consequences of not performing the function;

(C) The terms of a collective bargaining agreement;

(D) The work experience of past incumbents in the job; and

(E) The current work experience of incumbents in similar jobs.

(5) "Labor organization" includes any organization constituted for the purpose, in whole or in part, of collective bargaining or dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employees.

(6) "Major life activity" includes, but is not limited to, self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

(a) Examples of specific major life activities include, but are not limited to, walking, sitting, standing, lifting, reaching, speaking, interacting with others, thinking, seeing, hearing, breathing, learning, reading, eating, sleeping, performing manual tasks, reproduction and working.

(b) To be substantially limited in the major life activity of working, a person must be significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to the ability of an average person with comparable skill, experience, education or other job-related requirements needed to perform those same positions.

(7) "Medical," as used in ORS 659A.133 and 659A.136 and these rules, means any information, whether oral, written or electronic that:

(a) Is created or received by an employer; and

(b) Relates to the past, present, or future physical or mental health status or condition of a person.

(8) "Misclassified," as used in ORS 659A.100(2)(b), means an erroneous or unsupported medical diagnosis, report, certificate or evaluation.

(9) An "otherwise qualified person with a disability" is a person with a disability who satisfies the requisite skill, experience, education and other job-related requirements of a position that the person holds or desires, and who can, with or without reasonable accommodation, perform the position's essential functions.

(10) "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, traumatic brain injury, emotional or mental illness, and specific learning disabilities.

(11) "Reasonable accommodation" is defined in OAR 839-006-0206.

(12) "Substantially limits" means:

(a) The impairment renders the person unable to perform a major life activity that the average person in the general population can perform; or

(b) The impairment significantly restricts the condition, manner or duration under which a person can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

(c) Factors that could affect whether an impairment "substantially limits a major life activity" include, but are not limited to, the presence of other impairments that combine to make the impairment disabling.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.100, 659A.103, 659A.142, 659A.112 - 659A.139

Hist.: BL 2-1984, f. & ef. 1-31-84; BL 15-1990, f. 10-29-90, cert. ef. 11-1-90; BL 4-1996, f. & cert. ef. 3-12-96; BL 2-1998, f. & cert. ef. 2-3-98; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 9-2006, f. 3-16-06, cert. ef. 3-20-06; BLI 4-2007, f. 1-29-07, cert. ef. 2-1-07

839-006-0206

Reasonable Accommodation

(1) "Reasonable Accommodation" means modifications or adjustments:

(a) To a job application process that enable an otherwise qualified

applicant with a disability to be considered for the position;

(b) To the work environment, or to the manner or circumstances under which a position is customarily performed, that enable an otherwise qualified employee or applicant with a disability to perform the position's essential functions; or

(c) That enable an otherwise qualified employee or applicant with a disability to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated employees without a disability.

(2) Reasonable accommodation of an otherwise qualified employee or applicant with a disability may include, but is not limited to:

(a) Making existing facilities used by employees readily accessible to and usable by an employee with a disability;

(b) Providing job restructuring, such as part-time or modified work schedules or reassignment to vacant positions;

(c) Acquiring or modifying equipment or devices;

(d) Appropriately adjusting or modifying examinations, training materials or policies;

(e) Providing qualified readers or interpreters; or

(f) Providing a leave of absence.

(3) Failure of an employer to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee or applicant with a disability who requests reasonable accommodation or otherwise discloses to the employer a disability that may require reasonable accommodation, will be found to be prohibited discrimination unless the employer can demonstrate that reasonable accommodation would impose an undue hardship on the business of the employer. Undue hardship is defined at ORS 659A.121.

(4) Once an otherwise qualified employee or applicant with a disability has requested reasonable accommodation or otherwise disclosed to the employer a disability that may require reasonable accommodation, the employer has a duty to initiate a meaningful interactive process with the employee or applicant to determine whether reasonable accommodation would allow the employee or applicant to perform the essential functions of a position held or sought.

(5) A meaningful interactive process is an informal process between an otherwise qualified employee or applicant with a disability and an employer in an effort to identify potential reasonable accommodation.

(a) An interactive process between an employee or applicant with a disability and an employer, that readily identifies mutually agreeable reasonable accommodation, is a meaningful interactive process.

(b) When reasonable accommodation is not readily identifiable, a meaningful interactive process identifies the nature of the limitations resulting from the disability, relevant to potential reasonable accommodation that could allow the employee or applicant to perform the essential functions of the job.

(6) A meaningful interactive process is a mandatory step in the reasonable accommodation of an otherwise qualified employee or applicant with a disability. Failure of an employer to engage in a meaningful interactive process with an otherwise qualified employee or applicant with a disability who has requested reasonable accommodation or has otherwise disclosed to the employer a disability that may require reasonable accommodation is a failure to reasonably accommodate in violation of ORS 659A.112(2)(e) and:

(a) The employer may be found liable for remedies described in OAR 839-003-0090(6) regardless of whether reasonable accommodation would have been possible; and

(b) The employer may also be found liable for any other remedies described in OAR 839-003-0090 if reasonable accommodation would have been possible.

(7) An employer may not be found to have engaged in an unlawful employment practice solely because the employer fails to provide reasonable accommodation to an employee or applicant with a disability arising out of transsexualism. However, an employer may not:

(a) Refuse to hire an applicant or promote an employee;

(b) Bar or discharge an employee or applicant from employment;

or

(c) Discriminate in compensation, terms, conditions or privileges of employment because an employee or applicant is transsexual when the employee or applicant is otherwise qualified.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.142 & 659A.112 - 659A.139

Hist.: BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 4-2007, f. 1-29-07, cert. ef. 2-1-07

839-006-0212

Determining Whether a Person Is Substantially Limited

(1) The following factors should be considered in determining whether a person with an impairment is substantially limited in a major life activity:

(a) The nature and severity of the impairment;

(b) The length of time an impairment persists or is expected to persist; and

(c) The permanent or expected long-term effect resulting from the impairment.

(2) The determination of whether a person is substantially limited in a major life activity must be made on a case-by-case basis.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.100, 659A.103, 659A.142 & 659A.112 - 659A.139

Hist.: BL 2-1998, f. & cert. ef. 2-3-98; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0240

Temporary and Progressive Impairments

(1) Temporary, non-chronic impairments, with little or no long-term or permanent effect, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis and influenza.

(2) Conditions that are progressive (including, but not limited to, cancer, Hodgkin's disease, multiple sclerosis and HIV infection, whether or not such condition substantially limits the individual in any major life activity at the time of the alleged discrimination) may not form the basis for an employer to refuse to employ or promote; bar or discharge from employment; or discriminate in compensation, terms, conditions or privileges of employment.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.142 & 659A.112 - 659A.139

Hist.: BL 2-1984, f. & ef. 1-31-84; BL 15-1990, f. 10-29-90, cert. ef. 11-1-90; BL 4-1996, f. & cert. ef. 3-12-96; BL 2-1998, f. & cert. ef. 2-3-98; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0242

Medical Evaluation

(1) An employer may not require any applicant to obtain a medical examination or evaluation prior to an offer of employment.

(2) An employer may require a medical examination or evaluation after making an employment offer but before the person commences work, only if all persons receiving offers of employment in that same job category are required to obtain a medical examination or evaluation.

(3) A drug test is not considered a medical examination or evaluation, for purposes of ORS 659A.133, 659A.136 and sections (1) and (2) of this rule, limiting employer actions in regard to medical examinations and inquiries.

(4) As provided in ORS 659A.306, the employer must pay the cost of any medical examination or evaluation or test, including a drug test, or the production of any health certificate required by the employer.

(5) An employer obtaining medical information about an employee or applicant must collect and maintain the information on separate medical forms and in separate medical files to be treated as confidential medical records, except as follows:

(a) Supervisors and managers may be informed regarding necessary restrictions on the work duties of an employee or necessary accommodations;

(b) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(c) Officers and employees of the Division investigating compliance with disability discrimination laws must be provided relevant information on request.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.142 & 659A.112 - 659A.139

Hist.: BL 2-1984, f. & ef. 1-31-84; BL 4-1996, f. & cert. ef. 3-12-96; BL 2-1998, f. & cert. ef. 2-3-98, Renumbered from 839-006-0235; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0244

Direct Threat

(1) Notwithstanding other provisions of these rules, an employer may refuse to employ a disabled person posing a direct threat to the health or safety of others. Direct threat means significant risk of substantial harm that cannot be eliminated or reduced below the level of

significant risk of substantial harm by reasonable accommodation.

(2) The determination that a disabled person poses a “direct threat” is based on an individualized assessment of the person’s present ability to safely perform the essential functions of the position. The assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge or on the best available objective evidence. In making the determination, factors to be considered include:

- (a) The duration of risk;
- (b) The nature and severity of potential harm;
- (c) The likelihood that potential harm will occur; and
- (d) The imminence of potential harm.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.142 & 659A.112 - 659A.139

Hist.: BL 2-1984, f. & ef. 1-31-84; BL 4-1996, f. & cert. ef. 3-12-96; BL 2-1998, f. & cert. ef. 2-3-98, Renumbered from 839-006-0230; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0250

Customer or Co-Worker Preference

An employer may not consider the attitude or preference of employers, managers, supervisors, co-workers, customers, clients or the general public toward a person’s perceived or actual impairment in determining whether a person is otherwise qualified for a position.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.142 & 659A.112 - 659A.139

Hist.: BL 2-1984, f. & ef. 1-31-84; BL 4-1996, f. & cert. ef. 3-12-96; BL 2-1998, f. & cert. ef. 2-3-98; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0255

Effect of Law

Where a state or federal law or regulation prevents employment in a particular position of a person with a specified, medically verifiable impairment or specified severity of impairment, an employer is not required to employ a disabled person with such an impairment in that position. Nothing in this rule will be construed to permit denial of employment to such person in a position that is not subject to such law or regulations.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.142 & 659A.112 - 659A.139

Hist.: BL 2-1984, f. & ef. 1-31-84; BL 4-1996, f. & cert. ef. 3-12-96; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0265

Subterfuge

An employer may not use the provisions of these rules as a subterfuge to avoid the employer’s duty to not discriminate under ORS 659A.142 and 659A.112 to 659A.139.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.142 & 659A.112 - 659A.139

Hist.: BL 2-1998, f. & cert. ef. 2-3-98; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

Discrimination Against Disabled Persons by State Government

839-006-0270

Purpose and Scope

(1) ORS 659A.103 provides that it is the policy of the State of Oregon to guarantee disabled persons the fullest possible participation in the social and economic life of the state, including participating in and receiving the benefits of the services, programs and activities of state government.

(2) ORS 659A.142(4) provides that it is an unlawful practice for state government to exclude an individual from participation in or deny an individual the benefits of the services, programs or activities of state government or to make any distinction, discrimination or restriction because the individual is a disabled person.

(3) State government shall make reasonable modifications in services, programs or activities, including but not limited to policies and procedures, when the modifications are necessary for state government to comply with ORS 659A.142(4) unless state government can demonstrate that making the modifications would result in a fundamental alteration in the nature of the service, program, or activity or would result in undue financial or administrative burdens on state government. This will be determined on a case by case basis.

(4) ORS 659A.142(4) and these rules are not intended to:

(a) Create an independent entitlement to any service, program or activity of state government; or

(b) Require state government to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program or activity or would result in undue financial or administrative burdens, as determined on a case-by-case basis.

(5) In determining whether financial and administrative burdens are undue for purposes of ORS 659A.142(4) and these rules, all resources available for use in the funding and operation of the service, program, or activity will be considered.

(6) Nothing in ORS 659A.142(4) or these rules prohibits state government from providing benefits, services, or advantages to individuals with disabilities beyond those required by ORS 659A.142(4) or these rules.

(7) A person claiming a violation of ORS 659A.142(4) may file a complaint with the Civil Rights Division as provided in OAR 839-003-0025.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.100, 659A.103, 659A.142

Hist.: BLI 21-2005, f. 10-20-05, cert. ef. 10-21-05

839-006-0275

Definitions — Disability

(1) For purposes of ORS 659A.142(4) and these rules, “disabled person” means an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

(2) “Physical or mental impairment” means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, traumatic brain injury, emotional or mental illness, and specific learning disabilities.

(3) “Substantially limits” means:

(a) The impairment renders the person unable to perform a major life activity that the average person in the general population can perform; or

(b) The impairment significantly restricts the condition, manner or duration under which a person can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

(4) “Major life activity” includes, but is not limited to, self care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property. Examples of specific major life activities include, but are not limited to, walking, sitting, standing, lifting, reaching, speaking, interacting with others, thinking, seeing, hearing, breathing, learning, reading, eating, sleeping, performing manual tasks, reproduction and working.

(5) “Has a record of such an impairment” means that the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. “Has been misclassified as having” means the individual has been or is the subject of an erroneous or unsupported medical diagnosis, report, certificate or evaluation.

(6) “Is regarded” as having impairment means that the individual:

(a) Has a physical or mental impairment that does not substantially limit major life activities but is treated by state government as having such an impairment;

(b) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or

(c) Has none of the impairments described in subparagraphs (a) or (b) of this paragraph, but is treated by state government as having a mental or physical impairment that substantially limits a major life activity.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.100, 659A.103, 659A.142

Hist.: BLI 21-2005, f. 10-20-05, cert. ef. 10-21-05

839-006-0280

Definitions — State Government

(1) For purposes of ORS 659A.142(4) and these rules, “state

government” has the meaning given to that term in ORS 174.111 and includes the executive, judicial and legislative departments of state government. Consistent with ORS 174.108(3), it does not include the Oregon Health and Science University, the Oregon State Bar, any intergovernmental entity formed by a public body with another state or with a political subdivision of another state, or any intergovernmental entity formed by a public body with an agency of the federal government.

(2) Pursuant to ORS 174.112, “executive department” means all statewide elected officers other than judges, and all boards, commissions, departments, divisions and other entities, without regard to the designation given to those entities, that are within the executive department of government as described in Article III, Section 1 of the Oregon Constitution, and that are not in the judicial department, legislative department, local governments or special government bodies. “Executive department” includes:

(a) An entity created by statute for the purpose of giving advice only to the executive department and that does not have members who are officers or employees of the judicial department or legislative department;

(b) An entity created by the executive department for the purpose of giving advice to the executive department, if the document creating the entity indicates that the entity is a public body; and

(c) Any entity created by the executive department other than an entity described in paragraph (b) of this subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the executive department.

(3) Pursuant to ORS 174.113, “judicial department” means the Oregon Supreme Court, the Oregon Court of Appeals, the Oregon Tax Court, the Oregon circuit courts and all administrative divisions of those courts, whether denominated as boards, commissions, committees or departments or by any other designation. “Judicial department” includes:

(a) An entity created by statute for the purpose of giving advice only to the judicial department and that does not have members who are officers or employees of the executive department or legislative department;

(b) An entity created by the judicial department for the purpose of giving advice to the judicial department, if the document creating the entity indicates that the entity is a public body; and

(c) Any entity created by the judicial department other than an entity described in paragraph (b) of this subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the judicial department.

(4) Pursuant to ORS 174.114, “legislative department” means the Legislative Assembly, the committees of the Legislative Assembly and all administrative divisions of the Legislative Assembly and its committees, whether denominated as boards, commissions or departments or by any other designation. “Legislative department” includes:

(a) An entity created by statute for the purpose of giving advice only to the legislative department and that does not have members who are officers or employees of the executive department or judicial department;

(b) An entity created by the legislative department for the purpose of giving advice to the legislative department, but that is not created by statute, if the document creating the entity indicates that the entity is a public body; and

(c) Any entity created by the legislative department by a document other than a statute and that is not an entity described in paragraph (b) of this subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the legislative department.

Stat. Auth.: ORS 659A.805
Stats. Implemented: ORS 659A.100, 659A.103, 659A.142
Hist.: BLI 21-2005, f. 10-20-05, cert. ef. 10-21-05

839-006-0290

Other Statutes, Regulations and Agencies Governing Access by or Discrimination Against Disabled Persons

(1) Public transportation services, programs, and activities of public entities are subject to Title II of the federal Americans with Disabilities Act and regulated by the U.S. Department of Transportation. See 42 USC 12141 §221 and 49 CFR §37.

(2) Accessibility of government facilities is subject to Title II of the Americans with Disabilities Act, 42 USC §12131. The U.S. Department of Justice regulates existing government facilities (28 CFR §35.150) and new construction and alterations to government facilities (28 CFR §35.151). The Oregon Department of Consumer and Business Services has jurisdiction over disability access to state and local government facilities in Oregon. See ORS 447.210 to 447.280 and administrative rules and standards adopted pursuant thereto.

(3) The federal Rehabilitation Act provides that no otherwise qualified individual with a disability in the United States shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any federal Executive agency or by the United States Postal Service. 29 USC §794.

(4) Discrimination against disabled persons in employment is subject to ORS 659A.100 to 139, 659A.142 and OAR 839-006-0200 to 0265.

(5) Discrimination against disabled persons with respect to goods and services offered in a commercial manner by places of public accommodation is subject to ORS 659A.142 and OAR 839-006-0300 to 0335.

(6) Discrimination against disabled persons in real property transactions is subject to ORS 659A.142, 659A.145 and OAR 839-006-0400 to 0425.

Stat. Auth.: ORS 659A.805
Stats. Implemented: ORS 659A.100, 659A.103, 659A.142
Hist.: BLI 21-2005, f. 10-20-05, cert. ef. 10-21-05

839-006-0295

Provision of Auxiliary Aids and Services

(1) Except as provided for in subsection (3) of this section, state government must provide auxiliary aids and services when necessary to ensure equal access to state government programs, services, and activities.

(2) Auxiliary aids and services may include:

(a) Qualified interpreters, note takers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDDs), videotext displays, computer aided real time captioning (CART), or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(b) Qualified readers, taped texts, audio recordings, brailled materials, large print materials, e-mail, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(c) Acquisition or modification of equipment or devices; and

(d) Other similar services and actions.

(3) State government is not required to provide auxiliary aids or services that state government can demonstrate would result in a fundamental alteration in the nature of a service, program or activity of state government or would result in undue financial or administrative burdens on state government. This will be determined on a case by case basis.

(4) State government may not place a surcharge on an individual with a disability to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual with the nondiscriminatory treatment required by ORS 659A.142(4).

Stat. Auth.: ORS 659A.805
Stats. Implemented: ORS 659A.100, 659A.103, 659A.142
Hist.: BLI 21-2005, f. 10-20-05, cert. ef. 10-21-05

Discrimination Against Disabled Persons by Places of Public Accommodation

839-006-0300

Purpose and Scope

(1) It is the policy of the State of Oregon to guarantee disabled persons equal access to and enjoyment of places of public accommodation as defined in ORS 659A.142 and 659A.400. No place of public accommodation may discriminate against a person by any distinction or restriction because that person is disabled.

(2) Discrimination on the basis of disability by places of public accommodation is an unlawful practice and the Civil Rights Division of the Bureau of Labor and Industries has the responsibility to protect disabled persons' rights through the enforcement of ORS 659A.142 and 659A.121. OAR 839-006-0300 to 839-006-0335 interpret these statutes and apply to all complaints and inquiries relating to these statutes received on or after the effective date of these rules.

(3) A person claiming a violation of ORS 659A.142 and 659A.121, pertaining to discrimination of disabled persons by places of public accommodation, may file a complaint with the Civil Rights Division as provided in OAR 839-003-0025.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.100, 103, 121, 142 & 400

Hist.: BL 10-1996, f. & cert. ef. 12-4-96; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0305

Definitions

(1) "Disability" means, with respect to a person:

(a) A physical or mental impairment that substantially limits one or more major life activities;

(b) A record of such an impairment; or

(c) Being regarded as having such an impairment.

(2) "Major life activity" includes, but is not limited to, self care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

(a) Examples of specific major life activities include, but are not limited to, walking, sitting, standing, lifting, reaching, speaking, interacting with others, thinking, seeing, hearing, breathing, learning, reading, eating, sleeping, performing manual tasks, reproduction and working.

(b) To be substantially limited in the major life activity of working, a person must be significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to the ability of an average person with comparable skill, experience, education or other job-related requirements needed to perform those same positions.

(3) "Misclassified," as used in ORS 659A.100(2)(b), means an erroneous or unsupported medical diagnosis, report, certificate or evaluation.

(4) "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, traumatic brain injury, emotional or mental illness, and specific learning disabilities.

(5) "Places of public accommodation" means any places or services offering the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise. However, places of public accommodation do not include institutions, bona fide clubs or places of accommodation that are in their nature distinctly private.

(6) "Substantially limits" means:

(a) The impairment renders the person unable to perform a major life activity that the average person in the general population can perform; or

(b) The impairment significantly restricts the condition, manner or duration under which a person can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 30.675, 659A.100, 659A.103, 659A.142 & 659A.121

Hist.: BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 9-2006, f. 3-16-06, cert. ef. 3-20-06

839-006-0310

Removal of Physical Barriers to Facilities

(1) Places of public accommodation must remove physical barriers to entering and using existing facilities when such removal is readily achievable.

(2) "Readily achievable" means the barrier removal is easily accomplishable and can be carried out without much difficulty or expense. In determining whether a barrier removal is readily achiev-

able, the factors to be considered include:

(a) The nature and cost of the action needed;

(b) The overall financial resources of the site or sites involved in the action;

(c) The number of persons employed at the site;

(d) The effect on expenses and resources;

(e) Legitimate safety requirements that are necessary for safe operation, including crime prevention measures;

(f) The impact otherwise of the barrier removal upon the operation of the site;

(g) The administrative or fiscal relationship of the site or sites in question to any parent corporation or entity; and

(h) The overall financial resources of any parent corporation or entity.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103 & 659A.142

Hist.: BL 10-1996, f. & cert. ef. 12-4-96; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0320

Provision of Auxiliary Aids

(1) Places of public accommodation must provide auxiliary aids and services when necessary to ensure equal access to offered goods, privileges, services or facilities.

(2) Places of public accommodation are not required to provide auxiliary aids that would result in significant difficulty or expense, or in a fundamental alteration in the nature of the offered goods, privileges or services. This is to be determined on a case-by-case basis.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103 & 659A.142

Hist.: BL 10-1996, f. & cert. ef. 12-4-96; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0330

Removal of Barriers to Goods and Services

(1) Places of public accommodation must remove physical and administrative barriers, if readily achievable (as defined in OAR 839-006-0310) in order to make offered goods and services accessible.

(2) If barrier removal is not readily achievable, places of public accommodation must take alternative steps to make offered goods and services accessible, such as providing goods and services at the door, sidewalk or curb; providing home delivery; retrieving merchandise from inaccessible shelves or racks; relocating activities to accessible locations; or relaxing administrative policies.

(3) Places of public accommodation may not impose charges on disabled persons to recover costs of barrier removal.

(4) Removal of physical or administrative barriers that would result in significant difficulty or expense or in a fundamental alteration in the nature of the offered goods or services is not required and is to be determined on a case-by-case basis.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103 & 659A.142

Hist.: BL 10-1996, f. & cert. ef. 12-4-96; BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0335

Direct Threat

(1) Notwithstanding other provisions of these rules, places of public accommodation may refuse to permit a disabled person to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation if the disabled person poses a direct threat to the health or safety of others. Direct threat means significant risk of substantial harm that cannot be eliminated or reduced below the level of significant risk of substantial harm by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.

(2) In determining whether a disabled person poses a direct threat to the health or safety of others, places of public accommodation must make an individualized assessment, based on reasonable judgment that relies on the most current medical knowledge, or on the best available objective evidence, to ascertain:

(a) The duration of risk;

(b) The nature and severity of potential harm;

(c) The likelihood that potential harm will occur;

(d) The imminence of potential harm; and

(e) Whether reasonable modifications of policies, practices or procedures will mitigate the risk.

Stat. Auth.: ORS 659A.805
 Stats. Implemented: ORS 659A.103 & 659A.142
 Hist.: BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

Disabled Persons in Real Property Transactions

839-006-0400

Purpose and Scope

(1) The public policy of the State of Oregon guarantees disabled persons the fullest possible participation in the social and economic life of the state, including the right to purchase, lease or rent property without discrimination on the basis of disability. The Bureau of Labor and Industries, through the Civil Rights Division, protects these rights by enforcement of ORS 659A.142, 659A.145 and 659A.820.

(2) A person claiming a violation of ORS 659A.142 or 659A.145 may file a complaint with the Civil Rights Division as described in OAR 839-003-0025.

(3) These rules apply to all complaints and inquiries relating to these sections received on or after the effective date of these rules.

Stat. Auth.: ORS 659A.805
 Stats. Implemented: ORS 659A.100, 659A.103, 659A.142, 659A.145 & 659A.820
 Hist.: BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0405

Definitions

(1) "Disabled Person" means a person with a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

(2) "Major life activity" includes, but is not limited to, self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

(a) Examples of specific major life activities include, but are not limited to, walking, sitting, standing, lifting, reaching, speaking, interacting with others, thinking, seeing, hearing, breathing, learning, reading, eating, sleeping, performing manual tasks, reproduction and working.

(b) To be substantially limited in the major life activity of working, a person must be significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to the ability of an average person with comparable skill, experience, education or other job-related requirements needed to perform those same positions.

(3) "Misclassified," as used in ORS 659A.100(2)(b), means an erroneous or unsupported medical diagnosis, report, certificate or evaluation.

(4) "Person associated with a purchaser, lessee or renter," as used in ORS 659A.145(1), includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees in bankruptcy, receivers, public bodies or other entities that have the primary purpose of serving, representing or otherwise benefiting the protected class.

(5) "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, traumatic brain injury, emotional or mental illness, and specific learning disabilities.

(6) "Property" and "real property" include property used or intended for commercial, business or residential purposes.

(7) "Purchaser" means an occupant, prospective occupant, lessee, prospective lessee, renter, prospective renter, buyer or prospective buyer.

(8) "Receipt or alleged receipt of treatment for a mental disorder," as used in ORS 659A.142(4), means actual treatment of a person for a mental condition or an assertion that the person received such treatment.

(9) "Regarded as having an impairment," as used in ORS 659A.100(2)(c), means:

(a) A person having a physical or mental impairment that does not substantially limit a major life activity but who has been treated as having an impairment by a seller, lessor, advertiser, real estate broker or salesperson, or the agent of any seller, lessor, advertiser, real

estate broker or salesperson;

(b) A person having a physical or mental impairment that substantially limits a major life activity only as a result of the attitude of others toward such impairment; or

(c) A person having no physical or mental impairment but who is treated as having an impairment by a seller, lessor, advertiser, real estate broker or salesperson, or the agent of any seller, lessor, advertiser, real estate broker or salesperson.

(10) "Substantially limits" means:

(a) The impairment renders the person unable to perform a major life activity that the average person in the general population can perform; or

(b) The impairment significantly restricts the condition, manner or duration under which a person can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

(11) "Treatment" includes examination, evaluation, diagnosis and therapy by a health professional within the scope of the professional's applicable license.

Stat. Auth.: ORS 659A.805
 Stats. Implemented: ORS 659A.100, 659A.103, 659A.142 & 659A.145
 Hist.: BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 9-2006, f. 3-16-06, cert. ef. 3-20-06

839-006-0410

Persons Prohibited from Discriminating on the Basis of Disability in Real Property Transactions; Prohibited Acts

(1) Discrimination in real property transactions based on a person's disability is prohibited for:

(a) A seller, lessor, advertiser, real estate broker or salesperson, or the agent of any seller, lessor, advertiser, real estate broker or salesperson;

(b) Any person assisting, coercing, inducing or inciting another to permit or engage in an act or practice violating ORS 659A.145, having to do with real property transactions.

(2) Discrimination in real property transactions, based on a person's disability, includes, but is not limited to:

(a) Refusing to sell, lease, rent or otherwise make available any real property;

(b) Expelling a purchaser, lessee or renter;

(c) Making a distinction or restriction in price, terms, conditions or privileges relating to the sale, rental, lease or occupancy of real property, or the furnishing of any facilities or services in connection with real property; or

(d) Attempting to discourage the sale, rental, lease or occupancy of any real property.

(e) Publishing, circulating, issuing or displaying or causing to be published, circulated, issued or displayed any communication, notice, advertisement, or sign of any kind whether oral, written or electronic, relating to the sale, rental or leasing of real property which indicates any preference, limitation, specification or discrimination against a disabled person.

(f) Refusing to permit or make reasonable accommodations, including but not limited to;

(A) Refusing to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises, except that, in the case of rental, the landlord may, where it is reasonable to do so, condition permission for modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(B) Refusing to make reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.

Stat. Auth.: ORS 659A.805
 Stats. Implemented: ORS 659A.103, 659A.142 & 659A.145
 Hist.: BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0415

Persons Protected from Discrimination on the Basis of Disability in Real Property Transactions; Prohibited Acts

Persons protected from discrimination in real property transactions include:

- (1) A disabled person as defined in OAR 839-006-0405;
- (2) A person, partnership, association, corporation, legal representative, trustee in bankruptcy or receiver who acts with the primary purpose of serving, representing, or otherwise benefiting disabled persons; and
- (3) A purchaser, lessee or renter associated with a disabled person.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.142 & 659A.145

Hist.: BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-006-0425

Discrimination Based on "Just Cause"

(1) A lessor or agent may engage in conduct otherwise prohibited by ORS 659A.145 when:

(a) A disabled person's leasing or rental of the subject property would constitute a direct threat to the health or safety of other individuals or would result in substantial physical damage to the property of others; and

(b) No reasonable accommodation is possible that would render insignificant the risk to health and safety.

(2) A lessor or agent must allow alterations of existing premises if the premises are occupied by or to be occupied by a disabled person, and the disabled person pays for the alterations, as provided in OAR 839-006-0410(f).

(3) There is no just cause for discrimination on the basis of perceived disability.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.142 & 659A.145

Hist.: BLI 15-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

DIVISION 9

OREGON FAMILY LEAVE ACT

839-009-0200

Purpose and Scope

(1) The Civil Rights Division of the Bureau of Labor and Industries enforces the Oregon Family Leave Act (OFLA), ORS 659A.150 to 659A.186, which provides for OFLA leave and prohibits discrimination against employees using OFLA leave. These rules implement and interpret the Oregon Family Leave Act.

(2) These rules apply to complaints and inquiries received under ORS 659A.150 to 659A.186 and under these rules.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-009-0210

Definitions

(1) "Alternate duty" means work assigned to an employee that may consist of:

(a) The employee's same duties worked on a different schedule; or

(b) Different duties worked on the same or different schedule.

(2) "Child," for the purposes of parental and sick child leave only (not for the purposes of serious health condition leave), means a biological, adopted, foster or stepchild, the child of an employee's same sex-domestic partner or a child with whom the employee is or was in a relationship of in loco parentis. The child must be:

(a) Under the age of 18; or

(b) An adult dependent child substantially limited by a physical or mental impairment as defined by ORS 659A.100(2)(d).

(3) "Covered employer" means any employer employing 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar work weeks in the calendar year in which the leave is to be taken or in the calendar year immediately preceding the year in which the leave is to be taken.

(4) "Eligible employee" means an employee employed in the State of Oregon on the date OFLA leave begins. For eligibility of employees reemployed following a period of uniformed service, see subsection (c) of this section.

(a) For the purpose of taking parental leave, an employee must be employed by a covered employer for at least 180 calendar days immediately preceding the date on which OFLA leave begins.

(b) For purposes of taking all other types of OFLA leave, including pregnancy disability leave, an employee must be employed by a covered employer for an average of at least 25 hours per week during the 180 calendar days immediately preceding the date OFLA leave begins.

(A) In determining that an employee has been employed for the preceding 180 calendar days, the employer must count the number of days an employee is maintained on the payroll, including all time paid or unpaid. If an employee continues to be employed by a successor in interest to the original employer, the number of days worked are counted as continuous employment by a single employer.

(B) In determining 25 hours average per week, the employer must count actual hours worked using guidelines set out pursuant to the Fair Labor Standards Act (See 29 CFR Part 785).

(c) The federal Uniformed Services Employment and Reemployment Act, 38 USC 43 (USERRA) provides that an employee reemployed following a period of uniformed service is entitled to the seniority and seniority-based rights and benefits that the employee had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if the employee had remained continuously employed. Federal Department of Labor regulation 20 CFR 1002.210 provides that in determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute. Under USERRA, a reemployed service member would be eligible for leave under OFLA if the number of days and the number of hours of work for which the service member was employed by the civilian employer, together with the number of days and number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet OFLA's eligibility requirements. In the event that a service member is denied OFLA leave for failing to satisfy the OFLA days and hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under OFLA. [Note: USERRA also applies to leave under the federal Family and Medical Leave Act of 1993, 29 USC 2601-2654 (FMLA).]

(d) For the purpose of qualifying as an eligible employee, the employee need not work solely in the State of Oregon.

(5) "Family member" means the spouse, same-sex domestic partner, custodial parent, non-custodial parent, adoptive parent, foster parent, biological parent, parent-in-law, parent of same-sex domestic partner or a person with whom the employee is or was in a relationship of in loco parentis. It also includes the biological, adopted, foster or stepchild of an employee or the child of an employee's same-sex domestic partner. For the purposes of OFLA, an employee's child in any of these categories may be either a minor or an adult at the time serious health condition leave is taken.

(6) "FMLA" is the federal Family and Medical Leave Act, 29 USC 2601.

(7) "Foster child" means a child, not adopted, but being reared as a result of legal process, by a person other than the child's natural parent.

(8) "Health care provider" means:

(a) The person primarily responsible for providing health care to an eligible employee or to a family member of an eligible employee; and

(b) Who is a physician licensed to practice medicine or surgery, including a doctor of osteopathy; or

(c) A podiatrist, a dentist, a clinical psychologist, an optometrist, a naturopath, a nurse practitioner, a licensed physician's assistant, a direct entry midwife, a nurse-midwife or a clinical social worker authorized to practice and perform within the scope of a professional license as provided by law; or

(d) A Christian Science practitioner listed with the First Church of Christ Scientist in Boston, Mass: or

(e) A chiropractor, but only to the extent that a chiropractor provides treatment consisting of manual manipulation of the spine to correct a subluxation demonstrated to exist by X-rays.

(9) "In loco parentis" means in the place of a parent, having financial and day-to-day responsibility for the care of a child. A legal

or biological relationship is not required.

(10) "Intermittent leave" means leave taken in multiple blocks of time and/or requiring an altered or reduced work schedule.

(11) "OFLA" is the Oregon Family Leave Act, ORS 659A.150 to 659A.186.

(12) "OFLA leave" means a leave of absence for purposes described in ORS 659A.159 and OAR 839-009-0230(1) through (4).

(13) "OFLA leave year," for calculating the OFLA leave year entitlement, means a calendar year (January to December), a fixed 12-month period such as a fiscal year, a 12-month period measured forward from the date of the employee's first OFLA leave, or a 12-month period measured backward from the date the employee uses any OFLA leave. The option selected must be applied to all employees. In the absence of an employer policy or collective bargaining agreement defining how an OFLA leave year will be measured, a calendar year will be used.

(14) "Serious health condition" means an illness, injury, impairment or physical or mental condition of an employee or family member:

(a) That requires inpatient care in a medical care facility such as a hospital, hospice or residential facility such as a nursing home. When a family member resides in a long-term residential care facility, leave applies only to:

(A) Transition periods spent moving the family member from one home or facility to another, including time to make arrangements for such transitions;

(B) Transportation or other assistance required for a family member to obtain care from a physician; or

(C) Serious health conditions as described in (b) through (h) of section 14 of this rule.

(b) That the treating health care provider judges to pose an imminent danger of death, or that is terminal in prognosis with a reasonable possibility of death in the near future;

(c) That requires constant or continuing care such as home care administered by a health care professional;

(d) That involves a period of incapacity. Incapacity is the inability to perform at least one essential job function, or to attend school or perform regular daily activities for more than three consecutive calendar days and any subsequent required treatment or recovery period relating to the same condition. This incapacity must involve:

(A) Two or more treatments by a health care provider; or

(B) One treatment plus a regimen of continuing care.

(e) That results in a period of incapacity or treatment for a chronic serious health condition that requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity, such as asthma, diabetes or epilepsy;

(f) That involves permanent or long-term incapacity due to a condition for which treatment may not be effective, such as Alzheimer's disease, a severe stroke or terminal stages of a disease. The employee or family member must be under the continuing care of a health care provider, but need not be receiving active treatment;

(g) That involves multiple treatments for restorative surgery or for a condition such as chemotherapy for cancer, physical therapy for arthritis, or dialysis for kidney disease that if not treated would likely result in incapacity of more than three days; or

(h) That involves any period of disability of a female due to pregnancy or childbirth or period of absence for prenatal care.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 35-2006, f. 10-3-06, cert. ef. 10-4-06

839-009-0220

Relationship of OFLA to FMLA

(1) Leave taken under FMLA will count as OFLA leave provided the employee is also eligible for OFLA leave.

(2) Provisions of OFLA will be construed to the extent possible in a manner that is consistent with any similar provisions of FMLA.

(3) Employers subject to both OFLA and FMLA must apply the regulation that is more beneficial to the individual employee's circumstances.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-009-0230

Purposes for Taking OFLA Leave

Eligible employees may take OFLA leave for the purposes commonly referred to as parental leave, serious health condition leave, pregnancy disability leave and sick child leave.

(1) Parental leave is leave taken to care for the employee's newborn, newly adopted or newly placed foster child under 18 years of age or for a newly adopted or newly placed foster child 18 years of age or older who is incapable of self care because of a physical or mental impairment. It includes leave time to effectuate the legal process required for placement of a foster child or the adoption of a child.

(2) Serious health condition leave is leave taken:

(a) To provide care for a family member with a serious health condition as defined in 839-009-0210(14); or

(b) To recover from or seek treatment for a serious health condition that renders an employee unable to perform at least one essential function of the employee's regular position.

(3) Pregnancy disability leave is leave taken by a female employee for a disability related to pregnancy or childbirth, occurring before or after the birth of the child, or for prenatal care. Pregnancy disability leave is a form of serious health condition leave.

(4) Sick child leave is leave taken to care for an employee's child suffering from an illness or injury that requires home care but is not a serious health condition. An employer is not required to grant leave for routine medical or dental appointments.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-009-0240

Length of Leave and Other Conditions

(1) An eligible employee is entitled to as much as 12 weeks of OFLA leave in any one-year period except that:

(a) A female employee may take up to 12 weeks of pregnancy disability leave in addition to 12 weeks of OFLA leave for any leave purpose;

(b) An employee taking the entire 12 weeks of OFLA leave for parental leave may take an additional 12 weeks of sick child leave within the same leave year. If the employee uses less than 12 weeks of parental leave, however, no additional sick child leave is available, except for the balance of the initial 12 weeks. The employee may also use this balance for any other OFLA leave purpose.

(2) A female employee may take up to 36 weeks of OFLA leave in one leave year. The 36 weeks of OFLA leave may be taken, for example, under the following circumstances:

(a) The female employee takes 12 weeks of pregnancy disability leave, followed by;

(b) Twelve weeks of parental leave, followed by;

(c) Twelve weeks of sick child leave.

(3) A male employee may take up to 24 weeks of OFLA leave in one leave year, but only under the following circumstances:

(a) The male employee takes 12 weeks of parental leave, followed by;

(b) Twelve weeks of sick child leave.

(4) When two family members work for the same covered employer, both employees may take OFLA leave at the same time only under the following circumstances:

(a) One employee needs to care for the other employee suffering from a serious health condition; or

(b) One employee needs to care for a child suffering from a serious health condition while the other employee is also suffering from a serious health condition; or

(c) Both family members are suffering from a serious health condition; or

(d) The employer allows concurrent leave.

(5) Parental leave must be taken in one uninterrupted period — unless the employer approves otherwise — and must be completed within 12 months of the birth, adoption or placement of the child. An exception must be made to allow parental leave to effectuate adoption or foster placement of the child. Such leave need not be taken in one, uninterrupted period with any additional parental leave.

(6) The birth, adoption or foster placement of multiple children at one time entitles the employee to take only one 12-week period of parental leave.

(7) Sick child leave need not be provided to an eligible employee by a covered employer if another family member, including a non-custodial biological parent, is willing and able to care for the child.

(8) For the purpose of intermittent leave, OFLA leave entitlement is calculated for an employee by multiplying the number of hours the employee normally works per week by 12. (For example, an employee normally employed to work 30 hours per week is entitled to 12 times 30 hours, or a total of 360 hours OFLA leave.)

(a) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks worked prior to the beginning of the leave period must be used for calculating the employee's normal work week. (For example, an employee working an average of 25 hours per week is entitled to 12 times 25 hours, or a total of 300 hours OFLA leave.)

(b) If an employee takes intermittent or reduced work schedule OFLA leave, only the actual number of hours of leave taken may be counted toward the 12 weeks of OFLA leave to which the employee is entitled.

(9) An employee who has previously qualified for and taken some portion of OFLA leave must requalify as an "eligible employee" as defined in 839-009-0210(4) each time the employee begins additional OFLA leave within the same leave year. Exceptions:

(a) An employee who has been granted OFLA leave for a qualifying serious health condition of the employee or family member need not requalify under OAR 839-009-0210(4) each time leave for the same purpose (the same individual and the same serious health condition) is taken.

(b) A female employee who has been granted OFLA pregnancy disability leave need not requalify under OAR 839-009-0210(4) for an additional 12 weeks of leave within the same leave year for any OFLA leave purpose.

(c) An employee who has taken 12 weeks of OFLA parental leave, need not requalify under OAR 839-009-0210(4) for up to an additional 12 weeks of leave within the same leave year when used for the purposes of OFLA sick child leave.

(10) An exempt employee is a salaried executive, administrative or professional employee under the federal Fair Labor Standards Act (see 29 CFR Part 541 through 541.315) or the state minimum wage and overtime laws (ORS Chapters 652 and 653).

(a) When OFLA leave is also covered by FMLA and the employee takes intermittent leave in blocks of less than one day, the employer may reduce the employee's salary for the part-day absence without the loss of the employee's exempt status in accordance with OAR 839-020-0004(30)(a).

(b) When OFLA leave is not covered by FMLA (e.g., the employer has 25 to 49 employees, the leave is taken for a sick child, for the serious health condition of a parent-in-law, for the serious health condition of a same-sex domestic partner or for the serious health condition of a same-sex domestic partner's parents), and the employee takes intermittent leave in blocks of less than one day, an employer will jeopardize the employee's exempt status if the employer reduces the employee's salary for the part-day absence.

(11) The requirements of OFLA do not apply to any employer offering eligible employees a nondiscriminatory cafeteria plan, as defined by section 125 of the Internal Revenue Code of 1986, that provides as one of its options employee leave at least as generous as the leave required by OFLA.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 3-2005, f. 1-6-05, cert. ef. 1-7-05

839-009-0245

Intermittent Leave and Alternate Duty

(1) An employer may transfer an employee on intermittent OFLA leave or a reduced work schedule into an alternate position with the same or different duties to accommodate the leave, provided the following exist:

(a) The employee accepts the transfer position voluntarily and without coercion;

(b) The transfer is temporary, lasts no longer than necessary to accommodate the leave and has equivalent pay and benefits;

(c) The transfer is compliant with applicable collective bargaining agreements, as well as with state and federal law, providing all the employee protections found in FMLA regulations 29 CFR Part 825;

(d) Transfer to an alternate position is used only when there is no other reasonable option available that would allow the employee to use intermittent leave or reduced work schedule; and

(e) The transfer is not used to discourage the employee from taking intermittent or reduced work schedule leave, or to create a hardship for the employee.

(2) An employee transferred, as provided in section (1)(a) through (e) of this rule, to an alternate position for the purpose of a reduced work schedule must be returned to the employee's former position when the employee notifies the employer that the employee is ready to return to the former position at the end of the alternate duty leave.

(3) OFLA leave time for an employee on intermittent leave or a reduced work schedule is the difference between the number of hours the employee normally works and the number of hours the employee actually works during the intermittent leave or reduced work schedule.

(4) Holidays or days in which the employer's business is not in operation are not counted toward intermittent or reduced work schedule OFLA leave.

(5) An employer may transfer an employee recovering from a serious health condition to an alternate position that accommodates the serious health condition provided:

(a) The employee accepts the position voluntarily and without coercion;

(b) The transfer is temporary, lasts no longer than necessary and has equivalent pay and benefits;

(c) The transfer is compliant with applicable collective bargaining agreements, as well as with state and federal law, providing all the employee protections found in FMLA regulations 29 CFR Part 825; and

(d) The transfer is not used to discourage the employee from taking OFLA leave for a serious health condition, or to create a hardship for the employee.

(6) An employee is not on OFLA leave if the employee has been transferred — as provided in section (5)(a) through (d) of this rule — to an alternate position for the purpose of alternate work duties that the employee is able to perform within the limitations of the employee's own serious health condition, but not requiring a reduced work week. An employee working in an alternate position retains the right to return to the employee's original position unless all OFLA leave taken in that leave year plus the period of time worked in the alternate position exceed 12 weeks.

(7) An alternate position accommodating an employee's serious health condition may result in the employee working fewer hours than the employee worked in the original position. The employee's OFLA leave is the difference between the number of hours the employee worked in the original position and the number of hours the employee actually works in the alternate position.

(8) Intermittent leave for school teachers is subject to the special rules in OAR 839-009-0290.

Stat. Auth.: ORS 659A.805 & 659A.162

Stats. Implemented: ORS 659A.150 - 659A.186

Hist.: BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-009-0250

Notice by Employee; Designation by Employer

(1) Except in situations described in sections (2) and (3) of this rule, a covered employer may require an eligible employee to give 30 days written notice, including an explanation of the need for leave, before starting OFLA leave. The employee is not required to specify that the request is for OFLA leave:

(a) An employee able to give advance notice of the need to take OFLA leave must follow the employer's known, reasonable and customary procedures for requesting any kind of leave;

(b) An employer may request additional information to determine that a requested leave qualifies for designation as OFLA leave, except in cases of parental leave (no medical certification required) or sick child leave (no medical verification may be required until after three occurrences);

(c) The employer may provisionally designate an absence as OFLA leave until sufficient information is received to make a determination;

(d) An employee on OFLA leave who needs to take more leave than originally authorized should give the employer reasonable notice prior to the end of the authorized leave, following the employer's

known, reasonable and customary procedures for requesting any kind of leave. However, when an authorized period of OFLA leave has ended and an employee does not return to work, an employer having reason to believe the continuing absence may qualify as OFLA leave must request additional information, and may not treat a continuing absence as unauthorized unless requested information is not provided or does not support OFLA qualification.

(2) When an employee is unable to give the employer 30 days notice, the employee is encouraged to give the employer as much advance notice as is practicable.

(3) When taking OFLA leave in an unanticipated or emergency situation, an employee must give verbal or written notice within 24 hours of commencement of the leave. This notice may be given by any other person on behalf of an employee taking unanticipated OFLA leave. The employer may require written notice by the employee within three days of the employee's return to work.

(4) If an employee fails to give notice as required by sections (1), (2), and (3) of this rule or the employer's policies, the employer may reduce the period of unused OFLA leave by up to three weeks in that one-year leave period:

(a) The employee may also be subject to disciplinary action under an employer's uniformly applied policy or practice. This practice must be consistent with the employer's discipline for similar violations of comparable rules;

(b) An employer may not reduce an employee's available OFLA leave or take disciplinary action unless the employer has posted the required Bureau of Labor and Industries Family Leave Act notice or the employer can otherwise establish that the employee had actual knowledge of the notice requirement;

(c) Federal regulations prohibit reducing the leave period under FMLA, but allow an employer to delay the start of leave because of improper notice (see 29 CFR § 825.304);

(d) When an employee is subject to both FMLA and OFLA, the employer must apply the discipline available under (4)(a) or (c) of this rule that is most beneficial to the employee's individual circumstances.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 1-2007, f. 1-16-07, cert. ef. 1-17-07

839-009-0260

Medical Verification and Scheduling of Treatment

(1) When an employee gives 30 days notice for OFLA leave, other than for parental leave, the employer may require the employee to provide medical verification of the need for OFLA leave before the leave starts. Consistent with ORS 659A.306, the employer must pay the cost of the medical verification not covered by insurance or other benefit plan.

(2) If an employee's need for OFLA leave precludes giving 30 days notice, the employee must provide medical verification within 15 days of the employer's request for verification.

(3) The employer must provide the employee with written notice of any requirement to provide medical verification of the need for leave and the consequences for failure to do so.

(4) An employer may not delay the taking of an OFLA leave in the event that medical verification is not received prior to the commencement of (a) leave taken for unforeseen circumstances. The employer may designate the leave as provisionally approved subject to medical verification.

(5) If an employee submits medical verification signed by the health care provider, the employer may not directly request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical verification. If an employee is on OFLA or FMLA leave running concurrently with a worker's compensation absence, the employer may consult the worker's attending physician in a manner that is consistent with the worker's compensation regulations.

(6) An employer may not request subsequent medical verifications more often than every 30 days and only in connection with an absence by the employee except as stated in the FMLA regulations (see 29 CFR 825.308), including, for example, when:

(a) Circumstances described by the previous medical verification have changed significantly (e.g., the duration or frequency of absences,

the severity of conditions, complications); or

(b) The employer receives information that casts doubt upon the employee's stated reason for the absence.

(7) If an employee requests OFLA leave for a purpose described in ORS 659A.159(1)(b) to (d), the employer may require the employee to obtain the opinion of a second health care provider, designated by the employer, at the employer's expense. If the opinion of the second provider conflicts with the medical verification provided by the employee, the employer may require the two providers to designate a third health care provider to provide an opinion at the employer's expense. The opinion of the third provider is binding on both the employer and the employee. Before restoring the employee to work after taking OFLA leave for the employee's own serious health condition, the employer may require the employee to present certification from the employee's health care provider that the employee is able to resume work. The employer may not require the employee to obtain a second opinion.

(8) If an employee has taken sick child leave on all or any part of three separate days during a leave year, the employer may, at its discretion, require medical verification on the fourth day or subsequent occurrence of sick child leave within that leave year. The employer must pay the cost of the verification not covered by insurance or other benefit plan. The opinion of the health care provider is binding. The employer may not require the employee to obtain a second opinion.

(9) Where possible an employee must make a reasonable effort to schedule medical treatment or supervision at times that will minimize disruption of the employer's operation.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 3-2005, f. 1-6-05, cert. ef. 1-7-05; BLI 24-2005, f. 11-15-06, cert. ef. 11-16-05; BLI 12-2006, f. 3-22-06, cert. ef. 3-24-06

839-009-0270

Job Protection

(1) An employer must restore an employee returning from OFLA leave, including intermittent and alternative duty leave, to the employee's former position if the job still exists, even if it has been filled during the employee's OFLA leave. The former position is the position held by the employee at the time OFLA leave began, regardless of whether the job has been renamed or reclassified. (For example, a delivery driver must be returned to the same route, at the same rate of pay and benefits, driving the same truck, delivering the same goods, on the same shift and working from the same location as when the driver started OFLA leave.)

(2) Any worker hired during an eligible employee's leave to perform the same work that the eligible employee performed before the leave was taken is a replacement worker. When the eligible employee notifies the employer that the employee is ready to return to work, the employer must give that employee the opportunity to work any hours that the replacement worker would otherwise have been scheduled to work.

(3) The employee is not entitled to return to the former position if the employee would have been bumped even were OFLA not taken.

(4) If the position held by the employee at the time OFLA leave began has in fact been eliminated and not merely renamed or reclassified, the employer must restore the employee to any available, equivalent position.

(a) An available position is a position that is vacant or not permanently filled.

(b) An equivalent position is a position that is the same as the former position in as many aspects as possible. If an equivalent position is not available at the employee's former job site, the employee may be restored to an equivalent position within 20 miles of the former job site.

(5) Unless the terms of a collective bargaining agreement, other agreement or the employer's policy provide otherwise:

(a) An employee on OFLA leave does not accrue seniority, production bonuses or other benefits that would accrue while the employee is working;

(b) An employee has no greater right to a job or other employment benefits than if the employee had not taken OFLA leave; and

(c) An employee is subject to layoff the same as similarly situated employees not taking OFLA leave.

(6) Except for benefits used while on OFLA leave, benefits an

employee was entitled to prior to starting OFLA leave must be restored in full upon the employee's return to work. The benefits do not have to be restored, however, if such benefits have been eliminated or changed for similarly situated employees. (For example, an employer's medical insurance requires a three-month waiting period for health insurance coverage. An employee works seven months, takes OFLA leave for 12 weeks and returns to work with health problems. The employee must be covered immediately at the same level of coverage, with the same benefits as before the commencement of the OFLA leave.) This applies to all benefit provisions.

(a) An employer electing to continue health or other insurance coverage for an employee on OFLA leave may require that the employee pay only the same share of health or other insurance premium during the leave that the employee paid prior to the leave.

(b) If an employee cannot or will not pay such costs, the employer may elect to discontinue benefit coverage, unless to do so would render the employer unable to restore the employee to full benefit coverage as required in section (6) of this rule.

(c) If an employer pays any portion of any employee's benefit coverage for employees on non-OFLA leave, the employer must pay that portion during OFLA leave.

(d) If the employer pays (directly or indirectly, voluntarily or as required by state or federal statute) any part of the employee's share of health or other insurance premium while an employee is on OFLA leave, the employer may deduct up to 10 percent of the employee's gross pay each pay period after the employee returns to work until the amount is repaid.

(e) If an employer fails to return to work — unless the failure to return to work is because of a serious health condition for which the employee would be entitled to OFLA leave or another circumstance beyond the employee's control — the employer may recover the employee's share of benefits paid by the employer. The employer may use any legal means to collect the amount owed for the employee's share of benefits paid by the employer, including deducting the amount from the employee's final paycheck.

(7) An employer may require an employee to follow the employer's established leave policy regarding periodic reporting to the employer of the employee's current status. Before restoring the employee to work after taking OFLA leave for the employee's own serious health condition, the employer may require the employee to present certification from the employee's health care provider that the employee is able to resume work. Pursuant to ORS 659A.306, the employer is responsible for any co-pay or other out-of-pocket costs incurred by the employee in providing the certification. The employer may not require the employee to obtain a second opinion.

(8) If an employee gives unequivocal notice of intent not to return to work from OFLA leave:

(a) The employee is entitled to complete the approved OFLA leave, providing that the original need for OFLA leave still exists. The employee remains entitled to all the rights and protections under OFLA, including but not limited to, the use of vacation, sick leave and health benefits pursuant to OAR 839-009-0270 and 839-009-0280, except;

(b) The employer's obligations under OFLA to restore the employee's position and to restore benefits upon the completion of leave cease, except as required by COBRA; and

(c) The employer is not required to hold a position vacant or available for the employee giving unequivocal notice of intent not to return.

(9) An employer may not use the provisions of this section as a subterfuge to avoid the employer's responsibilities under OFLA.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-009-0280

Use of Paid Leave

(1) OFLA leave is unpaid leave except that an employee may use accrued paid vacation leave during OFLA leave, or an employer may require the use of accrued paid leave during OFLA leave, as follows:

(a) An employee may use, or an employer may require the employee to use, accrued vacation or personal leave during OFLA leave;

(b) An employee may use, or an employer may require the

employee to use, accrued sick leave during OFLA leave if to do so is consistent with a collective bargaining agreement or the employer's sick leave policy. (For example, if an employee is entitled to take sick leave for the illness of a family member, then the employer must allow, or may require, the employee to use accrued sick leave during OFLA leave for the serious health condition of a family member.)

(c) An employee taking parental leave may use, or the employer may require the employee to use, accrued vacation, personal and sick leave. The employer may not deny the use of accrued sick leave to an employee for the purpose of parental leave, regardless of the employer's regular policy except for the provisions in section (2) of this rule.

(d) As used in subsections (b) and (c) of section (1), accrued sick leave does not include disability insurance or disability benefits.

(2) Notwithstanding the provisions of section (1) of this rule and subject to the terms of a collective bargaining agreement or other written employment agreement, an employer may require an employee to use paid leave during OFLA leave, if available, and may determine the order in which paid leave is to be used if more than one type of leave is available. The employer may exercise these prerogatives only if:

(a) The employer provides written notice to the employee that accrued paid leave is to be used during OFLA leave, prior to the commencement of OFLA leave; or

(b) The employer provides written notice to the employee within two business days of the employee's notice of unanticipated or emergency leave that the employee will be required to use accrued paid leave.

(3) Either the employee or the employer may choose to have OFLA leave for the employee's serious health condition run concurrently with a Workers' Compensation leave for the same health condition. With the employee's consent, the employer may deduct from the employee's accrued sick leave during the concurrent OFLA and Workers' Compensation leaves, provided the payment amount for sick leave deducted makes up for but does not exceed the employee's daily wage that is not covered by time loss benefits. See ORS 656.240.

(4) Either the employee or the employer may choose to have an employee's OFLA leave run concurrently with a type of paid or unpaid leave not referenced in these rules, as provided or allowed under the employer's policy.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORE 656.240, 659A.150 - 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 47-2006, f. 12-29-06, cert. ef. 1-3-07

839-009-0290

Special Rules for Public School Teachers

(1) The provisions of this section apply only to employees of a school district, employed principally as instructors in public kindergartens, elementary schools, secondary schools or education service districts.

(2) If a public school teacher requests, in advance, OFLA leave for a serious health condition, and the teacher will be absent more than 20 percent of the time, the employer may require the teacher to elect one of the following options:

(a) To take OFLA leave for one uninterrupted period of time to complete medical treatment. (School holidays and school vacation days are not counted as OFLA leave); or

(b) To transfer temporarily into an available alternative position that better accommodates periodic absences.

(3) If a teacher begins OFLA leave more than five weeks before the end of the academic term because of the teacher's own serious health condition, the employer may require the teacher to remain on leave until the end of the term if:

(a) The OFLA leave is at least three weeks long; and

(b) The teacher's return to work would occur within three weeks of the end of the term.

(4) If a teacher begins OFLA leave within five weeks of the end of the academic term for parental leave or the serious health condition of a family member, the employer may require the teacher to remain on OFLA leave through the end of the term if:

(a) The leave is at least two weeks long; and

(b) The teacher's return would occur within the last two weeks of the term.

(5) If a teacher begins OFLA leave within three weeks of the end of the academic term for parental leave or to care for a family member with a serious health condition and the leave is greater than five work-

ing days, the employer may require the teacher to remain on family leave until the end of the term.

(6) If a teacher takes OFLA leave to the end of the school year and continues the leave at the beginning of the next school term, the leave is consecutive rather than intermittent leave.

(a) The period between the end of the school term and the beginning of the next school term, when a teacher would not have been required to report for duty, is not counted against the teacher's OFLA leave entitlement.

(b) A teacher on OFLA leave at the end of the school term must be provided with the same benefits during the period between school terms that the teacher would normally receive if no OFLA leave were taken.

(7) If a teacher is required by the employer to remain on leave to the end of the academic term, only the period of leave the teacher requested can be charged against the teacher's OFLA leave entitlement.

(8) Nothing in these rules prohibits the employer from allowing the teacher to work as a substitute or in some other paid capacity during the weeks prior to the end of term under subsection (4) or (5) of this rule.

(9) Full-time employees covered by this rule, and who have been maintained on the payroll by a school district during 180 consecutive calendar days, are thereafter deemed to have been employed by that school district for an average of at least 25 hours per week during the 180 days immediately preceding the date any OFLA leave begins.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-009-0300

Postings

Each covered employer must display the Bureau of Labor and Industries Family Leave Act notice. The notice must be displayed in each building or worksite in an area that is accessible to and regularly frequented by employees. Failure to post the Family Leave Act notice is an unlawful employment practice as provided in ORS 659A.001(12).

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-009-0320

Enforcement and Retaliation

(1) An employer's duties and obligations under OFLA extend to a successor employer as defined in 29 CFR 825.107.

(2) In accordance with the provisions of OFLA an eligible employee claiming a violation of the OFLA may file a complaint with the Civil Rights Division of the Bureau of Labor and Industries in the manner provided by ORS 659A.820.

(3) It is an unlawful employment practice for an employer to retaliate or in any way discriminate against any person with respect to hiring, tenure or any other term or condition of employment because the person has inquired about OFLA leave, submitted a request for OFLA leave or invoked any provision of the Oregon Family Leave Act.

(4) It is an unlawful employment practice for an employer to count OFLA leave against an employee in determining the employee's compliance with attendance policies or to count OFLA leave against an employee when determining eligibility for bonuses based on attendance. An employee is entitled to continue eligibility for a bonus based on attendance upon return from OFLA leave and may not be disqualified from the bonus as a result of taking OFLA leave.

(5) Pursuant to ORS 659A.030(1)(f), it is an unlawful employment practice for an employer to discharge, expel or otherwise discriminate against any person because the person has filed a complaint, testified or assisted in any proceeding in connection with the Oregon Family Leave Act.

(6) Pursuant to ORS 659A.030(1)(g), it is an unlawful employment practice for any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts in violation of the Oregon Family Leave Act or to attempt to do so.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 12-2006, f. 3-22-06, cert. ef. 3-24-06

DIVISION 10

WHISTLEBLOWING DISCLOSURES BY EMPLOYEES

839-010-0000

Purpose and Scope

(1) The Civil Rights Division of the Oregon Bureau of Labor and Industries enforces the provisions of ORS 659A.200 to 659A.233, prohibiting discrimination against employees based on whistleblowing activities that are described in the statutes. These rules apply to all such complaints and inquiries received on or after the effective date of these rules.

(2) The purpose of these rules is to clarify the provisions of the statutes.

(3) In accordance with ORS 659A.820, an individual claiming a violation of ORS 659A.200 to 659A.233, or these rules, may file a complaint with the Civil Rights Division, as provided in OAR 839-003-0025.

Stat. Auth.: ORS 659A.805 & 659A.221

Stats. Implemented: ORS 659A.200 - 659A.233

Hist.: BL 9-1991, f. & cert. ef. 8-29-91; BL 4-1996, f. & cert. ef. 3-12-96; BLI 17-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-010-0010

Definitions

As used in ORS 659A.200 to 659A.224 and these rules:

(1) "Abuse of authority" means to deliberately exceed or make improper use of delegated or inherent authority or to employ it in an illegal manner.

(2) "Disciplinary action" means any adverse action including dismissal, demotion, transfer, reassignment, supervisory reprimand, warning of possible dismissal or withholding of work, whether or not the action affects or will affect employee compensation.

(3) "Gross waste of funds" means to spend or use funds or to allow funds to be used without valuable result in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.

(4) "Mismanagement" means the exercise of an executive function in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.

(5) "Employee" means a person employed by or under contract with:

(a) The state or any agency of or political subdivision in the state;

(b) Any person authorized to act on behalf of the state, or agency of the state or subdivision in the state, with respect to control, management or supervision of any employee;

(c) Employees of the public corporation created under ORS 656.751;

(d) Employees of a contractor who performs services for the state, agency or subdivision, other than employees of a contractor under contract to construct a public improvement; and

(e) Any person authorized by contract to act on behalf of the state, agency or subdivision.

(6) "Public employer" means:

(a) The state or any agency of or political subdivision in the state; and

(b) Any person authorized to act on behalf of the state, or any agency of or political subdivision in the state, with respect to control, management or supervision of any employee.

(7) "Reckless disregard for its truth or falsity" means a conscious disregard of a substantial and justifiable risk that the information disclosed is false.

(8) "Substantial and specific danger" means a risk of serious injury, illness, peril or loss, to which the exposure of the public is a gross deviation from the standard of care or competence that a reasonable person would observe in the same situation.

Stat. Auth.: ORS 659A.805 & 659A.221

Stats. Implemented: ORS 659A.233 & 659A.200 - 659A.224

Hist.: BL 9-1991, f. & cert. ef. 8-29-91; BL 4-1996, f. & cert. ef. 3-12-96; BLI 17-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

Whistleblowing Disclosures by Public Employees

839-010-0020

Purpose and Scope of ORS 659A.200 to 659A.224

(1) Oregon public employee whistleblower statutes prohibit public employers from taking action against or prohibiting employees from:

- (a) Responding to legislative requests;
 - (b) Disclosing information the employee believes is evidence of violation of laws or disclosing evidence of mismanagement, gross waste or abuse of authority; or
 - (c) Reporting public endangerment resulting from an action by a public employer.
- (2) No public employer may require an employee to give notice prior to making any disclosure described in sections (1)(a), (b) and (c) of this rule.

(3) No public employer may identify the employee who discloses the following information during any investigation of the information provided by the employee without the written consent of the employee:

- (a) Matters described in ORS 659A.203(1)(b); and
 - (b) Reports required by ORS 659A.206(2).
- (4) No public employer may prohibit or take action against employees for disclosing that a person receiving public assistance is also subject to arrest.

Stat. Auth.: ORS 659A.805 & 659A.221
 Stats. Implemented: ORS 659A.233 & 659A.200 - 659A.224
 Hist.: BL 9-1991, f. & cert. ef. 8-29-91; BLI 17-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-010-0040

Discussions with Representatives of the Legislative Assembly

(1) ORS 659A.203(1)(a) and (d) prohibit a public employer from prohibiting, discouraging, restraining, dissuading, coercing or otherwise interfering with any employee responding to an official legislative request to discuss the activities of the state or any branch, agency or political subdivision thereof, or from discussing the activities of any person authorized to act on behalf of those entities.

(2) In order to be protected by ORS 659A.203(1)(a), a public employee must be responding to an official legislative request, whether oral or in writing. The request must be made by or at the direction of a member of the Legislative Assembly and must invite discussion with a member of the Legislative Assembly or legislative committee staff acting under the direction of a member of the Legislative Assembly;

(a) No employee may be required to inform the employer prior to engaging in the requested legislative discussion except when the legislative request for information is directed to the agency and the employee will speak or testify on behalf of the agency;

(b) Regarding legislative testimony or discussion with representatives of the Legislative Assembly, the whistleblower law is not intended to:

- (A) Authorize an employee to represent the employee's personal opinions as the opinions of the agency or subdivision;
- (B) Authorize an employee to disclose information required to be kept confidential under state or federal law, rule or regulation, or allow disclosure of records exempt from disclosure except as provided in ORS 192.501 to 192.505 or 659A.212;

(C) Prevent public employers from prohibiting employee disclosure of information of an advisory nature to the extent that it covers other than purely factual materials and is preliminary to any final agency determination of policy or action.

(3) An employee is not entitled to leave work without following the employer's applicable rules and policies pertaining to leave, unless the employee is requested by a member of the Legislative Assembly or a legislative committee to appear before a legislative committee. If the employee's testimony is so requested, the employee may elect to take personal time off in accordance with the employer's normal procedure.

(a) The employer may confirm the date and time for testimony but may not inquire into the substance of the testimony.

(b) The employer must excuse the employee's absence from work during the time required for testimony and travel to and from the location of the committee.

(c) If an employee appears to testify and testimony is not taken at the designated date and time, the absence must be treated in the

same manner as if the testimony had been taken.

(d) If an employee is subsequently recalled to testify, the subsequent request must be treated by the employer and employee in the same manner an initial request is treated.

(e) An employee may take time off to testify following the employer's regular time off policy without notifying the employer of the purpose of the absence.

(4) No public employer may take any disciplinary action against an employee for employee activity described by ORS 659A.203(1)(a). An employer, however, is not precluded from taking disciplinary action if:

- (a) The information disclosed by the employee is known to be false;
- (b) The employee discloses the information with reckless disregard for its truth or falsity;
- (c) The information disclosed relates to the employee's own violations, mismanagement, gross waste of funds, abuse of authority, or endangerment of the public health and safety.

Stat. Auth.: ORS 659A.805 & 659A.221
 Stats. Implemented: ORS 659A.200 - 659A.224
 Hist.: BL 9-1991, f. & cert. ef. 8-29-91; BL 4-1996, f. & cert. ef. 3-12-96; BLI 17-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-010-0050

Disclosure of Malfeasance

(1) ORS 659A.203(1)(b) and (d) require that a public employer not prohibit, discourage, restrain, dissuade, coerce, or otherwise interfere with any employee disclosing to any person, or take or threaten to take disciplinary action against an employee for disclosing any information that the employee reasonably believes is evidence of:

- (a) A violation of any federal or state law, rule or regulation by action of the state agency or political subdivision;
- (b) Mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety resulting from action of the state, agency or political subdivision.

(2) No employee may be required to give notice to a public employer prior to making any disclosure described in ORS 659A.203. If the employee elects to give notice to an employer the employer must protect the employee against retaliatory or disciplinary action by its supervisory personnel for such disclosure.

(3) In making disclosures described in this rule, the whistleblower law is not intended to:

- (a) Authorize an employee to represent the employee's personal opinions as the opinions of the agency or subdivision;
- (b) Authorize an employee to disclose information required to be kept confidential under state or federal law, rule or regulation, or allow disclosure of records exempt from disclosure except as provided in ORS 192.501 to 192.505, or as required by ORS 659A.212; or
- (c) Prevent public employers from prohibiting employee disclosure of information of an advisory nature to the extent that it covers other than purely factual materials and is preliminary to any final agency determination of policy or action.

(4) An employee is not entitled to leave the employee's assigned work areas during normal work hours without following applicable rules and policies pertaining to leaves, unless the employee is requested by a member of the Legislative Assembly or a legislative committee to appear before a legislative committee as described in OAR 839-010-0040(3).

(5)(a) No public employer may identify the employee who discloses matters described in this rule during any investigation of the information provided by the employee without the written consent of the employee.

(b) No supervisory or management employee of a public employer may reveal to an employee accused of malfeasance the identity of the employee who discloses matters described in ORS 659A.203 or reports described in ORS 659A.212.

(6) No public employer may take any disciplinary action against an employee for employee activity described by this section. An employer, however, is not precluded from taking disciplinary action if:

- (a) The information disclosed is known by the employee to be false;
- (b) The employee discloses the information with reckless disregard for its truth or falsity; or
- (c) The information disclosed relates to the employee's own

violations, mismanagement, gross waste of funds, abuse of authority, or endangerment of the public health or safety.

Stat. Auth.: ORS 659A.805 & 659A.221

Stats. Implemented: ORS 659A.200 - 659A.224

Hist.: BL 9-1991, f. & cert. ef. 8-29-91; BL 4-1996, f. & cert. ef. 3-12-96; BLI 17-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-010-0060

Reports Concerning Arrest Warrants for State Beneficiaries

(1) Under ORS 659A.212, if a public employee reasonably believes that a person receiving services, benefits or assistance from the state or any agency or political subdivision thereof is subject to an arrest warrant, the public employee must promptly report this, or cause to be reported, to the employee's immediate supervisor or a person designated by the agency to receive such report. That recipient must promptly notify the Oregon State Police of the information supplied by the employee.

(2) Such report is authorized, notwithstanding confidentiality provisions of state or federal law, rule or regulation.

(3) No public employer may identify the employee who makes such a report or causes such a report to be made during any investigation of information provided by the employee without the written consent of the employee.

(4) No public employer may invoke or impose any disciplinary action against an employee for making a report required by ORS 659A.212. An employer, however, is not precluded from taking disciplinary action if the information disclosed by the employee is known to be false, or if the employee discloses the information with reckless disregard for its truth or falsity.

Stat. Auth.: ORS 659A.221

Stats. Implemented: ORS 659A.200 - 659A.224

Hist.: BL 9-1991, f. & cert. ef. 8-29-91; BLI 17-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

Whistleblowing Disclosures by Public and Private Employees

839-010-0100

Statement of Purpose

(1) ORS 659A.230 prohibits any employer with one or more employees in Oregon from discriminating or retaliating against an employee because the employee has in good faith:

(a) Reported criminal activity by any person;

(b) Caused a complainant's information or complaint to be filed against any person;

(c) Cooperated with a law enforcement agency criminal investigation;

(d) Brought a civil proceeding against an employer; or

(e) Testified at a civil proceeding or criminal trial.

(2) The Civil Rights Division of the Oregon Bureau of Labor and Industries enforces the provisions of the Oregon whistleblower statutes prohibiting discrimination because of whistleblower activities.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.230

Hist.: BL 4-1996, f. & cert. ef. 3-12-96; BLI 6-1998, f. & cert. ef. 10-22-98; BLI 17-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-010-0110

Reporting Criminal Activity and Cooperating in a Criminal Investigation

An employee reporting criminal activity is protected by ORS 659A.230(1) and these rules if:

(1) The employee reports to any person, orally or in writing, the criminal activity of any person;

(2) The employee has in good faith reported activity the employee believed to be criminal, or caused criminal charges to be brought against any person. This can be done by either the complainant's information or by a complaint, as defined in ORS 131.005(3) and (4);

(3) The employee cooperated in good faith, whether or not under subpoena, in an investigation conducted by a law enforcement agency;

(4) The employee testified in a criminal trial, whether or not under subpoena; or

(5) The employer knows or believes that the employee engaged in the reporting acts described above.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.230

Hist.: BL 4-1996, f. & cert. ef. 3-12-96; BLI 6-1998, f. & cert. ef. 10-22-98; BLI 17-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

839-010-0140

Protection in Activities Related to Civil Proceedings

Under ORS 659A.230 and these rules, an employee is protected in activities related to civil proceedings. A civil proceeding, as used in ORS 659A.230 and these rules, includes a proceeding before an administrative agency or a court. The employee is protected under the statute if:

(1) The employee has brought, in good faith, a civil proceeding against an employer.

(a) Bringing a civil proceeding, as used in ORS 659A.230 and the rules, includes filing complaints to or cooperation with administrative agencies as well as courts.

(b) An employee is considered to have initiated a civil proceeding when the employee has contacted an administrative agency the employee believes in good faith to have jurisdiction and the ability to sanction the employer.

(c) The employer against whom a civil proceeding is filed or initiated need not be the employee's current employer.

(2) The employee has testified in good faith, whether or not under subpoena, in any civil proceeding.

(3) The employer knows or believes that the employee has engaged in the civil proceedings acts described above.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.230

Hist.: BL 4-1996, f. & cert. ef. 3-12-96; BL 10-1996, f. & cert. ef. 12-4-96; BL 2-1998, f. & cert. ef. 2-3-98; BLI 6-1998, f. & cert. ef. 10-22-98; BLI 17-2000, f. & cert. ef. 8-11-00; BLI 10-2002, f. & cert. ef. 5-17-02

Whistleblowing Disclosures by Nursing Staff

839-010-0200

Statement of Purpose

(1) ORS 441.174 prohibits a hospital from retaliating against a nursing staff because the nursing staff has taken "whistleblower" actions detailed in the statute.

(2) The purpose of these rules is to clarify the provisions of the statutes.

(3) In accordance with ORS 441.178, an individual claiming a violation of ORS 441.174, or these rules, may file a complaint with the Civil Rights Division, as provided in OAR 839-003-0025.

Stat. Auth.: ORS 659A.805 & 441.178

Stats. Implemented: ORS 441.174 & 441.178

Hist.: BLI 4-2005, f. 1-6-05, cert. ef. 1-7-05

839-010-0205

Definitions

For purposes of ORS 441.174 and these rules:

(1) "Affiliated hospital" means a hospital that has a business relationship with another hospital.

(2) "Hospital" means an acute inpatient care facility as defined in ORS 442.470 or a hospital as described in ORS 442.015:

(a) "Acute inpatient care facility" means a licensed hospital with an organized medical staff, with permanent facilities that include inpatient beds, and with comprehensive medical services, including physician services and continuous nursing services under the supervision of registered nurses, to provide diagnosis and medical or surgical treatment primarily for but not limited to acutely ill patients and accident victims. ORS 442.470.

(b) "Hospital" means a facility with an organized medical staff, with permanent facilities that include inpatient beds and with medical services, including physician services and continuous nursing services under the supervision of registered nurses, to provide diagnosis and medical or surgical treatment primarily for but not limited to acutely ill patients and accident victims, to provide treatment for the mentally ill or to provide treatment in special inpatient care facilities. ORS 442.015.

(3) "Manager" means a person who:

(a) Has authority to direct and control the work performance of nursing staff;

(b) Has authority to take corrective action regarding a violation of law or a rule or a violation of professional standards of practice, about which a nursing staff has complained; or

(c) Has been designated by a hospital to receive the notice described in ORS 441.174(2) and OAR 839-010-0210(1).

(4) "Nursing staff" means a registered nurse, a licensed practical nurse, a nursing assistant or any other assistive nursing personnel.

(5) "Public body" has the meaning given that term in ORS 30.260.

(6) "Retaliatory action" means the discharge, suspension, demotion, harassment, denial of employment or promotion, or layoff of a nursing staff, or other adverse action taken against a nursing staff in the terms or conditions of employment of the nursing staff by a hospital, because the nursing staff:

(a) Discloses or intends to disclose to a manager, a private accreditation organization or a public body an activity, policy or practice of the hospital or of a hospital that the nursing staff reasonably believes is in violation of law or a rule or is a violation of professional standards of practice that the nursing staff reasonably believes poses a risk to the health, safety or welfare of a patient or the public;

(b) Provides information to or testifies before a private accreditation organization or a public body conducting an investigation, hearing or inquiry into an alleged violation of law or rule or into an activity, policy or practice that may be in violation of professional standards of practice by a hospital that the nursing staff reasonably believes poses a risk to the health, safety or welfare of a patient or the public;

(c) Objects to or refuses to participate in any activity, policy or practice of a hospital that the nursing staff reasonably believes is in violation of law or rule or is a violation of professional standards of practice that the nursing staff reasonably believes poses a risk to the health, safety or welfare of a patient or the public; or

(d) Participates in a committee or peer review process or files a report or a complaint that discusses allegations of unsafe, dangerous or potentially dangerous care.

(7) For purposes of subsection (6) of this rule, "other adverse action" includes, but is not limited to:

(a) Constructive discharge as defined in OAR 839-005-0035;

(b) A significant or material change in a term or condition of employment, such as transferring a nursing staff to another location, shift or work schedule, or reducing work hours or remuneration for services;

(c) Making a decision that causes a significant or material change in an employment benefit;

(d) Removal of significant or material duties or responsibilities;

(e) Restriction or prohibition of access to the hospital or other facility, whether or not the action affects or will affect pay or other compensation;

(f) Withholding career-advancing opportunities such as training or participation in seminars or committees; or

(g) Supervisory reprimands, warnings of possible dismissal or withholding of work.

(8) For purposes of ORS 441.174 and these rules, a nursing staff "reasonably believes" if:

(a) A reasonable nursing staff in the circumstances would believe that an activity, policy or practice of a hospital:

(A) Is in violation of law or a rule or is in violation of professional standards of practice; or

(B) Poses a risk to the health, safety or welfare of a patient or the public; or

(b) An activity, policy or practice is in violation of law or rule or is in violation of professional standards of practice.

Stat. Auth.: ORS 659A.805 & 441.178

Stats. Implemented: ORS 441.172, 441.174 & 441.178

Hist.: BLI 4-2005, f. 1-6-05, cert. ef. 1-7-05

839-010-0210

Exceptions to Retaliatory Action

(1) Except as provided in section 2 of this rule, the protection against retaliatory action provided for in ORS 441.174(1) and OAR 839-010-0205(6) and (7) does not apply to a nursing staff unless the nursing staff, before making a disclosure to a private accreditation organization or a public body as described in ORS 441.174(1)(a) and OAR 839-010-0205(6)(a):

(a) Gives written notice to a manager of the hospital of the activity, policy, practice or violation of professional standards of practice that the nursing staff reasonably believes poses a risk to public health; and

(b) Provides the manager a reasonable opportunity to correct the activity, policy, practice or violation.

(2) A nursing staff is not required to comply with the provisions ORS 441.174(2) and OAR 839-010-0205(1) if the nursing staff:

(a) Is reasonably certain that the activity, policy, practice or vio-

lation is known to one or more managers of the hospital or an affiliated hospital and an emergency situation exists;

(b) Reasonably fears physical harm as a result of the disclosure; or

(c) Makes the disclosure to a private accreditation organization or a public body for the purpose of providing evidence of an activity, policy, practice or violation of a hospital or an affiliated hospital that the nursing staff reasonably believes is a crime.

(3) For the purposes of subsection (2) of this rule, a nursing staff "reasonably believes is a crime" means:

(a) The activity, policy, practice or violation of law or rule is a crime; or

(b) Whether or not the activity, policy, practice or violation of law or rule is a crime, a reasonable nursing staff in the circumstances would believe that it is a crime.

Stat. Auth.: ORS 659A.805 & 441.178

Stats. Implemented: ORS 441.174

Hist.: BLI 4-2005, f. 1-6-05, cert. ef. 1-7-05

DIVISION 11

APPRENTICESHIP AND TRAINING COUNCIL

General Rules

839-011-0000

Notice of Proposed Rule

Before the adoption, amendment, or repeal of any rule, the Apprenticeship and Training Council shall give notice of the proposed adoption, amendment, or repeal:

(1) In the Secretary of State's Bulletin referred to in ORS 183.360 at least 21 calendar days before the effective date.

(2) By mailing a copy of the notice to persons on the Apprenticeship and Training Council's mailing list established pursuant to ORS 183.335(7) at least 28 calendar days before the effective date.

(3) By mailing a copy of the notice to the following persons, organizations, or publications:

(a) Oregon AFL-CIO;

(b) State Building Trades Council;

(c) State Department of Education;

(d) Associated Oregon Industries;

(e) Building Codes Agency;

(f) United Metal Trades Association;

(g) Associated General Contractors;

(h) Associated Builders and Contractors;

(i) United States Department of Labor, Bureau of Apprenticeship and Training;

(j) Associated Press;

(k) Labor Press.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 183.335(7) & 183.360

Hist.: BL 187, f. & ef. 2-19-76; BL 4-1985, f. & ef. 8-8-85, Renumbered from 839-011-0117; BL 1-1991, f. & cert. ef. 1-23-91; BL 3-1994, f. & cert. ef. 6-3-94; BL 6-1994, f. & cert. ef. 10-10-94; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0010

Model Rules of Practice and Procedure

Pursuant to ORS 183.341, the Apprenticeship and Training Council adopts the Attorney General's *Model Rules of Procedure*, effective September 15, 1997, as the Council's rules of administrative procedure. The *Model Rules* shall control such procedures except as otherwise required by statute or this rule.

[ED. NOTE: The full text of the Attorney General's Model Rules of Procedure is available from the office of the Attorney General or Bureau of Labor and Industries.]

Stat. Auth.: ORS 344.745(1) & 660.120(1)

Stats. Implemented: ORS 183.341

Hist.: BL 121(Temp), f. & ef. 3-24-72; BL 127, f. 7-27-72, ef. 8-15-72; BL 130, f. 10-5-72, ef. 10-15-72; BL 163(Temp), f. 6-19-74, ef. 6-19-74; BL 167, f. 9-20-74, ef. 10-11-74; BL 188, f. & ef. 4-7-76; BL 1-1979, f. & ef. 1-23-79; BL 11-1982, f. & ef. 7-20-82; BL 4-1985, f. & ef. 8-8-85, Renumbered from 839-011-0118; BL 13-1988, f. & cert. ef. 7-1-88; BL 1-1991, f. & cert. ef. 1-23-91; BL 7-1993, f. & cert. ef. 7-12-93; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0015

Rules of Order

The Council adopts Roberts Rules of Order for the conduct of meetings; provided, however, that specific Administrative Rules of the Council will take precedence over Roberts Rules of Order.

Stat. Auth.: ORS 660
 Stats. Implemented: ORS 660.120
 Hist.: BL 4-1985, f. & ef. 8-8-85; BL 1-1991, f. & cert. ef. 1-23-91

839-011-0020

Date and Location of Council Meetings

The Council will hold at least four regular public meetings each year as required by ORS 660.120(2)(g). The date of the next regular Council meeting will be designated by the Chair and will be announced at each Council meeting. Meetings may be scheduled at any location within the State of Oregon selected by the Chair.

Stat. Auth.: ORS 660
 Stats. Implemented: ORS 660.120(2)(g)
 Hist.: BL 4-1985, f. & ef. 8-8-85; BL 1-1991, f. & cert. ef. 1-23-91

839-011-0025

Meetings and Notice

The Director shall follow the procedures established by the Public Meetings Law, ORS 192.610 to 192.690, to provide notice of Council meetings.

Stat. Auth.: ORS 660
 Stats. Implemented: ORS 192.610 - 192.690
 Hist.: BL 4-1985, f. & ef. 8-8-85; BL 1-1991, f. & cert. ef. 1-23-91

839-011-0030

Preparation of Agenda

(1) All matters to be included on the agenda must be delivered to the office of the Director by 5:00 p.m. at least 45 calendar days before the date of the next Council meeting. If the 45th calendar day before the next Council meeting falls on either a weekend or holiday, the items for the agenda will be submitted to the Director on the last business day before the 45th calendar day.

(2) All matters on the agenda requesting Council to approve, modify or revoke standards, committees or programs shall be submitted to the Director pursuant to section (1) of this rule.

(3) All other matters to be included on the agenda must be submitted in writing to the Director.

(4)(a) Late submissions for inclusion on the agenda that do not request Council to approve, modify or revoke standards, committees or programs may be considered by Council if a majority of the members agree;

(b) Items approved pursuant to subsection (4)(a) of this rule shall be appropriately placed on the agenda by the Chair.

Stat. Auth.: ORS 660
 Stats. Implemented: ORS 660.120(1)
 Hist.: BL 4-1985, f. & ef. 8-8-85; BL 1-1991, f. & cert. ef. 1-23-91; BL 6-1994, f. & cert. ef. 10-10-94; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0040

Participation by the Public

(1) The Council encourages public participation at Council meetings. Persons not members of the Council who desire to address the Council are required to:

(a) Request to address the Council by signing up to speak at the meeting. A sign-up sheet will be available in the Council meeting room approximately one-half hour before the scheduled meeting time. Individuals who fail to sign may address the Council at the discretion of the Chair;

(b) Indicate on the sign-up sheet:

- (A) Name;
- (B) Who he/she represents;
- (C) Agenda number;
- (D) Subject.

(c) Limit initial comments to five minutes per speaker; and

(d) Limit rebuttal to three minutes.

(2) No more than three persons other than members of the Council and Apprenticeship and Training Division staff will be allowed to speak on either side of an issue.

(3) The Chair may request further comment or information, or allow rebuttal.

(4) The Council may end debate at any time.

Stat. Auth.: ORS 660
 Stats. Implemented: ORS 660.120
 Hist.: BL 4-1985, f. & ef. 8-8-85; BL 1-1991, f. & cert. ef. 1-23-91; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0050

Certificate of Meritorious Service

The Council may grant a certificate of meritorious service to individuals who have devoted a minimum of three years to the service of registered apprenticeship based on either:

- (1) Recommendations of joint committees; or
- (2) Motion of a Council member.

Stat. Auth.: ORS 660
 Stats. Implemented: ORS 660.120
 Hist.: BL 4-1985, f. & ef. 8-8-85; BL 1-1991, f. & cert. ef. 1-23-91; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0060

Public Records Request

(1) The Bureau of Labor and Industries shall make available any record requested by any person pursuant to ORS 192.420, provided that the request is in writing and the record requested is not exempt from disclosure under the provisions of ORS Chapter 192, other applicable law, or required to be kept confidential by contract. A reasonable time shall be allowed for the Bureau to locate and retrieve information requested.

(2) The Bureau of Labor and Industries may charge a fee reasonably calculated to reimburse the Bureau for costs of providing and conveying copies of public records:

(a) The Bureau shall charge the requester, unless otherwise specified in OAR chapter 839, 15¢ per page as reimbursement for the actual costs of locating, reviewing, separating, photocopying, certifying (where requested) and preparing the record(s) for mailing, and normal and reasonable staff time. Any applicable delivery costs or postage will also be charged to the requester. The Bureau shall charge for copies sent by facsimile (fax) machine \$5 for the first page and \$2 for each page thereafter with a limit of 20 pages. As used in this section:

(A) "Page" refers to the number of copies produced, either 8.5 x 11 inches or 8.5 x 14 inches. Staff will not reduce size or otherwise manipulate records to fit additional records on a page, unless staff concludes that it will be the most effective use of their time. A double-sided copy consists of two pages. Because of the increased staff time involved in double-sided copying, there is no reduction in the per page fee.

(B) "Normal and reasonable" staff time is 10 minutes or less per request.

(b) Additional charges for staff time may be made when responding to record requests that require more than normal and reasonable time to respond, or when the search requires supervision by Bureau management or review by the Attorney General. Bureau staff time shall be charged for each hour or fraction thereof at the Bureau's hourly billing rate, by position, as follows:

(A) Supervisor/Administrator — \$29.00 per hour;

(B) Investigator/Compliance Specialist/Consultant — \$22.00 per hour;

(C) Clerical — \$16.00 per hour.

(c) The Bureau shall charge \$25 per hour, with a \$7.50 minimum, for the staff time required to fill public record requests that require electronic reproduction. Charges include time spent locating, downloading, formatting, copying and transferring records to media.

(d) The Bureau will provide blank reproduction media at the following rates:

(A) Diskettes, 5.25 or 3.5, \$1.00 each. (due to the threat of computer viruses, the Bureau will not permit requesters to provide diskettes);

(B) Video Cassettes, two hours, \$3.00 each;

(C) Audio Cassettes, \$2.00 each.

(e) The charge for a request for records on electronic mail is the actual cost the Bureau to provide such records including staff time and charges by any third party vendor.

(f) The costs of any necessary review of public records requests by the Attorney General shall be charged to the requester at the rate billed by the Department of Justice to the Bureau.

(3) The Bureau may require that all fees assessed pursuant to this rule be paid in cash before furnishing any copies, material, or information requested. The Bureau may require payment in exact change.

(4) Where the request is to inspect records, the Bureau may impose restrictions upon the location where the information requested will be made available for inspection. Where the Bureau allows the person requesting the information to search or inspect Bureau records,

the Bureau may, as it deems necessary for the protection of the records, assign an employee to supervise the search. The charge for this service will be in accordance with section (2)(b) of this rule.

(5) The commissioner may waive the requirements to pay the charges described in this rule, or any part thereof, where the commissioner determines that the waiver is in the public interest because making the record available primarily benefits the general public. In determining whether sufficient public interest is demonstrated, relevant factors include:

- (a) The requester's identity;
- (b) The purpose for which the requester intends to use the information;
- (c) The character of the information;
- (d) Whether the requested information is already in the public domain; and
- (e) Whether the requester can demonstrate the ability to disseminate the information to the public. The requester's inability to pay is also a factor, but is not alone a sufficient basis for a fee waiver.

Stat. Auth.: ORS 344.745(1) & 660.120(1)

Stats. Implemented: ORS 344.745

Hist.: BL 4-1985, f. & ef. 8-8-85; BL 1-1991, f. & cert. ef. 1-23-91; BL 7-1993, f. & cert. ef. 7-12-93; BL 6-1994, f. & cert. ef. 10-10-94; BL 7-1996, f. & cert. ef. 7-22-96; BLI 2-1999, f. & cert. ef. 4-2-99

Formation, Composition and Dissolution of Local Committees; Legislation of Agreements

839-011-0070 Definitions

(1) "Apprentice" means a worker at least 16 years of age, except where a higher minimum age is otherwise required by law, who is employed to learn an apprenticeable occupation under standards of apprenticeship approved by the State Apprenticeship and Training Council, as defined in ORS 660.010.

(2) "Apprenticeship Agreement" means a written agreement between an apprentice and either the employer or the local joint committee that shall contain the minimum terms and conditions of the employment and training of the apprentice, as defined in ORS 660.010.

(3) "Chair" means the Commissioner of the Oregon Bureau of Labor and Industries who serves as chairperson of the Council pursuant to ORS 660.110(5).

(4) "Commissioner" means the Commissioner of the Bureau of Labor and Industries, as defined in ORS 660.010.

(5) "Council" means the State Apprenticeship and Training Council, as defined in ORS 660.010.

(6) "Council Secretary" means the Oregon State Director of Apprenticeship and Training, as set forth in ORS 660.170(1).

(7) "Director" means the Oregon State Director of Apprenticeship and Training, as defined in ORS 660.010.

(8) "Employer" as defined in ORS 660.010, means any approved person employing the services of an apprentice, regardless of whether such person is a party to an apprenticeship agreement with that apprentice.

(9) "Employee" is defined as any person employed in, or active in, the applicable trade.

(10) "Local Joint Committee," as defined in ORS 660.010, includes local joint apprenticeship committees, local joint training committees and trade committees.

(11) "Minimum Guideline Standards" means industry/trade benchmarks developed and proposed by the appropriate state joint committee and approved by Council representing the fundamental requirements necessary for entry into, and completion of specific Council approved occupational/trade programs.

(12) "Program," as defined in ORS 660.010, means the total system of apprenticeship as operated by a particular local joint committee, including the committee's registered standards and all other terms and conditions for the qualification, recruitment, selection, employment and training of apprentices in that apprenticeable occupation.

(13) "Registration of an Apprenticeship Agreement" means the acceptance and recording of the agreement by the Apprenticeship and Training Division on behalf of the Council. Registration is evidence of the participation of the apprentice in a registered program.

(14) "Registration of a Training Agreement" means the acceptance and recording of the agreement by the Apprenticeship and Training

Division on behalf of the Council. Registration is evidence of the participation of the trainee in a registered program.

(15) "Standards" means a written agreement submitted by a local joint committee and approved by the Council, which sets forth a plan containing all terms and conditions for the qualification, employment and training of apprentices or trainees as set forth in ORS 660.126 and 660.137.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 660.120(1)

Hist.: BL 6-1985, f. & ef. 10-15-85; BL 7-1991, f. & cert. ef. 8-15-91 (and corrected 2-3-92); BL 6-1994, f. & cert. ef. 10-10-94; BLI 2-1999, f. & cert. ef. 4-2-99

Joint Committees

839-011-0072

Formation of Joint Committees

(1) Any person or group interested in forming a joint committee should contact any office of the Apprenticeship and Training Division, Oregon Bureau of Labor and Industries.

(2) The person or group, with the assistance of staff will set a date for an organizational meeting.

(3) At the organizational meeting participants, excluding staff, will:

- (a) Adopt *Roberts Rules of Order*;
- (b) Specify the committee name, its geographical jurisdiction, and the occupation or occupations in the case of the trades;
- (c) Elect a chair and a secretary, one of whom shall represent employees, the other of whom shall represent employers;
- (d) Select committee member nominees and submit their names pursuant to OAR 839-011-0074 on member selection.

(4) Registered apprenticeship programs and training agents shall be responsible for the administrative cost and expenses associated with the operation of their programs. No apprenticeship committee, sponsor or registered training agent shall charge or cause charges to be levied against an apprentice for purposes of financially supporting the administrative, clerical or organizational cost of operating an apprenticeship program. Apprentices may be required to pay the normal cost of tuition for educational services provided by a community college, university, trade school, training center or industry sponsored education facility.

(5) At the discretion of the Council, local committees may charge apprenticeship and training applicants a reasonable non-refundable application fee. Council shall require local committees to:

- (a) Revise the local committee's standards to reflect that the minimum qualifications of an applicant shall include payment of a non-refundable application fee. The standards shall also reflect that applicants with an income below 150% of the federal poverty guidelines may apply for a non-refundable application fee waiver. Federal poverty guidelines are established by the Federal Department of Health and Human Services and are recognized by the Oregon Adult and Family Services Division;

(b) Show that the non-refundable application fee results in no disparate impact and report to the Council regarding disparate impact reviews; and

(c) Show that the local committee experiences an extraordinary burden with respect to the administration of applications, i.e., beyond the ordinary course of conducting such procedures. Examples of an extraordinary burden are, but not limited to, development of specific entrance examinations, validation studies and extensive testing procedures or extensive interview procedures.

(d) No local committee shall charge such a fee until approval has been granted by Council.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 660

Stats. Implemented: ORS 660.120(2)(c), 660.135(1), (2), (3), (4) & (5)

Hist.: BL 6-1985, f. & ef. 10-15-85; BL 1-1991, f. & cert. ef. 1-23-91; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0073

Committee Policies

Pursuant to ORS 660.120(2)(a), all local apprenticeship and training committees shall develop and consistently administer operating policies as directed by Council.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 660.137(2)

Hist.: BL 8-1992, f. & cert. ef. 6-15-92; BL 1-1995, f. & cert. ef. 8-14-95; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0074

Committee Member Selection, JATC/JAC, TATC/TAC

(1) New Committees:

(a) Members for a new JATC/JAC committee are selected as follows:

(A) Representatives of employers, or an employer organization that represents the industry, shall submit nominations for not less than two nor more than four principal employer committee members to the Director;

(B) Representatives of employees, or an employee organization that represents the concerned employees and that is involved with the concerned occupation, shall submit nominations for not less than two nor more than four principal committee members to the Director. For the purposes of these rules, an individual is eligible to serve as an employee representative only if he/she is or has been a skilled practitioner in the occupation he/she represents and does not serve in a supervisory capacity as defined in the National Labor Relations Act (as amended); or is a bargaining unit representative for the employees of an employer(s) recognized as an approved training agent by the committee.

(b) Members for a new TATC/TAC committee are selected as in subsection (1)(a) of this rule *except*: Only one principal employee representative and one principal employer representative are allowed for each occupation within the TATC/TAC;

(c) The Director shall list the names of the nominees on the next Council agenda;

(d) After consideration of whether the appointments provide a balanced representation of the viewpoints of employer and employee groups, the Council will approve equal numbers of employers and employees to each committee;

(e) The Council may request the names of additional nominees if it does not approve of one or more of the nominees.

(2) Member Vacancies: When a member vacancy occurs on a committee, it shall be filled according to the member selection process contained in subsection (1)(a) of this rule.

(3) If either employers or employees cannot or will not recommend nominees for the committee, the Apprenticeship Representative for the area may recommend member(s) involved with the concerned occupation, and forward the name of the individual(s) to the Director. The Director will evaluate the individual(s), and if appropriate, provide interim approval pending submittal of the names of the individual(s) to the Council for approval according to the procedures of section (1) of this rule.

(4) Alternate Committee Members:

(a) There may be one, but no more than one, alternate committee member for each principal committee member and they shall be selected according to the procedures to select the principal committee members as set forth in this rule;

(b) Alternates shall serve in the absence of principal members consistent with ORS 660.135(2): "The alternate members may attend all committee meetings, participate in discussions and perform such duties as may be delegated to them by the committee, but may be not vote at committee meetings except when actually serving to substitute for an absent principal committee member for their respective employer or employee."

Stat. Auth.: ORS 660

Stats. Implemented: ORS 660.145

Hist.: BL 6-1985, f. & ef. 10-15-85; BL 1-1991, f. & cert. ef. 1-23-91; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0078

Removal of Committee Members

(1) The Council will remove committee members only for inactivity, inadequate activity, or failure to abide by ORS Chapter 660, or the rules and policies of the Council, pursuant to ORS 660.120(2)(d).

(2) The Council may also remove committee members upon the recommendation of the committee as set forth in section (3) of this rule. Each committee will establish its own written policy on what constitutes activity or inactivity.

(3) Committee(s) may recommend removal of a member subject to the following conditions:

(a) Only employer committee members may recommend and vote for removal of an employer member and such action shall be noted in the committee meeting minutes;

(b) Only employee committee members may recommend and

vote for removal of an employee committee member and such action shall be noted in the committee meeting minutes;

(c) If the committee is a trade committee, only employer committee members may recommend and vote for removal of an employer member from another occupation within the committee, while only employee committee members may recommend and vote for removal of an employee member from another occupation within the committee and such action shall be noted in the committee meeting minutes.

(4) The Director shall include such recommendations as recorded in committee meeting minutes on the Council Agenda.

(5) Notwithstanding OAR 839-011-0074, the Council may appoint a replacement committee member at the same meeting at which it removes a member.

Stat. Auth.: ORS 660

Stats. Implemented: ORS 660.120(2)(d)

Hist.: BL 6-1985, f. & ef. 10-15-85; BL 1-1991, f. & cert. ef. 1-23-91

839-011-0082

Dissolving Committees

The Council will dissolve committees for inactivity, inadequate activity, or failure to abide by ORS Chapter 660 or the rules and policies of the Council pursuant to ORS 660.120(2)(d), or if the committee has informed the Director or the Council that it will no longer perform its duties.

Stat. Auth.: ORS 660

Stats. Implemented: ORS 660.120(d)

Hist.: BL 6-1985, f. & ef. 10-15-85; BL 1-1991, f. & cert. ef. 1-23-91

839-011-0084

Approval of New Committees and Standards

(1) Any additional committees or standards in an area already served by a committee in the same trade, craft or occupation shall be established in the same manner as any other joint committee.

(2) All employers and their qualified employees shall be afforded the opportunity to participate, on a non-discriminatory basis, in existing programs.

(3) The Council will approve the creation of a new local joint committee or new standards for an existing committee only if the applicant for the new program or new standards can first demonstrate to the Oregon State Apprenticeship and Training Council, by a preponderance of evidence, that the application is in conformity with the following requirements:

(a) The applicant shall submit documentation showing committee composition pursuant to ORS 660.135, .145.

(b) The applicant shall submit standards in a format approved by the Council that meet or exceed any existing statewide guideline standards (ORS 660.137(1), .226, .155) for the occupation. Where no state guideline standards exist, proposed standards shall meet or exceed national guideline standards approved by the United States Department of Labor. Where no state or national guideline standards exist, standards will be approved at the discretion of the Council when the proposed occupation is clearly identified and commonly recognized throughout an industry.

(c) The applicant shall submit an administration plan that includes:

(A) Written designation of the program administrator;

(B) Documented assurances that the committee will be adequately funded to support its administration and the presentation of related instruction;

(C) Detailed statements of direct costs to apprentices/trainees (including instruction, books, tuition); and

(D) Assurances that training agents and prospective training agents will be provided with a written statement of costs for program participation.

(d) The applicant must demonstrate the ability to track required training, educational and affirmative action information (i.e., work progress reports, apprentice/trainee rotation system, employer's apprentice/trainee evaluation forms, grading sheets, applicant logs) and provide the Council with copies of the forms and documents that will be used to track such information.

(e) The applicant shall submit a plan detailing how the committee will ensure that participating employers will provide work in all areas covered by the program standards (ORS 660.137(5)), including:

(A) Training in all counties listed in proposed geographical area;

(B) Training in all work processes set forth in the standards;

(C) Committee expectations of supervising journey workers and a plan for the supervision of apprentices/trainees in the ratio set forth in the standards (ORS 660.126(1)(c), (f));

(D) Training agent qualifications and duties (ORS 660.137(5)); and

(E) A plan for training participating employers on their duties and responsibilities.

(f) The applicant shall submit a complete related training curriculum, including instructor qualifications, class outlines and expected competencies, grading procedures and completion criteria. This submission shall include:

(A) An explanation of the curriculum delivery method and a description of the related training facilities;

(B) Certification of the curriculum and instructional delivery plan by either a state education certifying authority or nationally recognized industry association (ORS 660.137(2)(c), .126(1)(j), .157); and

(C) Assurances that classroom and related instruction can be delivered throughout the geographic area. The applicant must submit a contract or other documentation demonstrating that actual instructional resources are in place. The committee's geographic area must be one that can be reasonably served by the committee with respect to employers and the location of the related training services (ORS 660.126(1)(a)).

(g) The applicant must submit operating policies and procedures and assurances that the program will be operated in accordance with the same;

(h) The applicant shall submit a plan to recruit, evaluate and select apprentice/trainee applicants, including an application form that meets Council requirements.

(4) All objections to the approval of a new committee or new standards shall be submitted to the Council in writing at the meeting where the application is being considered for approval, specifically detailing any objections to the application. Council may rule on the application and objections thereto at that time or grant the applicant 30 days after the Council meeting to submit a written rebuttal to the objections to the Director. Council shall direct the Director to investigate and evaluate the objections and rebuttal and provide a report to Council within 45 days of receipt of the rebuttal statement. At the next Council meeting after the initial submission, Council shall either approve or deny the application and provide a specific written explanation for its actions.

(5) All new programs shall serve a probationary period of three years after approval by Council. Failure to clearly demonstrate the ability to operate a satisfactory program during the probationary period, based upon periodic program reviews conducted by the Division, shall result in cancellation of the program by Council.

Stat. Auth.: ORS 660

Stats. Implemented: ORS 660.135(1)

Hist.: BL 6-1985, f. & ef. 10-15-85; BL 1-1991, f. & cert. ef. 1-23-91; BLI 2-1999, f. & cert. ef. 4-2-99; BLI 16-2005(Temp), f. & cert. ef. 8-23-05 thru 2-19-06; Administrative correction 3-20-06; BLI 16-2006, f. 4-17-06, cert. ef. 4-18-06

839-011-0086

Division Service to Committees

No Division staff may be elected, or appointed to any position within a committee.

Stat. Auth.: ORS 660

Stats. Implemented: ORS 660.135(2) & 660.135(5)

Hist.: BL 6-1985, f. & ef. 10-15-85; BL 1-1991, f. & cert. ef. 1-23-91

Apprenticeship Agreements

839-011-0088

Registration of Apprenticeship Agreements

(1) The Council delegates registration of apprenticeship agreements to the Apprenticeship and Training Division, and recognizes an agreement as registered when:

(a) It is on a form which has been approved pursuant to ORS 660.020 and issued by the Division;

(b) Information requested on the form as authorized by ORS 660.020 has been supplied by the apprentice. The requested information includes, but is not limited to:

(A) Social Security Number for identification purposes only; and

(B) The apprentice's signature indicating the release/non-release of information to the Shared Information System.

(c) It has been signed by the apprentice, and the local joint com-

mittee acting as the employer's agent; or the apprentice's employer with approval of the local joint committee pursuant to joint committee rules. Approval must be recorded as soon as possible at a committee meeting;

(d) The agreement has been submitted to and accepted by a representative of the Division.

(2) The effective date for the starting of apprenticeship or training for any apprentice or trainee shall be not more than three (3) months or ninety (90) days prior to the date that a fully executed agreement is submitted to and accepted by a representative of the Division.

(3) Any previous time spent by the apprentice or trainee in the trade, that the committee considers applicable to the training, shall be indicated as credit for previous experience, with the effective date as the date of approval of the application by the appropriate local committee. All local committees shall develop and implement a policy detailing the process through which previous experience is uniformly evaluated and credit awarded for advanced standing of a new apprentice in either or both on-the-job and related training.

(4) The local Apprenticeship and Training Division office will forward the agreement to the Division's main office where all agreements shall be maintained.

Stat. Auth.: ORS 660.120(1) & 660.020

Stats. Implemented: ORS 329.965 & 660.060(8)

Hist.: BL 6-1985, f. & ef. 10-15-85; BL 1-1991, f. & cert. ef. 1-23-91; BL 7-1996, f. & cert. ef. 7-22-96; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0090

Causes for Disciplinary Actions by Council

The Council has the authority to take disciplinary action against a committee for conduct or action, including but not limited to:

(1) Inappropriate use of an apprentice's or apprentices' time, skills or training;

(2) Inadequate training of an apprentice(s);

(3) Inappropriate assignment or abuse of discretion in work assignments;

(4) Discriminatory action(s) against an apprentice(s);

(5) Violation of any state or federal law; or

(6) Any other action deemed inappropriate by the Council.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 660.120(1) & 660.120(2)(d)

Hist.: BL 6-1994, f. & cert. ef. 10-10-94; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0093

Disciplinary Procedure

The Council shall establish a disciplinary procedure, to be applied before any disciplinary action toward a committee, consisting of but not limited to:

(1) A request to appear before Council to present information and answer questions from the Council; and

(2) A written notice of Council's decision in the matter.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 660.120(1) & 660.120(2)(d)

Hist.: BL 6-1994, f. & cert. ef. 10-10-94; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0095

Disciplinary Actions

Where violations in the apprenticeship program by a committee are found by the Council after a review of all relevant facts, including the opportunity for the committee to make a presentation before the Council, the Council may vote to:

(1) Censure the committee;

(2) Place the committee on probation for a specific period of time;

(3) Order specific actions to correct the violations;

(4) Impose sanctions pursuant to existing Council policies and interpretations; or

(5) Decertify the committee.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 660.120(1) & 660.120(2)(d)

Hist.: BL 6-1994, f. & cert. ef. 10-10-94; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0140

Rules for Approving or Disapproving Apprenticeship Standards Submitted by Appropriate Committees

Before the submission of any standards or modifications thereto pursuant to ORS 660.120, 660.126, or 660.137, the local committee shall ensure the following criteria have been met:

(1) The proposed standards have been filed with the Director in a proper and timely manner. The proposed standards have been submitted to the Director at least 45 calendar days before the date of the next Council meeting. If the 45th calendar day before the date of the next Council meeting falls on either a weekend or holiday, the items for the agenda will be submitted to the Director on the last business day before the 45th calendar day.

(2) The proposed standards are to be in a form and format approved by Council, including but not limited to:

- (a) Language and terminology as established by the Apprenticeship and Training Division;
- (b) Minimum qualifications for applicants;
- (c) Geographical area;
- (d) Hours of employment and work process;
- (e) Related training hours and subjects;
- (f) Wage schedule and apprenticeship periods;
- (g) The maximum number of apprentices in numeric ratio to journeypersons, consistent with proper supervision, training, safety, industry needs and continuity of employment in terms of job site, work force, department or plant; and
- (h) Probationary period.

(i) Signature sheets and meeting minutes must be submitted with proposed or revised standards. Council may require additional information of committees regarding program administration and training plans.

(3) Standards not in a form or format approved by Council may be granted when they are part of BAT approved national pattern standards and are consistent with BAT regulations and guidelines, these rules and Council policies.

(4) The Director has given adequate public notice that the Council will consider standards submitted for approval at its next meeting.

(5) Any apprenticeship or training standards referred back to local committees for revision may be approved by the Director when revised according to Council action.

(6) As a program's new or revised standards are approved, they shall supersede its previous standards covering the same occupation or geographical area.

(7) Any standards to which apprentices have not been registered for two or more years will be reported to the Council for dissolution. Thereafter, new standards must be approved prior to registration of any new apprentices.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 660.120(2)(b), 660.126 & 660.137

Hist.: BL 95, f. 8-16-65; BL 130, f. 10-5-72, ef. 10-15-72; BL 3-1978, f. & ef. 4-3-78; BL 13-1988, f. & cert. ef. 7-1-88; BL 1-1991, f. & cert. ef. 1-23-91; BL 6-1994, f. & cert. ef. 10-10-94; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0145

Compliance Reviews

Apprenticeship and Training Division staff will conduct an Affirmative Action Compliance Review annually for all programs on a form and in a format approved by the Council.

(1) The Affirmative Action Compliance Review shall include an analysis of the following items for the time period specified by the Council:

- (a) Selection method;
- (b) Affirmative action, equal employment opportunity records and performance;
- (c) Apprentice interviews, where applicable;
- (d) Records, including but not limited to, applications, logs, interviews, selection criteria, ranking lists, results, committee meeting minutes, standards and any other pertinent documentation; and
- (e) Results of the review.

(2) The Director shall develop and maintain a reporting schedule for Affirmative Action Compliance Reviews. The schedule will specify which programs are scheduled for review at a designated Council meeting. The Director shall provide a copy of the review schedule to committee chairpersons once a year.

(3) Upon receipt of the Affirmative Action Compliance Review reports the Council may take any action including the following, but not limited to:

- (a) Approve the report;
- (b) Refer the report back for further clarification;
- (c) Extend the review period for up to six months;
- (d) Order a probationary period including more frequent and

detailed program reviews;

(e) Direct compliance and/or corrective actions accordingly;

(f) Impose sanctions;

(g) Act to dissolve the committee and/or standards for cause or non-compliance; or

(h) Any other action as directed by the Council.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 660.120(2)(a) & 660.120(2)(f)

Hist.: BL 16-1979, f. & ef. 11-8-79; BL 6-1994, f. & cert. ef. 10-10-94; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0160

Formation and Filling of Vacancies of State Joint Committees

State joint committees shall be formed and vacancies filled pursuant to ORS 660.155.

Stat. Auth.:

Stats. Implemented: ORS 660.155

Hist.: BL 130, f. 10-5-72, ef. 10-15-72

839-011-0162

Employer Training Agents

(1) Where two or more programs of the same occupation exist in the same geographical area an employer may not serve as an approved training agent for more than one such program at a time.

(a) In the event an employer has been approved as a training agent by two or more of such programs, the Division shall notify the employer and the appropriate committees of this rule and require that the employer respond within twenty working days of receipt of the notice, designating the program in which the employer chooses to continue and resigning from all others. Such notice shall be sent by certified mail, return receipt requested.

(b) An employer who does not respond pursuant to section (1)(a) of this rule, shall be deemed conclusively to have elected to resign as a training agent from all such programs. The Division shall notify the committees serving programs in which the employer had participated that the employer's training agent status has been revoked by operation of this rule.

(2) No employer shall be required to join an industry or trade association as a condition of approval as a training agent.

Stat. Auth.: ORS 660

Stats. Implemented: ORS 660.120(1) & 660.137(5)

Hist.: BL 17-1979, f. & ef. 11-8-79; BL 1-1991, f. & cert. ef. 1-23-91; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0170

Committee Minutes Submission and Processing

As required in ORS 660.135(3), each committee secretary shall be responsible for the preparation, maintenance and submission of committee meeting minutes, including actions pertaining to apprentices and all supporting documentation, to the Apprenticeship and Training Division.

(1) All committee meeting minutes shall be submitted in a format approved by the Division within ten (10) working days of the meeting.

(2) All committee meeting minutes' actions shall be recorded and processed by the Division within ten (10) working days of receipt of the minutes.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 660.120(1) & 660.135(4)

Hist.: BL 6-1994, f. & cert. ef. 10-10-94; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0175

Cancellation Notices

All notices to appear for cancellation of apprenticeship agreements must be postmarked at least 22 calendar days in advance of the appearance date for the consideration of the cancellation.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 660

Hist.: BL 6-1994, f. & cert. ef. 10-10-94; BL 11-1996, f. & cert. ef. 12-10-96

839-011-0200

Equal Employment Opportunity in Apprenticeship

(1) The Apprenticeship and Training Council hereby adopts the "Equal Opportunity in Apprenticeship Plan," effective April 1, 1999, and incorporated by reference as if fully set forth in these rules.

(2) "Copies of the Equal Opportunity in Apprenticeship Plan" are available from any office of the Apprenticeship and Training Division. The offices are located in Bend, Eugene, Medford, Portland and Salem and listed in the blue pages of the telephone book.

[Publications: Publications referenced are available from the agency.]
 Stat. Auth.: ORS 660
 Stats. Implemented: ORS 660.120
 Hist.: BL 120, f. 2-16-72, ef. 3-1-72; BL 151(Temp), f. & ef. 12-19-73; BL 159, f. 3-8-74, ef. 4-11-74; BL 168, f. 10-11-74, ef. 11-11-74; BL 9-1978(Temp), f. & ef. 9-15-78; BL 13-1978, f. & ef. 12-8-78; BL 2-1988, f. & cert. ef. 2-19-88; BL 1-1991, f. & cert. ef. 1-23-91; BL 8-1991(Temp), f. 8-15-91, cert. ef. 9-1-91; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0250

Agreements During Labor Disputes

(1) Pursuant to the National Labor Relations Act and Title 29 CFR Parts 29.3(h) and 29.12(10), when a labor dispute exists with an employer or prospective employer in a single employer program, the Council will not:

- (a) Approve changes in existing standards;
- (b) Approve new standards;
- (c) Register additional apprentices for the employer; or
- (d) Review information of new committees until the labor dispute has been resolved or the representative union has tendered a written waiver of its objections to the employer or prospective employer's participation.

(2) Pursuant to the National Labor Relations Act and Title 29 CFR Parts 29.3(h) and 29.12(10), when a labor dispute exists with an employer or prospective employer in a multi-employer program, the local committee will not:

- (a) Provide additional apprentices to the employer or prospective employer engaged in the labor dispute; or
- (b) Grant training agent status until the labor dispute has been resolved or the representative union has tendered a written waiver of its objections to the employer or prospective employer's participation.

(3) For purposes of this rule, a labor dispute exists for an employer where:

- (a) There is a collective bargaining agreement in effect, or where employees have voted for a bargaining agreement; and
 - (b) There is a strike, lock out or work stoppage.
- (4) Apprentices or trainees subject to apprenticeship or training agreements and employed in an establishment involved in a labor dispute where the employees have voted for a bargaining unit and a strike is in progress are not in violation of their agreements if they leave their employment until settlement of the labor dispute.

[Publications: Publications referenced are available from the agency.]
 Stat. Auth.: ORS 660
 Stats. Implemented: ORS 660.120
 Hist.: BL 7-1986, f. & ef. 7-14-86; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0260

Movement and Training of Apprentices within the Same Occupation

(1) Apprentices who are registered to a particular employer and/or committee and deployed by the employer/committee to an area outside of committee jurisdiction may receive related training with the consultation and agreement of the appropriate joint committee in the new area.

(2) Each local committee shall develop and uniformly implement a policy defining its processes and procedures for the immigration of employers and apprentices into its geographical area and jurisdiction. Each policy must contain the committee's processes and procedures addressing:

- (a) The authorization of approved training agents domiciled in other jurisdictions;
- (b) The portability of apprentices; and
- (c) The hiring priority, if any, of unemployed apprentices within the jurisdiction.

(3) The policies of each committee shall be reviewed and approved by Division staff on behalf of the Council.

(4) In the event that a policy is not approved by the Division, it shall be referred to the Council's Rules and Policy Subcommittee for review and action.

Stat. Auth.: ORS 660
 Stats. Implemented: ORS 660.120
 Hist.: BL 7-1986, f. & ef. 7-14-86; BL 1-1991, f. & cert. ef. 1-23-91; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0265

Partial Rotation of Apprentices

(1) All apprentices must obtain work experience for at least 50% of the hours listed for each work process in the committee's approved

standards. In the event that a committee cannot provide an apprentice with work experiences equaling at least 50% of the hours listed for each work process set forth in the standards, the committee must include a written statement in the apprentice's file documenting that the apprentice has had adequate related training to compensate for the lack of on-the-job training.

(2) For licensed occupations, all variations in work processes must be within the statutory limits governing the trade.

Stat. Auth.: ORS 660
 Stats. Implemented: ORS 660.120
 Hist.: BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0270

Administrative Cancellation or Completion of Apprenticeship Agreements

(1) Whenever a local committee has insufficient members to conduct business, has not met at least once within a six-month period or has been dissolved by Council, the Director may:

- (a) Cancel an apprenticeship agreement:
 - (A) At the apprentice's request; or
 - (B) For good cause. For the purposes of this rule, "Good Cause" is defined by ORS 660.060(7) "...which includes but is not limited to failure to report to work, nonattendance at related training, failure to submit work progress reports and a lack of response to committee citations, with due notice to the apprentice..."

(C) In the case of the dissolution of a committee, or for lack of training standards.

(b) Complete an apprenticeship agreement when notice has been forwarded to the Director indicating that the apprentice has complied with the required standards established by the committee.

(2) Such action by the Director or the committee shall be taken pursuant to the following procedure:

- (a) Notice shall be provided by certified mail to the apprentice, employer, committee, Council, and any interested parties before to any action; and
- (b) Written notice to the apprentice, employer, committee, Council, and any interested parties of the final action taken by the Director.

(3) An apprentice may appeal an administrative cancellation as an order other than a contested case order under ORS 183.484.

Stat. Auth.: ORS 660.120
 Stats. Implemented: ORS 660.120(2)(f)
 Hist.: BL 7-1986, f. & ef. 7-14-86; BL 1-1991, f. & cert. ef. 1-23-91; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0280

Electrical Apprentices — 6,500 Hours

(1) A local committee, as defined in ORS Chapter 660, may take action to permit electrical apprentices to work under indirect supervision during their final term(s) of apprenticeship provided they have met the provisions of ORS 479.510 to 479.860 and have:

- (a) 6,500 hours of on-the-job training approved by the appropriate committee;
- (b) Successfully completed related training appropriate to the required 6,500 hours of on-the-job training;

(c) Conformed to the requirements of OAR 918-282-0270(3).

(2) The local committee shall take such actions to approve indirect supervision during committee meetings and detail the actions taken in committee minutes.

(3) The Division shall issue special identification cards to the above designated apprentices pursuant to this rule.

(4) Identification cards will be reissued by the Division upon request from local committees pursuant to their rerating procedure.

(5) The format of the special identification card shall be jointly agreed to by the Building Codes Division and the Apprenticeship and Training Division.

Stat. Auth.: ORS 660
 Stats. Implemented: ORS 479.510 - 479.860 & OAR 918-320-0190(6)
 Hist.: BL 11-1989(Temp), f. & cert. ef. 12-26-89; BL 17-1990, f. & cert. ef. 11-23-90; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0290

Plumber Apprentices — Phased Supervision

(1) A local committee, as defined in ORS Chapter 660, may adopt appropriate policies and take action to permit a plumbing apprentice to work without direct supervision, pursuant to OAR 918-690-0085, under the following circumstances:

- (2) The plumber apprentice must work in the physical presence

of an appropriate journey level plumber. This requires an appropriate journey level plumber's presence at the immediate work site at all times, except for not more than a cumulative 30 minutes during any work shift during which time the journey person is immediately available by voice communication.

(3) The plumber apprentice may work with limited (indirect) supervision when the following specific conditions are met:

(a) The appropriate journey person is immediately available to the apprentice by voice communication (immediately available means that the apprentice can reach the appropriate journey person within a 15-minute period); and

(b) The appropriate journey person meets with the apprentice at least once each day to go over the work done by the apprentice; and

(c) The activity is consistent with the committee's work requirements as established in its written policy; and

(d) There is only one apprentice on the job site and:

(A) The apprentice only engages in water heater replacement or conversion after completing at least six months of work experience, eight hours of related instruction and is evaluated and authorized to do this type of work by the committee; or

(B) The apprentice only engages in minor repairs in a one or two family dwelling after completion of three periods of work experience, the appropriate related instruction for three periods and is evaluated and authorized to do this type of work by the committee; or

(C) The apprentice only engages in general repairs and replacement of existing installations after completion of four periods of work experience, the appropriate related instruction for four periods and is evaluated and authorized to do this type of work by the committee; or

(D) The apprentice only engages in new or remodel installations after completing five periods of work experience, the appropriate related instruction for five periods and is evaluated and authorized to do this type of work by the committee.

(E) The apprentice progresses in phases and as they progress through each phase they may be authorized to participate in the work processes of the preceding phase provided they have been evaluated and authorized to do the specific types of work by the committee.

(4) An "appropriate journey person" is defined as an individual who holds a license equivalent to the license provided to individuals upon completion of the apprenticeship program in which the apprentice is registered.

Stat. Auth.: ORS 660

Stats. Implemented: ORS 693.040 & OAR 918-695-0140

Hist.: BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0300

Effective Date of Council Actions

All Council actions, other than rulemaking, unless otherwise specified by the Council, shall be effective on the first day of the month following the Council meeting at which such action is taken.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 660.120

Hist.: BL 7-1991, f. & cert. ef. 8-15-91 (and corrected 2-3-92)

839-011-0310

Apprentice Rights

Upon registration the local committee shall provide each apprentice with the following information:

(1) Apprenticeship Standards for the program in which the apprentice is registered;

(2) Committee policies;

(3) Apprentice responsibilities as determined by the committee;

(4) Complaint resolution procedure; and

(5) Copy of the apprenticeship agreement.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 660.120(2)(a)

Hist.: BL 7-1991, f. & cert. ef. 8-15-91 (and corrected 2-3-92); BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0320

Presentations to Council

(1) The Council shall require a committee member or designee other than Division or BAT staff to be present at the Council's Standards Review Subcommittee meetings when seeking approval for:

(a) New committee;

(b) New standards.

(c) Revised standards that do not have a staff recommendation

for approval.

(d) New or revised selection methods that do not have staff recommendation for approval.

(2) The Council will not require a committee member or designee to be present at the Council's Standards Review Subcommittee meetings when seeking approval for:

(a) Revised standards that have staff recommendation for approval;

(b) New or revised selection procedures that have staff recommendation for approval.

(3) The Council shall require a committee member or designee other than Division or BAT staff to be present at the Council's Program Quality Review Subcommittee meeting when seeking approval for:

(a) New or revised affirmative action plan that do not have staff recommendation for approval;

(b) Compliance review reports and/or responses that do not have staff recommendation for approval.

(4) The Council will not require a committee member or designee to be present at the Council's Program Quality Review Subcommittee meetings when seeking approval for:

(a) New or revised affirmative action plan that have staff recommendation for approval.

(b) Compliance review report or responses that have staff recommendation for approval.

(5) When a committee member or designee is not required to be present at a subcommittee meeting according to section (2) or (4) above and questions or deficiencies are noted by the subcommittee, the sponsor may be given ten (10) working days to correct the deficiencies and obtain staff recommendation for approval.

(a) If deficiencies are corrected, the submittal will be moved to the Council agenda.

(b) Any submittal that has deficiencies that are not corrected within the 10 day time limit will be referred to the next meeting of the appropriate subcommittee.

(6) The Director, at his or her discretion, may make exceptions to this rule upon receipt of a written request from the committee setting forth circumstances, such as an emergency or undue hardship, that might justify a failure to attend the Subcommittee meeting.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 660.120(2)(a)

Hist.: BL 7-1991, f. & cert. ef. 8-15-91 (and corrected 2-3-92); BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0330

Minimum Qualifications

(1) The Council shall not consider proposed standards, either new or revised that contain any of the following requirements within their minimum qualifications:

(a) Physical ability to do the job, unless it specifically references an occupational requirement, such as lifting a sack of cement to a specified height;

(b) Any tests (including color tests) that do not meet the validity requirements under 41 CFR 60.3;

(c) Requires a valid drivers license;

(d) Requires a medical exam.

(2) Standards submitted containing any of the above requirements will not be placed on the Council agenda.

(3) The minimum qualification section of standards, however, may include a note that advises applicants that employers may require a drivers license and/or medical exam as a condition of employment.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 660.120(2)(a)

Hist.: BL 7-1991, f. & cert. ef. 8-15-91 (and corrected 2-3-92); BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0332

Apprenticeship Qualification Standards

(1) Every local apprenticeship committee or trade committee shall propose to the State Apprenticeship and Training Council any new qualification standards for apprentice applicants, apprentice selection methods and any substantive revisions to previously approved qualification standards or selection methods.

(2) The Council shall evaluate proposed new qualification standards or selection methods and revisions to previously approved qualification standards and selection methods pursuant to the criteria set

forth in Title 29 CFR Part 30, the objectives expressed by the committee or sponsor and such other factors as the Council may deem appropriate.

(3) Evaluation of proposed qualification standards or selection methods by Council shall include an analysis of whether the qualification standards or proposed selection method would result in an adverse impact upon any protected class of applicants.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: SB 791 (1999)

Hist.: BLI 17-1999, f. & cert. ef. 12-20-99

839-011-0334

Eligibility of Family and Current Employees

(1) To the extent that the State Apprenticeship and Training Council determines that it would not result in an adverse impact on apprenticeship opportunities based on an individual's protected class status, an applicant who is otherwise eligible for selection as an apprentice under the selection method approved by the Council for use by the local committee may be directly indentured to a family business or the applicant's current employer, subject to the consent of the applicant, regardless of whether another employer would otherwise be entitled to indenture the applicant under the selection method used by the local committee.

(2) As used in this section, "otherwise eligible for selection as an apprentice under the selection method approved by the Council for use by the local committee" shall mean that the applicant has met the minimum qualifications for entry into the program; been evaluated or ranked by the local committee pursuant to the procedure set forth in its approved selection method; and based on that evaluation or ranking, is the next applicant or in the immediate group of applicants eligible to be assigned or dispatched to a registered training agent pursuant to the local committee's approved selection method.

(3) When submitting a new or revised selection method to the Council for approval, local committees must indicate whether they will be using an exception to the selection methods established in Title 29 CFR Part 30 and must note in their committee minutes when an individual is indentured pursuant to subsections (1) and (2) above.

(4) Nothing in this rule is intended or should be interpreted as discouraging the use of a qualification standard or selection method on the basis of relative qualifications, if the qualification standard or selection criteria has been validated in accord with the guidelines established in Title 41 CFR Part 60-3.6.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: SB 791 (1999)

Hist.: BLI 17-1999, f. & cert. ef. 12-20-99

839-011-0340

Program Operation Compliance Reviews

(1) Apprenticeship and Training Division staff will conduct a Program Operation Compliance Review on a form and in a format approved by the Council annually for the first three years for new programs and pursuant to a schedule developed by the Division and approved by the Council for established programs.

(2) The Program Operation Compliance Review shall evaluate the following items for the time period specified by the Council:

- (a) Apprentice registrations, program registration, administration and committee activity;
- (b) Records maintenance and management;
- (c) On-the-job and related training;
- (d) Apprentice completions, cancellations and associated policies;

(e) EEO performance and activities for the program; and
(f) Shall include an Affirmative Action Compliance Review, as outlined in 839-011-0145.

(3) The Director shall develop and maintain a reporting schedule for Program Operation Compliance Reviews. The schedule will specify which programs are scheduled for review at a designated Council meeting. The Director shall provide a copy of the review schedule to committee chairpersons once a year.

(4) Upon receipt of the Program Operation Compliance Review reports the Council may take any action including the following but not limited to:

- (a) Approve the report;
- (b) Refer the report back for further clarification;
- (c) Extend the review period for up to six months;

(d) Order a probationary period including more frequent and detailed program reviews;

(e) Direct compliance and/or corrective action accordingly;

(f) Impose sanctions;

(g) Act to dissolve the committee and or standards for cause or non-compliance; or

(h) Any other action as directed by the Council.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 660.120(1)

Hist.: BL 7-1991, f. & cert. ef. 8-15-91 (and corrected 2-3-92); BL 6-1994, f. & cert. ef. 10-10-94; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0350

Committee Officers

(1) There shall be elected by the committee a chairperson and a secretary from the committee members. One of the offices must be held by an employer member and one office must be held by an employee member.

(2) The officers shall serve for no less than one year and nor more than two years without an election unless the committee has adopted policies providing for the duration of officers' terms.

(3) In the event of a vacancy in an office, the respective employer or employee members shall elect from their representation a replacement to serve the unfilled term of office consistent with ORS Chapter 660.

Stat. Auth.: ORS 660.120(1)

Stats. Implemented: ORS 660.120(2)(a)

Hist.: BL 7-1991, f. & cert. ef. 8-15-91 (and corrected 2-3-92); BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0360

Minimum Guideline Standards

Council shall cause to be developed and/or proposed minimum guideline standards and approve said standards for occupations and/or trades which it has determined necessary.

(1) At its discretion, or upon petition by two or more committees directly affected by minimum guideline standards, Council will direct Division staff to convene a state joint committee composed of members of local committees training in the occupation. Division staff will organize the meeting time and location, and contact all appropriate local committees.

(a) Each local committee training in the occupation shall designate no more than one employer and one employee representative (with alternates) to the state joint committee; notification of this action must be submitted to the Division in writing.

(b) Local committees that have not appointed representatives to the state joint committee in accordance with (1)(a) shall not be entitled to vote on issues being decided by the state joint committee.

(c) To determine a quorum, the total number of authorized representatives appointed by local joint committees will be counted; appointed representatives of local trade committees will be counted only if they are present at the state joint committee meeting. A quorum shall consist of 50% plus one of the total authorized local committee representatives.

(d) Each state joint committee may adopt rules consistent with ORS Chapter 660 as it deems necessary for the orderly conduct of its meetings.

(2) The state joint committee will develop for Council approval proposed or revised minimum guideline standards as may be dictated by the needs of the industry and occupation. This committee shall establish minimum guidelines in the following standards areas:

(a) Minimum qualifications;

(b) Hours of employment;

(c) Work processes and approximate hours;

(d) Minimum related training hours and subjects;

(e) Maximum ratio of apprentices to journey persons; and

(f) Maximum probationary period.

(3) New or revised minimum guideline standards presented to the Council for approval shall be first distributed to local committees training in the occupation for review and comment.

(a) Each local committee shall have not more than 30 days to present any written objections they may have. This information shall be referred to the state joint committee for review.

(b) The state joint committee shall then prepare its final recom-

mentations to the Council.

(c) If consensus is not reached by the state joint committee, a majority and minority report will be submitted to the Council for consideration.

(d) When majority and minority reports are submitted for proposed new or revised guideline standards, the Council will take into consideration the geographic area covered by each participating committee as well as the number of apprentices served and the number of training agents affected.

Stat. Auth.: ORS 660.120(1)
Stats. Implemented: ORS 660.120(2)(a)
Hist.: BL 7-1991, f. & cert. ef. 8-15-91 (and corrected 2-3-92); BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0370

Flexibility Within Minimum Guideline Standards

Committees proposing new or revised standards affected by minimum guideline standards will be allowed to redistribute no more than 5% of on-the-job training hours within existing individual work processes:

(1) Total hours may not fluctuate below requirements dictated by minimum guideline standards.

(2) For licensed trades, the variations must be within statutory limits governing the licensed occupations.

Stat. Auth.: ORS 660.120(1)
Stats. Implemented: ORS 660.120(2)(a)
Hist.: BL 7-1991, f. & cert. ef. 8-15-91 (and corrected 2-3-92); BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0380

Minimum Guideline Standards Development and Revision

Council, upon petition by two or more committees directly affected by guideline standards, may instruct staff to convene an industry/trade advisory committee composed of members of appropriate JATC/TATC.

Stat. Auth.: ORS 660.120(1)
Stats. Implemented: ORS 660.120(2)(a)
Hist.: BL 7-1991, f. & cert. ef. 8-15-91 (and corrected 2-3-92); BLI 2-1999, f. & cert. ef. 4-2-99

Youth Apprenticeship Rules

839-011-0400

Youth Apprentice Selection Process

Apprenticeship committees may develop and, upon approval of the Director of the Apprenticeship and Training Division, implement a written policy for the purpose of selecting youth apprentices from the list of eligibles established by the school pursuant to ORS 344.745 through 344.757.

Stat. Auth.: ORS 660.120(1)
Stats. Implemented: ORS 344.745 & 660.120(2)(a)
Hist.: BL 2-1992, f. & cert. ef. 1-14-92; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0410

Review Policy, Formation and Scope of Responsibilities

A review policy shall be established by each participating Apprenticeship Committee for the purposes of periodically evaluating youth apprentices and recommending the granting of credit by the committee. The policy shall include the procedure to review the progress of the participants in the youth apprenticeship program including their participation in classroom instruction, related instruction, and on-the-job training.

Stat. Auth.: ORS 344.750 & 660.120(1)
Stats. Implemented: ORS 344.745(4)
Hist.: BL 2-1992, f. & cert. ef. 1-14-92; BL 7-1993, f. & cert. ef. 7-12-93; BL 3-1994, f. & cert. ef. 6-3-94

839-011-0420

Youth Apprentice Eligibility

(1) Committees are permitted to register youths in the Youth Apprenticeship Program who otherwise would not meet the minimum entry level qualifications in their standards for age, high school completion, or GED.

(2) The provisions and requirements of ORS 344.745 shall prevail over the committee's standards should any conflict exist.

Stat. Auth.: ORS 344.750 & 660.120(1)
Stats. Implemented: ORS 344.745(2)
Hist.: BL 2-1992, f. & cert. ef. 1-14-92; BL 3-1994, f. & cert. ef. 6-3-94

839-011-0430

Supervision

All students participating in the Youth Apprenticeship Program shall be under direct line of sight supervision of a journeyperson while engaged in on-the-job training within hazardous occupations as defined by OAR 839-021-0104. Students shall be under direct supervision at all other times to ensure optimal safety while on the job.

Stat. Auth.: ORS 344.750 & 660.120(1)
Stats. Implemented: ORS 660.120
Hist.: BL 2-1992, f. & cert. ef. 1-14-92; BL 7-1993, f. & cert. ef. 7-12-93; BL 3-1994, f. & cert. ef. 6-3-94

839-011-0440

Training Agent Approval Process

(1) Employers approved as training agents before to the implementation of these rules shall not automatically be eligible to participate in the youth apprenticeship program. The employer must apply in writing to the appropriate committee requesting authorization to participate. The committee will review the request and respond in writing with a copy to the Director.

(2) Apprenticeship committees participating in the youth apprenticeship program shall develop a process for the purpose of approving training agents to participate in the youth apprenticeship program.

Stat. Auth.: ORS 344.750 & 660.120(1)
Stats. Implemented: ORS 660.120(2)(a) & 660.137(5)
Hist.: BL 2-1992, f. & cert. ef. 1-14-92; BL 3-1994, f. & cert. ef. 6-3-94; BLI 2-1999, f. & cert. ef. 4-2-99

839-011-0450

Transfer of Youth Apprentice

It shall be the responsibility of the apprenticeship committee, in consultation with the participating school, to transfer a youth apprentice from one training agent to another within their committee when the training agent has been decertified, or for any other reasons, is unable to fully comply with the apprenticeship standards and these rules.

Stat. Auth.: ORS 660.120(1)
Stats. Implemented: ORS 660.120(2)(a)
Hist.: BL 2-1992, f. & cert. ef. 1-14-92

839-011-0460

Career Exploration

In order to participate as a youth apprentice, a student must demonstrate career exploration competencies contained in a curriculum approved by the Oregon State Board of Education.

Stat. Auth.: ORS 344.750 & 660.120(1)
Stats. Implemented: ORS 344.745(2)
Hist.: BL 2-1992, f. & cert. ef. 1-14-92; BL 3-1994, f. & cert. ef. 6-3-94

839-011-0470

Apprentice Displacement

In no case shall a youth apprentice displace a regular apprentice.

Stat. Auth.: ORS 660.120(1)
Stats. Implemented: ORS 660.120(2)(g)
Hist.: BL 2-1992, f. & cert. ef. 1-14-92

839-011-0480

Youth Apprentice Ratios

Committees shall adopt the same ratio of youth apprentices to journey persons as exists for adult apprenticeship programs, except that:

(1) Youth apprentices shall not be included in the count as part of the adult apprentices, but shall be counted separately and concurrently;

(2) A training agent is permitted to participate in the youth apprenticeship program without concurrently training/hiring adult apprentices; and

(3) At no time shall the total number of youth apprentices and adult apprentices exceed the number of journey persons for any job or training agent.

(4) The ratio shall be job and/or training agent specific in application.

(5) Approved youth apprenticeship training agents in the Building and Construction Trades shall be permitted only one youth apprentice without concurrently training/hiring adult apprentices.

Stat. Auth.: ORS 344.750 & 660.120(1)
Stats. Implemented: ORS 344.745(1)
Hist.: BL 4-1994, f. & cert. ef. 6-13-94; BLI 2-1999, f. & cert. ef. 4-2-99

DIVISION 14

REGULATION OF FARMWORKER CAMP OPERATORS

Procedural Rules

839-014-0020

Notice of Proposed Rule

Prior to the permanent adoption, amendment or repeal of any rule relating to farm-worker camp operations and registration of farm worker camps, the Bureau of Labor and Industries shall give notice of the intended action as required in OAR 839-002-0002.

Stat. Auth.: ORS 183.335, 651.060(4) & 658.705 - 658.850

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96; BLI 9-2004, f. 7-26-04, cert. ef. 7-27-04

839-014-0035

Definitions

As used in ORS 658.705 to 658.850, and in these rules unless the context requires otherwise:

(1) "Applicant" means an individual who proposes to operate a farmworker camp and who is applying for a camp operator indorsement.

(2) "Bureau" means the Bureau of Labor and Industries.

(3) "Commissioner" means the Commissioner of the Bureau of Labor and Industries or designee.

(4) "Director" means the Director of the Department of Consumer and Business Services.

(5) "Division" means the Oregon Occupational Safety and Health Division.

(6) "Farm labor contractor" has the same meaning as that provided in ORS 658.405 and the rules adopted thereunder.

(7) "Farm-worker camp" means any place or area of land where sleeping places, mobile home sites or other housing is provided by a farmer, farm labor contractor, employer or any other person in connection with the recruitment or employment of workers to work in the production and harvesting of farm crops or in the reforestation of lands, as described in ORS 658.405. "Farm-worker camp" does not include:

(a) A single, isolated dwelling occupied solely by members of the same family, or by five or fewer unrelated individuals; or

(b) A hotel or motel which provides housing with the same characteristics on a commercial basis to the general public on the same terms and conditions as housing is provided to such workers.

(8) "Farm-worker camp operator," except as otherwise provided in these rules, means any person who operates a farmworker camp and who is required to obtain a farm labor contractor license with an indorsement as provided in ORS 658.730. In determining who is a farmworker camp operator, the Bureau will consider the farm worker camp operator to be the person who, as a practical matter, exercises the ultimate right to determine terms and conditions of occupancy of the camp and who controls its maintenance and operation.

(9) "Forestation or reforestation of lands" includes, but is not limited to:

(a) The planting, transplanting, tubing, precommercial thinning, and thinning of trees and seedlings;

(b) The clearing, piling and disposal of brush and slash; and

(c) Other activities related to the forestation or reforestation of lands, including, but not limited to, tree shading, pinning, tagging, or staking; fire trail construction and maintenance; slash burning and mop up; mulching of tree seedlings; and any activity related to the growth of trees and tree seedlings and the disposal of debris from the land.

(10) "Indorsee" means a farm labor contractor licensed under ORS 658.410 who has obtained a camp indorsement.

(11) "Production and harvesting of farm products" includes, but is not limited to, the cultivation and tillage of the soil, the production, cultivation, growing and harvesting or any agricultural commodity and the preparation for and delivery to market of any such commodity.

(12) "Substantial ownership interest in real property" means at least a thirty percent share of the interest in the property.

(13) "Violation" means a transgression of any statute or rule, or any part thereof and includes both acts and omissions.

(14) "Worker" has the same meaning as that which appears in OAR 839-015-0004(13).

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0040

Character, Competence and Reliability

The character, competence and reliability contemplated by ORS 658.705 to 658.850 and these rules includes, but is not limited to, consideration of:

(1) A person's record of conduct in relations with workers, farmers and others with whom the person conducts business.

(2) A person's reliability in adhering to the terms and conditions of any contract or agreement between the person and those with whom the person conducts business.

(3) A person's timeliness in paying all debts owed including advances and wages.

(4) Whether a person has unsatisfied judgments or felony convictions.

(5) Whether a person has been refused a bond.

(6) Whether a person has paid worker's compensation insurance premium payments when due.

(7) Whether a person has violated any provision of ORS 658.405 to 658.850 or the rules adopted thereunder.

(8) Whether a person has employed an agent who has had a farm or forest labor contractor license denied, suspended, revoked or not renewed or who has otherwise violated any provisions of ORS 658.405 to 658.485.

(9) Whether a person has failed to notify the Bureau of any change in the circumstances under which a license was issued.

(10) Whether a person has repeatedly denied access to a farm worker camp to representatives of the Wage and Hour Division who are seeking access in connection with the enforcement of ORS Chapter 658.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

Licensing

839-014-0050

Operators Must Obtain Indorsement

Farm-worker camp operators must obtain a farm labor contractor's license pursuant to ORS 658.405 to 658.475 and the rules adopted thereunder, unless otherwise exempt pursuant to OAR 839-014-0060. Additionally, farmworker camp operators must obtain a special indorsement from the Bureau authorizing the operator to act as such.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0060

Exemptions

(1) A building or other structure is not considered to be a farmworker camp if it is:

(a) A single dwelling place, isolated and independent of other dwelling places, which is occupied solely by members of the same family;

(b) A single dwelling place, isolated and independent of other dwelling places, which is occupied by five or fewer persons who are unrelated to one another; or

(c) A hotel or motel provided that the housing provided to workers is provided under the same terms and conditions that is offered on a commercial basis to the general public.

(2) An operator of a farm-worker camp is not required to obtain the farm-worker camp operator's indorsement when the operator has a substantial ownership interest in the real property on which the camp is located or has any form of ownership interest in the business organization that operates the camp or is related by blood or marriage to a person with such interests provided:

(a) The property on which the camp is located is subject to a special farm use assessment under ORS 308A.050 to 308A.128; and, provided further,

(b) The business organization which operates the camp filed an income tax return reporting farm activity in the preceding tax year.

(3) Permanent employees of the farm-worker camp operator are not required to obtain a farm-worker camp operator indorsement, provided they have no financial interest in the camp or the business other than the wages paid to the employee.

Stat. Auth.: ORS 164, 165, 651, 658, 730(1) & 962

Stats. Implemented: ORS 658.705(7) & 658.715(1)(b) - 658.715(2)

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BLI 30-2005, f. 12-29-05, cert. ef. 1-1-06

839-014-0075

Issuance of Indorsement

(1) An indorsement may be issued only as follows:

(a) To an individual licensed as a farm/forest labor contractor proposing to operate as a sole proprietor under the individual's own name or under the individual's own name and an assumed business name registered with the Corporation Division;

(b) To an individual licensed as a farm/forest labor contractor proposing to operate as a partner in a partnership under the individuals' own names or under the individuals' own names and the assumed partnership business name registered with the Corporation Division;

(c) To a majority shareholder or majority shareholders of a corporation or cooperative corporation authorized to do business in Oregon by the Corporation Division and licensed as a farm/forest labor contractor.

(2) No indorsement may be issued to an individual proposing to do business as a partner in a partnership unless all the partners who will operate a farmworker camp are also issued indorsements.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0085

Use of Certain Agents Prohibited/Evidence of Sham or Subterfuge

(1) The bureau may refuse to issue indorsements to any person who proposes to use any individual, partnership, association, corporation or other entity as such persons' agent for the performance of any activity specified in ORS 658.405(1), when the proposed agent has, within the preceding three years, violated any section of ORS 658.405 to 658.485.

(2) The bureau will regard as prima facie evidence of sham or subterfuge mere changes in business form subsequent to denial, suspension, revocation or refusal to renew a license, where a relative by blood or marriage, or a person presently employed in an occupation, other than an occupation with a licensed farm or forest labor contractor, makes application, including a renewal application, for a license and indorsement if one or more of the following factors are present:

(a) A lack of adequate consideration or value given for the former business or its property;

(b) The use of the same real property, fixtures or equipment or use of a similar business name of the former business;

(c) The time period elapsed between the bureau's denial, suspension, revocation or refusal to renew a license and application by the new business for a license is less than one year;

(d) A person financially interested in any capacity in the former business has a financial interest in any capacity in the new business;

(e) The amount of capitalization is inadequate to meet current obligations of the new business; or

(f) The formalities of a partnership or a corporation are disregarded by the new business when such business is a partnership or corporation.

(3) When the factors outlined in section (2) of this rule are present, it shall be the burden of the applicant to provide evidence to the bureau clearly indicating that such business form is not sham or subterfuge.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0090

Procedure for Obtaining an Indorsement

An indorsement may be applied for as follows:

(1) File a completed application on forms supplied by the Bureau. In the case of a partnership or corporation, each partner, majority shareholder or major shareholders must complete and file a separate application form.

(2) Pay the appropriate fees at the time the application is filed. In the case of a partnership, each partner must pay the appropriate fee.

(3) File with the application proof of financial ability as provided for in ORS 658.415 or 658.735, whichever is greater, or a greater amount if required by the Commissioner, on forms supplied by the Bureau. In the case of a partnership, each partner must file such proof. Such proof may be a corporate surety bond, or a deposit in cash or negotiable securities acceptable to the Commissioner.

(4) File any assumed business name and corporate name with the

Corporation Division and submit proof of such filing with the application.

(5) If a corporation, show proof of being authorized to do business in Oregon.

(6) All forms, documents and other required information shall be filed with Bureau of Labor and Industries, Wage and Hour Division, License Unit, 800 N.E. Oregon, #32, Portland, OR 97232.

Stat. Auth.: ORS 658.407(3), 658.415(14), 658.730(1) & 658.820

Stats. Implemented: ORS 658.415, 658.730(1) & 658.735

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 10-1993(Temp), f. 10-29-93, cert. ef. 11-3-93; BL 1-1994, f. & cert. ef. 5-3-94

839-014-0100

Procedure for Obtaining a Duplicate Indorsement

In the event a license with the indorsement is lost or stolen, the licensee shall submit a written request for a duplicate license and indorsement. The licensee shall state the reasons for the request and the circumstances of the loss or theft. The replacement license will indicate the word "duplicate" on the license. The written request shall be made to the Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96; BLI 30-2005, f. 12-29-05, cert. ef. 1-1-06

839-014-0105

Procedure for Renewing Indorsement

(1) Indorsement shall expire with the farm/forest contractor's license each year unless sooner revoked.

(2) Applications for renewal shall be made 30 days before the expiration date of the license by filing a renewal application, paying the appropriate fees, and filing proof of financial ability to pay wages and certain advances.

(3) Applications, fees and other forms and documents must be filed with the Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96; BLI 30-2005, f. 12-29-05, cert. ef. 1-1-06

Examinations

839-014-0170

Scope

(1) The License Unit shall provide written examinations as the commissioner deems necessary.

(2) The License Unit shall provide all materials required for the examinations except hand-held calculators or slide rules that may be used by the applicant.

(3) All examinations shall be "closed book."

(4) A written examination shall not exceed three hours.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0175

Examination Requirements

(1) Applicants may schedule an appointment with staff or designated proctors throughout the state to take an examination after receipt of a letter of authorization from the License Unit.

(2) Once an applicant is authorized for examination, the applicant has 30 days in which to schedule an appointment to take the examination. Applicants shall take the examination within 45 days from the date of authorization.

(3) To reschedule an examination after the 45 day examination period or to change the site of the examination shall require submission of a new request.

(4) Except for hand-held calculators, and interpreters, no applicant may use any other aids or notes, or receive help from another person during an examination. Violation of this rule shall result in the examination being invalidated and treated as failed.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0178

Grading of Examinations/Notice of Score

- (1) The passing score for each examination shall be 75 percent.
- (2) The License Unit shall notify the applicant by mail of the examination scores.

Stat. Auth.: ORS 164, 165, 651, 658 & 962
 Stats. Implemented: ORS 658.705 - 658.850
 Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0180

Review of Examinations

- (1) Applicants failing to pass an examination may schedule an appointment with the License Unit to review the examination at a site designated by the License Unit.

- (2) Requests to review failed examinations shall be scheduled within 30 days from notification of scores.

- (3) Applicants shall show picture identification before examination review.

- (4) Applicants reviewing failed examinations shall not be accompanied by another person during the review or retain notes taken during the review.

- (5) Examinations may be reviewed only by the applicant and/or any person who is authorized by the applicant, in writing, to do so.

Stat. Auth.: ORS 164, 165, 651, 658 & 962
 Stats. Implemented: ORS 658.705 - 658.850
 Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0185

Re-Examination

- (1) Applicants who fail an examination shall wait the following time periods before retaking the examination:

- (a) First failure: seven days;
- (b) Second failure: 14 days;
- (c) Third failure: 30 days;
- (d) Any subsequent failures: 60 days.

- (2) Re-examinations shall not be scheduled sooner than seven days after review of a failed examination.

Stat. Auth.: ORS 164, 165, 651, 658.730(1) & 962
 Stats. Implemented: ORS 658.730(1)(b)
 Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 6-1990(Temp), f. 4-18-90, cert. ef. 4-17-90;
 BL 9-1990, f. 5-25-90, cert. ef. 6-1-90

839-014-0190

Substitution of Oregon Examination

- (1) The commissioner may recognize national or state examinations for licensing if taken and passed within the last 12 months.

- (2) A specific examination that may be recognized in lieu of the Oregon examinations is the Farm Labor Contractor examination for the State of California.

- (3) Independent verification of test results from the testing authority is required.

Stat. Auth.: ORS 164, 165, 651, 658 & 962
 Stats. Implemented: ORS 658.705 - 658.850
 Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0195

Alternative Methods of Examination

- (1) An applicant for whom English is a second language may bring an interpreter to the examination to translate the examination questions. An interpreter may not assist an applicant in answering any question, but may translate the answers.

- (2) Alternative methods of examination will be provided upon written request.

Stat. Auth.: ORS 164, 165, 651, 658.730(1) & 962
 Stats. Implemented: ORS 658.730(1)(b)
 Hist.: BL 2-1990, f. & cert. ef. 3-1-90

Bonds and Deposits

839-014-0200

Proof Required/Forms to Be Used

- (1) Every applicant for a farm-worker camp operator's indorsement shall, in lieu of the bond or deposit required by ORS 658.415 and unless otherwise exempt, submit a bond or deposit with the application and continually maintain a bond or deposit approved by the commissioner. The applicant may make a deposit in cash or negotiable securities acceptable to the commissioner in lieu of the bond. The bond or deposit shall be conditioned upon:

- (a) All sums legally owing to any person when the indorsee or the indorsee's agents have received such sums;

- (b) All damages occasioned to any person by reason of any material misrepresentation, fraud, deceit or other unlawful act or omission by the indorsee, or the indorsee's agents or employees acting within the scope of their employment; and

- (c) All sums legally owing to any employee of the indorsee.

- (2) The bond referred to in section (1) of this rule shall be a properly executed corporate surety bond as evidenced by the completion of Form WH-157.

- (3) The forms are available upon request from: Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305.

Stat. Auth.: ORS 164, 165, 651, 658 & 962
 Stats. Implemented: ORS 658.705 - 658.850
 Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96; BLI 30-2005, f. 12-29-05, cert. ef. 1-1-06

839-014-0210

Amount of Bond or Deposit to Be Filed

- (1) The amount of the bond or deposit referred to in OAR 839-014-0200 is \$15,000, unless a greater amount is required by ORS 658.415 or by the Commissioner. The amount of the bond or deposit must be continually maintained as long as the contractor is required to be licensed under ORS 658.405 to 658.475, and is indorsed to operate a farmworker camp.

- (2) When an applicant for a license has been required to satisfy a court-ordered Judgment or a Final Order issued by a governmental agency, the Commissioner or the Commissioner's designee may require the applicant to provide a bond or deposit of up to three times the amount required by ORS 658.415 or 658.735, whichever is greater, as a condition of licensure. In such case, the Commissioner or Commissioner's designee will determine the actual amount of the bond or deposit by considering the following factors:

- (a) The amount of the Judgment or Order that was satisfied;

- (b) The magnitude and seriousness of the violation or violations which lead to the Judgment or Order;

- (c) The past history of the applicant in taking all necessary measures to prevent or correct violations of statutes or rules;

- (d) Prior violations, if any, of statutes or rules;

- (e) Other matters which indicate to the Commissioner or Commissioner's designee that the applicant is not likely to violate ORS 658.415(3) in the future.

Stat. Auth.: ORS 658.407(3), 658.415(14) & 658.820(1)
 Stats. Implemented: ORS 658.415(3) & 658.735(1)
 Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 10-1993(Temp), f. 10-29-93, cert. ef. 11-3-93; BL 1-1994, f. & cert. ef. 5-3-94

839-014-0220

Deposit in Cash or Negotiable Securities

- As used in ORS 658.735 and in these rules "a deposit in cash or negotiable securities" means a single financial instrument which yields no less than the amount required pursuant to OAR 839-014-0210 in cash immediately upon demand. If the deposit is one which is subject to a penalty for early withdrawal, then the deposit must be in an amount sufficient to satisfy the penalty and yield no less than the amount required under OAR 839-014-0210 in cash.

Stat. Auth.: ORS 658.407(3), 658.415(14) & 658.820(1)
 Stats. Implemented: ORS 658.735(1)
 Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 10-1993(Temp), f. 10-29-93, cert. ef. 11-3-93; BL 1-1994, f. & cert. ef. 5-3-94

Indorsement Protest

839-014-0250

Protesting the Issuance of an Indorsement

- Any individual may protest the issuance of an indorsement to any applicant for such an indorsement. The protest may be made at any time after the indorsement is actually issued as well as at any time prior to the issuance of the indorsement.

Stat. Auth.: ORS 164, 165, 651, 658.730(1) & 962
 Stats. Implemented: ORS 658.730(1)
 Hist.: BL 2-1990, f. & cert. ef. 3-1-90

839-014-0260

Procedure for Filing Protest

- (1) Any individual desiring to protest the issuance of an indorsement must file the protest in writing with the Bureau of Labor and

Industries, Wage and Hour Division, License Unit, 800 NE Oregon Street #32, Portland, OR 97232.

(2) The written protest must contain the following information:

(a) Name, address and phone number of the individual filing the protest;

(b) Date of the protest;

(c) Name of indorsee or applicant against whom the protest is being made;

(d) A complete statement of the facts, circumstances and other reasons for the protest. The statement should include alleged violations, approximate dates of alleged violations, names of witnesses, if any, and any documents which support the allegations;

(e) The signature of the individual making the protest.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

Records

839-014-0310

Required Records

(1) All farmworker camp operators shall make and maintain for a period of three years records necessary to determine their compliance with ORS 658.705 to 658.850 and these rules.

(2) Records necessary to determine compliance with ORS 658.705 to 658.850 and these rules include, but are not limited to records of:

(a) The names and permanent home mailing addresses of each resident of the farmworker camp;

(b) The dates each resident resided in the camp;

(c) Records of financial transactions between the operator and the residents;

(d) Records of any inspection or citations of the camp issued by any agency of government responsible for health, safety or sanitation inspections, and correspondence with any such agency;

(e) Notices posted at the camp to comply with these rules;

(f) Any notices and rules for access to an operating telephone, pursuant to OAR 839-014-0620;

(g) Other required records as determined by the commissioner.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0320

Records Availability

A farmworker camp operator shall make available to representatives of the Wage and Hour Division records necessary to determine compliance with ORS 658.405 to 658.475, 658.705 to 658.850 and these rules. Records shall be made available upon the request of such representatives.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

Posting Requirements

839-014-0350

Notice of Compliance with Bond Requirements

(1) Every farmworker camp operator who is required to furnish a surety bond, or make a deposit in lieu thereof, shall keep conspicuously posted in an exterior area of the camp which is open to all residents and in a manner easily visible to occupants of and visitors to the camp, a notice of compliance with bond requirements in both English and any other language used by the camp operator to communicate with workers.

(2) The notice shall state that the contractor has complied with ORS 658.735, by obtaining a corporate surety bond or by making a deposit with the commissioner. The notice shall indicate the amount of the bond or deposit is conditioned on the payment of:

(a) All sums legally owing to any person when the indorsee or the indorsee's agents have received such sums;

(b) All damages occasioned to any person by reason of any material misrepresentation, fraud, deceit or other unlawful act or omission by the indorsee, or the indorsee's agents or employees acting within the scope of their employment; and

(c) All sums legally owing to any employee of the indorsee.

(3) The notice shall contain the name and Oregon address of the surety on the bond, if applicable, or the address of the bureau when a deposit is made with the commissioner.

(4) The notice shall also indicate the expiration date of the bond or deposit.

(5) The commissioner has prepared a notice (Form LU-121) in English and Spanish which complies with this rule. Contractors may use any form or notice so long as it contains all the elements of Form LU-121.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0360

Posting the Indorsement

(1) Every farmworker camp operator shall keep conspicuously posted a copy of the license, with the appropriate indorsement affixed thereto, in an exterior area of the camp easily accessible to camp occupants. The license must be posted in a manner that is easily visible to the occupants of and visitors to the camp.

(2) The license form to be posted shall be provided to the farmworker camp operator by the Bureau at the time the licensee receives the indorsement.

Stat. Auth.: ORS 164, 165, 651, 658.730(1) & 962

Stats. Implemented: ORS 658.730(2)

Hist.: BL 2-1990, f. & cert. ef. 3-1-90

Enforcement

839-014-0380

Action Against the Bond or Deposit

(1) Any person entitled to recover sums received by the indorsee or the indorsee's agents or damages occasioned to the person by reason of any material misrepresentation, fraud, deceit or other unlawful act or omission by the indorsee or the indorsee's agents or employees acting within the scope of their employment, or any employee of the indorsee who is legally owed any sum has a right of action against the surety on the bond or deposit with the commissioner. The individual may exercise this right or may assign this right to another.

(2) The action on the bond or on the deposit held by the commissioner may not be joined in a suit or action on the bond or against the commissioner brought for any other claim.

(3) Any person seeking to recover on the bond or from the deposit with the commissioner must first establish the farmworker camp operator liability. The liability may be established in any of the following ways:

(a) A judgment of the court; or

(b) A final administrative order issued pursuant to statute or rule; or

(c) The acknowledgment of the farmworker camp operator of such liability; or

(d) Other satisfactory evidence of liability as may be shown which establishes the liability.

(4) Claims against the bond or deposit will not be paid unless, within six months of the end of the license year to which the bond or deposit applies, the claimant or claimant's assignee gives notice of the claim by certified mail to the surety or the commissioner.

(5) Any claim or notice of claim filed pursuant to a claimant's right of action must be filed as follows:

(a) If the filing is against a surety bond, the claim or notice must be filed with the surety. The name and address of the surety may be obtained from the Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305;

(b) If the filing is against a deposit held by the commissioner, the claim or notice must be filed with the Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305;

(6) The commissioner and the surety shall make payments on the bond or deposit in the following priority:

(a) Wage claims;

(b) Payments on all sums legally owing to any employee of the indorsee;

(c) Payments on all sums legally owing to any person when the indorsee or the indorsee's agents have received such sums;

(d) Payments on all damages occasioned to any person by reason of any material misrepresentation, fraud, deceit or other unlawful act or omission by the indorsee or the indorsee's agents or employees acting within the scope of their employment;

(e) If there are insufficient funds to pay all sums, in accordance with the priority of payment, in full, such sums will be paid in part.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96; BLI 30-2005, f. 12-29-05, cert. ef. 1-1-06

Civil Penalties

839-014-0400

Definitions

As used in OAR 839-014-0400 to 839-014-0450 "knowingly" or "willfully" means action undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person "should have known the thing to be done or omitted" if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts knowingly or willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of this rule, the farmworker camp operator or any person acting as such is presumed to know the affairs of their business operations relating to farmworker camp operations.

Stat. Auth.: ORS 164, 165, 651, 658.820(1) & 962

Stats. Implemented:

Hist.: BL 2-1990, f. & cert. ef. 3-1-90

839-014-0410

Violations Separate and Distinct

Each violation is a separate and distinct offense. In the case of continuing violations, each day's continuance is a separate and distinct violation.

Stat. Auth.: ORS 164, 165, 651, 658.820(1) & 962

Stats. Implemented:

Hist.: BL 2-1990, f. & cert. ef. 3-1-90

839-014-0420

Violations for Which a Civil Penalty May Be Imposed

Pursuant to ORS 658.850, the commissioner may impose a civil penalty for any of the following violations:

(1) Operating a farmworker camp without first having obtained a farm labor contractor's license in violation of ORS 658.715;

(2) Operating a farmworker camp without first having obtained an indorsement to do so in violation of ORS 658.715;

(3) Operating a farmworker camp which is not registered with the Department of Consumer and Business Services in violation of ORS 658.755(2)(a);

(4) Failing to post the indorsement in violation of ORS 658.730(2);

(5) Failing to continually maintain a bond and security behind the bond in violation of ORS 658.735;

(6) Failing to post a notice of compliance with ORS 658.735, in violation of ORS 658.735(8);

(7) Failing to comply with the following provisions of ORS 658.755(1), as follows:

(a) ORS 658.405 to 658.485; or

(b) ORS Chapter 654 and the rules adopted thereunder, provided the division has determined that there has been a failure to comply with said statute and rules; or

(c) All applicable building codes and health and safety codes; or

(d) ORS 659.280 to 659.295 (access to farmworker camps); or

(e) Pay or distribute promptly, when due, to individuals entitled thereto, money or other things of value as required by ORS 658.755(1)(e); or

(f) The terms and provisions of all legal and valid contracts or agreements as required by ORS 658.755(1)(f); or

(8) Willfully making or causing to be made to any person any false, fraudulent or misleading representation concerning the terms and conditions of occupancy in the farmworker camp in violation of ORS 658.755(2)(c);

(9) Making any material misrepresentation, false statement or willful concealment in the application for an indorsement in violation

of ORS 658.755(2)(b);

(10) Knowingly publishing or circulating any false or misleading information concerning the terms, conditions or existence of housing at any place in violation of ORS 658.755(2)(d);

(11) Knowingly publishing or circulating any false or misleading information concerning the terms conditions or existence of employment at any place in violation of ORS 658.755(2)(d);

(12) Assisting a person who is not entitled to operate a farmworker camp without a farm labor contractor's license with an indorsement as required by ORS 658.715 to act in violation of any of the following statutes, in violation of ORS 658.755(2)(e):

(a) ORS 658.705 to 658.850; or

(b) ORS 658.405 to 658.485; or

(c) ORS Chapter 654 when a violation has been determined by the division in violation of ORS 658.755(2)(e).

(13) By force, intimidation or threat in any manner whatsoever, inducing any occupant of the farmworker camp to give up any part of the compensation the occupant is entitled to by contract or by any state or federal wage payment law in violation of ORS 658.755(2)(f);

(14) By force, intimidation or threat in any manner whatsoever, restraining any person who wishes to leave the camp from doing so in violation of ORS 658.755(2)(g);

(15) Discharging, evicting or in any other manner discriminating against any person in violation of ORS 658.760; and

(16) Failing to provide housing, without charge, when required by ORS 658.790, pursuant to the provisions of said law.

Stat. Auth.: ORS 658.407(3), 658.415(14) & 658.820

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 10-1993(Temp), f. 10-29-93, cert. ef. 11-3-93; BL 1-1994, f. & cert. ef. 5-3-94; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0430

Criteria for Determining a Civil Penalty

(1) The commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the Commissioner finds to be appropriate:

(a) The history of the farmworker camp operator or other person in taking all necessary measures to prevent or correct violations of statutes or rules;

(b) Prior violations, if any, of statutes or rules;

(c) The magnitude and seriousness of the violation;

(d) Whether the farmworker camp operator or other person knew or should have known of the violation.

(2) It shall be the responsibility of the farmworker camp operator or other person to provide the commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed.

(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of money or valuables, if any, taken from camp occupants by the farmworker camp operator or other person in violation of any statute or rule.

(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the farmworker camp operator or other person for the purpose of reducing the amount of the civil penalty to be imposed.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0440

Schedule of Civil Penalties

(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

(2) For purposes of this rule, "repeated violations" means violations of a provision of law or rule which have been violated on more than one contract within two years of the date of the most recent violation.

(3) When the commissioner determines to impose a civil penalty for acting as a farmworker camp operator without a valid license indorsement, the minimum civil penalty shall be as follows:

(a) \$500 for the first violation;

(b) \$1,000 for the first repeated violation;

(c) \$2,000 for the second and each subsequent repeated violation.

(4) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR

839-014-0430.

(5) The civil penalties set out in this rule shall be in addition to any other penalty imposed by law or rule.

Stat. Auth.: ORS 658.820

Stats. Implemented: ORS 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96; BL 5-1996, f. 6-14-96, cert. ef. 7-1-96

839-014-0450

Suspension of Civil Penalty

(1) The commissioner may suspend any civil penalty issued pursuant to ORS 658.850(3), if the matter for which the penalty was issued was corrected within 15 days of the time the operator received notice of the violation for which the civil penalty was issued. Persons desiring to have the civil penalty suspended may petition the commissioner. The petition shall contain each and every reason for the request and shall be submitted in an answer filed with the person's request for a hearing on the civil penalty action.

(2) The commissioner shall grant or deny the petition and in so doing shall consider the following factors:

(a) The magnitude and seriousness of the violation or violations which led to the civil penalty;

(b) The petitioner's past history in taking all necessary measures to prevent or correct violations of statutes or rules;

(c) The petitioner's other prior violations of the statute or rules, if any;

(d) Other matters which indicate to the commissioner that the petitioner is not likely to violate ORS 658.705 to 658.850 and these rules in the future.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0470

Denying, Suspending, Revoking or Refusing to Renew or Issue a License Indorsement

(1) The commissioner may deny, refuse to issue or renew, suspend or revoke a license indorsement if:

(a) The conditions under which the indorsement was issued have changed or no longer exist;

(b) The indorsee's character, competence or reliability makes the indorsee unfit to act as a farmworker camp operator; or

(c) The applicant or operator makes any material misrepresentation, false statement or willful concealment on the application for a license.

(d) The indorsee discharges, evicts or in any other manner discriminates against any person in violation of ORS 658.760.

(2) The following actions of an indorsee demonstrate that the indorsee's character, competence or reliability make the licensee unfit to act as a farmworker camp operator:

(a) Operation of a farmworker camp without a valid indorsement;

(b) Operation of a farmworker camp without a valid registration certificate when the contractor is required to obtain and maintain a valid registration certificate;

(c) Failure to continually maintain the appropriate bond and security behind the bond;

(d) Failing to comply with ORS 658.405 to 658.485;

(e) Failing to comply with building codes or health and safety laws to the extent that an authority responsible for the enforcement of such codes and laws has determined the farmworker camp to be unfit for inhabitation;

(f) Violating any provision of ORS 658.755(2); or

(g) Failing to provide lodging as provided for in ORS 658.790.

(3) When an application is denied or an indorsement is revoked or when the commissioner refuses to issue or renew an indorsement the commissioner will not issue the applicant or indorsee an indorsement for a period of three years from the date of the denial, refusal to issue or renew or revocation of the indorsement.

(4) Notwithstanding section (3) of this rule, the commissioner, for good cause shown, may issue an indorsement to a farmworker camp operator whose application has been previously denied or whose indorsement was not issued, renewed or was revoked before the expiration of three years, provided:

(a) The applicant or indorsee submits a petition explaining each and every reason why the applicant or indorsee should receive an indorsement; and

(b) The applicant or indorsee files a completed application with the petition and pays the appropriate fees.

(5) As used in section (4) of this rule, "good cause" means an excusable mistake or a circumstance beyond a person's control.

(6) The commissioner shall grant or deny the petition referred to in section (5) of this rule, and in so doing shall consider the following factors:

(a) The magnitude and seriousness of the violation or violations which led to the denial, refusal to issue or renew or revocation of the indorsement;

(b) The petitioner's past history in taking all necessary measures to prevent or correct violations of statutes or rules;

(c) The petitioner's other prior violations of the statute or rules, if any;

(d) Other matters which indicate to the commissioner that the petitioner is not likely to violate ORS 658.705 to 658.850 and these rules in the future.

(7) Nothing in this rule shall preclude the commissioner from imposing a civil penalty in lieu of denying or refusing to issue or renew an application or in lieu of suspension or revocation of an indorsement.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

Emergency Suspension of License Indorsement

839-014-0500

Immediate Suspension or Refusal to Renew a License Indorsement; Notice of Opportunity for Hearing; Service

(1) If the bureau finds there is a serious danger to the public health or safety, it may immediately suspend or it may refuse to renew a license indorsement. For purposes of this rule, such a decision is referred to as an emergency suspension order. An emergency suspension order is a written order which is not a final order under ORS Chapter 183. An emergency suspension order is not an order in a contested case and may be issued without notice or an opportunity for a hearing as required for contested cases under ORS Chapter 183.

(2)(a) Except where the danger to the public health or safety is so imminent that opportunity for the licensee to object under section (3) of this rule is not practicable as determined by the bureau, the bureau shall provide the licensee with notice and opportunity to object prior to issuing the emergency suspension order. For purposes of this rule, this notice is referred to as a pre-suspension notice;

(b) The pre-suspension notice shall:

(A) Specify the acts of the licensee and the evidence available to the bureau which would be grounds for revocation, suspension or refusal to renew the license under the bureau's usual procedures;

(B) Specify the reasons why the acts of the licensee seriously endanger the public's health or safety;

(C) Identify a person in the bureau authorized to issue the emergency suspension order or to make recommendations regarding the issuance of the emergency suspension order.

(c) The bureau may provide the pre-suspension notice to the licensee in writing, orally by telephone or in person, or by any other means available to the bureau;

(d) Where the pre-suspension notice is given orally, the bureau subsequently shall provide the licensee with a written copy of the notice.

(3) Following the pre-suspension notice, the bureau shall provide the licensee an immediate opportunity to object to the bureau's specifications provided in the pre-suspension notice before a person authorized to issue the emergency suspension order or to make recommendations regarding the issuance of the emergency suspension order.

(4)(a) When the bureau issues the emergency suspension order, the bureau shall serve the order on the licensee either personally or by registered or certified mail;

(b) The order shall include the following statements:

(A) Those required under ORS 183.415(2) and (3);

(B) That the licensee has the right to demand a hearing to be held as soon as practicable to contest the emergency suspension order;

(C) That if the demand is not received by the bureau within 90 days of the date of notice of the emergency suspension order the licensee shall have waived its right to a hearing under ORS Chapter 183;

(D) The effective date of the emergency suspension order;

(E) The specifications noted in subsection (2)(b) of this rule;

(F) That with the agreement of the licensee and the bureau the hearing opportunity on the emergency suspension order may be combined with any other bureau proceeding affecting the license. The procedures for a combined proceeding shall be those applicable to the other proceeding affecting the license.

(5)(a) If timely requested by the licensee pursuant to subsection (4)(b) of this rule, the bureau shall hold a hearing on the emergency suspension order as soon as practicable;

(b) At the hearing, the bureau shall consider the facts and circumstances including, but not limited to:

(A) Whether at the time of issuance of the order there was probable cause to believe from the evidence available to the bureau that there were grounds for revocation, suspension or refusal to renew the license under the bureau's usual procedure;

(B) Whether the acts or omissions of the licensee pose a serious danger to the public's health or safety;

(C) Whether circumstances at the time of the hearing justify confirmation, alteration or revocation of the order;

(D) Whether the bureau followed the appropriate procedures in issuing the emergency suspension order.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.705 - 658.850

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

Access to Telephone in Farmworker Camp

839-014-0600

Definitions

As used in ORS 659.285(3) and in OAR 839-014-0600 to 839-014-0630, unless the context requires otherwise:

(1) "Emergency" means circumstances in which the life, health, safety or property of a person, or of a member of a person's immediate family, is threatened with imminent harm, and shall include any instance in which a reasonable person would seek the immediate assistance of medical, law enforcement or emergency personnel.

(2) "Farm-worker camp operator" means any person who operates a farmworker camp, notwithstanding the provisions of OAR 839-014-0035(8).

(3) "Operating telephone" means a telephone for the purpose of communicating with persons outside the farmworker camp and over which information may be given and received at the time it is intended to be given or received.

(4) "Owned or controlled" includes sufficient ownership or control to affect the terms and conditions of occupancy of the housing.

(5) "Pay telephone" means a telephone which is operated by use of coins or credit card. "Pay telephone" does not include a telephone normally used by the employer for the employer's private use.

(6) "Reasonable access" means access to a telephone at any time the employee indicates that an emergency exists and that a telephone is needed to communicate with any person for the purpose of dealing with the emergency. A reasonably accessible telephone must be located at the housing or within one tenth of one mile from the housing.

(7) "Reasonable opportunity for private use" means that workers are provided access to a telephone which can be used by them under circumstances in which their conversation cannot be overheard or monitored by the employer or by any other person, and at times of the day and week when they are not working, and during which they can conduct personal business. If the telephone is not located at the site of the housing, reasonable opportunity for private use includes posting at the housing in view of the workers, in the language used to communicate with the employees, a notice containing directions to the telephone and any conditions on use or availability of the telephone.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 659.280 - 659.295

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0610

Emergency Access to Telephone

(1) When employees occupy farmworker housing that is owned or controlled by the employer, the employer shall ensure that employees occupying the housing have reasonable access to an operating telephone at any time for emergency use. The telephone may be a pay telephone, at the discretion of the employer.

(2) Employers shall allow employees access to a telephone pur-

suant to the provisions of this rule, upon request of the employee.

Stat. Auth.: ORS 164, 165, 651, 658, 659.297(9) & 962

Stats. Implemented: ORS 659.285(3)

Hist.: BL 2-1990, f. & cert. ef. 3-1-90

839-014-0620

Other Access to Telephone

(1) When employees occupy housing that is owned or controlled by the employer, the employer shall ensure that employees occupying the housing have reasonable access to an operating telephone for the private use of the employees. The telephone must be located within a two mile radius of the farm worker housing as measured by the most direct route by road or foot path from the housing to the place where the telephone is located.

(2) When the telephone designated by the employer for personal use of the employees is located in the employer's residence or place of business, the employer may establish reasonable rules for the private use of the telephone by the employees. If the employer establishes such rules, the employer shall post a copy of the rules in a conspicuous place where all occupants can easily view them. The rules established by the employer shall be in English and in the language used by the employer to communicate with the employees.

(3) If a dispute arises regarding the terms of access established by the employer, the or the court if a private action has been filed, shall determine whether the terms of access to the telephone are reasonable.

(4) In making a determination, the commissioner will consider:

(a) Any circumstances presented by the employer in support of the employer's position;

(b) Any circumstances presented by the employee in support of the employee's position;

(c) The number of employees occupying the housing;

(d) The location of the housing;

(e) Any other relevant information.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 659.280 - 659.295

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BL 1-1996, f. & cert. ef. 1-9-96

839-014-0630

Waiver from Telephone Requirement

(1) An employer may request a waiver from the requirements of ORS 659A.153(3) and these rules. Prior to the granting of any request for waiver the employer must demonstrate to the Commissioner that:

(a) Compliance with the statute and rules would constitute an unreasonable hardship for the employer; and

(b) The employer meets any and all requirements of the Division for an emergency medical plan.

(2) Persons desiring a waiver, may apply to the Commissioner on a form prepared by the Bureau. The completed waiver application form shall be submitted to the Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, N.E., Bldg. E-1, Salem, OR 97305.

(3) Persons desiring to obtain a waiver must submit, with the application, a copy of the emergency medical plan, which meets the requirements of the rules of the Division.

(4) In determining what circumstances constitute an unreasonable hardship the Commissioner shall consider the following:

(a) Any circumstances presented by the employer in support of the application;

(b) The number of employees occupying the housing;

(c) The location of the housing;

(d) The length of time the housing is intended to be occupied;

(e) Any other relevant information.

(5) In considering the request for the waiver the Commissioner shall consider:

(a) The history of the employer in complying with the emergency medical plan;

(b) Any other relevant information.

(6) The Commissioner may grant the waiver request when the Commissioner determines that the provisions of section (1) of this rule are met. The Commissioner may specify any conditions on approval of the request. If the request is denied, the Commissioner shall state each reason for the denial.

Stat. Auth.: ORS 164, 165, 651, 658, 659.285(3) & 962

Stats. Implemented: ORS 659.285(3)

Hist.: BL 2-1990, f. & cert. ef. 3-1-90; BLI 30-2005, f. 12-29-05, cert. ef. 1-1-06

DIVISION 15

RULES REGULATING FARM AND FOREST
LABOR CONTRACTORS

839-015-0000

Notice of Proposed Rule

Prior to the permanent adoption, amendment or repeal of any rule relating to farm and forest labor contractors, the Bureau of Labor and Industries shall give notice of the intended action as required in OAR 839-002-0002.

Stat. Auth.: ORS 183.335, 651.060(4), 658.407(3) & 658.405 - 658.503

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 10-1980, f. & ef. 9-19-80; BL 6-1984, f. & ef. 4-27-84, Renumbered from 839-015-0103; BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96; BLI 9-2004, f. 7-26-04, cert. ef. 7-27-04

839-015-0004

Definitions

As used in these rules, unless the context requires otherwise:

(1) "Aggregate bond or deposit" means a bond or deposit posted pursuant to ORS 658.415 by a licensed business entity on behalf of itself and any of its owners or employees who engage in farm or forest labor contracting activities to secure payment of wages and advances due from the entity or any of its owners or employees arising from their activities as farm or forest labor contractors, whether incurred on behalf of the entity or any of its owners or employees.

(2) "Agreed remuneration" means compensation of any kind that is agreed upon by a farm or forest labor contractor and another for the services of such contractor.

(3) "Agricultural association" means a nonprofit or cooperative association of farmers, growers or ranchers that is incorporated under applicable state law and that acts as a farm labor contractor solely on behalf of members of the association.

(4) "Application of big game repellent by contract crew" means work performed by workers who are recruited, solicited, supplied or employed by a person who has contracted to supply a crew of workers to apply big game repellent.

(5) "Bureau" means the Bureau of Labor and Industries.

(6) "Commissioner" means the Commissioner of the Bureau of Labor and Industries, or designee.

(7) "Crew leader" means the member of a group of workers who acts as a spokesperson for the group, travels with the group from another state into Oregon, performs the same work along with other members of the group and receives no extra compensation from any person by virtue of acting as a crew leader, aside from any money received from other members of the group for sharing payment of the actual expenses of the group, and provided that the employer pays the members of the group directly and individually for their labor. An immediate family acting as a single unit is not a group, within the meaning of this rule. The spokesperson for such unit is not, therefore, a crew leader. An immediate family includes the father, mother, son, daughter, brother, sister, husband, or wife of the spokesperson for the family. A crew leader may perform the following activities without a license:

(a) Transporting workers from their local place of residence to their place of employment when the crew leader does not perform this service for a profit; and

(b) Making arrangements for jobs, housing, credit, or any other needs of the members of the group, provided the crew leader receives no compensation for this service; and

(c) Adding members to the group in Oregon, provided the crew leader receives no compensation therefore from the added members or from any other person.

(8) "Farm labor contractor" means:

(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the production or harvesting of farm products;

(b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the production or harvesting of farm products;

(c) Any person who recruits, solicits, supplies or employs workers to gather wild forest products, as that term is defined in paragraph (23) of this section;

(d) Any person who furnishes board or lodging for workers in

connection with the recruiting, soliciting, supplying or employing of workers to be engaged in the production or harvesting of farm products or in the gathering of wild forest products;

(e) Any person who bids or submits contract offers for the production or harvesting of farm products or the gathering of wild forest products; or

(f) Any person who subcontracts with another for the production or harvesting of farm products or the gathering of wild forest products.

(9) "Farmer" means the owner or lessee of land used in the production and harvesting of farm products.

(10) "Farm-worker camp" has the same meaning as that defined in ORS 658.705(7).

(11) "Farm-worker camp operator" has the same meaning as that defined in OAR 839-014-0035(8).

(12) "Forest fire suppression by contract crew" includes work performed by forest fire fighters who are recruited, solicited, supplied or employed by a person who has contracted to supply a crew of forest fire fighters prior to the existence of the fire. (An incidental duty to assist in emergency fire suppression arising from a permit, timber sale contract, or similar agreement whose primary purpose does not relate to fire suppression does not constitute such a prior contract to supply forest fire fighters.)

(13) "Forest labor contractor" means:

(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the forestation or reforestation of lands; or

(b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the forestation or reforestation of lands; or

(c) Any person who furnishes board and lodging for workers in connection with the recruiting, soliciting, supplying or employing of workers to be engaged in the forestation or reforestation of lands;

(d) Any person who bids or submits contract offers for the forestation or reforestation of lands; or

(e) Any person who subcontracts with another for the forestation or reforestation of lands.

(14) "Forestation or reforestation of lands" includes, but is not limited to:

(a) The planting, transplanting, tubing, pre-commercial thinning, and thinning of trees and seedlings; and

(b) The clearing, piling and disposal of brush and slash; and

(c) Other activities related to the forestation or reforestation of lands including, but not limited to, tree shading, pinning, tagging or staking; fire trail construction and maintenance; slash burning and mop up; mulching of tree seedlings; forest fire suppression by contract crew; application of big game repellent by contract crew; herbicide or pesticide application in the forest by contract crew; gopher baiting; gopher trapping and any activity related to the growth of trees and tree seedlings and the disposal of debris from the land.

(15) "Herbicide or pesticide application in the forest by contract crew" means work performed by workers who are recruited, solicited, supplied or employed by a person who has contracted to supply a crew of workers to apply herbicides or pesticides in the forest.

(16) "Individuals engaged in the solicitation or recruitment of persons for day-haul work" means individuals who solicit or recruit only persons:

(a) Who reside permanently in the local area; and

(b) Who do not, temporarily or otherwise, reside on the farm on which they are working; and

(c) Who are not employed by the individuals; and

(d) Who are transported to the farm each day.

(17) "License" means a farm or forest labor contractor's license issued by the Bureau.

(18) "Perform labor" means the performance of work which is manual or physical in nature (including the use of tools), as distinguished from mental, technical, professional or managerial. Work of a mental, technical, professional or managerial nature includes, but is not limited to:

(a) The operation of aircraft, trucks or heavy equipment that require special permits to operate or labor performed by support crews in connection with such operation;

(b) Stocking surveys;

(c) Timber cruising;

(d) Plantation and timber stand examination;

- (e) Surveying;
- (f) Secretarial work;
- (g) Supervising employees;
- (h) Technical or professional work which requires an occupational license (other than the license required by ORS 658.405 to 658.475);
- (i) Work requiring an advanced type of knowledge in a field of science, technology or learning customarily acquired over a prolonged course of specialized instruction and study;

(j) Forest research and genetic improvement work (including single-tree or sample lot cone collections and the planting of parent or study trees) that services technical forestry advancement rather than direct forestation or reforestation efforts.

(19) "Permanent employee" means an employee of a farmer, nursery owner, processor of farm products, or owner or lessee of land intended to be used for the production of timber whose employment is intended to continue indefinitely. Employees employed on a seasonal, temporary or transient basis are not permanent employees under the section.

(20) "Person" means any individual, sole proprietorship, partnership, corporation, cooperative corporation, association, public or private corporation, government or governmental instrumentality or other business or legal entity.

(21) "Platoon leader" means a temporary supervisor employed by the farmer to supervise employees hired independently by the farmer and placed under the direction of the platoon leader, provided there is no other connection between the platoon leader and the employees.

(22) "Production and harvesting of farm products" includes, but is not limited to, the cultivation and tillage of the soil, the production, cultivation, growing and harvesting of any agricultural commodity, including, but not limited to, cottonwood trees for fiber production and Christmas trees, and the preparation for and delivery to market of any such commodity.

(23) "To gather wild forest products" or "the gathering of wild forest products" means the gathering of evergreen boughs, yew bark, bear grass, salal or ferns, and nothing else, from public lands for sale or market prior to processing or manufacture. This term does not include the gathering of these products from private lands in any circumstance or from public lands when the person gathering the products, or the person's employer, does not sell the products in an unmanufactured or unprocessed state.

EXAMPLE: A nursery uses its own employees to gather evergreen boughs which it uses in the manufacture of Christmas wreaths. The nursery is not engaged in farm labor contracting activity and therefore would not be required to obtain a license.

EXAMPLE: A person contracts with the owner of private land to remove salal from the land for resale to florists. Because the salal is growing on private land, the person is not engaged in "gathering of wild forest products" as that term is used in these rules (although in some circumstances, the person may be harvesting a farm product).

(24) "To induce to travel" means to cause or entice a worker to travel to a specific geographical location or area, by any promise or inducement.

(25) "Worker" means an individual performing labor in the forestation or reforestation of lands, in the gathering of wild forest products or in the production and harvesting of farm products, or any person who is recruited, solicited, supplied or employed to perform such labor, notwithstanding whether or not a contract of employment is formed or the labor is actually performed. A "worker" includes, but is not limited to employees and members of a cooperative corporation.

(26) As used in subsections (4), (12), and (15) of this rule, the term "work performed" has the same meaning as the term "perform labor" in subsection (18) of this rule.

Stat. Auth.: ORS 658.407

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 16-1988, f. & cert. ef. 12-13-88; BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96; BL 5-1996, f. 6-14-96, cert. ef. 7-1-96; BL 7-2000, f. & cert. ef. 2-23-00

Licensing

839-015-0125

Contractors Must Obtain a License; Indorsement

No person may perform the activities of a farm or forest labor contractor without first obtaining a temporary permit or license issued by the bureau. No person may perform the activities of a forest labor contractor or operate a farmworker camp without first obtaining a spe-

cial indorsement from the bureau authorizing such performance. Unless otherwise specifically exempt, and except for cooperative corporations, no person may perform the duties of a farm or forest labor contractor or operate a farmworker camp under a license issued to a corporation unless the person is also licensed to perform such duties.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96

839-015-0130

Exemptions from Licensing

The following persons are not required to obtain a farm or forest labor contractor's license:

(1) A farmer or owner or lessee of land intended to be used for the production of timber dealing with workers or worker groups only concerning employment in their own operation.

(2) A nursery owner or operator dealing with workers or worker groups only concerning employment in their own operations.

(3) A processor of farm products dealing with workers or worker groups only concerning employment in their own farm operations.

(4) A permanent employee of a farmer, nursery owner, or processor of farm products, or a permanent employee of an owner or lessee of land intended to be used for the production of timber so long as the employee is engaged solely in activities which would not require the employer to be licensed if the employer were performing the activity.

(5) A person engaged only in the solicitation or recruitment of workers for agricultural day-haul work and not engaged in arranging for board or lodging for migrant workers and not performing as an employer of the workers.

(6) A platoon leader.

(7) A leader, or a leader's agent, of an organization operating as a labor union, provided that the only payment received from the workers is in the form of membership dues for which the workers are accorded membership status in the conduct of the affairs of the organization.

(8) An employee of a farm or forest labor contractor except for any employee who:

(a) Recruits, solicits, supplies or employs workers on behalf of the farm or forest labor contractor; or

(b) For an agreed remuneration or rate of pay recruits, solicits, supplies or employs workers to perform labor for any other person in forestation or reforestation of lands or the production or harvesting of farm products; or

(c) Recruits, solicits, supplies or employs workers to gather wild forest products; or

(d) Furnishes board or lodging for such workers (but cooks employed by the contractor are not required to be licensed by reason of this sole activity); or

(e) On his or her own behalf bids or submits prices on contracts offers for those activities or enters into a subcontract with another for any of those activities.

(9) A crew leader provided that if the crew leader engages in any activity or receives any compensation with respect to any worker which exceed the permitted activities or compensation allowed by the definition in OAR 839-015-0004(7)(a), the crew leader is not exempt with respect to any activities or workers.

(10) A person who is primarily a supplier of on-farm equipment (sheep shearers, potato diggers, or other farm machinery) or cottonwood tree harvesting machines unless the person also supplies temporary workers other than workers engaged in driving or maintaining the equipment.

(11) The advertising media.

(12) Employees of the Employment Department who are acting within the scope of their employment.

(13) A person performing work of a mental, technical, professional or managerial nature as defined in OAR 839-015-0004(18).

(14) An individual who performs work, other than recruiting, soliciting, supplying or employing workers to perform labor for another, or recruiting, soliciting, supplying or employing workers to gather wild forest products, alone or with only the assistance of the individuals named in section (15) of this rule.

(15) The spouse, son, daughter, brother, sister, mother or father of the individuals named in sections (14) and (16) of this rule.

(16) Individuals who perform labor in connection with an agree-

ment for the exchange of labor or services with each other, provided that the work is performed on land owned or leased by the individuals, and provided further that the labor or services involved are performed solely by said individuals, their immediate families as specified in section (15) of this rule, or their permanent employees.

(17) An educational institution which is recognized as such by the Oregon Department of Education.

(18) An individual who collects tree seed cones or an individual who buys tree seed cones from other individuals. This section applies to individuals only and not to persons who are otherwise defined as farm or forest labor contractors.

(19) Persons who recruit, solicit, supply or employ workers to perform labor under a contract or agreement solely for the following activities, provided that the person performs no other activities which would require licensing:

- (a) Stream or creek debris removal;
- (b) Provision of security services;

(c) Any activity which does not have the primary purpose of forestation or reforestation of lands, the gathering of wild forest products or of production or harvesting of farm products.

(20) Persons engaged in logging operations who would only otherwise be farm or forest labor contractors because they engage in reforestation activities that are incidental to contracts the primary purpose of which is the sale of timber, provided that they perform such incidental reforestation work using their own employees. If the incidental reforestation activities are carried out using a subcontractor, the subcontractor is required to be licensed.

Stat. Auth.: ORS 658.407

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 16-1988, f. & cert. ef. 12-13-88; BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96; BL 5-1996, f. 6-14-96, cert. ef. 7-1-96; BLI 7-2000, f. & cert. ef. 2-23-00; BLI 3-2006, f. 2-16-06, cert. ef. 3-1-06

839-015-0135

Issuance of License

(1) A license may be issued only as follows:

(a) To an individual proposing to operate as a sole proprietor under the individual's own name or under the individual's own name and an assumed business name registered with the Corporation Division;

(b) To an individual proposing to operate as a partner in a partnership or a limited liability partnership under the individual's own name or under the individuals' own names and the assumed partnership business name registered with the Office of the Secretary of State;

(c) To the majority shareholder or majority shareholders of a corporation or member(s) owning a majority of a limited liability company that is authorized to do business in Oregon by the Office of the Secretary of State and to the corporation or limited liability company. Under this form of licensing, except as provided in subsection (3), the licensed majority shareholder or majority shareholders and the licensed corporation or the majority member(s) of a limited liability company and the licensed limited liability company are jointly and severally liable for all violations of the corporation or limited liability company and its agents when acting as a farm labor contractor;

(d) To a cooperative corporation authorized to do business in Oregon by the Office of the Secretary of State;

(e) To a private nonprofit corporation authorized to do business in Oregon by the Office of the Secretary of State and designated by the Internal Revenue Service as exempt under section 501(c)(3) of the Internal Revenue Code, provided:

(A)(i) The purpose of the corporation is to provide education or training; and

(ii) Workers recruited, solicited, supplied or employed by the corporation are recruited, solicited, supplied or employed only for the purpose of educating or training the workers in the forestation or reforestation of lands or in the production or harvesting of farm products; or

(B) For at least five years before the corporation files an application for a farm labor contractor license, the corporation has been:

(i) Authorized to do business in Oregon by the Office of Secretary of State;

(ii) Primarily engaged in recruiting, soliciting, supplying or employing workers; and

(iii) Designated by the Internal Revenue Service as exempt under section 501(c)(3) of the Internal Revenue Code;

(f) To an agricultural association that is authorized to do business in Oregon by the Office of the Secretary of State;

(g) To an employee of a forest or farm labor contractor who is proposing to or is carrying out activities which would require the employee to obtain a license as a farm or forest labor contractor.

(2) No license may be issued to an individual proposing to do business as a partner in a partnership unless all of the proposed partners are licensed.

(3) The majority shareholder or majority shareholders of a corporation or member(s) owning a majority of a limited liability company are not required to be licensed under this section if the corporation or limited liability company:

(a)(A) Publicly trades its shares of stock on a stock exchange regulated by the United States Securities and Exchange Commission; or

(B) Has 10 or more shareholders or members and demonstrates to the satisfaction of the commissioner that the corporation or limited liability company is adequately capitalized; and

(C) No individual shareholder or member owns, or no two shareholders or members collectively own a majority of the corporation or limited liability company; and

(b) Is authorized to do business in Oregon by the Office of the Secretary of State.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96; BLI 7-2000, f. & cert. ef. 2-23-00; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01

839-015-0140

Licensing Requirements

To be eligible for a license, an applicant therefore must:

(1) Be of good character, competence and reliability.

(2) Be a person who has not, within the preceding three years, had an Oregon farm and forest labor contractor's license application denied.

(3) Be a person who has not, within the preceding three years, in Oregon or in any other jurisdiction, had a farm or forest labor contractor's license or indorsement denied, revoked or suspended.

(4) Not have persons financially interested in any capacity in the applicant's business as a farm or forest labor contractor who were denied an Oregon farm or forest labor contractor's license within the preceding three years or who had such license denied, revoked, or suspended within the preceding three years in Oregon or any other jurisdiction. A refusal to renew a license or grant a temporary permit because the applicant or any person financially interested in the applicant's business as a farm or forest labor contractor has been denied a license or had a license revoked in Oregon or any other jurisdiction within the preceding three years is considered the same as the revocation of the license or permit on the date of its expiration.

(5) Not have any unsatisfied final judgments of the court or final orders issued by any government agency which require the payment of unpaid wages to employees or the payment of any advances made to the contractor by farmers or owners or lessees of land intended to be used for the production of timber.

(6) Pay the appropriate license fee.

(7) Except as provided in OAR 839-015-0141(2), show proof of financial ability to promptly pay the wages of employees and advances made by farmers or owners or lessees of land intended for the production of timber in the form of a corporate surety bond or deposit with the commissioner.

(8) File a completed application form.

(9) Except as provided in OAR 839-015-0141(2), certify on the application that there is insurance on vehicles used to transport workers in an amount sufficient to comply with the Oregon Financial Responsibility Law (ORS 486.011 to 486.680).

(10) Except as provided in OAR 839-015-0141(2), in the case of forest labor contractor license applicants, show proof that worker's compensation insurance will be provided on each individual as required in ORS 658.417(4).

(11) In the case of a corporation, be authorized to do business in Oregon.

Stat. Auth.: ORS 651 & 658

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 2-1996, f. & cert. ef. 1-9-96

839-015-0141

Licensing Requirements for Employees of Contractor/Indorsements

(1) The employee of a farm or forest labor contractor who is licensed under ORS 658.405 to 658.503 may be licensed as a farm or forest labor contractor subject to an employee indorsement if the employee continuously meets all of the following conditions:

(a) The employee's employer has filed with the Commissioner of the Bureau of Labor and Industries a signed statement, in a form required by the commissioner, agreeing to sponsor the application and to notify the commissioner promptly upon termination of the employment of the employee;

(b) The employee engages in activities that would require licensing as a farm or forest labor contractor solely on behalf of the employer;

(c) The employee does not personally employ any workers and is not responsible for paying any workers;

(d) The employer maintains proof of financial responsibility pursuant to ORS 658.415(3);

(e) The employer's license remains in good standing; and

(f) The employee meets all of the conditions for licensing as a farm or forest labor contractor provided for in OAR 839-015-0140.

(2) A farm or forest labor contractor subject to an employee indorsement acting in compliance with section (1) of this rule need not comply with OAR 839-015-0140(7), (9) and (10) insofar as the employer has complied with these provisions.

(3) The license of a farm or forest labor contractor subject to the employee indorsement shall state on its face the conditions contained in this rule and shall state further that the bearer of the license is licensed to act only as conditioned by this rule.

(4) The license of a farm or forest labor contractor subject to an employee indorsement shall terminate immediately upon the termination of the employment relationship with the employer who sponsored the employee's application. The employee shall submit the license to the bureau forthwith.

(5) A license subject to an employee indorsement may be terminated either by the employee or by the sponsoring employer by notifying the bureau in writing that either wishes to terminate the license or that the conditions specified in section (1) of this rule are no longer met.

(6) The license subject to an employee indorsement terminates upon receipt by the bureau of notice referred to in section (5). The employer's joint and several liability for actions taken by the employee under color of the employee's license pursuant to Ch. 73, Sec. 3(6), 1995 Oregon Laws, extends to any actions taken by the employee before the original license is surrendered to the bureau.

Stat. Auth.: OL Ch. 73, Sec. 3, 1995
Stats. Implemented: ORS 658.405 - 658.503
Hist.: BL 2-1996, f. & cert. ef. 1-9-96

839-015-0142

Use of Certain Agents Prohibited/Evidence of Sham or Subterfuge

(1) The Bureau may refuse to license or renew the license of any person who proposes to use any individual, partnership, association, corporation or other entity as such person's agent for the performance of any activity specified in ORS 658.405(4), when the proposed agent has, within the preceding three years, violated any section of ORS 658.405 to 658.485.

(2) The Bureau may refuse to license or renew the license of any applicant where there is evidence of sham or subterfuge in the identity of the applying entity. The Bureau will regard as prima facie evidence of sham or subterfuge mere changes in business form in anticipation of or subsequent to denial, suspension, revocation or refusal to renew a license, where a relative by blood or marriage, or a person presently employed in an occupation, other than an occupation with a licensed farm or forest labor contractor, makes application, including a renewal application, for a license and one or more of the following factors are present:

(a) A lack of adequate consideration or value given for the former business or its property;

(b) The use of the same real property, fixtures or equipment or use of a business name similar to that of the former business;

(c) A time period of less than one year elapsed between the former entity's receipt of notice of the Bureau's intent to deny, suspend, revoke or refuse to renew its license or application and the license

application by the new business;

(d) A person financially interested in any capacity in the former business has a financial interest in any capacity in the new business;

(e) Assets or capital of the former business are commingled with assets or capital of the new business;

(f) The amount of capitalization is inadequate to meet current obligations of the new business; or

(g) The formalities of a partnership or a corporation are disregarded by the new business when such business is a partnership or corporation.

(3) When the factors outlined in section (2) of this rule are present, it shall be the burden of the applicant to provide evidence to the Bureau clearly indicating that such business form is not sham or subterfuge.

Stat. Auth.: ORS 651 & 658.415(14)
Stats. Implemented: ORS 658.425(3) & 658.440(3)(a)
Hist.: BL 16-1988, f. & cert. ef. 12-13-88; BLI 7-2000, f. & cert. ef. 2-23-00

839-015-0145

Character, Competence and Reliability

The character, competence and reliability contemplated by ORS 658.405 to 658.475 and these rules includes, but is not limited to, consideration of:

(1) A person's record of conduct in relations with workers, farmers and others with whom the person conducts business.

(2) A person's reliability in adhering to the terms and conditions of any contract or agreement between the person and those with whom the person conducts business.

(3) A person's timeliness in paying all debts owed, including advances and wages.

(4) Whether a person has unsatisfied judgments or felony convictions.

(5) Whether a person has been refused a bond.

(6) Whether a person has provided workers' compensation coverage for each worker or paid worker's compensation insurance premium payments when due.

(7) Whether a person has violated any provision of ORS 658.405 to 658.503 or these rules.

(8) Whether a person has employed an agent who has had a farm or forest labor contractor license denied, suspended, revoked or not renewed or who has otherwise violated any provisions of ORS 658.405 to 658.503 or these rules.

(9) Whether a person has notified the bureau of any change in the circumstances under which a license was issued.

(10) Whether a person has failed to comply with federal, state or local laws or ordinances relating to the payment of wages, income taxes, social security taxes, unemployment compensation tax, or any tax, fee or assessment of any sort.

(11) Whether a person, when required by law, has failed or refused to seek food, water, shelter, or medical attention, or to provide any other necessary goods or services required for the safety and health of workers.

(12) Whether a person has repeatedly failed to file or furnish all forms and other information required by ORS 658.405 to 658.503 and these rules.

(13) Whether a person has made a willful misrepresentation, false statement or concealment in the application for a license.

(14) Whether a person has willfully made or caused to be made to any person any false, fraudulent or misleading representation, or publish or circulate any false, fraudulent or misleading information concerning the terms, conditions, or existence of employment at any place or by any person.

(15) Whether a person failed to maintain the bond or cash deposit as required by ORS 658.405 to 658.503.

Stat. Auth.: ORS 651 & 658
Stats. Implemented: ORS 659.405 - 658.503
Hist.: BL 6-1984, f. & ef. 4-27-84; BL 16-1988, f. & cert. ef. 12-13-88; BL 2-1996, f. & cert. ef. 1-9-96; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01; BLI 3-2006, f. 2-16-06, cert. ef. 3-1-06

839-015-0150

Procedure for Obtaining a Temporary Permit

(1) A Farm or Forest Labor Contractor may obtain a temporary permit by filing an application with any office of the Bureau. Forms for this purpose may be obtained from the office in which the application is filed.

(2) Temporary permits may be issued only under the following conditions:

- (a) The application is complete on its face;
- (b) Satisfactory evidence of insurance is certified to on the application;
- (c) The applicant or any person financially interested in any manner in the applicant's operations as a Farm or Forest Labor Contractor has not had an application denied or license revoked or suspended within the preceding three years. A refusal to renew a license or grant a temporary permit because the applicant therefore or any person financially interested in the applicant's business as a Farm or Forest Labor Contractor has been denied a license or had a license revoked in Oregon or any other jurisdiction within the preceding three years, is considered the same as the revocation of the license or permit on the date of its expiration;
- (d) Proof of financial ability to pay employees wages and advances from farmers or owners or lessees of land intended to be used for the production of timber is submitted with the application and is complete on its face;
- (e) The appropriate fee is paid at the time the application is submitted.

(3) A temporary permit is valid for not more than 60 days. The permit immediately expires if the license application is rejected or a license issued.

(4) The farm-forest labor contractor examination must be scheduled and taken within 45 days of the date a letter of authorization is issued by the License Unit. Failure to take and pass the examination prior to the expiration date of the temporary permit will result in denial of the license application.

(5) Only one temporary permit shall be issued in a 12-month consecutive period.

Stat. Auth.: ORS 164, 165, 651, 658.407(3) & 962

Stats. Implemented: ORS 658.425(1) - (3)

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 3-1990, f. & cert. ef. 3-1-90; BLI 7-2000, f. & cert. ef. 2-23-00; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01

839-015-0155

Procedure for Obtaining a License

Application for a license may be made as follows:

(1) File a completed application on forms supplied by the Bureau. In the case of a partnership, each partner must complete and file a separate application form.

(2) A farm or forest labor contractor may apply for a license on behalf of an employee, providing that all of the requirements of OAR 839-015-0141 are met.

(3) Pay the appropriate fees at the time the application is filed. Where the applicant is engaged in the production or harvesting of farm products, a \$100 fee is required. Where the applicant is engaged in the forestation or reforestation of lands (or engaged in both the forestation and reforestation of lands and the production or harvesting of farm products), a \$250 fee is required. In the case of a partnership, each partner must pay the appropriate fee.

(4) File with the application proof of financial ability to pay wages and advances in the amount required by OAR 839-015-0210 on forms supplied by the bureau. Except as provided in OAR 839-015-0157, in the case of a partnership, each partner must file such proof. Such proof may be a corporate surety bond, a cash deposit or a deposit the equivalent of cash.

(5) File any assumed business name and corporate name with the Office of the Secretary of State and submit proof of such filing with the application.

(6) If a corporation, show proof of being authorized to do business in Oregon.

(7) All forms, documents and other required information shall be filed with Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305.

Stat. Auth.: ORS 651.060(4), 658.407(3), 658.415(14) & 658.820

Stats. Implemented: ORS 658.405 - 658.830

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 16-1988, f. & cert. ef. 12-13-88; BL 3-1990, f. & cert. ef. 3-1-90; BL 11-1993(Temp), f. 10-29-93, cert. ef. 11-3-93; BL 1-1994, f. & cert. ef. 5-3-94; BL 2-1996, f. & cert. ef. 1-9-96; BLI 12-1999, f. 9-28-99, cert. ef. 10-23-99; BLI 28-2005, f. 12-29-05, cert. ef. 1-1-06

839-015-0157

Procedure for Obtaining Reduction in the Amount of Required Aggregate Bonding When More than One Individual is Required to Be Licensed in One Entity

(1) Farm or forest labor contractors desiring to apply for a reduction in the required bond or deposit may do so by submitting an application to the Bureau of Labor and Industries.

(2) Applications shall be in writing and on forms provided by the bureau. All completed applications must be mailed or delivered to the Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305.

(3) No such application shall be considered unless the commissioner determines that:

- (a) The application pertains to a single business entity; and
- (b) More than one natural person is an owner or employee of the business entity; and
- (c) Such persons engage in activities requiring a farm labor contractor's license; and
- (d) Such persons engage in such activities solely for the business entity.

(4) In the case of a corporate surety bond, applications must be accompanied by a statement from the licensee's bonding agent or agents certifying the length of time the licensee has been bonded by the agent and that there have been no valid claims against the licensee's bond during that time. If the license utilized more than one bonding agent, a statement is required from each agent.

(5) No application may be granted unless the business entity has operated for at least one year without a valid claim in this or any other state against the bond or deposit.

(6) When the commissioner is satisfied that the business entity has presented adequate proof that it has operated for at least one year without a valid claim against its bond or deposit, and when the commissioner determines that the conditions set out in sections (3) and (5) of this rule are met, the commissioner may grant an application for a reduction in the aggregate amount of the required bond or deposit.

(7) In determining whether to grant the application, the commissioner shall consider the following circumstances:

- (a) All matters contained in the application;
- (b) The number of licensees;
- (c) The type of business entity;
- (d) The history of each licensee in complying with any law;
- (e) Whether the licensees are dealing directly or indirectly with employees;
- (f) The number of employees employed by the business entity;
- (g) The character, competence or reliability of the licensees, as those terms are used in these rules;
- (h) Other information bearing on the circumstances of the application.

(8) When the commissioner determines to grant an application for lower aggregate bonding requirements for a business entity and its owners pursuant to sections (5) and (6) of this rule, the application will be granted to permit a total aggregate bond or deposit in the amount required by OAR 839-015-0210 for one licensee with a corresponding number of employees:

(9) When the commissioner grants an application for lower aggregate bonding requirements for a business entity and its owners, the required amount of aggregate bond or deposit may be divided among the licensees as they may agree, so long as each is obligated; in the absence of an agreement, the required amount shall be divided equally among them.

(10) Notwithstanding section (8) of this rule, when the commissioner determines to grant an application for lower aggregate bonding requirements for a business entity and its owners pursuant to section (6) of this rule, the entity must post an aggregate bond or deposit in the minimum amount specified in ORS 658.415 or 658.735, whichever is greater.

(11) The commissioner may specify conditions, if any, on the approval of the application.

(12) If the commissioner rejects the application, the reasons for the rejection will be specified.

(13) The commissioner may, for good cause shown, revoke the licensee's authorization to post a reduced bond or deposit. "Good cause" includes but is not limited to the following situations:

- (a) A valid claim is filed against the bond or deposit of the

business entity or licensee who is an owner or employee;

(b) The business entity ceases operating the business for which the bond or deposit was accepted;

(c) Failure to pay wages to the employees when due;

(d) Failure to pay advances made to or on behalf of the licensee by growers or producers of agricultural products or by owners or lessees of land intended to be used for the production of timber;

(e) The business entity, its licensees, its agents or employees during the course of their employment, cause damage to any person by reason of willful misrepresentation, fraud, deceit or other unlawful act or omission;

(f) The business entity, including any licensee, agent or employee, acting in the course of employment, has engaged in forest or farm labor contracting activities on behalf of anyone other than the business entity.

Stat. Auth.: ORS 658.407(3), 658.415(14) & 658.820

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 3-1990, f. & cert. ef. 3-1-90; BL 11-1993(Temp), f. 10-29-93, cert. ef. 11-3-93; BL 1-1994, f. & cert. ef. 5-3-94; BL 2-1996, f. & cert. ef. 1-9-96; BLI 28-2005, f. 12-29-05, cert. ef. 1-1-06

839-015-0160

Procedure for Obtaining a Duplicate License

In the event a license is lost or stolen, the licensee shall submit a written request for a duplicate license. The licensee shall state the reasons for the request and the circumstances of the loss or theft. The new license will indicate the word "DUPLICATE" on the license above the number. The written request shall be made to the Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 16-1988, f. & cert. ef. 12-13-88; BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96; BLI 28-2005, f. 12-29-05, cert. ef. 1-1-06

839-015-0165

Procedure for Issuing or Renewing License

(1) Each license shall be issued on the date all application requirements are met. Except as provided in section (2) of this rule, licenses are valid for one year.

(2) The expiration date of the license will be one year later, on the last day of the month in which the license was issued.

(3) Applications for renewal shall be made 30 days prior to the expiration date by filing a renewal application, paying the appropriate fees, and filing proof of financial ability to pay wages and certain advances.

(4) Each renewal application shall be accompanied by the work agreement between the contractor and the workers which is required by OAR 839-015-0360. The completed renewal application, renewal fee, and other information required in section (2) of this rule must be post-marked or received by the Licensing Unit at least 30 days prior to the expiration date of the license.

(5) Applications, fees and other forms and documents must be filed with the Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 16-1988, f. & cert. ef. 12-13-88; BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96; BLI 28-2005, f. 12-29-05, cert. ef. 1-1-06

Examinations

839-015-0170

Scope

(1) The License Unit shall provide written examinations as the Commissioner deems necessary.

(2) The License Unit shall provide all materials required for the examinations except hand-held calculators that may be used by the applicant.

(3) All examinations shall be "closed book."

(4) A written examination shall not exceed three hours.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96

839-015-0175

Examination Requirements

(1) Applicants shall schedule an appointment with Bureau staff or designated proctors throughout the state to take an examination after receipt of a letter of authorization from the License Unit.

(2) Once an applicant is authorized for examination, the applicant has 30 days in which to schedule an appointment to take the examination. The applicant shall take the examination within 45 days of the date of authorization.

(3) Applicants must submit a written request to reschedule or change the site of an examination after the 45-day period referred to in section (2) of this rule.

(4) Except for hand-held calculators and Oregon certified court interpreters, no applicant may use any other aids or notes or receive help from another person during an examination, except to the extent required to reasonably accommodate a disability under state or federal law. Violation of this rule shall result in the examination being invalidated and treated as failed.

(5) Requests for a certified court interpreter shall be made to the License Unit in writing by the applicant no fewer than 15 calendar days in advance of the date of the scheduled examination.

(6) The Bureau shall arrange for an Oregon certified court interpreter to interpret the examination and the applicant's examination responses upon receiving a written request for an interpreter by the applicant.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96; BLI 7-2000, f. & cert. ef. 2-23-00

839-015-0178

Grading of Examinations/Notice of Score

(1) The passing score for each examination shall be 75 percent.

(2) The License Unit shall notify applicants by mail of their examination scores.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96

839-015-0180

Review of Examinations

(1) Applicants failing to pass an examination may schedule an appointment with the License Unit to review the examination at a site designated by the License Unit.

(2) Requests to review failed examinations shall be scheduled within 30 days from notification of score.

(3) Applicants shall show picture identification before examination review.

(4) Applicants reviewing failed examinations shall not retain notes taken during the review.

(5) Examinations may be reviewed only by the applicant and/or any person the applicant has authorized, in writing, to review such examinations.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96

839-015-0185

Re-Examination

(1) Applicants who fail an examination shall wait the following time periods before retaking the examination:

(a) First failure: seven days;

(b) Second failure: 14 days;

(c) Third failure: 30 days;

(d) Any subsequent failures: 60 days.

(2) Re-examination shall not be scheduled sooner than seven days after review of a failed examination.

Stat. Auth.: ORS 164, 165, 651, 658.412 & 962

Stats. Implemented: ORS 658.412

Hist.: BL 3-1990, f. & cert. ef. 3-1-90; BL 6-1990(Temp), f. 4-18-90, cert. ef. 4-17-90; BL 9-1990, f. 5-25-90, cert. ef. 6-1-90

839-015-0190

Substitution of Oregon Examination

(1) The Commissioner may recognize national or state examinations for licensing if taken and passed within the last 12 months.

(2) Specific examinations that may be recognized in lieu of the

Oregon examinations are: Farm Labor Contractor examination for the State of California.

(3) Independent verification of the test results from the testing authority is required.

Stat. Auth.: ORS 164, 165, 651, 658.412 & 962
Stats. Implemented: ORS 658.412
Hist.: BL 3-1990, f. & cert. ef. 3-1-90

839-015-0195

Alternative Methods of Examination

(1) An Applicant for whom English is a second language may bring an interpreter to the examination to translate the examination questions. An interpreter may not assist an applicant in answering any question, but may translate the answers.

(2) Alternative methods of examination will be provided upon written request.

Stat. Auth.: ORS 164, 165, 651, 658.412 & 962
Stats. Implemented: ORS 658.412
Hist.: BL 3-1990, f. & cert. ef. 3-1-90

Proof of Financial Ability to Pay Wages and Advances

839-015-0200

Proof Required/Forms to Be Used

(1) Every applicant for a farm or forest labor contractor's license must, unless otherwise exempt, show proof of financial ability to promptly pay the wages of employees and any advances made to or on behalf of the contractor by farmers or owners or lessees of land intended to be used for the production of timber. Such proof must accompany the applicant's application and be on forms supplied by the bureau.

(2) The proof of financial ability to promptly pay the wages and advances referred to in section (1) of this rule shall be a properly executed corporate surety bond as evidenced by the completion of Form WH-157 or a deposit in cash or negotiable securities acceptable to the commissioner.

(3) The forms are available upon request from: Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305.

Stat. Auth.: ORS 658.407(3), 658.415(14) & 658.820
Stats. Implemented: ORS 658.405 - 658.503
Hist.: BL 6-1984, f. & ef. 4-27-84; BL 16-1988, f. & cert. ef. 12-13-88; BL 3-1990, f. & cert. ef. 3-1-90; BL 11-1993(Temp), f. 10-29-93, cert. ef. 11-3-93; BL 1-1994, f. & cert. ef. 5-3-94; BL 2-1996, f. & cert. ef. 1-9-96; BLI 28-2005, f. 12-29-05, cert. ef. 1-1-06

839-015-0210

Amount of Bond or Deposit to Be Filed

(1) Except as provided in section (3) of this rule, the amount of the bond or deposit referred to in OAR 839-015-0157 and 839-015-0200 shall be based on the maximum number of employees employed at any one time during the license year. The bond or deposit shall be:

(a) \$10,000 if the contractor employs no more than 20 employees; or

(b) \$30,000, or such lesser sum as may be authorized by the commissioner pursuant to ORS 658.416 and OAR 839-015-0230. The bond and any financial instrument shall be in the principal sum of the amount required by this rule. The amount of the bond or deposit must be continually maintained as long as the contractor is required to be licensed under ORS 658.405 to 658.475.

(2) When a licensee or holder of a temporary permit employs more than the maximum number of employees covered by the bond or deposit in section (1)(a) of this rule, the licensee or permit holder shall immediately increase the amount of the bond or deposit to the amount required by section (1)(b) of this rule. The licensee or permit holder shall also immediately notify the License Unit of the Wage and Hour Division.

(3) Notwithstanding the provisions of ORS 658.415(3), (4), (8), (9), and (16), an agricultural association or private nonprofit corporation described in ORS 658.410(2)(f)(B) shall submit and continually maintain, until excused, a corporate surety bond of a company licensed to do such business in Oregon, a cash deposit or a deposit the equivalent of cash. This bond or deposit shall be in the amount of \$30,000 and in a form approved by and payable to the Commissioner of the Bureau of Labor and Industries.

(4) When an applicant for a license has been required to satisfy a court-ordered judgment or a final order issued by a governmental

agency, the commissioner or the commissioner's designee may require the applicant to provide a bond or deposit of up to three times the amount required by section (1) of this rule as a condition of licensure. In such case, the commissioner or commissioner's designee will determine the actual amount of the bond or deposit by considering the following factors:

- (a) The amount of the judgment or order that was satisfied;
- (b) The magnitude and seriousness of the violation or violations which lead to the judgment or order;
- (c) The past history of the applicant in taking all necessary measures to prevent or correct violations of statutes or rules;
- (d) Prior violations, if any, of statutes or rules;
- (e) Other matters which indicate to the commissioner or commissioner's designee that the applicant is not likely to violate ORS 658.415(3) in the future.

Stat. Auth.: ORS 658.407(3), 658.415(14) & 658.820
Stats. Implemented: ORS 658.405 - 658.503
Hist.: BL 6-1984, f. & ef. 4-27-84; BL 3-1990, f. & cert. ef. 3-1-90; BL 11-1993(Temp), f. 10-29-93, cert. ef. 11-3-93; BL 1-1994, f. & cert. ef. 5-3-94; BL 2-1996, f. & cert. ef. 1-9-96; BLI 7-2000, f. & cert. ef. 2-23-00; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01

839-015-0220

Deposit in Cash or Negotiable Securities

As used in ORS 658.415(3) and in these rules "a deposit in cash or negotiable securities" means a single financial instrument which yields no less than the amount required pursuant to OAR 839-015-0210 in cash immediately upon demand. If the deposit is one which is subject to a penalty for early withdrawal, then the deposit must be in an amount sufficient to satisfy the penalty and still yield no less than the amount required under OAR 839-015-0210 in cash.

Stat. Auth.: ORS 658.407(3), 658.415(4) & 658.820
Stats. Implemented: ORS 658.415(3)
Hist.: BL 6-1984, f. & ef. 4-27-84; BL 3-1990, f. & cert. ef. 3-1-90; BL 11-1993(Temp), f. 10-29-93, cert. ef. 11-3-93; BL 1-1994, f. & cert. ef. 5-3-94

839-015-0230

Procedure for Obtaining Reduction in the Amount of Bond or Deposit Required

(1) In addition to the application for aggregate bond reduction provided in OAR 839-015-0157, farm and forest labor contractors who have been licensed for at least two consecutive years may apply for a reduction in the bond or deposit required by ORS 658.415(3). Applications shall be in writing and on forms provided by the bureau. All completed applications should be mailed or delivered to the Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305.

(2) Farm and forest labor contractors may apply for a reduction in the bond or deposit required at any time after the contractor has been licensed for no less than two consecutive years or at the time a farm or forest labor contractor license renewal application is made, pursuant to ORS 658.435(2).

(3) The contractor must have prior approval from the Bureau of Labor and Industries before submitting a reduced bond or deposit.

(4) No application for a reduction in the bond or deposit will be considered by the commissioner in the case of a farm or forest labor contractor license renewal application unless such completed application is received with a completed license renewal application at least 30 days prior to the expiration of the license.

(5) Applicants for a reduction in the bond or deposit will be notified in writing of the commissioner's disposition of the application by the License Unit of the bureau within 15 days of receipt of a completed application for a reduction.

(6) If application for a reduction in the bond or deposit is made less than 30 days prior to the expiration date of the farm labor contractor's license, the contractor must submit the bond or deposit required pursuant to ORS 658.415(3) without reduction along with the contractor's completed application for a bond or deposit reduction.

(7) If an application for a reduction in the bond or deposit is approved by the commissioner after the contractor has submitted an unreduced bond, an amended bond for the reduced amount approved will be accepted by the commissioner after approval of the reduced bond.

(8) If an application for a reduction in the bond or deposit is approved by the commissioner after the contractor has submitted an unreduced cash deposit, the commissioner will initiate a refund of the appropriate amount to the contractor within five working days after

approval of the reduced deposit.

(9) If an application for a reduction in the bond or deposit is approved by the commissioner after the contractor has submitted an instrument the equivalent of cash, the contractor will be allowed to replace such instrument with an instrument in the approved lesser amount.

(10) No application for reduction in the required bond or deposit shall be approved unless the commissioner determines that:

(a) The applicant has operated as an Oregon licensed farm labor contractor without an employee indorsement for at least two years in compliance with ORS 658.405 to 658.503 and with any other laws pertaining to the conduct of farm labor contractors; and

(b) The applicant employs 21 or more employees; and

(c) No valid claims for unpaid wages have been made against the applicant during the qualifying period of time for a bond or deposit reduction.

(11) If the commissioner rejects the application, every reason for the rejection will be specified.

(12) The commissioner may, for good cause shown, revoke the licensee's authorization to post a reduced bond or deposit. "Good cause" includes, but is not limited to, the following situations:

(a) A valid claim is filed against the bond or deposit of the licensee;

(b) Failure to pay wages to employees when due;

(c) Failure to pay advances made to or on behalf of the licensee by growers or producers of agricultural products or by owners of lessees of land intended to be used for the production of timber;

(d) The licensee or its agents cause damage to any person by reason of willful misrepresentation, fraud, deceit or other unlawful act or omission;

(e) The licensee or its agents engage in farm or forest labor contracting activities on behalf of anyone other than the business entity.

(f) Actions of the licensee demonstrate the licensee's character, reliability or competence make the licensee unfit to act as a contractor pursuant to OAR 839-015-0520(3).

(13) If the commissioner determines that the criteria in section (2) have been met by the applicant, the commissioner may reduce the amount of the bond or deposit that would otherwise be required pursuant to ORS 658.415(3) to an amount determined by the commissioner, but not less than the following:

(a) If the commissioner finds that the contractor has so operated for a period of at least five years, \$20,000; or

(b) If the commissioner finds that the contractor has so operated for a period of at least four years, \$22,500; or

(c) If the commissioner finds that the contractor has so operated for at least three years, \$25,000; or

(d) If the commissioner finds that the contractor has so operated for at least two years, \$27,500.

(14) If the applicant provided one or more corporate surety bonds as proof of financial responsibility during any of the qualifying period of time for which application for reduction is being made, the applicant must submit with the application a statement from the licensee's bonding agent or agents certifying the length of time the licensee has been bonded by the agent and that there have been no valid claims filed against the licensee's bond(s) during the qualifying period of time covered by the application. If the licensee utilized more than one bonding agent, a statement is required from each agent for the period of time covered by the application.

Stat. Auth.: OL Ch. 73, Sec. 4, 1995

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 2-1996, f. & cert. ef. 1-9-96; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01; BLI 28-2005, f. 12-29-05, cert. ef. 1-1-06

License Protests

839-015-0250

Protesting the Issuance of a License

Any individual may protest the issuance of a Farm or Forest Labor Contractor's license to any applicant for such license. The protest may be made at any time after the license is actually issued as well as at any time prior to the issuance of the license.

Stat. Auth.: ORS 651 & 658.415(14)

Stats. Implemented: ORS 658.420(3)

Hist.: BL 6-1984, f. & ef. 4-27-84

839-015-0260

Procedure for Filing Protest

(1) Any individual desiring to protest the issuance of a farm and forest labor contractor license must file the protest in writing with the Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305.

(2) The written protest must contain the following information:

(a) Name, address and phone number of the individual filing the protest;

(b) Date of the protest;

(c) Name of licensee or license applicant against whom the protest is being made;

(d) A complete statement of the facts, circumstances and other reasons for the protest. The statement should include alleged violations, approximate dates of alleged violations, names of witnesses, if any, and any documents which support the allegations;

(e) The signature of the individual making the protest.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01; BLI 28-2005, f. 12-29-05, cert. ef. 1-1-06

Forms Prescribed by the Commissioner

839-015-0300

"Wage Certification" Form

(1) Every farm and forest labor contractor must, unless otherwise exempt, submit a certified true copy of all payroll records to the Wage and Hour Division when the contractor or the contractor's agent pays employees directly as follows:

(a) The first report is due no later than 35 days from the time the contractor begins work on each contract and must include whatever payrolls the contractor has paid out at the time of the report;

(b) The second report is due no later than 35 days following the end of the first 35 day period on each contract and must include whatever payrolls have been issued as of the time of the report;

(c) If the contract lasts more than 70 days, succeeding wage certification reports must include whatever payrolls the contractor has paid out at the time of the report, with the reports due at successive 35 day intervals, e.g. 105 days, 140 days from the time the contractor begins work on the contract.

(2) The certified true copy of payroll records may be submitted on Form WH-141. This form is available to any interested person. Any person may copy this form or use a similar form provided such form contains all the elements of Form WH-141.

(3) The wages paid to the officers of the corporation may be omitted from the Form WH-141 or the other records submitted under this rule.

(4) The certified true copy of payroll records shall be submitted to: Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305.

(5) Contractors who have recruited, solicited or supplied workers from the state of Oregon who are employed on farm or forestation/reforestation contracts located outside the State of Oregon must comply with the provisions of this rule.

(6) For purposes of forest fire suppression by contract crew, the term "contract" as used in this rule means the acceptance of each dispatch order to a fire incident by a contractor supplying a contract crew to perform such work.

(7) The acceptance of a dispatch order for each separate crew will be deemed to constitute a separate and distinct contract such that the failure of a contractor to submit certified payrolls for each crew as required by this rule is a separate violation.

Stat. Auth.: ORS 658.417(3)

Stats. Implemented: ORS 658.417(3)

Hist.: BL 7-1983(Temp), f. & ef. 8-5-83; BL 6-1984, f. & ef. 4-27-84; BL 16-1988, f. & cert. ef. 12-13-88; BL 2-1996, f. & cert. ef. 1-9-96; BL 5-1996, f. 6-14-96, cert. ef. 7-1-96; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01; BLI 28-2005, f. 12-29-05, cert. ef. 1-1-06; BLI 3-2006, f. 2-16-06, cert. ef. 3-1-06

839-015-0310

Statement of Worker's Rights and Remedies

(1) Every Farm and Forest Labor Contractor must furnish each worker with a written statement of the worker's rights and remedies under the Worker's Compensation Law, the Farm and Forest Labor Contractor Law, and Federal Service Contracts Act, The Federal and

Oregon Minimum Wage Laws, Oregon Wage Collection Laws, Unemployment Compensation Laws, and Civil Rights laws. The form must be written in English and in the language used by the contractor to communicate with the workers.

(2) The form must be given to the workers at the time they are hired, recruited or solicited by the contractor or at the time they are supplied to another by the contractor, whichever occurs first.

(3) The Commissioner has prepared Form WH-151 for use by contractors in complying with this rule. The form is in English and Spanish and is available at any office of the Bureau of Labor and Industries.

Stat. Auth.: ORS 651 & 658.407(3)
Stats. Implemented: ORS 658.440(1)(f)(I)
Hist.: BL 6-1984, f. & ef. 4-27-84

839-015-0320

Form of License

In addition to the information required by ORS 658.430, the license form will contain such other information as the commissioner deems appropriate, including, but not limited to:

(1) The indorsement required by ORS 658.417, 658.715 and by OR Laws, Chap. 73, Sec. 3, 1995, where appropriate.

(2) A statement indicating whether the licensee is authorized to act as a farm labor contractor or whether the licensee is authorized to act as both a farm labor contractor and a forest labor contractor or whether the licensee is authorized to act as a farmworker camp operator.

Stat. Auth.: ORS 164, 165, 651, 658 & 962
Stats. Implemented: ORS 658.405 - 658.503
Hist.: BL 6-1984, f. & ef. 4-27-84; BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96

Other Required Forms

839-015-0350

Work Agreements Between Farm Labor Contractor and Farmers

(1) Farm Labor Contractors are required to file information relating to their agreements with farmers with the Bureau.

(2) The Commissioner has developed Form WH-152 that may be used to comply with this rule. Farm Labor Contractors may use any form for filing the information so long as it contains all the elements of Form WH-152.

(3) Farm Labor Contractors must file this information with the Bureau by April 30 of each year. Amended or updated information may be filed at any time. All information must be filed with the Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305.

Stat. Auth.: ORS 164, 165, 651, 658.407(3) & 962
Stats. Implemented: ORS 658.440(1)(e)
Hist.: BL 6-1984, f. & ef. 4-27-84; BL 3-1990, f. & cert. ef. 3-1-90; BLI 7-2000, f. & cert. ef. 2-23-00; BLI 28-2005, f. 12-29-05, cert. ef. 1-1-06

839-015-0360

Work Agreements Between Farm and Forest Labor Contractors and Their Workers

(1) Farm and forest labor contractors are required to file information relating to work agreements between the farm and forest labor contractors and their workers with the bureau.

(2) The commissioner has developed Form WH-153 that, in conjunction with Form WH-151, Statement of Workers Rights and Remedies, may be used to comply with this rule. Farm and forest labor contractors may use any form for filing the information so long as it contains all the elements of Form WH-153 and Form WH-151.

(3) Farm and forest labor contractors must file the form or forms used to comply with this rule with the bureau at the same time that the contractors apply for a license renewal.

(4) Farm and forest labor contractors are required to furnish their workers with a written statement disclosing the terms and conditions of employment, including all the elements contained in Form WH-151 and if they employ workers, to execute a written agreement with their workers prior to the starting of work. The written agreement must provide for all the elements contained in Form WH-153. A copy of the agreement and the disclosure statement must be furnished to the workers in English and in any other language used to communicate with the workers. The disclosing statement must be provided to the workers at the time they are hired, recruited or solicited or at the time they are supplied to another by that contractor, whichever occurs first. A copy

of the agreement must be furnished to workers prior to the workers starting work.

(5) Written notification of any changes in the terms and conditions of employment must be provided any time any of the elements listed in the original statement change.

(6) Except as provided in sections (7) and (8) of this rule, if it is not feasible to provide written notice at the time changes to the terms and conditions of employment are made, written notice of such changes may be made as soon as practicable.

(7) Written notice of pay decreases must be provided either prior to or at the time such decrease is implemented.

(8) In the case of the notice required by ORS 658.440(1)(f)(G) of the name(s) and address(es) of the owner(s) of operations where workers are employed, so long as notice is provided no later than the next regularly scheduled payday following a change in the location of work, in addition to the notice provided in (10)(a) or (b), notice may be provided:

(a) To the Bureau of Labor and Industries in writing; or

(b) On any documents issued to workers such as picking tickets or itemized deduction statements provided to workers.

(9) Nothing in the written agreement relieves the contractor or any person for whom the contractor is acting of compliance with any representation made by the contractor in recruiting the workers.

(10) For purposes of these rules, "written" notice of changes in the terms and conditions of employment includes, but is not limited to the following:

(a) Issuance of an amended disclosure statement/agreement (with the information required in Form WH-153) including the specific change(s) in terms and conditions of employment; or

(b) Issuance of a written notice of any specific change(s) in the terms and conditions of employment.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 3-1990, f. & cert. ef. 3-1-90; BL 6-1996, f. & cert. ef. 1-9-96; BLI 7-2000, f. & cert. ef. 2-23-00

839-015-0370

Statement of Earnings; Statement of Prevailing Wage

(1) Farm and forest labor contractors are required to furnish each worker, each time the worker receives a compensation payment from the contractor, a written itemized statement of earnings. The written itemized statement must include:

(a) The total gross payment being made;

(b) The amount and purpose of each deduction from the gross payment;

(c) The total number of hours worked during the time covered by the gross payment;

(d) The rate of pay;

(e) If the worker is paid on a piece rate, the number of pieces done and the rate of pay per piece done;

(f) The net amount paid after any deductions;

(g) The employer's name, address and telephone number;

(h) The pay period for which the payment is made.

(2) If the worker is being paid for work done under any law which requires the payment of a prevailing rate of wage (such as the Federal Service Contract Act, Davis-Bacon Act or state prevailing wage law), farm and forest labor contractors must furnish the worker with a written statement specifying the amount of the prevailing wage rate required to be paid.

(3) The commissioner has prepared Form WH-154 which contains all the elements required by, and can be used to comply with, this rule. Farm and forest labor contractors may use any form for furnishing this information to workers so long as it contains all the elements of Form WH-154.

Stat. Auth.: ORS 651 & 658

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 2-1996, f. & cert. ef. 1-9-96; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01

Records

839-015-0400

Required Records

(1) All farm and forest labor contractors shall make and maintain for a period of three years records necessary to determine their compliance with ORS 658.405 to 658.475 and these rules.

(2) Records necessary to determine compliance with ORS 658.405 to 658.475 and these rules include, but are not limited to records of:

- (a) The name and address of each worker (address includes both the permanent and local addresses of the worker);
- (b) The name and address of each subcontractor;
- (c) The work classification of each employee;
- (d) The rate of monetary wages and fringe benefits, if any, paid to each employee;
- (e) The total compensation paid to each employee during each pay period and the date it was paid;
- (f) The dates of each employee's employment;
- (g) The daily and weekly hours worked by each employee;
- (h) Any deductions taken from the employee's total compensation and an explanation thereof;
- (i) The actual net wages paid to each employee during each pay period;
- (j) The agreements required to be furnished to each worker pursuant to OAR 839-015-0360;
- (k) The agreements between the contractor and any subcontractors;
- (l) The statement of worker's rights and remedies as required by OAR 839-015-0310;
- (m) The statement of earnings and the statement of prevailing wage given to each employee as required by OAR 839-015-0370;
- (n) The agreements between the contractor and farmers;
- (o) The contracts between the contractor and the owner or lessee of land intended to be used for the production of timber;
- (p) Any advances and payments thereon made to the contractor by a farmer or owner or lessee of land intended to be used for the production of timber;
- (q) Any payroll or other records pertaining to the contractor's business as a Farm or Forest Labor Contractor and the manner in which the contractor conducts such business;
- (r) The type and number of any identification the worker produced as evidence of his/her legal presence and legal employability in the United States.

Stat. Auth.: ORS 164, 165, 651, 658.407(3) & 962

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 3-1990, f. & cert. ef. 3-1-90; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01

839-015-0410

Records Availability

Farm and Forest Labor Contractors will make available to representatives of the Wage and Hour Division records necessary to determine compliance with ORS 658.405 to 658.475 and these rules. Records will be made available upon request of such representatives.

Stat. Auth.: ORS 651 & 658.407(3)

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & ef. 4-27-84

Posting Requirements

839-015-0450

Notice of Compliance with Bond Requirements

(1) Every farm and forest labor contractor is required to post a notice of compliance with bond requirements in English and in any language used by the contractor to communicate with the contractor's workers. The notice must be posted in a conspicuous place on the job site where the contractor's employees are working and must be easily accessible to them.

(2) The notice shall state that the contractor has complied with ORS 658.415 by obtaining a corporate surety bond or by making a deposit with the commissioner. The notice shall also indicate the amount of the surety bond or deposit and the expiration date of the bond or deposit, and that the surety bond or deposits are conditioned on the payment of wages and advances made by farmers or owners or lessees of land intended to be used for the production of timber.

(3) The notice shall contain the name and Oregon address of the surety on the bond, if applicable, or the address of the bureau when a deposit is made with the commissioner.

(4) The commissioner has prepared a notice (WH-155) in English and Spanish which complies with this rule. Contractors may use any form or notice so long as it contains all the elements of Form WH-155.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96

Enforcement

839-015-0500

Action Against the Bond or Deposit

(1) Any person not paid wages owed to him/her by a farm or forest labor contractor or any farmer or owner or lessee of land intended to be used for the production of timber not paid advances due them by the farm or forest labor contractor has a right of action against the surety on the bond or deposit with the commissioner. The individual may exercise this right or may assign this right to another.

(2) The action on the bond or on the deposit held by the commissioner may not be joined in a suit or action on the bond or against the commissioner brought for any other claim.

(3) Any person seeking to recover on the bond or from the deposit with the commissioner must first establish the licensee's liability. The liability may be established in any of the following ways:

- (a) A judgment of the court;
- (b) A final administrative order issued pursuant to statute or rule;
- (c) The acknowledgment of the contractor of such liability;
- (d) Other satisfactory evidence of liability as may be shown which establishes the liability.

(4) Claims against the bond or deposit will not be paid unless, within six months of the end of the period during which the bond or deposit applies, the claimant or claimant's assignee gives notice of the claim by certified mail to the surety or the commissioner. Notice of claim shall be sufficient if it states that a wage claim is being made by the worker against the contractor, and it is not a defense to payment on the bond or deposit that the amount of the wage claim is not specified in the notice, or that the ultimate amount of wages found to be due is greater than the amount specified in the notice.

(5) Any claim or notice of claim filed pursuant to a claimant's right of action must be filed as follows:

(a) If the filing is against a surety bond, the claim or notice must be filed with the surety. The name and address of the surety may be obtained from the Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305;

(b) If the filing is against a deposit held by the commissioner, the claim or notice must be filed with the Bureau of Labor and Industries, Wage and Hour Division, Farm Labor Unit, 3865 Wolverine Street, NE, Bldg. E-1, Salem, OR 97305.

(6) Except as provided in section (8) of this rule, the commissioner and the surety shall make payments on the bond or deposit in the following priority:

- (a) Payments on wage claims;
- (b) Payments on advances made to or on behalf of the contractor by a farmer or an owner or lessee of land intended to be used for the production of timber;

(c) If there are insufficient funds to pay all wage claims in full, such claims will be paid in part;

(d) If there are insufficient funds to pay advances in full after all wage claims are paid, such advances will be paid in part.

(7) Except as provided in section (8) of this rule, in order to insure that all wage claims will be accorded priority treatment as required by ORS 658.415(9)(a), the commissioner may delay any payments for advances claimed, until the expiration of the time within which wage claims may be submitted. The commissioner may make conditional payment based upon adequate security that subsequent wage claims will be paid.

(8) Any person who suffers any loss of wages from the employer of the person or any other loss due to activities of an agricultural association or private nonprofit corporation as a farm labor contractor shall have a right of action against the surety upon the bond or against the deposit with the commissioner. The right of action is assignable and may not be included in any action against the agricultural association or private nonprofit corporation but shall be exercised independently after first procuring adequate proof of liability as provided in section (3) of this rule.

(9) A member of any agricultural association that is required to be licensed under ORS 658.410 shall be jointly and severally liable for any damages, attorney fees, or costs awarded to any person for actions

taken by the association in its capacity as a farm labor contractor if such actions were required, authorized, approved or ratified by the member.

(10) The surety company or the commissioner shall make prompt and periodic payments on the agricultural association's or private non-profit corporation's liability up to the extent of the total sum of the bond or deposit. Payments shall be made in the following manner:

(a) Payment based upon priority of wage claims over other liabilities;

(b) Payment in full of all sums due to each person who presents adequate proof of the claim; and

(c) If there are insufficient funds to pay in full the person next entitled to payment in full, payment in part to the person.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96; BLI 7-2000, f. & cert. ef. 2-23-00; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01; BLI 28-2005, f. 12-29-05, cert. ef. 1-1-06

Payment by Contractor of Certain Travel, Food and Lodging Expenses of Worker

839-015-0502

Travel of Workers Prior to the Availability of Employment/Provision of Food and Lodging

(1) When a worker is recruited or solicited for work and the worker is required to travel from one place to another before there is work available, the farm or forest labor contractor shall furnish to the worker, at no cost to the worker, food and lodging until the work begins. The contractor shall provide, without cost to the worker, the following:

(a) Lodging facilities which comply with the provisions ORS Chapter 654 and the rules adopted thereunder; and

(b) An adequate supply of food to feed the worker at least twice in a 24 hour period.

(2) The lodging facilities and adequate supply of food referred to in section (1) of this rule shall be provided by the contractor to the worker at no cost to the worker for as long as the worker must wait for work to become available.

(3) The worker may not be charged the cost of food and lodging provided pursuant to section (1) of this rule before or after the worker starts work.

(4) As used in this rule an "adequate supply of food" means an amount and variety of food sufficient to meet commonly accepted daily nutritional requirements for adults, minors, males or females, as the case may be.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96

839-015-0503

Travel of Workers to Alternative Work Sites/Payment of Certain Transportation Costs

When a worker arrives at a place of employment pursuant to OAR 839-015-0502(1), and work is not available to that worker within 30 days of the date the work was represented to begin, the contractor shall:

(1) Refund to the worker, all sums paid to the contractor by the worker.

(2) Provide to the worker cash or a negotiable instrument in an amount sufficient to pay for one of the following circumstances:

(a) The cost of transportation, including the cost of meals and lodging while in transit, to return the worker to the place where the worker left as a result of the recruitment or solicitation; or

(b) At the option of the worker, the cost of transportation, including meals and lodging while in transit to any other worksite selected by the worker, but no greater amount need be paid than the amount specified in subsection (a) of this section.

Stat. Auth.: ORS 164, 165, 651, 658.440(2)(c) & 962

Stats. Implemented: ORS 658.440(2)(c)

Hist.: BL 3-1990, f. & cert. ef. 3-1-90

839-015-0504

Application of OAR 839-015-0502 and 839-015-0503 Limited

(1) OAR 839-015-0502 and 839-015-0503 do not apply to workers who, pursuant to OAR 839-015-0502(1), arrive at a place of employment before the date instructed by the contractor or agreed to

by the worker and the contractor. The provisions of such rules are applicable only on and after the date agreed upon, when no work is available on that date.

(2) OAR 839-015-0502 and 839-015-0503 do not apply to workers who have been provided housing or employment and who have not otherwise been recruited or solicited by the contractor or the contractor's agent prior to the arrival of the worker at the place of housing or employment.

Stat. Auth.: ORS 164, 165, 651, 658.440(2)(c) & 962

Stats. Implemented: ORS 658.440(2)(c)

Hist.: BL 3-1990, f. & cert. ef. 3-1-90

Civil Penalties for Farm and Forest Labor Contractor Violations

839-015-0505

Definitions

As used in OAR 839-015-0505 to 839-015-0530:

(1) "Knowingly" or "willfully" means action undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person "should have known the thing to be done or omitted" if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts knowingly or willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of this rule, the farm labor contractor, forest labor contractor or any person acting as a farm or forest labor contractor is presumed to know the affairs of their business operations relating to farm or forest labor contracting.

(2) "Violation" means a transgression of any statute or rule, or any part thereof and includes both acts and omissions.

Stat. Auth.: ORS 651 & 658

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 11-1988(Temp), f. & cert. ef. 6-17-88; BL 16-1988, f. & cert. ef. 12-13-88;

BL 2-1996, f. & cert. ef. 1-9-96; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01

839-015-0507

Violations Separate and Distinct

Each violation is a separate and distinct offense. In the case of continuing violations, each day's continuance is a separate and distinct violation.

Stat. Auth.: ORS 651 & 658.407(3)

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 11-1988(Temp), f. & cert. ef. 6-17-88; BL 16-1988, f. & cert. ef. 12-13-88

839-015-0508

Violations for Which a Civil Penalty May Be Imposed

(1) Pursuant to ORS 658.453, the commissioner may impose a civil penalty for violations of any of the following statutes:

(a) Recruiting, soliciting, supplying or employing workers without a license to act as a farm or forest labor contractor in violation of ORS 658.410;

(b) Failure of the farm or forest labor contractor to, before beginning work on any contract or other agreement:

(A) Display the license or temporary permit to the person to whom workers are to be provided, or to the person's agent; or

(B) Provide to the person to whom workers are to be provided, or to the person's agent, a copy of the license or temporary permit pursuant to ORS 658.437(1).

(c) Failing to post a notice in English and in any other language used to communicate with workers that the contractor has a bond or deposit and where claims can be made against the bond or deposit in violation of ORS 658.415(15);

(d) Failing to file a change of address notice with the U.S. Post Office and the bureau in violation of ORS 658.440(1)(b);

(e) Failing to pay or distribute when due any money or other valuables entrusted to the contractor in violation of ORS 658.440(1)(c);

(f) Failing to comply with contracts or agreements entered into as a contractor in violation of ORS 658.440(1)(d);

(g) Failing to furnish each worker, at the time of hiring, recruiting, soliciting or supplying, whichever occurs first, a written statement that contains the terms and conditions described in ORS 658.440(1)(f);

(h) Failing to execute a written agreement between the worker and the farm labor contractor containing the terms and conditions described in ORS 658.440(1)(f), at the time of hiring and prior to the

worker performing any work for the farm labor contractor;

(i) Failing to furnish each worker with an itemized deduction statement and statement as to the rate of wage to be paid and other information in violation of ORS 658.440(1)(h);

(j) Making misrepresentations, false statements or willful concealments on the license applications in violation of ORS 658.440(3)(a);

(k) Willfully making or causing to be made any false, fraudulent or misleading information concerning the terms, conditions or existence of employment in violation of ORS 658.440(3)(b);

(l) Soliciting or inducing or causing to be solicited or induced a violation of an existing employment contract in violation of ORS 658.440(3)(c);

(m) Knowingly employing an alien not legally employable or present in the United States in violation of ORS 658.440(3)(d);

(n) Assisting an unlicensed person to act as a contractor in violation of ORS 658.440(3)(e);

(o) Inducing in any manner whatsoever an employee or subcontractor to give up any part of the employee's or subcontractor's compensation to which they are entitled under an employment contract or under federal or state wage laws in violation ORS 658.440(3)(f);

(p) Soliciting, inducing, or causing to be solicited or induced, the travel of a worker from one place to another by representing to a worker that employment for the worker is available at the destination when employment for the worker is not available within 30 days after the date work was represented as being available, is in violation of ORS 658.440(3)(g);

(q) Discharging or in any other manner discriminating against employees in violation of ORS 658.452;

(r) Failing to provide lodging and food when required by ORS 658.440(2)(c) and these rules;

(s) Failing to carry the license in violation of ORS 658.440(1)(a);

(t) Failing to exhibit the license in violation of ORS 658.440(1)(a);

(u) Failing to provide certified true copies of payroll records in violation of ORS 658.440(1)(i).

(2) In the case of forest labor contractors, in addition to any other penalties, a civil penalty may be imposed for each of the following violations:

(a) Failing to obtain a special indorsement from the bureau to act as a forest labor contractor in violation of ORS 658.417(1);

(b) Failing to provide workers' compensation insurance in violation of ORS 658.417(4).

(3) The commissioner may impose a civil penalty on a person to whom workers are to be provided, or on the person's agent, when the person uses an unlicensed farm or forest labor contractor without first:

(a) Examining the license or temporary permit of the farm or forest labor contractor; and

(b) Retaining a copy of the license or temporary permit provided to the person by the farm or forest labor contractor, pursuant to ORS 658.453(1)(f).

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 11-1988(Temp), f. & cert. ef. 6-17-88; BL 16-1988, f. & cert. ef. 12-13-88; BL 3-1990, f. & cert. ef. 3-1-90; BL 2-1996, f. & cert. ef. 1-9-96; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01; BLI 28-2005, f. 12-29-05, cert. ef. 1-1-06

839-015-0510

Criteria for Determining a Civil Penalty

(1) The commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the commissioner finds to be appropriate:

(a) The history of the contractor or other person in taking all necessary measures to prevent or correct violations of statutes or rules;

(b) Prior violations, if any, of statutes or rules;

(c) The magnitude and seriousness of the violation;

(d) Whether the contractor or other person knew or should have known of the violation.

(2) It shall be the responsibility of the contractor or other person to provide the commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed.

(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of money or valuables, if any, taken from employees or subcontractors by the contractor or other per-

son in violation of any statute or rule.

(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor or other person for the purpose of reducing the amount of the civil penalty to be imposed.

Stat. Auth.: ORS 651 & 658

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & cert. ef. 4-27-84; BL 11-1988(Temp), f. & cert. ef. 6-17-88; BL 16-1988, f. & cert. ef. 12-13-88; BL 2-1996, f. & cert. ef. 1-9-96

839-015-0512

Schedule of Civil Penalties

(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

(2) For purposes of this rule, "repeated violations" means violations of a provision of law or rule which have been violated on more than one contract within two years of the date of the most recent violation.

(3) When the Commissioner determines to impose a civil penalty for acting as a farm or forest labor contractor without a valid license, the minimum civil penalty shall be as follows:

(a) \$500 for the first violation;

(b) \$1,000 for the first repeated violation;

(c) \$2,000 for the second and each subsequent repeated violation.

(4) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR 839-015-0510.

(5) The civil penalties set out in this rule are in addition to any other penalty assessed by law or rule.

Stat. Auth.: ORS 658.407

Stats. Implemented: ORS 658.453

Hist.: BL 11-1988(Temp), f. & cert. ef. 6-17-88; BL 16-1988, f. & cert. ef. 12-13-88; BL 5-1996, f. 6-14-96, cert. ef. 7-1-96; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01

839-015-0520

Denying, Suspending, Revoking or Refusing to Renew License

(1) The following violations are considered to be of such magnitude and seriousness that the Commissioner may propose to deny or refuse to renew a license application or to suspend or revoke a license:

(a) Making a misrepresentation, false statement or certification or willfully concealing information on the license application;

(b) Causing an existing contract of employment to be violated;

(c) Knowingly employing an alien not legally present or legally employable in the United States;

(d) Assisting an unlicensed person to act as a farm or forest labor contractor;

(e) In any way inducing an employee or subcontractor of the contractor to give up any part of the compensation to which the employee or subcontractor is entitled under a contract or under federal or state wage laws;

(f) Discharging or discriminating in any way against an employee in violation of ORS 658.452;

(g) Intentionally altering a license or permit, or using the license or permit of another;

(h) Knowingly permitting another to use the licensee's license or permit; or

(i) Acting as a farm or forest labor contractor without a license.

(2) When the applicant for a license or a licensee demonstrates that the applicant's or licensee's character, reliability or competence makes the applicant or licensee unfit to act as a farm or forest labor contractor, the Wage and Hour Division shall propose that the license application be denied or license of the licensee be suspended, revoked or not renewed.

(3) The following actions of a farm or forest labor contractor license applicant or licensee or an agent of the license applicant or licensee demonstrate that the applicant's or the licensee's character, reliability or competence make the applicant or licensee unfit to act as a farm or forest labor contractor:

(a) Violations of any section of ORS 658.405 to 658.485;

(b) Conviction of a felony in connection with the applicant's or licensee's business operations as a farm or forest labor contractor;

(c) Willful violation of the terms and conditions of any work agreement or contract;

(d) Failure to comply with federal, state or local laws or ordinances relating to the payment of wages, income taxes, social security taxes, unemployment compensation tax or any tax, fee or assessment

of any sort;

(e) Knowing failure or refusal to seek food, water, shelter, or medical attention, or to provide any other necessary goods or services required by law for the safety and health of workers;

(f) Repeated failure to file or furnish all forms and other information required by ORS 658.405 to 658.503 or these rules;

(g) Failure to report any change in the circumstances under which the license was issued, including the failure to notify the Bureau of any change in the permanent or temporary address of the applicant or licensee;

(h) Willful misrepresentation, false statement or concealment in the application for a license;

(i) Willfully making or causing to be made to any person any false, fraudulent or misleading representation, or publishing or circulating any false, fraudulent or misleading information concerning the terms, conditions or existence of employment at any place or by any person;

(j) Failure to provide workers compensation coverage for each worker or to make worker's compensation insurance premium payments when due;

(k) Employing or using an agent who has had a farm or forest labor contractor license denied, suspended, revoked or not renewed or who has otherwise violated ORS 658.405 to 658.503;

(l) Failure to maintain the bond or cash deposit as required by ORS 658.405 to 658.503 or these rules;

(m) A course of misconduct in relations with workers, farmers and others with whom the person conducts business;

(n) Failure to pay all debts owed, including advances and wages, in a timely manner;

(o) Failure to promptly satisfy any or all judgments levied against the applicant/licensee;

(p) Conduct of the applicant/licensee resulting in the inability to obtain a bond.

(4) When a farm or forest labor contractor's license application is denied or a license is revoked or when the commissioner refuses to renew a license, the commissioner will not issue the applicant or licensee a license for a period of three (3) years from the date of the denial, refusal to renew or revocation of the license.

(5) Notwithstanding section (4) of this rule, the commissioner, for good cause shown, may issue a license to a contractor whose application has been previously denied or whose license was not renewed or was revoked before the expiration of three years, provided:

(a) The contractor submits a petition explaining each and every reason why the contractor should be licensed; and

(b) The contractor files a completed application with the petition and pays the appropriate fees.

(6) As used in section (5) of this rule, "good cause" means an excusable mistake or a circumstance beyond a person's control.

(7) The commissioner shall grant or deny the petition referred to in section (5) of this rule and in so doing shall consider the following factors:

(a) The magnitude and seriousness of the violation or violations which led to the denial, refusal to renew or revocation of the license;

(b) The petitioner's past history in taking all necessary measures to prevent or correct violations of statutes or rules;

(c) The petitioner's other prior violations of the statute or rules, if any;

(d) Other matters which indicate to the commissioner that the petitioner is not likely to violate ORS 658.405 to 658.475 and these rules in the future.

(8) Nothing in this rule shall preclude the commissioner from imposing a civil penalty in lieu of denying or refusing to renew a license application or in lieu of suspension or revocation of a license.

Stat. Auth.: ORS 651 & 658

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 11-1988(Temp), f. & cert. ef. 6-17-88; BL 16-1988, f. & cert. ef. 12-13-88; BL 2-1996, f. & cert. ef. 1-9-96; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01

Emergency Suspension of License

839-015-0525

Immediate Suspension or Refusal to Renew a License; Notice of Opportunity for Hearing; Service

(1) If the Bureau finds there is a serious danger to the public health or safety, it may immediately suspend or it may refuse to renew

a license. For purposes of this rule, such a decision is referred to as an emergency suspension order. An emergency suspension order is a written order which is not a final order under ORS Chapter 183. An emergency suspension order is not an order in a contested case and may be issued without notice or an opportunity for a hearing as required for contested cases under ORS Chapter 183.

(2)(a) Except where the danger to the public health or safety is so imminent that opportunity for the licensee to object under section (3) of this rule is not practicable as determined by the Bureau, the Bureau shall provide the licensee with notice and opportunity to object prior to issuing the emergency suspension order. For purposes of this rule, this notice is referred to as a presuspension notice;

(b) The presuspension notice shall:

(A) Specify the acts of the licensee and the evidence available to the Bureau which would be grounds for revocation, suspension or refusal to renew the license under the Bureau's usual procedures;

(B) Specify the reasons why the acts of the licensee seriously endanger the public health or safety;

(C) Identify a person in the Bureau authorized to issue the emergency suspension order or to make recommendations regarding the issuance of the emergency suspension order.

(c) The Bureau may provide the presuspension notice to the licensee in writing, orally by telephone or in person, or by any other means available to the Bureau;

(d) Where the presuspension notice is given orally, the Bureau subsequently shall provide the licensee with a written copy of the notice.

(3) Following the presuspension notice, the Bureau shall provide the licensee an immediate opportunity to object to the Bureau's specifications provided in the presuspension notice before a person authorized to issue the emergency suspension order or to make recommendations regarding the issuance of the emergency suspension order.

(4)(a) When the Bureau issues the emergency suspension order, the Bureau shall serve the order on the licensee either personally or by registered or certified mail; and

(b) The order shall include the following statements:

(A) Those required under ORS 183.415(2) and (3);

(B) That the licensee has the right to demand a hearing to be held as soon as practicable to contest the emergency suspension order;

(C) That if the demand is not received by the agency within 90 days of the date of notice of the emergency suspension order the licensee shall have waived its right to a hearing under ORS Chapter 183;

(D) The effective date of the emergency suspension order;

(E) The specifications noted in subsection (2)(b) of this rule;

(F) That with the agreement of the licensee and the Bureau the hearing opportunity on the emergency suspension order may be combined with any other Bureau proceeding affecting the license. The procedures for a combined proceeding shall be those applicable to the other proceeding affecting the license.

(5)(a) If timely requested by the licensee pursuant to subsection (4)(b) of this rule, the Bureau shall hold a hearing on the emergency suspension order as soon as practicable; and

(b) At the hearing, the Bureau shall consider the facts and circumstances including, but not limited to:

(A) Whether at the time of issuance of the order there was probable cause to believe from the evidence available to the Bureau that there were grounds for revocations, suspension or refusal to renew the license under the Bureau's usual procedures;

(B) Whether the acts or omissions of the licensee pose a serious danger to the public's health or safety;

(C) Whether circumstances at the time of the hearing justify confirmation, alteration or revocation of the order;

(D) Whether the Bureau followed the appropriate procedures in issuing the emergency suspension order.

Stat. Auth.: ORS 164, 165, 651, 658 & 962

Stats. Implemented:

Hist.: BL 16-1988, f. & cert. ef. 12-13-88; BL 3-1990, f. & cert. ef. 3-1-90

839-015-0530

Knowing Employment of an Alien Not Legally Present or Legally Employable in the United States

(1) A contractor knowingly employs an alien who is not legally present or legally employable in the United States, in violation of ORS 658.440(3)(d), if the contractor:

(a) Actually knows that the alien is not legally present and/or not legally employable in the United States; or

(b) Would know that fact if the contractor made efforts to ascertain the alien's status in the United States which were reasonably diligent under the circumstances as the contractor knows them.

(2) Efforts to ascertain an alien's status in the United States which are reasonably diligent under the circumstances as a contractor knows them include but are not limited to the following actions by the contractor:

(a) Making clear to all applicants, hirees and workers that they cannot work for the contractor unless they are legally present and legally employable in the United States;

(b) Taking one of the following actions:

(A) Requiring that every hiree produce documentary proof that he/she is legally present and legally employable in the United States before he/she begins work; or

(B) Asking all applicants for employment if they are U.S. citizens and requiring that any applicant who has indicated that she/he is not a U.S. citizen, and whom the contractor intends to hire, produce such proof.

(c) Familiarizing itself with pertinent U.S. Immigration and Naturalization Service (INS) regulations and procedures, the types of documentary proof listed in section (4) of this rule, and the other types of documentary identification of aliens issued by INS; and

(d) Making additional efforts to better discourage and detect the presence of aliens not legally present and/or not legally employable in the United States in the contractor's workforce, if the contractor knows or should know that the contractor's past efforts to accomplish that objective have been unsuccessful.

(3) A contractor should be suspicious that an applicant, hiree or worker is not legally present and/or not legally employable in the United States if, for example:

(a) The documentation of that individual's status in the United States:

(A) Does not evidence the individual's legal presence and legal employability in the United States;

(B) Appears on its face to be counterfeit;

(C) Includes information which does not match the individual offering the documentation; or

(D) In the case of documentation of alien status, does not match the INS specimens of the documentary identification which INS issues for aliens;

(b) The applicant, hiree or worker has given the contractor contradictory information relating to his/her status in the United States or information on that subject which conflicts with pertinent INS regulations and procedures;

(c) The contractor knows or should know that the applicant, hiree or worker has been apprehended by INS as an alien not legally present or legally employable in the United States and/or, because of that status, returned to the alien's country of citizenship; or

(d) The contractor is aware of information indicating that the applicant, hiree or worker is an alien not legally present or legally employable in the United States.

(4) Documentary proof that an individual is legally present and legally employable in the United States includes:

(a) Acceptable evidence of United States' citizenship:

(A) Birth certificate showing place of birth within the United States, its territories or possessions;

(B) Certificate of citizenship;

(C) Certificate of naturalization;

(D) U.S. identification card (INS Form I-179 or I-197);

(E) Passport issued by the United States identifying the individual as a citizen of the United States;

(F) Consular report of birth (State Department Form FS-40);

(G) Baptismal certificate under seal of a church or other religious body which practices infant baptism showing the individual's date and place of birth within the United States, its territories or possessions;

(H) A document under seal of a religious body which does not practice infant baptism showing the individual's date and place of birth within the United States, its territories or possessions;

(I) Tribal enrollment card in an American Indian tribe recognized by the Bureau of Indian Affairs;

(J) Other written advice from INS attesting that the individual is a citizen of the United States;

(K) A copy of a declaration, signed by the person under penalty of prosecution for violation of **Title 18 U.S.C. 1001**, and witnessed by the signature of the appropriate official of the U.S. Employment Service, affixed in the presence of the applicant, filed with the U.S. Employment Service or any of its affiliated offices, attesting that such individual is a citizen of the United States, was born at the place stated and on the date set forth thereon, and reciting the following additional information:

(i) Social security number of such individual (voluntary); and

(ii) Names and addresses of three adult citizens of the United States who can be contacted to verify the individual's citizenship.

(L) A certificate issued by the U.S. Department of Labor, Bureau of Employment Security, or the Commonwealth of Puerto Rico which attests that, based upon examination of any of the documents prescribed by paragraphs (a)(A) through (L) of this section, the individual named and identified by the picture on that certificate was born within the United States (including its territories and possessions) at the place and on the date specified thereon and which sets forth such individual's home address (street and number, city, state, and zip code) and social security number.

(b) INS Form I-151 or I-551, Alien Registration Receipt Card;

(c) INS Form I-94 (with or without a passport) bearing an employment authorization consisting of the words "Employment Authorized";

(d) INS Form I-94 (with or without a passport) bearing the designation of H-2, as endorsed on the front or back of the form, authorizing an individual to engage only in agricultural employment during the period of such individual's authorized stay in the United States;

(e) INS forms I-688 and I-688A;

(f) Any other written document from INS indicating that the individual is an alien authorized by INS to accept such employment in the United States; or

(g) U.S. Armed Forces Discharge Papers.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 164, 165, 651, 658.407(3) & 962

Stats. Implemented: ORS 658.440(3)(d)

Hist.: BL 6-1984, f. & ef. 4-27-84; BL 3-1990, f. & cert. ef. 3-1-90; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01

Private Right of Action

839-015-0600

Procedure for Filing Civil Action under ORS 658.453(4)

(1) Any worker who wishes to file a civil action pursuant to ORS 658.453(4) must file a complaint with the commissioner.

(2) The complaint shall be in writing, and shall contain the name or names of the persons or entities against whom the complaint is being filed. A copy of the proposed complaint to be filed with the court should, if available, be attached to the complaint filed with the commissioner. The worker filing the complaint with the commissioner should also state whether the worker intends to pursue a private civil court action.

(3) The complaint shall be considered filed with the commissioner on the date that it is mailed to the following address: Bureau of Labor and Industries; Wage and Hour Division, 800 NE Oregon Street #1045, Portland, OR 97232.

(4) The complaint that is filed with the commissioner should be filed prior to the filing in court of a civil complaint pursuant to ORS 658.453(4). However, if the complaint filed with the commissioner is not filed prior to the filing of a complaint in court but is done so before the entry of a final judgment, it shall be considered to be filed timely for purposes of ORS 658.453(4).

Stat. Auth.: ORS 651 & 658

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 16-1988, f. & cert. ef. 12-13-88; BL 2-1996, f. & cert. ef. 1-9-96; BLI 28-2005, f. 12-29-05, cert. ef. 1-1-06

839-015-0605

Knowingly Using the Services of an Unlicensed Contractor

(1) Pursuant to ORS 658.465(1), any person who knowingly uses the services of an unlicensed farm or forest labor contractor is personally, jointly and severally liable with the person acting as a farm or forest labor contractor to the same extent and same manner as provided in ORS 658.453(4).

(2) A person knowingly uses the services of an unlicensed farm or forest labor contractor in violation of ORS 658.465(1), if the person:

(a) Uses the services of a person acting as a farm or forest labor contractor and the person actually knows that the contractor does not have a valid license to act as a farm or forest labor contractor;

(b) Uses the services of an unlicensed farm or forest labor contractor without having first completed one of the following steps:

(A) Inspected an apparently valid farm or forest labor contractor's license which has not expired, which appears to be issued to the contractor, and which bears a forestry endorsement, if required;

(B) Confirmed that the name of the contractor appears on the current list of farm and forest labor contractors distributed by the Bureau of Labor and Industries as holding a valid license for the services which are contemplated by the user; or

(C) Obtained telephonic confirmation from the Bureau of Labor and Industries that the contractor is properly licensed to engage in the activities contemplated, and recorded the time, date, and name of the staff person of the Bureau who has provided the information.

Stat. Auth.: ORS 651 & 658.407(3)

Stats. Implemented: ORS 658.465(1)

Hist.: BL 16-1988, f. & cert. ef. 12-13-88; BLI 12-2001, f. 8-31-01, cert. ef. 9-1-01

839-015-0610

Actions Under ORS 658.475 for Injunctive or Declaratory Relief and Damages

(1) Any person who wishes to file a civil action pursuant to ORS 658.475 is not required to file a complaint with the commissioner. However, if a person filing such action desires to notify the commissioner, he/she may do so by sending a copy of the complaint that the person filed with the court to: Bureau of Labor & Industries, Wage and Hour Division, 800 NE Oregon Street #1045, Portland, OR 97232.

(2) The damages provided for in ORS 658.475 are in addition to damages provided for in any other statute including, but not limited to, ORS 658.453(4).

(3) The commissioner or any other person, including workers, may bring a civil action under ORS 658.475.

Stat. Auth.: ORS 651 & 658

Stats. Implemented: ORS 658.405 - 658.503

Hist.: BL 16-1988, f. & cert. ef. 12-13-88; BL 2-1996, f. & cert. ef. 1-9-96; BLI 28-2005, f. 12-29-05, cert. ef. 1-1-06

DIVISION 17

PRIVATE EMPLOYMENT AGENCY MATTERS

Interpretive Rules and Policies for Operating Employment Agencies

839-017-0004

Definitions

As used in ORS 658.005 to 658.245 and in these rules unless the context requires otherwise:

(1) "Advertising" means any material or means used by the employment agency for solicitation or promotion of business. This includes, but is not limited to, business cards, notices or announcements in newspapers, radio, television, brochures, pamphlets, gift items, and signs. It may also mean referral cards, invoices, letterheads, or other forms if such forms are used in combination with solicitation and promotion of business.

(2) "Applicant for Employment" means an individual who is seeking or who has obtained employment through the services of an employment agency.

(3) "Bureau" means the Bureau of Labor and Industries of the State of Oregon.

(4) "Charge for Services" means any money or other consideration paid or promised to be paid by an applicant for employment for services rendered by an employment agency.

(5) "Commissioner" means the Commissioner of the Bureau of Labor and Industries or the Commissioner's authorized deputies and officers.

(6) "Employment listing service" means a business operated by a person that:

(a) Provides lists of specified positions of employment available with an employer listing service or that holds itself out to individuals as able to provide information about specific positions of employment with an employer other than the employment listing service;

(b) Charges an individual a fee for its services; and

(c) Does not arrange or set up interviews between an individual and a prospective employer or otherwise intercede between an individual and a prospective employer but may offer limited counseling and employment-related services to an individual that includes, but is not limited to, personal grooming and appearance and interview preparation.

(7) "Engaged in Procuring for a Fee, Employment for Others and Employees for Employers" as used in ORS 658.005(3) means all actions of an employment agency leading up to and including the placing of job applicants in employment with others, provided a charge for services is paid to the employment agency by an applicant. Such actions include but are not limited to:

(a) Assisting an individual in completing the agency's application form or other documents detailing the individual's work experience and general qualifications for employment;

(b) Interviewing an individual in connection with specific job openings or in connection with the agency's general practice and procedure for determining the experience and qualifications of an applicant for employment;

(c) Referring individuals to prospective employers pursuant to job orders obtained from said employers;

(d) Soliciting and obtaining job orders from employers;

(e) Recruiting individuals to fill job orders obtained from employers;

(f) Advertising for individuals to fill job orders obtained from employers;

(g) Other activities that cause, acquire, gain, get or bring about the placement of individuals in employment.

(8) "Fee Paid Position" means a position in which under no circumstances is the applicant for employment who is identified, appraised, referred, or recommended charged a deposit, retainer, fee or any other charge for services directly or indirectly at any time in connection with such position.

(9) "Violation" means a transgression of any statute, rule or order, or any part thereof and includes both acts and omissions.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.005 - 658.245

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 12-1978, f. & ef. 8-16-78; BL 10-1987(Temp), f. 9-30-87, ef. 10-1-87; BL 8-1988 f. & cert. ef. 5-16-88, Renumbered from 839-017-0176; BL 6-1997, f. & cert. ef. 11-13-97; BLI 6-2003, f. 12-31-03, cert. ef. 1-1-04

Procedural Rules

839-017-0005

Notice of Proposed Rule

Prior to the adoption, amendment or repeal of any rule relating to private employment agency matters, the Wage and Hour Division of the Bureau of Labor and Industries shall give notice of intended action:

(1) In the Secretary of State's Bulletin referred to in ORS 183.360 at least 21 days prior to the effective date.

(2) By mailing a copy of the notice of intended action to persons on the Wage and Hour Division's mailing list for private employment agency matters established pursuant to ORS 183.335 at least 28 days prior to the effective date.

(3) By mailing a copy of the notice of intended action to:

(a) Associated Press;

(b) Private Employment Agencies;

(c) Oregon Association of Personnel Consultants.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.005 - 658.245

Hist.: BL 10-1980, f. & ef. 9-19-80; BL 8-1988 f. & cert. ef. 5-16-88; BL 6-1997, f. & cert. ef. 11-13-97

Contracts Between Employment Agencies and Applicants for Employment

839-017-0011

Contents of Contract

(1) All employment agencies making a charge for service to the applicant for employment, either directly or indirectly, must have a written contract with the applicant for employment which contains the requirements set out in ORS 658.005 to 658.245.

(2) The contract shall contain a schedule of maximum service charges. When the agency places applicants for employment in

permanent employment (as defined in ORS 658.185(1)(a)), temporary employment (as defined in ORS 658.185(1)(b)) or in employment compensated on a commission basis, the schedule shall contain separate sections pertaining to the types of employment in which applicants for employment are placed. However, separate sections are required only when the agency makes placements in more than one type of employment.

(3) See **Appendix 1** for an example of a contract which complies with this rule.

[ED. NOTE: Appendices referenced are available from the agency.]

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.005 - 658.245

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88

839-017-0012

Additional Contract Requirements

In addition to the requirements of the statutes included in OAR 839-017-0011, the following contract clauses must be in all contracts between the employment agency and an applicant for employment who may be responsible for the agency's charge for services either directly or indirectly:

(1) "A refund, when due, shall be made within ten (10) days after notice of termination of the applicant's employment has been received by the agency."

(2) "If my employment lasts less than ninety (90) calendar days, _____ (agency) _____ shall reduce the service charge so that it will not exceed one-ninetieth of the charge for permanent employment for each consecutive calendar day during the period I am employed or compensated as though employed."

(3) "I understand I shall be responsible for only one full fee for any single placement whether or not employment is secured through the assistance of more than one employment agency."

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.165 & 658.185

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88

839-017-0013

Requirements When Compensation Based on Commission

In addition to the requirements of OAR 839-017-0011 and 839-017-0012, the following clauses are required to be in all contracts between agencies and applicants for employment when placements are made or to be made on commission positions:

(1) "Should proof be presented after six months and/or twelve months of employment that the estimates of total gross earnings were inaccurate, _____ (agency) _____ shall refund to the applicant any excess charges paid by him, or the applicant shall pay to _____ (agency) _____ any deficiency in charges."

(2) "If the applicant's compensation is based on commission and his employment is terminated prior to the conclusion of the first twelve months of employment, the actual total gross earnings of the applicant for the period of employment shall be projected to twelve months on a pro-rata basis as though the applicant had been employed for the entire period of twelve months, and a computation shall be made thereon. The adjusted charge for services by the applicant shall be predicated upon such computation."

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.185

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77

839-017-0025

Clauses or Statements Not Required, May Be Included

The following clauses or statements are not required to be in any contract between the employment agency and the applicant for employment who may be responsible for the agency's charge for service directly or indirectly, but so long as consistent with other required or permissible clauses, may be included in the contract between the employment agency and the applicant for employment:

(1) "In no instance in which the employment secured is subsequently terminated shall the charge for services be greater than the total gross earnings of the applicant."

(2) "One month equals 1/12th of a year or 4-1/3 weeks."

(3) "These service charges often may be deducted for income tax

purposes."

(4) "Payment of any refund which shall be due shall be made to the applicant's lender, if any, to the extent of the then unpaid balance of such loan to minimize the liability of _____ (agency) _____ for the interest, fees, or other charges incurred by the applicant."

(5) "I will keep the agency informed about the results of all arranged interviews, and will advise the agency at once upon acceptance of employment, or if employment which has been accepted is terminated for any reason."

(6) "I hereby give permission for references to be checked for purposes of employment, and understand that upon request _____ (agency) _____ will divulge the content of same to me."

(7) "If the applicant fails to perform this contract, or to pay the agency's service charge provided herein, then the applicant agrees to pay _____ (agency) _____ reasonable attorney's fees and other costs of collection as determined by a court."

(8) "There shall be no oral agreements or oral additions to this contract. Any further terms, conditions, or understandings shall be in writing."

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.168(4)

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156, f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77

839-017-0030

Refund to Applicant

(1) Whenever an agency receives notice from any source that an applicant for employment has terminated employment within the time which requires a refund of a portion or all of the agency's charge for services, the agency shall refund within ten days of such notice, by cash or its equivalent, and not by goods or services, all sums due as a refund to the applicant.

(2) Those applicants for employment whose compensation is based upon commission employment and who have presented proof of earnings at the end of six and/or twelve months which may require a refund of a portion of the agency's charges, shall receive such refund from the agency within ten days of such request.

(3) Contracts or agreements shall not contain statements or understandings concerning job replacement or other goods and services contrary to this rule.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.185

Hist.: BL 149, f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88

839-017-0031

Oral Agreements or Additions to Contracts Prohibited

There shall be no oral agreements or oral additions to any contract between the employment agency and the applicant for employment. Any terms, conditions, or understandings between the employment agency and the applicant for employment shall be in writing.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.168

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77

839-017-0032

Record of Contracts

All contracts shall be in numerical order and registered in a log. The log will contain the contract number, the date, and the name of the applicant as it appears in some uniform place in the contract. A separate set of numbers may be used for "fee" and "fee paid" contracts.

Stat. Auth.: ORS 658.210 & 658.078

Stats. Implemented: ORS 658.078

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77

839-017-0040

Fee Paid Positions

(1) When an employment agency deals in both fee paid positions and in positions for which the applicant for employment pays the charge for service, and when the agency intends to assist individuals exclusively with referrals and placements in fee paid positions, the agency must enter into a written agreement with each individual applicant for employment. This agreement may be similar to that as provided in Appendix 2. If the applicant subsequently desires referrals to applicant fee paid positions, the agency must enter into a new contract

in conformity with OAR 839-017-0011 to 839-017-0045 before any such referral is made.

(2) Written disclosure to the applicant for employment that is provided for in section (1) of this rule shall not be required when the position for which the applicant for employment is applying or being recruited will pay the applicant for employment no less than \$30,000 per year on a salary basis.

[ED. NOTE: Appendices referenced are available from the agency.]

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.005 - 658.245

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88; BL 6-1997, f. & cert. ef. 11-13-97

839-017-0045

Addendum to Contract to Provide Specific Terms for Payment

After an applicant for employment has accepted employment with an employer, but before actually starting work, the applicant and the employment agency may change the terms agreed to in their original contract or enter into an addendum to the original contract between themselves which provides for specific terms of payment after the applicant actually starts work. See Appendix 3 for a sample form which complies with this rule.

[ED. NOTE: Appendices referenced are available from the agency.]

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.168(4)

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77

Job Order and Job Referral Document Rules

839-017-0051

Definitions

(1) "Open" or "Standing" job orders are for categories of jobs for which an employer usually has two or more open positions at any one given time although on occasion the employer is merely interested in receiving applications and does not hire immediately all qualified applicants. In addition, these are types of positions for which an employer has a steady and continuous need of qualified employees.

EXAMPLE: A job order from the central hiring office of a large bank to refer any qualified applicants the agency may have for teller openings that come up regularly and habitually.

(2) An "Exploratory Interview" or "Exploratory Job Order" means a bona fide order for employment valid for one specific applicant only.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.165

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156, f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77

Job Referral Documents

839-017-0052

What Constitutes a Bona Fide Job Order

(1) A bona fide job order is valid for referral of any qualified applicant for employment until it is filled or canceled by the employer and may serve as the basis for agency advertising.

(2) A bona fide job order may be considered to have been given by an employer to an employment agency when the following conditions are met:

(a) The employer or the employer's agent, in person, by telephone, telegram, facsimile or other electronic media, or in writing, registers a request that the agency recruit or gives permission to the agency to refer applicants for employment who meet stated job specifications;

(b) The agency contacts the employer after every thirty days to insure that the position is still vacant prior to any additional advertising or referrals.

(3) "Open" or "Standing" job orders are to be renewed prior to each interview with an applicant for employment and at the end of every thirty days in order for them to be current and valid. Open or Standing job orders may not be advertised in any way. Open or Standing job orders must be for specific job categories as distinguished from a specific job. Open or Standing job orders must fulfill all informational content requirements of "Regular" job orders. Open/Standing job orders will contain the title "Open" or "Standing" job order.

(4) An "Exploratory Interview" or "Exploratory Job Order" is not valid for advertising. Prior to any interview, an "exploratory" job order

must be written up by the agency containing as much available job order information as can be supplied by the employer. A job referral document shall be supplied to the applicant, containing all available job order information, and the following underlined statement: "This is an exploratory interview. There is no definite position open with this employer at this time. However, this interview has been agreed to by the employer." Employment agencies shall not obtain exploratory job orders/interviews in situations where they either have a "regular" job order, or access to one.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.005 - 658.245

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88; BL 6-1997, f. & cert. ef. 11-13-97

839-017-0053

Exploratory Job Order/Interview Considered to Be Given

An Exploratory Job Order/Interview shall be considered to have been given if, as the result of the agency's bringing the qualifications of an applicant for employment to the attention of an employer, the employer's interest in exploring the possibility of employing the applicant is evidenced by the employer's agreement to interview the applicant.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.165

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88

839-017-0054

Identification by Agency to Employer/Accepting a Fee Paid Order

(1) In the process of obtaining a job order, the employment agency shall identify itself as an employment agency to employers in an introductory statement in all cases unless identification of the specific agency representative to the specific employer representative has been previously established. Where the employer is to pay the fee, the agency must obtain the employer's agreement from the personnel manager or other authorized agent.

(2) When accepting a job order for a fee paid position, the agency shall make a reasonable effort to inform the employer that the employer cannot collect the employment agency fee from the applicant for employment.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.005 - 658.245

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156, f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88; BL 6-1997, f. & cert. ef. 11-13-97

839-017-0060

Information Required to Be Contained in a Job Order

(1) Except as provided in rule 839-017-0052(3), information that is required to be contained in all job orders includes:

(a) Normal hours of work per day. (State exceptions);
(b) Weekend or night work if indicated (total number and which days);

(c) Whether employer fee paid or applicant fee paid position;
(d) The job title(s)/kind of work. A list of special skills required to perform adequately on the job together with the minimum performance level required. "Required" means only those skills which will be regularly and habitually required to gain the job, perform at a minimum level on the job and to retain the job. This section shall not apply to any job with a starting salary of \$30,000 per year or more;

(e) A list of established fringe benefits (considerations of privilege) such as holidays, sick leave, car allowances, expense allowances, room and board, medical and hospital insurance, vacations together with whether or not paid by the employer as indicated by the employer;
(f) The number of the job order;

(g) The date received;
(h) The salary, hourly pay rate, or salary or hourly pay range for the position. At least a minimum salary or wage must be specified in terms of dollars and cents. If earnings are to be on commission, a statement as to whether or not any guaranteed salary or draws are involved;

(i) The name and address of the company placing the job order, and the location of work;

(j) The name of the individual who placed the job order for the employer and the name of the individual who accepted the order for the agency;

(k) Whether union membership is required and indications of any labor trouble existing.

(2) When a job order is filled, the true name of the individual who obtained the job as appears in the agency's records, the date the job was filled, and the fee charged to the applicant for employment will be appended to the job order.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.165

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 9-1980, f. & cert. 9-5-80; BL 8-1988 f. & cert. ef. 5-16-88

Job Referral Document Rules

839-017-0070

Job Referral Document

(1) The job referral document shall be assigned the same number as that assigned to the job order and shall include:

(a) The name, address, and telephone number of the employment agency;

(b) The date of issuing the job referral document;

(c) The name of the applicant for employment, the name and address of the person to whom the applicant is sent for interview, the date and time of the interview, and the address where the applicant is to report for employment;

(d) The approximate amount of fee to be charged and to be collected from the applicant for employment, if the applicant accepts employment, and starts work and any fee conditions as stated by the employer on the Job Order, and a statement that the employer is not responsible for paying the fee unless specifically provided for on the Job Referral Document;

(e) The kind of work or employment as shown by the job classification stated in the Job Order;

(f) The daily hours of work and the approximate wages or salary, including any consideration of privilege;

(g) If any labor trouble exists at the place of employment, a statement of that fact;

(h) Union membership, if required.

(2) The job referral document shall be signed by a representative of the employment agency, and shall be delivered to the applicant for employment or sent to the applicant for employment by United States mail.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.005 - 658.245

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88; BL 6-1997, f. & cert. ef. 11-13-97

839-017-0071

Document to Include Expiration of Referral Information

The date and the fact that 90 days from the date of referral the referral will expire and the applicant for employment may be liable for a fee thereafter only if the applicant accepts a job in the position to which the applicant was specifically referred must be included in the Job Referral Document.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.172

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88

839-017-0072

Applicant Shall Receive Job Referral Document

The completed Job Referral Document shall be given to the applicant for employment prior to any job interview, with the following exceptions:

(1) No job referral document is required when the referral is made to a fee paid position.

(2) If the referral is made by telephone contact or other means of remote communication, the full content of the job referral document will be revealed to the applicant for employment at the time of referral and the job referral document will be mailed to the applicant.

(3) Job referral documents which are mailed, must be mailed within 24 hours or one working day of the referral contact with the applicant for employment.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.172

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88

Disputes Between Agencies

839-017-0101

Fee Earned by Agency Responsible for Placement

In disputes between employment agencies concerning the earning of a fee for placement of an applicant for employment, the fee shall be earned by the agency responsible for the applicant being placed. A reasonable effort shall be made by an agency which bills an applicant for employment to determine that it is entitled to the fee before billing. The applicant for employment shall be responsible for only one full fee for any single placement, and this fact shall be stated in the contract. (See Appendix 1 and OAR 839-017-0012)

[ED. NOTE: Appendices referenced are available from the agency.]

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.165

Hist.: BL 150(Temp), f. 12-13-73, ef. 12-15-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88

839-017-0102

Determination of Agency Entitled to Fee

In order to make a reasonable effort to determine the agency entitled to the fee, the following rules shall be followed:

(1) When two agencies have referred the applicant for employment to the same position, the agency entitled to the fee shall be the agency that:

(a) First established a scheduled appointment between the applicant for employment and employer for the specific position which the applicant subsequently accepted and started work;

EXAMPLE: On Monday, agency "A" arranges an appointment for an applicant with an employer for Wednesday morning. Agency "B" arranges an appointment for the same applicant for the same job opening on Tuesday morning for Tuesday afternoon. If the applicant accepts the position and starts work, Agency "A" is entitled to the fee.

(b) Records accurately the time and date of the making, by agency personnel, of the appointment for interview;

EXAMPLE: Agency personnel record that they called employer at 9:06 a.m., October 18th and scheduled interview for applicant.

(c) And, as soon as possible after the appointment is established, advises the applicant for employment by complying with the job referral document requirements.

(2) Resume' Mailing. The resume' must indicate clearly the name and address of the referring agency. When a resume' is mailed by the agency to the employer, the agency is entitled to the fee when:

(a) The agency contacts the applicant for employment immediately and advises the applicant of the name of the employer to whom the resume' was mailed, and, the employer gives or has given the agency a bona fide job order and the agency first establishes a scheduled appointment with the applicant and complies with job referral document requirements;

(b) Or the employer, as the result of the mailing, contacts the applicant for employment directly, arranges the first scheduled appointment and gives the agency a bona fide job order and the agency complies with job referral document requirements;

(c) And as a result of the job interview, the applicant accepts a specific position and starts work.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.165

Hist.: BL 150(Temp), f. 12-13-73, ef. 12-15-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88

839-017-0103

Definitions for the Purpose of Solving Interagency Disputes Only

(1) "Employer" means any person or agent of a company that has the authority and responsibility to interview or initiate the action that would result in a position with said company. It is recognized that some companies can have several employers within the company (the same legal entity) due to departments or locations. If an interview is scheduled for an applicant for employment to a different department or location by the original interviewer within the company, it will be considered to be the same employer. If an interview is scheduled for the same applicant for employment by another employment agency to a different department, for the purpose of this definition, it would be considered a different employer even though it may be within the same

company.

(2) "Scheduled Appointment" means a definite date and time of interview with a specific company representative. If the time of making the first interview is not determined satisfactorily between the agencies involved, the employer's statement shall be accepted as to the time of the making of the first appointment.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.165

Hist.: BL 150(Temp), f. 12-13-73, ef. 12-15-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88

Rebate of Interest Charges and Other Charges for Permanent Employment Lasting Less than 90 Days

839-017-0151

Interest, Fees, or Other Charges Allowed as Credit

In all cases where employment lasts less than 90 full calendar days, all interest, fees, or other charges paid or required to be paid to any person or organization in order to procure the funds to pay an employment agency's charge for service shall be allowed as a credit against the charge. This includes all carrying and service charges and all related charges in obtaining funds for payment of the agency's charge.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.165

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 12-1978, f. & ef. 8-16-78

839-017-0152

Interest, Fees, and Other Charges May Be Prorated

(1) If interest, fees, or other charges are incurred by the applicant for employment for more than the agency's charge for service and in such a way that the interest, fees, or other charges for the employment agency's services are not stated separately, then the interest, fees, and other charges may be prorated to cover only those interest, fees, and service charges directly attributable to the payment of the employment agency's charge for services.

(2) In cases where employment involves commission earnings and service charges are based upon annual estimated earnings, and employment is terminated for any cause prior to 12 months but after 90 days, a pro-rata computation shall be made on all charges paid or required to be paid (by an applicant) to any person or organization in order to procure the funds to pay an employment agency's charges for the period from 91 days until date of termination within a 12 month period. The pro-rata computation shall be allowed as a credit against the agency fee.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.165

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77

839-017-0153

Agency to Procure Necessary Information

A reasonable effort shall be made by the agency, within the ten day specified time for making the rebate, to procure all information necessary regarding the interest, fees, and other charges required to be paid by the applicant for employment in procuring the funds to pay the agency's charge for service.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.165

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88

False and Misleading Advertising

839-017-0177

Publication of False, Misleading, or Fraudulent Information Prohibited

No employment agency shall knowingly publish or cause to be published any false, fraudulent, or misleading information, representation, notice, or advertisement. The following are types of advertising which are considered false or misleading:

(1) Exclusive listing in advertisements of jobs designated as "fee paid" by agencies which do not operate exclusively on the basis of no fee to the applicant for employment, in such manner as to give the false impression that all jobs handled by the agency are "fee paid" jobs.

(2) Where both "fee" and "fee paid" jobs are listed, use of the phrases such as "100 percent free" or "all free" as column headings, so as to give the impression that the entire agency operation is on a "fee paid" basis.

(3) Designating jobs as "fee paid" where this is true only if certain conditions are met. For example, jobs where the employer will pay the fee only if the applicant for employment stays on the job for a stipulated period of time, or jobs where the employer deducts the amount of the fee from the applicant's salary, or where the employer will pay only a portion of the fee, or if the fee payment on the part of the employer is a negotiable item.

(4) Use of the phrase "lowest fee" or similar words, where the agency's fee is not in fact the lowest fee rate in effect in the area in which the agency does business.

(5) Headlines or titles relating to fees, such as "Applicant Pays Fee" or "Fee Paid," must be set in the same type of equal size and boldness, when an agency advertises both categories of jobs.

(6) In group advertisements which contain both "Employer Pays Fee" and "Applicant Pays Fee" listings, all listings of each type shall be grouped together in a block under the respective title, or each listing must include a designation as to the source of the fee.

(7) If an advertisement is of a job or jobs for which the employer pays the fee, and if the agency so advertised, the ad must state in type of equal size and boldness, that the agency also handles jobs for which the applicant for employment pays the fee if such is the case.

(8) Ads worded so as to mislead the applicant for employment regarding the nature of the position advertised.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.195

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 12-1978, f. & ef. 8-16-78; BL 8-1988 f. & cert. ef. 5-16-88

839-017-0178

Advertising Must Be Factual

All advertising must be factual as to the requirements of the job. Sufficient information must be contained in each ad to indicate the nature, terms and conditions of the position. Omission of unusual or special job requirements and characteristics or of the amount of wages to be paid is considered misleading or fraudulent.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.195

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88

839-017-0180

Advertising Deemed False or Misleading

Advertising which shall be deemed false and misleading includes, but is not limited to, advertising which fails to conform to the following specifications:

(1) If specific requirements not normally associated with the position advertised are required, the requirements must be indicated in the ad.

(2) No salary shall appear in an ad except one which appears in the actual job order as a starting salary. Where the top of the salary range is quoted, it must be preceded by the bottom of the salary range and the word "to" or "_____."

(3) If the position advertised is located fifty miles or more from the location of the office of the agency, the fact that it is non-local or that relocation is necessary, or the location of the place of employment shall be indicated in the listing.

(4) The entire assumed business name or corporate name of the agency, without abbreviation, must appear on any sign, advertising, or promotional material used by the agency. Except in an advertisement in a section of a publication that otherwise clearly designates the advertisement as that of an employment agency, every employment agency charging or collecting a fee for services from individuals seeking or obtaining employment shall use the word "agency" or "agencies" as part of its licensed name, or after its licensed name, in type no smaller than the type employed in the body of the advertisement.

(5) The word "open" or the symbol "\$\$\$" or words and symbols of similar import may not be used as a substitute for the salary of any position or positions in an ad.

(6) The symbol "+" or the word "plus" may be used in connection

with a salary appearing in an ad only when it refers to an extra such as a car, bonus, commission, or lodging which is provided in addition to the given salary. Such extras must be contained in the agency's job order for the position. The salary figure in the advertisement can only represent the amount of salary or draw indicated on the job order.

(7) The word "up" may be listed with a salary appearing in an ad only when the employer has made a definite commitment to the agency to pay a higher salary for a highly qualified employee. The commitment by the employer to pay a higher salary must be contained in the agency's job order for the position.

(8) In accepting a job order from an employer, the agency should determine whether salary quoted by the employer is a "guaranteed" salary or is based on anticipated commissions and/or bonuses. If a salary advertised is based entirely or partially on a bonus and/or commission, an indication to this effect must be contained in the ad.

(9) If an employment agency indicates in its letters or general advertising that members of the agency are "certified," "registered," or "licensed," or uses other terms conveying special qualifications or abilities, the members of the agency must in fact be certified, registered or licensed and possess special qualifications or abilities as conveyed by the terms so used. Acronyms, initials or other such terms used to advertise special qualifications or abilities must be recognized as those which are used by the organization or government agency "certifying," "registering," "licensing," or attesting to an agency member's special qualifications or abilities.

(10) If the employment agency advertises a job where the employment agency itself is the employer, the ad shall so indicate.

(11) If an employment agency which handles both "fee" and "fee paid" positions, advertises a "fee paid" position, the advertisement must include the job order number of the "fee paid" position or positions.

(12) Employment positions will not be advertised on the same day under two or more different job descriptions.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.005 - 658.245

Hist.: BL 149(Temp), f. 10-30-73, ef. 11-1-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 12-1978, f. & ef. 8-16-78; BL 8-1980, f. & ef. 9-5-80; BL 10-1987(Temp), f. 9-30-87, ef. 10-1-87; BL 8-1988 f. & cert. ef. 5-16-88; BL 6-1997, f. & cert. ef. 11-13-97

Enforcement Action Against Bond or Deposit

839-017-0271

Generally

(1) The action on the bond or letters of credit maintained by the employment agency may not be joined in a suit or action on the bond brought for any other claim.

(2) Any person seeking to recover on the bond must first establish the employment agency's liability. The liability may be established in any of the following ways:

- (a) A judgment of the court;
- (b) A final administrative order issued pursuant to statute or rule;
- (c) The acknowledgment of the employment agency of such liability;

(d) Other satisfactory evidence of liability as may be shown which establishes the liability.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.005 - 658.245

Hist.: BL 10-1987(Temp), f. 9-3-87, ef. 10-1-87; BL 8-1988 f. & cert. ef. 5-16-88; BL 6-1997, f. & cert. ef. 11-13-97

839-017-0272

Filing Claims Against Bond or Letters of Credit Maintained by the Employment Agency; Time for Filing Claims

(1) Claims against the bond will not be paid unless the claimant or claimant's assignee gives notice of the claim by certified mail to the surety.

(2) Any claim or Notice of Claim filed pursuant to a claimant's right of action must be filed as follows: If the filing is against a surety bond, the claim or notice must be filed with the surety. The name and address of the surety may be obtained from the employment agency.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.005 - 658.245

Hist.: BL 8-1988 f. & cert. ef. 5-16-88; BL 6-1997, f. & cert. ef. 11-13-97

Civil Penalties for Violations of Private Employment Agency Matters

839-017-0274

Violations for Which a Civil Penalty May Be Imposed

The Commissioner may impose a civil penalty not to exceed \$2,000 against any person, firm, organization, limited liability company or corporation for violations of any of the following statutes, rules or orders:

(1) Violation of any provision of ORS 658.005 to 658.245.

(2) Violation of any provision of OAR 839-017-0000 to 839-017-0477.

(3) Violation of any term or condition of an Order of the Commissioner issued pursuant to any violation of ORS 658.005 to 658.245 and OAR 839-017-0000 to 839-017-0477.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.005 - 658.245

Hist.: BL 8-1988 f. & cert. ef. 5-16-88; BL 6-1997, f. & cert. ef. 11-13-97

839-017-0275

Violations Separate and Distinct

Each violation is a separate and distinct offense. In the case of continuing violations, each day's continuance is a separate and distinct violation.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.115

Hist.: BL 8-1988 f. & cert. ef. 5-16-88

Administration

839-017-0276

Definitions

As used in OAR 839-017-0274 to 839-017-0280, a person acts knowingly when the person has actual knowledge of a thing to be done or omitted or should have known the thing to be done or omitted. A person should have known the thing to be done or omitted if the person has knowledge of facts or circumstances that would place the person on reasonably diligent inquiry. A person acts knowingly if the person has the means to inform himself or herself but elects not to do so. For purposes of this rule, a person, firm, organization, limited liability company or corporation is presumed to know the affairs of the employment agency.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.005 - 658.245

Hist.: BL 150(Temp), f. 12-13-73, ef. 12-15-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88; BL 6-1997, f. & cert. ef. 11-13-97

839-017-0277

Criteria to Determine Civil Penalty

(1) The Commissioner shall consider the following mitigating and aggravating circumstance when determining the amount of any civil penalty to be imposed against an employment agency and shall cite those the Commissioner finds to be applicable:

(a) The actions of the employment agency in responding to previous violations of statutes and rules.

(b) Prior violations, if any, of statutes or rules.

(c) The opportunity and degree of difficulty to comply.

(d) Magnitude and seriousness of violation.

(e) Whether the employment agency knew or should have known of the violation.

(2) It shall be the responsibility of the employment agency to provide the Commissioner with evidence of any mitigating and aggravating circumstances set out in section (1) of this rule.

(3) In arriving at the actual amount of the civil penalty, the Commissioner shall consider the amount of money, if any, taken from an applicant for employment by the employment agency in violation of any statute or rule.

(4) Notwithstanding any other section of this rule, the Commissioner shall consider all mitigating and aggravating circumstances presented by the employment agency for the purpose of reducing the amount of the civil penalty to be imposed.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.005 - 658.245

Hist.: BL 150(Temp), f. 12-13-73, ef. 12-15-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88; BL 6-1997, f. & cert. ef. 11-13-97

839-017-0280

Schedule of Civil Penalties

(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

(2) Repeated violations of the provisions of ORS 658.005 to 658.245 or OAR 839-017-0000 to 839-017-0477 are considered to be of such magnitude and seriousness that no less than \$500 for each violation will be imposed when the Commissioner determines to impose a civil penalty.

(3) In addition to any other provision of these rules, the following violations are so serious and of sufficient magnitude that the minimum civil penalty indicated will be imposed, when the Commissioner determines to impose a penalty: Violation — Minimum Penalty

(a) Knowingly giving, publishing or causing to be published false fraudulent or misleading information in violation of ORS 658.195, OAR 839-017-0177 and 839-017-0178 — \$1,000;

(b) Knowingly charging a fee in excess of the fee schedule published by the employment agency in violation of ORS 658.155 — \$700;

(c) Knowingly charging a fee without a bona fide job order in violation of ORS 658.165 — \$700;

(d) Knowingly referring an applicant for employment without a bona fide job order in violation of ORS 658.165 — \$700;

(e) Knowingly failing to provide an applicant for employment with a job referral document in violation of ORS 658.172 and OAR 839-017-0072 — \$500;

(f) Knowingly issuing a contract which terms would violate any law or knowingly attempting to fill a job order in violation of any law in violation of ORS 658.176 — \$500;

(g) Knowingly requiring or accepting a fee from an applicant for employment prior to the applicant actually starting work in violation of ORS 658.176 — \$500;

(h) Knowingly failing to comply with any provision pertaining to refunds to applicants for employment in violation of ORS 658.185 — \$300;

(i) Placing or assisting in the placement of any minor if the employment is in violation of laws regulating the employment of minors in violation of ORS 658.205(4) — \$500;

(j) Knowingly permitting a person of bad character to frequent or be employed by the agency in violation of ORS 658.205(2). As used in this subsection a “person of bad character” includes but is not limited to a person convicted of a felony; a person who has had a license revoked, suspended, denied or refused to be issued; a person who has repeatedly violated or caused to be repeatedly violated any statute or rule pertaining to private employment agency matters, tax matters and other statutes and rules pertaining to the employment of employees or to the protection of consumers in their dealings with employment agencies. — \$500;

(k) Knowingly referring the applicant for employment to a place where a labor dispute exists in violation of ORS 658.205(5) — \$500;

(l) Splitting a fee in violation of ORS 658.205(7) — \$500;

(m) Charging a fee in violation of ORS 658.205(8) and 658.205(9) — \$500;

(n) Requesting or accepting an assignment of wages in violation of ORS 658.205(10) — \$500.

(4) Notwithstanding section (3) of this rule, when the Commissioner determines to impose a civil penalty, the minimum civil penalty to be imposed for knowing violations of OAR 839-017-0180, Advertising Deemed False or Misleading, shall be \$100. In the case of two or more violations of the same advertising provision in OAR 839-017-0180 that appears in the same publication on the same date, all such violations will be considered as one for purposes of computing the penalty.

(5) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR 839-017-0277.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.005 - 658.245

Hist.: BL 8-1988 f. & cert. ef. 5-16-88; BL 6-1997, f. & cert. ef. 11-13-97

Special Waivers

839-017-0300

Waiver from Use of Word “Agency” or “Agencies”

(1) Employment agencies desiring to apply for a waiver from the

use of the word “agency” or “agencies” as required by ORS 658.195(4) may do so by submitting an application to the Bureau of Labor and Industries.

(2) Applications for a waiver will be in writing and on forms provided by the Bureau of Labor and Industries. All completed applications will be mailed or delivered to the Licensing Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon #32, Portland, Oregon, 97232.

(3) Applicants for waivers must clearly and concisely state each and every situation and each and every reason for desiring not to use the word “agency” or “agencies.” All such reasons must be in writing and appear on the application form or attachments thereto.

(4) When granting or denying an application for a waiver, the Commissioner or the Commissioner’s designated representative, will consider the following circumstances:

(a) Whether the name of the agency will convey to the public that an employment agency rather than an employer is involved when the word “agency” or “agencies” is not used;

(b) Whether descriptive language proposed to be used by the agency in conjunction with its licensed name will convey to the public that an employment agency rather than an employer is involved when the word “agency” or “agencies” is not used;

(c) Whether advertising materials are directed toward the public or employers;

(d) Whether signs are used primarily for identification purposes rather than advertising;

(e) Whether forms used by the agency are internal in nature and not normally seen by the applicant for employment;

(f) Other situations and circumstances as may be appropriate.

(5) The Commissioner or the Commissioner’s designated representative, will consider any and all the circumstances set forth in section (4) of this rule when granting or denying an application.

(6) The Commissioner or the Commissioner’s designated representative will specify each and every reason for denying an application and each and every condition on approval of the application, if any.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.195

Hist.: BL 5-1981, f. 6-2-81, ef. 6-8-81; BL 8-1988 f. & cert. ef. 5-16-88

Disputes Between Agencies and Their Employees

839-017-0376

Disputes Between Agencies and Their Employees

In order to properly settle any complaints that may arise and in order to establish all sums legally owed to any employee of the employment agency, the employment agency:

(1) Will maintain employment records of all employees for three years. These records will include the original application for employment with the agency and will indicate starting date of employment, rate of pay and/or rate of commission and method of compensation, and date of termination of employment if applicable.

(2) Shall retain for three years copies of all contracts signed with employees of the agency relative to conditions of employment.

(3) Will indicate on all receipts of moneys received from applicants in payments of fees, the name of employee or agent of the employment agency responsible for placement of applicant.

(4) Will give to each employee on payroll checks, or by separate document, a record of commissions or other sums earned and paid in full or in part during each payroll period established by the employer or at least every 35 days if no more frequent payroll period has been established.

(5) Canceled payroll checks, and state and federal tax reports shall be retained as required by State and Federal law.

(6) Records required by Fair Labor Standards Act (FLSA) and Oregon’s minimum wage law must be kept for a period of three years on all employees regardless of the type of specific agreement for compensation between the agency and its employees.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.005 - 658.245

Hist.: BL 150(Temp), f. 12-13-73, ef. 12-15-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 6-1997, f. & cert. ef. 11-13-97

Record Keeping**839-017-0476****Time for Maintenance of Records**

(1) Except as provided in section (2) of this rule, all records of the employment agency will be maintained for a period of three years.

(2) Copies of all job advertisements with the information required by OAR 839-017-0477(6) thereon shall be maintained for a period of one year.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.078

Hist.: BL 150(Temp), f. 12-13-73, ef. 12-15-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 8-1988 f. & cert. ef. 5-16-88

839-017-0477**Method of Maintaining Records**

(1) All records of the agency pertaining to a job referral, and placement of an applicant for employment shall be maintained together or adequately cross-indexed for easy retrieval by the Bureau of Labor and Industries. This includes, but is not limited to, the applications, contract, addendums to contracts, reference information (employment, personal, or credit), and a copy of all job orders and job referral documents.

(2) A separate file shall be maintained for applicants for employment placed by the agency, either alphabetically, or by adequate cross-index for easy retrieval for the Bureau of Labor and Industries.

(3) If the applicant for employment has been placed by the agency, the name of the employer, the starting date of employment, the amount of starting salary, the amount of the fee charged, and whether the fee is paid by the employer or the applicant shall be written on the application or appended to the application.

(4) An adequate file or log of job orders shall be maintained in chronological order. If an agency wishes, it may have a separate file for "fee paid" orders. When a job order position is filled by the agency, the true name as it appears on the contract of the individual who obtained the job, the date the job was filled, and the fee charged for the service will be appended to the job order.

(5) Each agency shall keep a record of all receipts of money received from an applicant for employment in payment of a charge for service. The receipts shall be filed together or adequately cross-indexed for easy retrieval for the Bureau of Labor and Industries. All receipts or evidence of refunds shall be filed with the receipts showing payment of a charge for service or adequately cross-indexed for easy retrieval for the Bureau of Labor and Industries.

(6) Each agency shall keep copies of all job advertisements correlated to show the date and the publication in which the advertisement appeared together with the job order number of each job advertised.

(7) When the charge for services of the employment agency is not made to or collected from individuals seeking or obtaining employment, for purposes of ORS 658.005 to 658.245 the agency is not required to keep records of contracts or receipts of moneys in connection with the placement of such individuals.

Stat. Auth.: ORS 658.210

Stats. Implemented: ORS 658.078

Hist.: BL 150(Temp), f. 12-13-73, ef. 12-15-73; BL 156(Temp), f. 2-20-74, ef. 3-1-74; BL 157, f. 2-20-74, ef. 3-15-74; BL 200, f. 11-1-77, ef. 11-15-77; BL 12-1978, f. & ef. 8-16-78; BL 10-1987(Temp), f. 9-3-87, ef. 10-1-87; BL 8-1988 f. & cert. ef. 5-16-88

Rules Relating to Employment Listing Services**839-017-0500****Contracts Between Employment Listing Services and Individuals**

(1) Before collecting a fee from an individual, Employment Listing Services must comply with the following provisions:

(a) The Employment Listing Service must execute a written contract with the individual; and

(b) The Employment Listing Service must provide a copy of the contract to the individual.

(2) Written contracts between an Employment Listing Service and individuals must include the following information:

(a) The name, physical address, mailing address if any, and telephone number of the Employment Listing Service;

(b) The name, address, and telephone number of the individual;

(c) A statement that the Employment Listing Service is registered with the Corporation Division pursuant to OAR 839-017-0515;

(d) The effective dates of the contract;

(e) The signature of an authorized Employment Listing Service representative and date of signature;

(f) The signature of the individual contracting with the Employment Listing Service and date of signature;

(g) The fee schedule of the Employment Listing Service as provided in OAR 839-017-0505;

(h) A description of the information that will be provided by the Employment Listing Service to the individual, including but not limited to:

(A) The format of the information to be provided (e.g., written publication, internet information, by telephone);

(B) How and when the information may be accessed by the individual; and

(C) When updates will be made to the information.

(i) A statement specifying the frequency of verification of the availability of positions by the Employment Listing Service;

(j) Any contract terms which may be changed by the Employment Listing Service and notification provisions relating to such changes;

(k) Provisions for and terms of any contract extensions;

(L) Any contract cancellation provisions;

(m) Any guarantees of the Employment Listing Service;

(n) Refund terms and conditions if any; and

(o) The following statements:

(A) "In addition to the penalties provided under ORS 658.115 and 658.991, an employment listing service shall forfeit any fees received from an individual if the employment listing service fails to provide to the individual a copy of:

(i) The fee schedule that the employment listing service charges;

(ii) All contracts entered into between the employment listing service and the individual; and any changes in the fees that the employment listing service charges an individual who uses its service." and

(B) "READ BEFORE SIGNING — This is a contract. You understand that (Name of Employment Listing Service) provides information on bona fide job listings but does not guarantee you will be offered a job. You also understand you are liable for the payment of the fee when you receive the list or job listing information. Do not sign this contract before you read it or if any spaces intended for the agreed terms are left blank. You must be given a copy of this contract at the time you sign it."

(3) There may be no oral agreements or additions to any contract between an Employment Listing Service and individual. Any terms, conditions, or understandings between an Employment Listing Service and individual must be in writing.

(4) Employment Listing Services must retain copies of all contracts for no fewer than three years from the execution date of the contract.

Stat. Auth.: ORS 658.210 & SB 341 (2003 Legislature)

Stats. Implemented: ORS 658.005 - 658.991

Hist.: BLI 6-2003, f. 12-31-03, cert. ef. 1-1-04

839-017-0505**Fees Charged by Employment Listing Services**

(1) Before collecting a fee from an individual, Employment Listing Services must comply with the following provisions:

(a) The Employment Listing Service must publish a schedule of its fees; and

(b) The Employment Listing Service must provide a copy of its schedule of fees to the individual.

(2) The schedule of fees required in this section may be incorporated in the contract between an Employment Listing Service and individual or may be a separate document incorporated by reference in the contract required by OAR 839-017-0500.

(3) Employment Listing Service fee schedules must include the following information:

(a) The effective dates of the fee schedule;

(b) The specific services provided by the Employment Listing Service and fee for each service;

(c) When fees are required to be paid to an Employment Listing Service by an individual;

(d) The circumstances under which any additional fees may be charged by an Employment Listing Service to an individual;

(e) Any payment terms, including any interest charges which may be assessed; and

(f) The following statement: "In addition to the penalties provided under ORS 658.115 and 658.991, an employment listing service shall forfeit any fees received from an individual if the employment listing service fails to provide to the individual a copy of:

(A) The fee schedule that the employment listing service charges;

(B) All contracts entered into between the employment listing service and the individual; and

(C) Any changes in the fees that the employment listing service charges an individual who uses its service."

(4) Notwithstanding the provisions of OAR 839-017-0505(3)(f), if the schedule of fees is included in the contract as provided in 839-017-0505(2), the statement required by 839-017-0505(3)(f) is only required once in the contract.

Stat. Auth.: ORS 658.210 & SB 341 (2003 Legislature)

Stats. Implemented: ORS 658.005 - 658.991

Hist.: BLI 6-2003, f. 12-31-03, cert. ef. 1-1-04

839-017-0510

Confirmation of Position Availability by Employment Listing Services

(1) Employment Listing Services must confirm and document in writing the availability of positions included in the information provided to individuals at least once every ten business days.

(2) Employment Listing Services must document in writing the following information for each position listing published and confirmed thereafter:

(a) The name and address of the company where the position is located;

(b) The date the information regarding the position is received by the Employment Listing Service;

(c) The name, title, and telephone number of the person providing the position information to the Employment Listing Service;

(d) The name of the Employment Listing Service representative receiving the information about the position;

(e) The job title of the position;

(f) The requirements of the position;

(g) Whether the position is "full time" (32 or more hours/week) or "part time" (fewer than 32 hours/week);

(h) The location of the position;

(i) The salary, hourly pay rate, or salary or hourly pay range for the position; and

(j) How individuals may apply for the position.

(3) Employment Listing Services must remove a listing from any and all of its publications by the end of the first business day after receiving notice that the position is no longer available.

(4) Employment Listing Services must retain copies of the information obtained about positions for no less than one year from the date the information is obtained.

Stat. Auth.: ORS 658.210 & SB 341 (2003 Legislature)

Stats. Implemented: ORS 658.005 - 658.991

Hist.: BLI 6-2003, f. 12-31-03, cert. ef. 1-1-04

839-017-0515

Employment Listing Services Required to be Registered

Employment Listing Services must be actively registered with the Corporation Division of the Oregon Secretary of State's Office.

Stat. Auth.: ORS 658.210 & SB 341 (2003 Legislature)

Stats. Implemented: ORS 658.005 - 658.991

Hist.: BLI 6-2003, f. 12-31-03, cert. ef. 1-1-04

839-017-0520

Fee Forfeiture Provisions

In addition to the penalties provided under ORS 658.115 and 658.991, an Employment Listing Service shall forfeit any fees received as a result of any violation of the following provisions:

(1) Failure to provide a copy of the fee schedule that the Employment Listing Service charges an individual for its services to the individual;

(2) Failure to provide a copy of the contract entered into between an Employment Listing Service and an individual to the individual; or

(3) Failure to provide a copy of any changes in the fees that the Employment Listing Service charges an individual who uses its services to the individual.

Stat. Auth.: ORS 658.210 & SB 341 (2003 Legislature)

Stats. Implemented: ORS 658.005 - 658.991

Hist.: BLI 6-2003, f. 12-31-03, cert. ef. 1-1-04

DIVISION 19

CHILD LABOR VIOLATIONS

Procedural Rules

839-019-0000

Notice of Proposed Rules

Prior to the permanent adoption, amendment or repeal of any rule relating to civil penalties for child labor violation matters, the Wage and Hour Division of the Bureau of Labor and Industries shall give notice of intended action as required in OAR 839-002-0002.

Stat. Auth.: ORS 651.060(4) & 653.305 - 653.545

Stats. Implemented: ORS 183.335

Hist.: BL 5-1988, f. & cert. ef. 4-12-88; BLI 9-2004, f. 7-26-04, cert. ef. 7-27-04

839-019-0004

Definitions

As used in ORS 653.365 to 653.370 and in these rules, unless the context requires otherwise:

(1) "Bureau" means the Bureau of Labor and Industries of the State of Oregon.

(2) "Commission" means the Wage and Hour Commission of the State of Oregon.

(3) "Commissioner" means the Commissioner of the Bureau of Labor and Industries or the Commissioner's authorized deputies and officers.

(4) "Employ" shall have the same meaning as that which appears in ORS 653.010(2).

(5) "Employer" shall have the same meaning as that which appears in ORS 653.010(3).

(6) "Employment Certificate" means the employment certificate issued to employers for the employment of minors pursuant to ORS 653.307 and the employment permit referred to in ORS 653.360.

(7) "Minor" means any person under 18 years of age.

(8) "Person" includes the term "employer" as defined in section (5) of this rule and school districts required to comply with ORS 653.307(3).

(9) "Violation" means a transgression of any statute, rule or order, or any part thereof and includes both acts and omissions.

(10) "Wilful" means intentional and includes failure to act. A person commits a wilful act when the person knows what she/he is doing, intends to do what she/he is doing and is a free agent.

(11) "Work Permit" means the employment certificate issued to minors pursuant to ORS 653.307.

Stat. Auth.: ORS 651 & 653

Stats. Implemented: ORS 653.370

Hist.: BL 5-1988, f. & cert. ef. 4-12-88

Civil Penalties for Child Labor Violations

839-019-0010

Violations for Which a Penalty May Be Imposed

The Commissioner may impose a civil penalty for violations of any of the following statutes, administrative rules and orders:

(1) Violation of any provision of ORS 653.305 to 653.370.

(2) Violation of any provision of OAR 839-021-0001 to 839-021-0500.

(3) Violation of any term or condition of an Order of the Wage and Hour Commission issued pursuant to any violation of ORS 653.305 to 653.370 and OAR 839-021-0001 to 839-021-0500.

Stat. Auth.: ORS 651 & 653

Stats. Implemented: ORS 653.370

Hist.: BL 5-1988, f. & cert. ef. 4-12-88

839-019-0015

Violations Separate and Distinct

Each violation is a separate and distinct offense. In the case of continuing violations, each day's continuance is a separate and distinct violation.

Stat. Auth.: ORS 651 & 653

Stats. Implemented: ORS 653.370

Hist.: BL 5-1988, f. & cert. ef. 4-12-88

839-019-0020

Determination of the Amount of the Civil Penalty

(1) Except as provided in section (4) of this rule, when determin-

ing the amount of civil penalty to be imposed, the Commissioner shall consider the following circumstances and shall cite those the Commissioner finds applicable:

- (a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes and rules;
 - (b) Prior violations, if any, of statutes and rules;
 - (c) The magnitude and seriousness of the violation;
 - (d) The opportunity and degree of difficulty to comply;
 - (e) Any other mitigating circumstances.
- (2) It shall be the responsibility of the employer to provide the Commissioner with evidence of the mitigating circumstances set out in section (1) of this rule.

(3) In arriving at the actual amount of the civil penalty, the Commissioner shall consider whether the minor was injured while employed in violation of the statute and rules.

(4) Notwithstanding section (1) of this rule, in the case of a serious injury to or the death of a minor while employed in violation of the statutes or rules, the Commissioner may impose the maximum penalty allowed by ORS 653.370.

(5) Notwithstanding any other section of this rule, the Commissioner shall consider all mitigating and aggravating circumstances presented by the employer for the purpose of reducing the amount of the civil penalty to be imposed.

Stat. Auth.: ORS 651 & 653
Stats. Implemented: ORS 653.370
Hist.: BL 5-1988, f. & cert. ef. 4-12-88

839-019-0025

Schedule of Civil Penalties

(1) The civil penalty for any one violation shall not exceed \$1,000. The actual amount of the civil penalty will depend on all the facts and any mitigating and aggravating circumstances.

(2) When the Commissioner determines to impose a civil penalty for the employment of a minor without a valid employment certificate, the minimum civil penalty shall be as follows:

- (a) \$100 for the first offense;
 - (b) \$300 for the second offense;
 - (c) \$500 for the third and subsequent offenses.
- (3) The civil penalties set out in section (2) of this rule shall be in addition to any other penalty imposed by law or rule.

(4) When a minor incurs a serious injury or dies while employed in violation of any of the following statutes and rules, the violation is considered to be so serious and of such magnitude that the maximum penalty will be imposed when the Commissioner determines to impose a civil penalty:

- (a) Employment of a minor under 14 years of age in violation of ORS 653.320.
- (b) Employment of a minor in violation of ORS 653.330, 653.335, 653.340 or 653.360.
- (c) Employment of a minor in violation of OAR 839-021-0097(1)(a), 839-021-0097(1)(c) or 839-021-0097(2).
- (d) Employment of a minor in violation of OAR 839-021-0102 or 839-021-0104.
- (e) Employment of a minor in violation of OAR 839-021-0280(2) or 839-021-0282.
- (f) Employment of a minor in the entertainment industry in violation of OAR 839-021-0355, Prohibited Performances.

(5) Willful and repeated violations of the provisions of ORS 653.305 to 653.370 or OAR 839-021-0001 to 839-021-0500 are considered to be of such seriousness and magnitude that no less than \$500 for each willful or repeated violation will be imposed when the Commissioner determines to impose a civil penalty.

(6) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR 839-019-0020.

Stat. Auth.: ORS 651 & 653
Stats. Implemented: ORS 653.370
Hist.: BL 5-1988, f. & cert. ef. 4-12-88

Exemptions

839-019-0100

Exemptions

The provisions of OAR 839-019-0000 to 839-019-0025 do not apply when minors are employed under the following circumstances:

- (1) The minor is employed by the parent of the minor;
 - (2) The minor is employed by a person standing in the place of the parent of the minor and who has custody of the minor.
- Stat. Auth. ORS 651 & 653
Stats. Implemented: ORS 653.365 & 653.370
Hist.: BL 5-1988, f. & cert. ef. 4-12-88; BL 7-1997, f. & cert. ef. 11-13-97

DIVISION 20

WAGES

Procedural Rules

839-020-0000

Notice of Proposed Rule

Prior to the adoption, amendment, or repeal of any rule relating to minimum wages, overtime and working conditions matters, the Bureau of Labor and Industries will give notice of the proposed adoption, amendment, or repeal as required in OAR 839-002-0002.

Stat. Auth.: ORS 653
Stats. Implemented: ORS 183
Hist.: BL 1-1987, f. & ef. 1-12-87; BL 9-1996, f. & cert. ef. 10-8-96; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0004

Definitions

As used in ORS 653.010 to 653.261 and these rules, unless the context requires otherwise:

(1) "Administrator" means the Administrator of the Wage and Hour Division.

(2) "Adult" means an individual of 18 years of age or more.

(3) "Adult foster home" means any family home or facility in which residential care is provided in a homelike environment for five or fewer adults who are not related to the provider by blood or marriage.

(4) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur-bearing animals, or poultry and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. "Agricultural employment" is employment in "Agriculture" as herein defined.

(5) "Bureau" means Bureau of Labor and Industries.

(6) "Casual basis" as used in ORS 653.020(2) and these rules means employment which is irregular and intermittent and which is not performed by an individual whose vocation is providing domestic services.

(7) "Child care service person" means an individual who performs child care services in the home of the individual or the child and who during any part of a 24 hour period provides custodial care and protection to infants or children.

(8) "Commissioner" means the Commissioner of the Bureau of Labor and Industries.

(9) "Commission" means the Wage and Hour Commission.

(10) "Commissions" or "pay on a commission basis" means payment based on a percentage of total sales, or of sales in excess of a specified amount, or on a fixed allowance per unit agreed upon as a measure of accomplishment or on some other formula and may be the sole source of compensation or payment in addition to other compensation.

(11) "Companionship services", as used in ORS 653.020(14) and in these rules, means those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the elderly or infirm person such as meal preparation, bed making, washing of clothes and other similar services. They may also include the performance of general household work: provided, however, that such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the elderly or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact

does not remove them from the category of covered domestic service employees when employed in or about a family home.

(12) "Division" means the Wage and Hour Division of the Bureau of Labor and Industries.

(13) "Domestic service" means services of a household nature performed by an employee in or about a family home (permanent or temporary) of the person by whom the employee is employed. The term includes, but is not limited to, employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, gardeners, and companions to the elderly and infirm.

(14) "Domicile" means the permanent residence of a person or the place to which that person intends to return even though that person may actually reside elsewhere.

(15) "Employed on a seasonal basis at", as used in ORS 653.020(10) and in these rules, means employment that occurs during the time the organized camp provides services to campers at the camp site where campers are located. The term includes employment at the camp site in duties preparatory to the opening or closing of the camp site. The term includes employment during the camping season only and does not include full time, year around employment.

(16) "Employer" has the same meaning as that in ORS 653.010(3).

(17) "Fair market value" means an amount not to exceed the retail price customarily paid by the general public for the same or similar meals, lodging or other facilities or services provided to the employee by the employer. In determining the fair market value of meals, lodging and other facilities and services, the bureau will be guided by these rules and by Title 29, CFR Part 531 — Wage Payments under the Fair Labor Standards Act of 1938, where applicable.

(18) "Family home", as used in ORS 653.020(2) and this section, means a residence, the purpose of which is to provide an abode for the owner or renter of the residence and family members of the owner or renter. For example, a boarding house or an adult foster care home are not family homes for purposes of ORS 653.020(2) and these rules. However, when casual domestic service work is performed in structures where the owner or renter resides and operates a business, such work may qualify as exempt under ORS 653.020(2) depending upon all the facts of the particular arrangement.

(19) "Homeworker" means any employee suffered or permitted to produce goods or services for an employer in or about a home, apartment or room in a residence in which that employee or other employees of an employer resides, regardless of the source of the materials used by the homeworker in such production.

(20) "Hours worked" means all hours for which an employee is employed by and required to give to the employer and includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place and all time the employee is suffered or permitted to work. "Hours worked" includes "work time" as defined in ORS 653.010(12).

(21) "Immediate family" means grandfather, grandmother, father, mother, son, daughter, sister, brother, uncle or aunt.

(22) "Minimum wage" means the rate of pay prescribed in ORS 653.025 and 653.030.

(23) "Minor" means an individual of 17 years of age or less.

(24) "Organized camp" has the same meaning as that in ORS 653.010(7).

(25) "Primary duty" means, as a general rule, the major part, or over 50 percent, of an employee's time. However, a determination of whether an employee has management as the employee's primary duty must be based on all the facts of a particular case. Time alone is not the sole test and in situations where the employee does not spend over 50 percent of the employee's time in managerial duties, the employee might have management as a primary duty if other pertinent factors support such a conclusion. Factors to be considered include, but are not limited to, the relative importance of the managerial duties as compared with other duties, the frequency with which the employee exercises discretionary powers, the relative freedom from supervision and the relationship between the salary paid the employee and wages paid other employees for the kind of non-exempt work performed by the supervisor.

(26) "Primary school" means a learning institution containing any combination of grades Kindergarten - 8 or age level equivalent.

(27) "Reside" means a personal presence at some place of abode with no present intention of definite and early removal and with the

intent to remain for an undetermined period, but not necessarily combined with the intent to stay permanently.

(28) "Resident manager" means an employee of an adult foster home who is domiciled at the home and who is directly responsible for the care of residents in the home on a day to day basis.

(29) "Salary" means a predetermined amount constituting all or part of the employee's compensation paid for each pay period of one week or longer (but not to exceed one month) and in no instance will be any amount less than required to be paid pursuant to ORS 653.025.

(30) "Salary basis" means a salary as defined in section (29) of this rule, which is not subject to deduction because of lack of work for part of a work week, however, deductions for absences of one day or more may be made if the employee is absent for other reasons. Deductions may not be made for absences of less than one day, except as permitted for employers covered by the federal Family and Medical Leave Act of 1993, Public Law 103-3, for part-day absences due to leave pursuant to that law. Employees who are not paid for workweeks in which they performed no work are considered to be on a salary basis provided they are paid on a salary basis in workweeks when work is performed.

(a) Payment of additional compensation is not inconsistent with the salary basis of payment.

(b) Compensation paid in the form of fees is not inconsistent with the salary basis of payment, provided the fees paid in each pay period are not less than the amount required to be paid pursuant to ORS 653.025 and meet the requirements for fee payments under the federal Fair Labor Standards Act, as stated in Title 29, Code of Federal Regulations, Part 541.605 and related rules.

(31) "Secondary school" means a learning institution containing any combination of grades 9 — 12 or age level equivalent and includes those institutions that provide junior high schools which include 9th grade.

(32) "Violation" means a transgression of any statute or rule, or any part thereof and includes both acts and omissions.

(33) "Willfully" means knowingly. An action is done knowingly when it is undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person "should have known the thing to be done or omitted" if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of these rules, the employer is presumed to know the requirements of ORS 653.010 to 653.261 and these rules.

Stat. Auth.: ORS 653.040

Stats. Implemented: ORS 653.010 - 653.261

Hist.: BL 1-1987, f. & ef. 1-12-87; BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BL 10-1990, f. & cert. ef. 7-26-90; BL 3-1992, f. & cert. ef. 3-2-92; BL 5-1993(Temp), f. 5-7-93, cert. ef. 5-14-93; BL 12-1993, f. 10-29-93, cert. ef. 11-1-93; BL 9-1996, f. & cert. ef. 10-8-96; BL 9-1997, f. & cert. ef. 11-13-97; BL 1-2002, f. & cert. ef. 1-9-02; TIC 3-2006, f. & cert. ef. 11-24-06; BL 41-2006(Temp), f. & cert. ef. 11-27-06 thru 5-23-07; BL 11-2007, f. 5-10-07, cert. ef. 5-15-07

839-020-0005

Employees Engaged in Administrative, Executive, Professional, or Outside Sales Work, Defining the Terms

As used in ORS 653.010 to 653.261 and in these rules, unless the context requires otherwise:

(1) "Executive Employee" means any employee:

(a) Whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof. The foregoing language of this paragraph prescribing the primary duty does not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment or who owns at least 20 percent interest in the enterprise in which the employee is employed; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion of any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who earns a salary and is paid on a salary basis pursuant to ORS 653.025 exclusive of board, lodging, or other facilities.

(2) "Administrative Employee" means any employee:

(a) Whose primary duty consists of either:

(A) The performance of office or non-manual work directly related to management policies or general business operations of the employee's employer or the employer's customers; or

(B) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; or

(A) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or;

(B) Who executes under only general supervision special assignments and tasks; and

(d) Who earns a salary and is paid on a salary basis pursuant to ORS 653.025 exclusive of board, lodging, or other facilities.

(3) "Professional Employee" means any employee:

(a) Whose primary duty consists of the performance of:

(A) Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or

(B) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee; or

(C) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which the employee is employed; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who earns a salary and is paid on a salary basis pursuant to ORS 653.025 exclusive of board, lodging, or other facilities.

(4) "Outside Sales Person" means any employee:

(a) Who is employed for the purpose of and who is customarily and regularly engaged away from the employer's place or places of business in:

(A) Making sales; or

(B) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(b) Whose hours of work spent engaged in activities other than those activities described in paragraph (a)(A) or (B) of this section, do not exceed 30 percent of the hours worked in the workweek by non-exempt employees of the employer: Provided, that work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, will not be regarded as non-exempt work.

(5) "Independent Judgment and Discretion" means the selection of a course of action from a number of possible alternatives after consideration of each, made freely without direction or supervision with respect to matters of significance. It does not include skill exercised in the application of prescribed procedures.

Stat. Auth.: ORS 183 & 653

Stats. Implemented: ORS 653.010 - 653.261

Hist.: BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BL 10-1990, f. & cert. ef. 7-26-90; BLI 1-2002, f. & cert. ef. 1-9-02

Payment of Minimum Wages

839-020-0010

Payment of Minimum Wages — Generally

(1) Employees shall be paid no less than the applicable minimum wage for all hours worked, which includes "work time" as defined in ORS 653.010(11). If in any pay period the combined wages of the employee are less than the applicable minimum wage, the employer shall pay, in addition to sums already earned, no less than the difference between the amounts earned and the minimum wage as prescribed by the appropriate statute or administrative rule.

(2) Employers may include commission and bonus payments to employees when computing the minimum wage. Such commission or bonus payment may only be credited toward employees' minimum wages in the pay periods in which they are received.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.025

Hist.: BL 1-1987, f. & ef. 1-12-87; BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BL 10-1990, f. & cert. ef. 7-26-90; BL 9-1996, f. & cert. ef. 10-8-96

839-020-0012

Wage Statements to Be Provided to Employees

(1) Except for employees who are otherwise specifically exempt under ORS 653.020, employers must furnish each employee, each time the employee receives a compensation payment from the employer, a written itemized statement of earnings. The written itemized statement must include:

(a) The total gross payment being made;

(b) The amount and a brief description of each and every deduction from the gross payment;

(c) The total number of hours worked during the time covered by the gross payment;

(d) The rate of pay;

(e) If the worker is paid on a piece rate, the number of pieces done and the rate of pay per piece done;

(f) The net amount paid after any deductions;

(g) The employer's name, address and telephone number;

(h) The pay period for which the payment is made.

(2) When a compensation payment is a draw or advance against future earnings, and no deductions are being made from the payment, the written itemized statement must include the information required in section (1)(a), (g) and (h) of this rule. The employee must be provided with a statement containing all of the information required by section (1) of this rule at the employee's next regular payday, even if the employee is not entitled to payment of any further wages at that time.

(3) Pursuant to the Uniform Electronic Transactions Act (Chapter 535, Oregon Laws 2001), the itemized statement may be provided in an electronic format if:

(a) The employee agrees; and

(b) The employee has the ability to print or store the electronic itemized statement at the time of receipt.

Stat. Auth.: ORS 651.060

Stats. Implemented: ORS 652.610 & 652.640

Hist.: BL 9-1996, f. & cert. ef. 10-8-96; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0013

Bonuses Provided to Workers in Agriculture

(1) Every producer, or agent of the producer, who employs a labor contractor to provide a working crew for harvesting perishable agricultural products or who offers a bonus to those persons who harvest perishable agricultural products shall cause to be conspicuously posted and maintained on the premises where the agricultural products are to be harvested, a notice that states:

(a) A description of the terms and conditions of any bonus offered, including the manner of determining when the bonus is earned; and

(b) That portion of the labor contractor's compensation that is based on the amount of work done by each employee of the labor contractor.

(2) Such notice must be written in the language customarily used by the employer or its agents to communicate with a worker.

(3) The notice must be distributed in writing to workers, if required by ORS 658.440(1)(f) or any other law.

(4) Any condition that has not been properly disclosed in the manners described above cannot be enforced against any worker to

deny or diminish the amounts to which the worker would otherwise be entitled.

Stat. Auth.: ORS 651.060
Stats. Implemented: ORS 652.635
Hist.: BL 9-1996, f. & cert. ef. 10-8-96

839-020-0015

Fixed Minimum Hourly Wage Rates Lower than the Minimum Wage Rate

(1) Pursuant to ORS 653.025 and 653.030 the commissioner will consider the employment of specific types of persons or of individual persons themselves at a fixed minimum hourly wage rate lower than the rate required by ORS 653.025, when the commissioner has determined that the application of these requirements would substantially curtail employment opportunities for the specific types of persons or individuals involved. The types of persons for whom a lower rate may be set upon a showing of good cause as set out below include, but are not limited to, the mentally and physically handicapped who cannot perform all of the bona fide job requirements within a reasonable period of time expected of those at the entry level and student learners as defined in ORS 653.070.

(2) Rules for the employment of specific named individuals at less than the minimum wage:

(a) An employer must submit an application for the payment of a fixed minimum hourly wage rate lower than the rate required by ORS 653.025 on a form provided by the commissioner stating each and every reason why the employer believes a lower rate should be established. Forms may be obtained at any office of the Bureau of Labor and Industries;

(b) The application form must be signed by the employer, the prospective employee and legal guardian, or person legally empowered to act for such employee to whom the lower wage rate is proposed to be paid;

(c) The commissioner may require additional information from the employer or prospective employee to verify the conditions or reasons specified in the application including, but not limited to, medical reports;

(d) In considering the application, the Civil Rights Division of the Oregon Bureau of Labor and Industries, or other appropriate governmental agencies may be consulted for technical assistance to reasonably assure that no approval will be granted that will conflict with the rights of workers under other laws;

(e) The commissioner will grant the application only when the commissioner has determined that the application of ORS 653.025 would substantially curtail opportunities for employment of the prospective employee named in the application. The application may be granted under such terms and conditions as the commissioner deems appropriate;

(f) The commissioner will consider each application on an individual basis and will not grant blanket authorization in advance for a specific type or group of persons unless the conditions set out in section (3) of this rule are met.

(3) Rules for general authorization for an employer to employ unnamed mentally or physically handicapped individuals at less than the minimum wage:

(a) Under certain circumstances, the commissioner may grant blanket approval for an employer to employ persons who are mentally or physically handicapped or others when good cause is shown at a fixed minimum hourly wage rate lower than the rate required by ORS 653.025. An example when blanket approval may be given includes, but is not limited to, nonprofit sheltered workshops organized and conducted for the education and training of the mentally and physically handicapped;

(b) An employer desiring blanket authority to employ mentally or physically handicapped individuals at less than the minimum wage must apply to the commissioner for such authority;

(c) The application should include:

(A) The name of the organization;

(B) The purpose for which it was created;

(C) A detailed statement of the organization and its activities;

(D) The method and procedure by which the applicant obtains its employees;

(E) A detailed statement of the duties the employees will perform and a description of the end product produced from the performance of such duties;

(F) The hours the employees will work;

(G) How many individuals it intends to employ under authorization, if granted, and for how long;

(H) The rate of pay it will pay such individuals if authorization is granted.

(d) The applicant will be required to submit such other information as the commissioner deems necessary;

(e) The commissioner will grant the application only when it has determined that the application of ORS 653.025 would substantially curtail opportunities for employment;

(f) If the commissioner grants the application the commissioner may do so under such terms and conditions as the commissioner deems appropriate;

(g) Employers operating "nonprofit sheltered workshops" which are organized and conducted for the education and training of the mentally and physically handicapped, who desire blanket authorization to pay less than the minimum wage required by ORS 653.025, must apply for such authorization to the U.S. Department of Labor, Wage and Hour Division, Federal Office Building, 1111 Third Avenue, Suite 605, Seattle, WA 98101-3212, utilizing the application procedures set out in Title 29, CFR, Part 525. Pursuant to an agreement with the U.S. Department of Labor, the commissioner may review the application material submitted to the U.S. Department of Labor. The employer will be notified whether it may pay less than the minimum wage required by ORS 653.025 at the same time it is notified by the Department of Labor pursuant to the federal regulations.

Stat. Auth.: ORS 183 & 653

Stats. Implemented: ORS 653.030

Hist.: BL 1-1987, f. & ef. 1-12-87; BL 10-1990, f. & cert. ef. 7-26-90; BLI 1-2002, f. & cert. ef. 1-9-02

Deduction from the Minimum Wage

839-020-0020

Deductions — Generally

Employers may not deduct the cost of any of the following items from the minimum wage:

(1) Tools.

(2) Equipment.

(3) Uniforms, including but not limited to, garments such as suits, dresses, aprons, and all other garments whatsoever as worn by the employees as a condition of employment. Such apparel of a similar design, color, or material or forming part of the decorative pattern of the establishment or distinguishing the employee as an employee of the concern is presumed to be worn as a condition of employment.

(4) Laundry or cleaning of uniforms.

(5) Maintenance of tools, equipment or uniforms.

(6) Breakage or loss of tools, equipment or uniforms.

(7) Any other item required by the employer to be worn or used by the employee as a condition of employment.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.025

Hist.: BL 1-1987, f. & ef. 1-12-87; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0025

Deductions for Meals, Lodging, Facilities or Other Services

(1) The fair market value of meals, lodging and other facilities or services furnished by the employer to the employee for the private benefit of the employee may be deducted from the minimum wage. The employer has the burden of establishing the fair market value (See also OAR 839-020-0004(17)).

(2) "Fair market value" may be established in either of the following ways:

(a) The amount actually and customarily charged for comparable meals, lodging, facilities or services to consumers who are not employees of the employer; or

(b) The actual cost to the employer in purchasing, preparing or providing the meals, lodging or other facilities or services.

(3) The provisions of section (1) of this rule do not prohibit the payment of wages as meals, lodging and other facilities or services furnished to employees either as additions to wages or as items for which deductions from wages will be made. These provisions apply to all facilities or services furnished by the employer as compensation to the employee regardless of whether the employer calculates charges for such facilities or services as additions to or deductions from wages. In order for the employer to be able to claim credit toward the mini-

minimum wage for providing meals, lodging or other facilities or services furnished to an employee, the deduction of these costs from the employee's wages must have been authorized by the employee in writing, the deduction must have been for the private benefit of the employee, and the deduction must be recorded in the employer's books, or the deduction of these costs must be authorized by a collective bargaining agreement, in accordance with the provisions of ORS 652.610.

(4) Full settlement of sums owed to the employer by the employee because of meals, lodging and other facilities or services furnished by the employer shall be made on each regular payday.

(5) The provisions of section (1) of this rule apply only when the following conditions are continuously met:

(a) The employer has met the conditions of ORS 652.610(3); and

(b) The employee actually receives the meals, lodging or other facilities or services; and

(c) The meals, lodging or other facilities or services are furnished by the employer for the private benefit of the employee; and

(d) The meals, lodging or other facilities and services are provided in a lawful manner. No deduction from the minimum wage may be made for alcohol provided without applicable permits, for illegal substances or services, such as drugs or prostitution, or for any other substance, facility or service which is provided in a manner determined by a court or appropriate administrative agency to have been unlawful.

(6) As used in this rule, meals actually received by the employee and furnished by the employer are regarded as being for the private benefit of the employee except when meal expenses are incurred by an employee while traveling away from the employee's home on the employer's business.

(7) Lodging or other facilities or services are furnished for the private benefit of the employee when such lodging or other facilities or services are not required by the employer. For purposes of this rule, lodging or other facilities or services are required by the employer when:

(a) Acceptance of the lodging or other facilities or services is a condition of the employee's employment; or

(b) The expense is incurred by an employee who must travel away from the employee's home on the employer's business; or

(c) The acceptance of the lodging or other facilities or services is involuntary or coerced; or

(d) The provision of lodging or other facilities or services is necessary in order for the employer to maintain an adequate work force at the times and locations the employer needs them.

Stat. Auth.: ORS 651.060(4) & 653

Stats. Implemented: ORS 653

Hist.: BL 1-1987, f. & ef. 1-12-87; BL 5-1991(Temp), f. 5-15-91, cert. ef. 5-17-91; BL 3-1992, f. & cert. ef. 3-2-92; BL 9-1996, f. & cert. ef. 10-8-96; BLI 15-1999, f. & cert. ef. 10-6-99

839-020-0027

Deductions for Garnishment Processing Fee

(1) Pursuant to ORS 18.736, if a garnishee that employs a debtor is required to make any payment under a writ of garnishment by reason of wages payable to the debtor, the garnishee may collect a \$1 processing fee for each week of wages, or fraction of a week of wages, for which a payment is made under the provisions of ORS 18.735. The processing fee must be collected after the last payment is made under the writ. The fee shall be withheld from the wages of the debtor, and is in addition to the amounts withheld for payment to the garnishor under the writ or under any other writ delivered to the garnishee.

(2) The fee provided for in this section may not be collected if withholding of the fee would reduce the debtor's net disposable income below the minimum amount prescribed by ORS 23.186.

Stat. Auth.: ORS 651.060(4), 652, 653 & HB 3544(2003 legislature)

Stats. Implemented: ORS 18.838, 652.150 & 653.261(1)

Hist.: BLI 7-2003, f. 12-31-03, cert. ef. 1-1-04

Payment of Overtime Wages

839-020-0030

Overtime — Generally

(1) Except as provided in OAR 839-020-0125 to 839-020-0135, all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefits of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1).

Similar benefits include, but are not limited to, discretionary bonuses, gifts, profit sharing, thrift and savings program, trusts, reimbursements for expenses, holiday, or vacation pay.

(2) Definitions:

(a) "Work week" means any seven (7) consecutive twenty four (24) hour period as determined by the employer. The beginning of the work week may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of this rule. For purposes of overtime computation, each work week stands alone;

(b) "Regular rate," for purposes of overtime computation, means a regular hourly rate, but in no case will the regular hourly rate be less than the applicable statutory minimum wage rate. In the absence of an express agreement between the employer and the employee which specifies the regular hourly rate, the regular hourly rate is determined by dividing the total remuneration for employment in any work week (excluding commissions, spiffs, bonuses, tips or similar benefits), by the total number of hours actually worked in that work week for which such remuneration was paid. The division will be guided in the application and calculation of regular rate by **Title 29, Code of Federal Regulations, Part 778, Subpart C, D and E** except when expressly prohibited by ORS Chapter 653 or these rules.

(3) Methods for determining amount of overtime payment under different compensation agreements:

(a) Compensation based exclusively on hourly rate of pay:

(A) Where the employee is employed solely on the basis of a single hourly rate, the hourly rate is the "regular rate." For hours worked in excess of forty (40) hours in a work week the employee must be paid, in addition to the straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of forty (40);

(B) For example, a \$10 per hour rate will bring, for an employee who works 46 hours, a total weekly wage of \$490 (46 hours at \$10 plus six hours at \$5.00). In other words the employee must be paid an amount equal to \$10 per hour for 40 hours and \$15.00 per hour for the six hours of overtime, or a total of \$490.

(b) Compensation based upon piece-rate agreement:

(A) Where an employee is employed on a piece-rate basis, the regular hourly rate of pay is determined by adding together the total earnings, (excluding commissions, spiffs, bonuses, tips or similar benefits) for the work week and dividing this sum by the number of hours worked in the week for which such compensation is to be paid;

(B) For example, an employee who has earned \$500 during a 50 hour work week must be paid an additional sum of \$50 for the ten overtime hours, or a total of \$550 (50 hours at \$10 per hour and the ten overtime hours at \$5.00 per hour).

(c) Compensation based upon weekly salary agreement for regular work week of less than 40 hours:

(A) Where the employee is employed on a weekly salary for a regular work week of fewer than 40 hours, the regular hourly rate of pay is determined by dividing the salary by the number of hours agreed to be worked in the work week which such salary is intended to compensate;

(B) For example, if an employee is hired at a salary of \$525 and it is understood that this salary is compensation for a regular work week of 35 hours, the employee's regular rate of pay is \$15 per hour (\$525 divided by 35 hours). Thus, where the employee works in excess of 35 hours in a given work week such employee must be paid \$15 per hour for each of the first 40 hours and \$22.50 per hour (one and one-half times \$15) for each hour worked in excess of 40 hours in such work week.

(d) Compensation based upon a weekly salary agreement for a regular work week of 40 hours:

(A) Where the employee is employed on a weekly salary for a regular work week of 40 hours, the regular hourly rate of pay is computed by dividing the salary by 40 hours;

(B) For example, where an employee is hired at a salary of \$600 and it is understood that this weekly salary is compensation for a regular work week of 40 hours, the employee's regular rate of pay is \$15 per hour and such employee must be compensated at the rate of \$22.50 per hour for each hour worked in excess of 40 hours in such work week.

(e) Compensation based upon weekly salary agreement for regular workweeks of more than 40 hours:

(A) If the employee is employed on a weekly salary which is the

agreed compensation for a set number of hours in excess of 40, the regular hourly rate of pay is determined by dividing the weekly salary by the set number of hours which such salary is intended to compensate;

(B) For example, where an employee is hired at a weekly salary of \$675 and it is understood that this weekly salary is compensation for a regular work week set at 45 hours, the employee's regular rate of pay is \$15 per hour and such employee must be paid an additional sum of \$37.50 for such work week or a total of \$712.50 (45 hours at \$15 per hour and the five overtime hours at \$7.50 per hour). The employee must be paid an additional \$22.50 per hour for each hour worked in excess of 45 hours in such work week.

(f) Compensation based upon an agreed fixed salary for fluctuating hours (fluctuating workweek method for payment of overtime):

(A) An employee employed on a fixed salary may have hours of work which vary from work week to work week and the salary may be paid to the employee pursuant to an understanding with the employer that such employee will receive such fixed amount of compensation for whatever hours the employee is called upon to work in a work week, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation for the hours worked each work week, whatever their number, such a salary arrangement is permitted if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable statutory minimum wage rate for every hour worked in those work weeks in which the number of hours worked is greatest, and if the employee receives overtime compensation, in addition to such salary, for all hours worked in excess of 40, at a rate not less than one-half the regular rate of pay. Since, under such an arrangement, the number of hours actually worked will fluctuate from work week to work week, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the work week into the amount of the salary to obtain the applicable regular hourly rate for any given work week. Payment for overtime hours worked in excess of 40 hours in such work week at one-half such hourly rate in addition to the salary satisfies the requirements of this rule because such hours have already been compensated at the regular rate, under the salary arrangement. The following examples, based upon a weekly salary of \$400, are offered by way of illustration:

(i) Work week #1 — 50 hours worked; the employee's regular rate of pay is \$8 per hour and the employee must be paid an additional sum equal to one-half the regular rate times the ten overtime hours worked or \$40, making the total compensation for that work week \$440;

(ii) Work week #2 — 60 hours worked; the employee's regular rate of pay is \$6.67 per hour, which is less than the required state minimum wage rate. The employee must be paid an additional sum equal to the difference between the employee's weekly salary of \$400 and the total of the amount the employee earned at the minimum wage for 40 hours plus one and one-half times the minimum wage rate for the hours worked over 40 during the work week (40 hours X minimum wage rate + 20 hours X 1.5 X minimum wage rate).

(B) The fluctuating work week method for the payment of overtime does not apply to employers covered by the federal Family Medical Leave Act of 1993, 29 USC 2601, et. seq., who comply with the Code of Federal Regulations regarding the nonpayment of leave time authorized by the Act and the special exception pertaining to the payment of overtime under the fluctuating workweek method. (See 29 CFR, Part 825.206 (b) and (c)) Employers who select this method for paying overtime and who are covered by this Act but choose not to comply with 29 CFR 825.206, must comply with this rule.

(g) Fixed salary for periods other than work week: Where a salary covers a period longer than a work week, such as a month, it must be reduced to its work week equivalent. A monthly salary is subject to translation to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semi-monthly salary is translated into its equivalent weekly wages by multiplying by 24 and dividing by 52. Once the weekly wage is arrived at, the regular rate of pay and the amount of any overtime pay is determined as provided by this rule.

Stat. Auth.: ORS 183 & 653

Stats. Implemented: ORS 653.261

Hist.: BL 1-1987, f. & ef. 1-12-87; BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BL 9-1996, f. & cert. ef. 10-8-96; BLI 1-2002, f. & cert. ef. 1-9-02; BLI 7-2003, f. 12-31-03, cert. ef. 1-1-04

Hours Worked

839-020-0040

Hours Worked — Generally

(1) OAR 839-020-0040 to 839-020-0047 deals with hours worked as defined by OAR 839-020-0004(20) and discusses principles involved in determining what constitutes working time for purposes of ORS 653.010 to 653.261 and these rules.

(2) Work requested or required is considered work time. Work not requested, but suffered or permitted is considered work time.

(3) Work performed for the employer but away from the employer's premises or job site is considered work time. If the employer knows or has reason to believe that work is being performed, the time spent must be counted as hours worked.

(4) It is the duty of the employer to exercise control and see that the work is not performed if it does not want the work to be performed. The mere promulgation of a policy against such work is not enough.

Stat. Auth.: ORS 183 & 653

Stats. Implemented: ORS 653.010 - 653.261

Hist.: BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BL 10-1990, f. & cert. ef. 7-26-90; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0041

Waiting Time

(1) On duty (engaged to wait): Where waiting is an integral part of the job, i.e., when the time spent waiting belongs to and is controlled by the employer and the employee is unable to use the time effectively for the employee's own purposes, that employee will be considered as engaged to wait. All time spent in activity where an employee is engaged to wait will be considered as part of hours worked.

(2) Off duty (waiting to be engaged): Periods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for the employee's own purposes are not hours worked. The employee is not completely relieved from duty and cannot use the time effectively for the employee's own purposes unless the employee is told in advance that the employee may leave the job and that the employee will not have to commence work until a specified hour has arrived. Whether the time is long enough to enable the employee to use the time effectively for the employee's own purposes depends upon all of the facts and circumstances of the case.

(3) On-call time: An employee who is required to remain on-call on the employer's premises or so close thereto that the employee cannot use the time effectively for the employee's own purposes is working while "on-call." An employee who is not required to remain on the employer's premises but is merely required to leave word at the employee's home or with company officials where the employee may be reached is not working while on-call.

Stat. Auth.: ORS 183 & 653

Stats. Implemented: ORS 653.010 - 653.261

Hist.: BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BL 10-1990, f. & cert. ef. 7-26-90; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0042

Sleeping Time and Certain Other Activities

Under certain conditions an employee is considered to be working even though some of the employee's time is spent sleeping or in certain other activities:

(1) Less than 24 hours duty: An employee who is required to be on duty for less than 24 hours is working even though the employee is permitted to sleep or engage in other activities when not busy.

(2) Duty of 24 hours or more: Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than eight hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted sleep period. If sleeping period is of more than eight hours, only eight hours will be credited. Where no expressed or implied agreement to the contrary is present, the eight hours of sleeping time and lunch periods constitute hours worked:

(a) Interruptions of sleep. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable sleep period, the entire period must be counted;

(b) For purposes of this rule a reasonable night's sleep is consid-

ered sleep time of not less than five continuous hours.

(3) Employees residing on employers' premises or working at home: An employee who resides on the employer's premises on a permanent basis or for extended periods of time is not considered as working all the time the employee is on the premises. Ordinarily, the employee may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when the employee may leave the premises for the employee's own purposes. To determine the exact hours worked, any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.010 - 653.261

Hist.: BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0043

Preparatory and Concluding Activities

(1) Preparatory and concluding activities are considered hours worked if the activities performed by the employee are an integral and indispensable part of a principal activity for which the employee is employed:

(a) Example: A bank teller counts the till and arranges the work space in preparation for receiving customers. This activity is an integral and indispensable part of the principal activity for which the employee is employed and is included as hours worked;

(b) Example: In connection with the operation of a lathe, the lathe operator oils, greases, or cleans the machine or installs a new cutting tool. Such activities are an integral and indispensable part of a principal activity and are included as hours worked;

(c) Example: Agricultural workers must dress in protective clothing and thoroughly clean up after their work with or around pesticides. The time spent in these activities is work time.

(2) These rules are applicable even where there exists a custom, contract or agreement not to pay for the time spent in such activity.

(3) Where a contract, custom or practice dictates certain activities to be considered as work time, even though not considered to be an integral and indispensable part of a principal activity, the time devoted to such activities will be considered as work time.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.010 - 653.261

Hist.: BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0044

Lectures, Meetings and Training Programs

(1) Attendance at lectures, meetings, training programs and similar activities need not be counted as work time if the following four criteria are met:

(a) Attendance is outside of the employee's regular working hours;

(b) Attendance is voluntary;

(c) The course, lecture, or meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

(2) Involuntary attendance: Attendance is not voluntary if it is required by the employer. It is not voluntary in fact, if the employee is given to understand or led to believe that the employee's present working conditions or the continuance of the employee's employment would be adversely affected by non-attendance.

(3) Training is directly related to an employee's job if it is designed to make the employee handle the employee's job more effectively as distinguished from training the employee for another job or teaching the employee a new additional skill in the same job.

(4) Independent training is time spent by the employee on the employee's own initiative attending an independent school, college, or independent trade school after hours. Time spent in this activity is not considered hours worked for an employer even if the courses are related to the employee's job.

(5) Special situations: There are special situations where the time spent in attending lectures, training sessions and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of its employees a program of instruction, which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are

directly related to his job, or paid for by the employer.

(6) Time spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship programs may be excluded from working time if the following criteria are met:

(a) The apprentice is employed under a written apprenticeship agreement or program which meets the standards of and is registered with the Bureau of Labor and Industries, Apprenticeship and Training Division; and

(b) Such time does not involve productive work or performance of the apprentice's regular duties. If the above criteria are met, the time spent in such related supplemental training will not be counted as hours worked unless the written agreement specifically provides that it is hours worked. The mere payment or agreement to pay for time spent in related instruction does not constitute an agreement that such time is hours worked.

(7) Time spent in required training outside regular working hours at specialized or follow up training which is required for certification of employees by any law or ordinance does not constitute compensable hours of work. The time spent in training as provided in this subsection is not compensable, even if all or part of the cost of training is borne by the employer.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653

Hist.: BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BL 9-1996, f. & cert. ef. 10-8-96; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0045

Travel Time

(1) Home to work in an ordinary situation: An employee who travels from home before the employee's regular workday and returns home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment, whether the employee works at a fixed location or at different job sites. Normal travel from home to work is not work time.

(2) Home to work in an emergency situation: If an employee has left the employer's premises or job site after completing the day's work and is subsequently called out to travel a substantial distance to perform an emergency job, any time spent in excess of time spent in normal home-to-work travel will be considered working time. Call-backs which require only normal home-to-work travel to the employer's place of business or job site will not be considered working time. For purposes of this section, "substantial distance" means a distance beyond a 30-mile radius of the employer's place of business.

(3) Travel that is all in a day's work: Time spent by an employee in travel as part of the employee's principal activity must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there or to pick up and carry tools, the travel from the designated place to the work place is part of the day's work and must be counted as hours worked regardless of any contract, custom or practice:

(a) Example: A construction worker who travels from job site to job site during the work day must be compensated for time spent in traveling;

(b) Example: If an employee who normally finishes work on the employer's premises at 5 p.m. is sent to another job at a different site, finishes that job at 8 p.m. and is then required to return to the employer's premises arriving at 9 p.m., the employee will be compensated for all time up to 9 p.m. However, if the employee goes home instead of returning to the employer's premises, the travel time after 8 p.m. is considered normal work to home travel and is not compensable.

(4) Home to work on special one-day assignment to another city: An employee who regularly works at a fixed official work station, if given an assignment to work in another city outside of a 30 mile radius of the official work station where normally employed, and not required to stay over night, must be paid travel time pursuant to section (3) of this rule. This time is considered an integral part of a principal activity.

(5) Travel away from the home community: Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is work time when it cuts across the employee's workday. The employee is substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on non-working days. Time that is spent in travel away from home outside of regular work hours as a passenger on an airplane, train, boat, bus, or automo-

bile is not considered work time.

(6) When a private automobile is used in travel away from the home community: If an employee is offered public transportation but requests permission to drive the employee's own car instead, the employer may count as hours worked either the time spent driving the car or the time the employee would have had to count as hours worked during working hours if the employee had used the public conveyance.

(7) Work performed while traveling includes any work which an employee is required to perform while traveling and must be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when the employee is permitted to sleep in adequate facilities furnished by the employer.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.010 - 653.261

Hist.: BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0046

Adjusting Grievances, Medical Attention, Civic and Charitable Work and Suggestion Systems

(1) Time spent in adjusting grievances between an employee and employer during the time employees are required to be on the premises is hours worked, but in the event a bona fide union is involved the counting of such time will be left to the process of collective bargaining or to the custom or practice under the collective bargaining agreement.

(2) Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when the employee is working constitutes hours worked.

(3) Time spent in work for public or charitable purposes at the employer's request, or under its direction or control, or while the employee is required to be on the premises, is working time. Time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked.

(4) Time spent by employees outside of their regular working hours in developing suggestions under a general suggestion system is not working time, but if employees are permitted to work on suggestions during regular working hours the time spent must be counted as hours worked. When an employee is assigned to work on the development of a suggestion, the time is considered hours worked.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.010 - 653.261

Hist.: BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0047

Agricultural Employees

The provisions of OAR 839-020-0040 to 839-020-0047 apply to all persons employed in Agriculture who are required to be paid minimum wages pursuant to ORS 653.025.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.025

Hist.: BL 10-1990, f. & cert. ef. 7-26-90

Working Conditions

839-020-0050

Meal and Rest Periods

(1) Every employer shall provide to each employee an appropriate meal period and an appropriate rest period.

(a) "Appropriate meal period" means:

(A) A period of not less than 30 minutes during which the employee is relieved of all duties for each work period of not less than six or more than eight hours. If the work period is seven hours or less, the meal period is to be taken between the second and fifth hour worked. If the work period is more than seven hours, the meal period is to be taken between the third and sixth hour worked; or

(B) A period in which to eat (for each work period of not less than six or more than eight hours) while continuing to perform duties or remain on call, which is not deducted from the employee's hours worked. This is permitted only in those cases where the employer can show that the nature or circumstances of the work prevent the employee from being relieved from all duty.

(C) Where the employer can show that industry practice or custom has established a paid meal period of less than 30 minutes (but no

less than 20 minutes) during which employees are relieved of all duty, such industry practice or custom will satisfy the meal period provisions of section (1) of this rule.

(b) "Appropriate rest period" means: A period of rest of not less than ten minutes for every segment of four hours or major part thereof worked in one work period without deduction from the employee's pay. The period of rest must be in addition to and taken separately from the time allowed for the usual meal period. Insofar as feasible, considering the nature and circumstances of the work, such period of rest is to be taken by an employee approximately in the middle of each four hour (or major part thereof) segment. The rest period is not to be added to the usual meal period or deducted from the beginning or end of the work period to reduce the overall length of the total work period.

(A) The provisions of section (1) of this rule regarding appropriate rest periods do not apply when all of the following conditions are met:

(a) The employee is 18 years of age or older; and

(b) The employee works less than five hours in any period of 16 continuous hours; and

(c) The employee is working alone; and

(d) The employee is employed in a retail or service establishment, i.e., a place where goods and services are sold to the general public, not for resale; and

(e) The employee is allowed to leave the employee's assigned station when the employee must use the restroom facilities.

(2) In the absence of regularly scheduled meal periods and rest periods, it will be sufficient compliance with section (1) of this rule when the employer can show that the employee has, in fact, received the time specified. This is permitted only in those cases where the employer can show that the ordinary nature and circumstances of the work prevent the employer from establishing and maintaining a regularly scheduled meal period and rest period.

(3) For the purposes of 839-020-0050, factors to be considered in determining the nature or circumstances of work which prevent an employee being relieved of all duties or the scheduling of regular meal and rest periods may include, but are not limited to, the following: The safety and health of employees, patients, clients, and the public; availability of other employees to provide relief; qualifications (or lack thereof) of those available to provide relief; costs involved in the shutdown/startup of machinery in continuous-operation industrial processes; intermittent and unpredictable work flow not in the control of the employer/employee; unforeseeable equipment failures, emergencies, acts of nature.

(4) As used in this rule, "work period" means the period between the time the employee begins work and the time the employee ends work, and includes rest periods, and any period of one hour or less (not designated as a meal period) during which the employee is relieved of all duties. Meal periods are not included as part of the work period unless the employee continues to perform duties during the meal period.

(5) The provisions of this section regarding appropriate meal periods and rest periods may be modified by the terms of a collective bargaining agreement if the provisions of the collective bargaining agreement entered into by the employees specifically prescribe rules concerning meal periods and rest periods.

Stat. Auth.: ORS 183 & 653

Stats. Implemented: ORS 653.261

Hist.: BL 1-1987, f. & ef. 1-12-87; BL 10-1990, f. & cert. ef. 7-26-90; BL 9-1996, f. & cert. ef. 10-8-96; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0060

Weight Lifting

No employee shall be required to lift excessive weights.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.261(1)

Hist.: BL 1-1987, f. & ef. 1-12-87

839-020-0065

Other Working Conditions

(1) No employer shall employ or shall suffer or permit any employee to work in the State of Oregon, except under the following conditions:

(a) Where a sanitary and safe work area is provided;

(b) Where adequate lighting is provided;

(c) Where adequate ventilation is provided;

(d) Where adequate washrooms are provided;

(e) Where adequate toilet facilities are provided;

(f) Where the employer is in full compliance with the provisions of ORS Chapter 654 (the Oregon Safe Employment Act) and the rules and regulations promulgated thereunder. For the purposes of this rule, the compliance status of an employer is determined by the Occupational Safety and Health Division of the Department of Insurance and Finance;

(g) Where, if provided, the cot or stretcher to be used in illnesses, accidents, or other emergencies is adequate.

(2) Every employer shall provide to each employee when required by the nature of the work, suitable seats, suitable tables, and suitable work benches:

(a) Suitable seats means convenient, comfortable and safe seats where the work is such that employees may sit while working. "Suitable seats" in cannery occupations means one for every three employees who work in or on inspection tables and inspection belts;

(b) Suitable tables and suitable work benches means tables and work benches so constructed as to give the greatest possible comfort and convenience to employees where the nature of the work and the safety and convenience of the employee requires a bench or table.

Stat. Auth.: ORS 183 & 653

Stats. Implemented: ORS 653.261(1)

Hist.: BL 1-1987, f. & ef. 1-12-87; BL 10-1990, f. & cert. ef. 7-26-90

839-020-0070

Homework — Generally

(1) Homeworkers as defined by OAR 839-020-0004(19) will be paid not less than the applicable minimum wage pursuant to ORS 653.025 for all hours suffered or permitted to work.

(2) Homeworkers will be paid no less than time and one-half their regular rate of pay for all hours worked in excess of 40 hours in a work week pursuant to OAR 839-020-0030.

(3) General record keeping requirements, as provided in these rules, OAR 839-020-0080(1) through (3), are applicable to homeworkers.

(4) Employer employing homeworkers are subject to the provisions of OAR 839-020-0083 and 839-020-0085 concerning record availability and posting requirements.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.025 & 653.261(1)

Hist.: BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BLI 1-2002, f. & cert. ef. 1-9-02

General Recordkeeping Requirements

839-020-0080

General Requirements

(1) Every employer regulated under ORS 653.010 to 653.261 must maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom the law applies:

(a) Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records;

(b) Home address, including zip code;

(c) Date of birth, if under 19;

(d) Sex and occupation in which employed. (Sex may be indicated by use of the prefixes Mr., Mrs., Miss, or Ms.);

(e) Time of day and day of week on which the employee's workweek begins. If the employee is part of a work force or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole work force or establishment will suffice;

(f) Regular hourly rate of pay for any workweek in which overtime compensation is due, and an explanation of the basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and the amount and nature of each payment which, pursuant to ORS 653.261(1) is excluded from the "regular rate of pay." (These records may be in the form of vouchers or other payment data.);

(g) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of seven consecutive workdays);

(h) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation;

(i) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under subsection (h) of this section;

(j) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions;

(k) Total wages paid each pay period;

(l) Date of payment and the pay period covered by payment.

(2) Every employer who makes retroactive payment of wages or compensation under the supervision of the U.S. Department of Labor or the Oregon Bureau of Labor and Industries must record and preserve, as an entry on the pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment.

(3) With respect to employees working on fixed schedules, an employer may maintain records showing instead of the hours worked each day and each workweek as required by this rule, the schedule of daily and weekly hours the employee normally works, provided:

(a) In weeks in which an employee adheres to this schedule, indicates by check mark, statement or other method that such hours were in fact actually worked by the employee; and

(b) In week in which more or less than the scheduled hours are worked, shows that exact number of hours worked each day and each week.

(4) With respect to each employee in a bona fide executive, administrative, or professional capacity (including employees employed in the capacity of academic administrative personnel or teachers in elementary or secondary schools), or in outside sales, as defined in ORS 653.010(8), employers must maintain and preserve records containing all the information and data required by subsections (1)(a) through (e) of this rule and, in addition, the basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and perquisites.

(5) With respect to each employee of hospitals and institutions primarily engaged in the care of the sick, the aged, or mentally ill or defective who reside on the premises compensated for overtime work on the basis of a work period of 14 consecutive days pursuant to an agreement or understanding under OAR 839-020-0125(2)(d), employer must maintain and preserve:

(a) The records required by section (1) of this rule except subsections (1)(e) and (g) through (i) of this rule, and in addition:

(A) Time of day and day of week on which the employee's 14-day work period begins;

(B) Hours worked each workday and total hours worked each 14-day work period;

(C) Total straight-time wages paid for hours worked during the 14-day work period;

(D) Total overtime excess compensation paid for hours worked in excess of eight in a workday and 80 in the work period.

(b) A copy of the agreement or understanding with respect to using the 14-day period for overtime pay computations or, if such agreement or understanding is not in writing, a memorandum summarizing its terms and showing the date it was entered into and how long it remains in effect.

(6) With respect to each tipped employee, the employer must maintain and preserve payroll or other records containing all the information and data required in section (1) of this rule and, in addition, a symbol, letter or other notation placed on the pay records identifying each employee.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.045

Hist.: BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0082

Special Recordkeeping Circumstances

(1) In addition to keeping other records required by these rules, an employer who makes deductions from the wages of employees for lodging, meals or other facilities or services (as these terms are used in ORS 653.035) furnished to them by the employer or by an affiliated person, or who furnishes such lodging, meals, other facilities or

services to employees as an addition to wages, must maintain and preserve records substantiating the fair market value of furnishing each class of facility. Separate records of the fair market value of each item furnished to an employee need not be kept. The requirements may be met by keeping combined records of the fair market value in each class of facility, such as housing, fuel, or merchandise furnished through a company store or commissary. Such records must include itemized accounts showing the nature and amount of any expenditures entering into the computation of the fair market value, as defined in these rules.

(2) If additions to or deductions from wages paid so affect the total cash wages due in any workweek (even though the employee actually is paid on other than a workweek basis) as to result in the employee receiving less in cash than the applicable minimum hourly wage, or if the employee works in excess of the applicable maximum hours standard and any addition to the wages paid are a part of wages, or any deductions made are claimed as allowable deductions, the employer must maintain records showing on a workweek basis those additions to or deductions from wages.

Stat. Auth.: ORS 653
Stats. Implemented: ORS 653.045
Hist.: BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0083

Records Availability

(1) All records required to be preserved and maintained by these rules shall be preserved and maintained for a period of at least two years.

(2) All employers shall keep such records in a safe and accessible place.

(3) All records required to be preserved and maintained by these rules shall be made available for inspections and transcription by the Commissioner or duly authorized representative of the Commissioner.

Stat. Auth.: ORS 653
Stats. Implemented: ORS 653.045
Hist.: BL 1-1990, f. 2-27-90, cert. ef. 2-28-90

839-020-0085

Posting Requirements

Every employer employing any employees subject to the minimum wage provisions shall post and keep posted a notice explaining ORS 653.010 to 653.261, as prescribed by the Commissioner, in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy. Any employer of employees to whom OAR 839-020-0030 does not apply because of a total establishment exemption may alter or modify the poster with a legible notation to show that the overtime provisions do not apply.

EXAMPLE: "Overtime Provisions not Applicable to Taxicab Drivers (ORS 653.020(6))."
Stat. Auth.: ORS 653
Stats. Implemented: ORS 653.050
Hist.: BL 1-1990, f. 2-27-90, cert. ef. 2-28-90

Exemptions

839-020-0115

Relationship of State and Federal Law

(1) The Bureau of Labor and Industries has been informed and has reason to believe that there exists confusion and uncertainty on the part of employers concerning the inter-relationship of the Federal Fair Labor Standards Act and the regulations adopted pursuant thereto and the State Minimum Wage Law and the administrative rules adopted thereunder.

(2) The purpose of this rule, therefore, is to inform employers of the proper application of the law and to direct them to authoritative sources in cases of doubt.

(3) Employers who are required to comply with the state and federal laws, regulations and rules referred to in section (1) of this rule are required to comply with all standards set by those laws, regulations and rules. When one set of standards differs from the other, the standards most advantageous to employees must be met. For example, when the state minimum wage requires a higher hourly rate to be paid than the federal minimum wage rate, the state rate must be paid. By paying the higher rate, the employer complies with both standards. Another example is when the employer may qualify for an exemption under the state law but not the federal law. In this case, the employer is required to comply with the federal law.

(4) Employers may contact the Technical Assistance Unit of the

Bureau of Labor and Industries, 800 N.E. Oregon, #32, Portland, OR 97232 for more information on specific fact situations.

(5) The purpose of this rule is stated in section (2) of this rule. The rule should not be interpreted to mean anything other than this stated purpose.

Stat. Auth.: ORS 653
Stats. Implemented: ORS 653.010 & 653.261
Hist.: BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BLI 7-2003, f. 12-31-03, cert. ef. 1-1-04

Exemptions from Overtime

839-020-0125

Overtime Exemptions Pertaining to Employers Regulated Under the Federal Fair Labor Standards Act

(1) This rule applies to employers and employees subject to OAR 839-020-0030, Overtime Generally, by virtue of the repeal of ORS 653.020(7) by Section 2, Chapter 446, 1989 Oregon Laws.

(2) No employer shall be deemed to have violated OAR 839-020-0030 under the following circumstances:

(a) By employing any employee for a workweek in excess of that specified in OAR 839-020-0030 without paying the compensation for overtime employment prescribed therein; provided that, such employee received compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which the employee is employed; and, provided further that such employee is so employed as follows:

(A) In pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than 1,040 hours during any period of 26 consecutive weeks; or

(B) In pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board which provides that during a specified period of 52 consecutive weeks the employees shall be employed not more than 2,240 hours and shall be guaranteed not less than 1,840 hours (or not less than 46 weeks at the normal number of hours worked per week, but not less than 30 hours per week) and not more than 2,080 hours of employment for which the employee shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under OAR 839-020-0030 or 2,080 hours in such period at rates not less than one and one-half times the regular rate at which the employee is employed. (Reference: Sec. 7(b)(1) and Sec. 7(b)(2), FLSA)

(b) By an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products, if:

(A) The annual gross volume of sales of such enterprise is less than \$1,000,000 exclusive of excise taxes; and

(B) More than 75 per centum of such enterprise's annual dollar volume of sales is made within the state in which such enterprise is located; and

(C) Not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale; and

(D) Such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to the employee under ORS 653.025. (Reference: Sec. 7(b)(3), FLSA)

(c) By employing any employee for a workweek in excess of the maximum workweek applicable to such employee under OAR 839-020-0030 if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement specifies a regular rate of pay of not less than the minimum hourly rate provided in ORS 653.025 and compensation at not less than 1-1/2 times such rate for all hours worked in excess of such maximum workweek, and a weekly guarantee of pay for not more than 60 hours based on the rates so specified. (Reference: Sec. 7(f), FLSA);

(d) By employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified in OAR 839-020-0030, if the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable under ORS 653.025 and if more than half of the employee's compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commission, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw of guarantee. (Reference: Sec. 7(i), FLSA);

(e) When an employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises enters into an agreement or understanding arrived at between the employer and employee before performance of the work, that provides for a work period of 14 consecutive days in lieu of the workweek of seven consecutive days for purposes of overtime computation and provides further that for the employee's employment in excess of eight hours in any workday and in excess of 80 hours in such 14-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which the employee is employed. (Reference: Sec. 7(j), FLSA);

(f) By employing an employee of a not for profit amusement or recreational establishment in excess of the applicable work week specified in OAR 839-020-0030 if the establishment does not operate for more than seven months in any calendar year, or if, the establishment's average receipts for any six months of such year were not more than 33-1/3 per centum of its average receipts for the other six months of such year. (Reference: Section 13(a)(3), FLSA);

(g) By employing an employee in excess of the applicable workweek specified in OAR 839-020-0030 when the employee is employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacean, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee. (Reference: Sec. 13(a)(5), FLSA)

(h) By employing an employee who is compensated on an hourly basis at a rate of not less than \$27.63 per hour and who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty consists of the following:

(A) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system specifications;

(B) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) A combination of duties described in paragraphs (A), (B), and (C) of this paragraph the performance of which requires the same level of skills. (Reference: Sec. 13(a)(17), FLSA)

(3) The provisions of OAR 839-020-0030 do not apply when the provisions of Section 13(b), of the Fair Labor Standards Act apply to employees as follows:

(a) Any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935; or

(b) Any employee of an employer engaged in the operation of a common carrier by rail and subject to the provisions of Part I of the Interstate Commerce Act; or

(c) Any employee of a carrier by air subject to the provisions of Title II of the Railway Labor Act; or

(d) Any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(e) Any employee employed as a seaman; or

(f) Any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located in a city or town of 100,000 population or less, according

to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Bureau of the Budget, which has a total population in excess of 100,000, or is located in a city of 25,000 population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(g) Any sales person, parts person or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if the employee is employed by a non-manufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(h) Any sales person primarily engaged in selling trailers, boats, or aircraft if the salesperson is employed by a non-manufacturing establishment primarily engaged in the business of selling trailers, boats or aircraft to ultimate purchasers; or

(i) Any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Commissioner shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under OAR 839-020-0030; or

(j) Any employee employed in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water for agricultural purposes; or

(k) Any employee with respect to the employee's employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on the farmer's own account or in conjunction with other farmers, if such employee is primarily employed during the employee's workweek in agriculture by such farmer, and if such employee is paid for the operations at a wage rate not less than that prescribed by ORS 653.025; or

(l) Any employee employed within the area of production (as defined by the Commissioner) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operation; or

(m) Any employee engaged in the transportation and preparation for transportation of fruits and vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the State of Oregon, or any employee engaged in transportation, whether or not performed by the farmer, between the farm and any point within the State of Oregon of persons employed or to be employed in the harvesting of fruits or vegetables; or

(n) Any employee who is employed in domestic service in a household and who resides in such household; or

(o) Any employee employed by an establishment which is a motion picture theater; or

(p) Any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by the employee's employer in such forestry or lumbering operations does not exceed eight; or

(q) Any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and receives compensation for employment in excess of 56 hours in any workweek at a rate not less than one and one-half times the regular rate at which the employee is employed. (Reference: Sec. 13(b), (1), (2), (3), (5), (6), (9), (10), (11), (12), (13), (14), (16), (21), (27), (28), and (29), FLSA)

(4) The provisions of OAR 839-020-0030 shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homemaker engaged in the making of wreaths composed principally of natural holly, pine, cedar or other evergreens

(including the harvesting of the evergreens or other forest products used in making such wreaths). (Reference: Sec. 13(d), FLSA)

Stat. Auth.: ORS 653.040 & 653.261

Stats. Implemented: ORS 653.261

Hist.: BL 5-1989(Temp), f. 8-18-89, cert. ef. 9-1-89, (and corrected by BL 10-1989(Temp), f. 12-4-89, cert. ef. 9-1-89); BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BL 10-1990, f. & cert. ef. 7-26-90; BL 5-1992, f. 4-24-92, cert. ef. 4-29-92; BL 6-1992(Temp), f. & cert. ef. 6-5-92; BL 14-1992, f. & cert. ef. 12-14-92; BL 9-1996, f. & cert. ef. 10-8-96; BLI 7-2003, f. 12-31-03, cert. ef. 1-1-04

839-020-0130

Public Employees

(1) Pursuant to the provisions of ORS 653.261(3), OAR 839-020-0030 does not apply to individuals employed by the State of Oregon or any political subdivision or quasi-municipal corporation thereof under the following circumstances:

(a) When the provisions of any law prescribe rules pertaining to overtime pay; or

(b) When the provisions of a collective bargaining agreement prescribes rules pertaining to overtime pay.

(2) Individuals employed by a public employer are subject to the overtime pay provisions of ORS 653.268 unless otherwise exempt under ORS 653.269. The State of Oregon or any political subdivision or quasi-municipal corporation thereof is a public employer and the overtime provisions of OAR 839-020-0030 do not apply to its employees.

(3) As used in this rule, "public employer" means the State of Oregon, including the following political subdivisions: cities, counties, community colleges, school districts, special districts and public and quasi-public corporations.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.261

Hist.: BL 5-1989(Temp), f. 8-18-89, cert. ef. 9-1-89, (and corrected by BL 10-1989(Temp), f. 12-4-89, cert. ef. 9-1-89); BL 1-1990, f. 2-27-90, cert. ef. 2-28-90; BL 9-1996, f. & cert. ef. 10-8-96

839-020-0135

Agricultural Employees

Pursuant to the provisions of ORS 653.261(2), OAR 839-020-0030 does not apply to individuals employed in agricultural employment.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.261(2)

Hist.: BL 5-1989(Temp), f. 8-18-89, cert. ef. 9-1-89, (and corrected by BL 10-1989(Temp), f. 12-4-89, cert. ef. 9-1-89); BL 1-1990, f. 2-27-90, cert. ef. 2-28-90

Exemptions from Minimum Wage and Overtime

839-020-0150

Exemptions

(1) An individual employed as a resident manager of an adult foster home is not subject to the minimum wage and overtime provisions of ORS 653.010 to 653.261 so long as the resident manager is domiciled at the adult foster home and is directly responsible for the daily care of the residents residing in the home; and

(a) The resident manager is employed to work in a licensed adult foster home as defined in ORS 443.705(4) pursuant to the Adult Foster Homes Licensing Law (ORS 443.705 to 443.825); or

(b) The resident manager is employed to work in an adult foster home which is exempt from the license, inspection and fee provisions of the Adult Foster Homes Licensing Law (ORS 443.705 to 443.825) pursuant to ORS 443.780.

(2) The provisions of ORS 653.010 to 653.261 and these rules pertaining to the payment of minimum wage and overtime pay do not apply to inmates of the Oregon Department of Corrections assigned to a work release program or otherwise working in gainful private employment pursuant to ORS 144.480, relating to prison inmate labor.

(3) The provisions of ORS 653.010 to 653.261 and these rules do not apply to persons serving as a referee or assistant referee in a youth or adult recreational soccer match. Pursuant to Chapter 765, 2001 Oregon laws, these referees and assistant referees are independent contractors.

(4) The provisions of OAR 839-020-0050 to 839-020-0065 relating to working conditions do not apply to employees employed by public employers provided that the conditions of ORS 653.261(3) are met.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.020

Hist.: BL 9-1996, f. & cert. ef. 10-8-96; BLI 1-2002, f. & cert. ef. 1-9-02; BLI 8-2003, f. 12-31-03, cert. ef. 2-1-04

Exemptions Relating to Persons Employed by a Public Agency in Fire Protection and Law Enforcement Activities

839-020-0200

Authority

ORS 653.269(3) requires the Labor Commissioner to define certain terms relating to persons employed by a public employer in fire protection and law enforcement activities (including security personnel in corrections institutions), who are exempt from the overtime provisions of ORS 653.268.

Stat. Auth.: ORS 279.342(3)

Stats. Implemented: ORS 279.342

Hist.: BL 8-1997, f. & cert. ef. 11-13-97; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0210

Generally

(1) OAR 839-020-0200 to 839-020-0270 are adopted pursuant to ORS 653.269(3). The rules define certain public employees and activities exempt from the overtime provisions of 653.268.

(2) Employees of a public employer, as defined in ORS 243.650, are exempt from the overtime pay requirements of ORS 653.268 when they are employed in:

(a) Fire protection activities; or

(b) Law enforcement activities, including security personnel in correctional institutions.

(3) The application of OAR 839-020-0200 to 839-020-0270 is limited to public agencies, and does not apply to any private organization engaged in furnishing fire protection or law enforcement services, even if the services are provided under contract with a public agency.

Stat. Auth.: ORS 279.342(3)

Stats. Implemented: ORS 279.342

Hist.: BL 8-1997, f. & cert. ef. 11-13-97; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0220

Definitions

As used in ORS 653.269 and OAR 839-020-0200 to 839-020-0270, unless the context requires otherwise:

(1) "Employees employed in fire protection activities" include:

(a) A "firefighter" as that term is defined in ORS 652.050; and

(b) Any employee:

(A) Who is employed by an organized fire department or fire protection district;

(B) Who has been trained to the extent required by state statute or local ordinance;

(C) Who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and

(D) Who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills, and inspecting homes and schools for fire hazards.

(c) Employees as defined in paragraphs (a) and (b) of this subsection, regardless of their status as "trainee," "probationary," or "permanent," or of their particular specialty or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief, or chief), and regardless of their assignment to support activities of the type described in section (2) of this rule, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity;

(d) Rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities (see OAR 839-020-0260);

(e) Employees who work for forest conservation agencies or other public agencies charged with forest fire fighting responsibilities and who direct or engage in:

(A) Fire spotting or lookout activities; or

(B) Fighting fires on the fire line or from aircraft; or

(C) Operating tank trucks, bulldozers and tractors for the purpose of clearing fire breaks.

(f) Employees as defined in paragraph (e) of this subsection, regardless of their status as full time or part time agency employees

or as temporary or casual workers employed for a particular fire or for periods of high fire danger, including those who have had no prior training;

(g) Any employee who actually engages in fire protection activities as defined in this section and in the simultaneous performance of such related functions as housekeeping, equipment maintenance, tower repairs and/or the construction of fire roads.

(2) "Employees employed in fire protection activities" does not include:

(a) "Civilian" employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks and stenographers;

(b) Maintenance and office personnel who do not fight fires on a regular basis, although such employees may be included during emergency situations when they are called upon to spend substantially all (i.e., 80 percent or more) of their time during the applicable work period in one or more of the activities described in paragraph (c) of this section.

(3) "Employees employed in law enforcement activities" include:

(a) Employee who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by state statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes and:

(A) Who has the power to arrest; and

(B) Who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigation and law enforcement techniques, community relations, medical aid and ethics.

(b) Employees as defined in paragraph (a) of this subsection, regardless of their rank, or of their status as "trainee," "probationary," or "permanent," and regardless of their assignment to duties incidental to the performance of their law enforcement activities such as equipment maintenance or lecturing, or to support activities of the type described in section (8) of this rule, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity;

(c) Rescue and ambulance service personnel if such personnel form an integral part of the public agency's law enforcement activities (see OAR 839-020-0260).

(4) "Employees employed in law enforcement activities" typically include city police; district or local police, sheriffs, under sheriffs or deputy sheriffs who are regularly employed and paid as such; court marshals or deputy marshals; constables and deputy constables who are regularly employed and paid as such; border control agents; state troopers and highway patrol officers. Other agency employees not specifically mentioned may, depending upon the particular facts and pertinent statutory provisions in that jurisdiction meet the tests described in section (3) of this rule. If so, for purposes of ORS 653.269(3), they will also qualify as law enforcement officers. Such employees might include, for example, fish and game wardens or criminal investigative agents assigned to the office of a district attorney, an attorney general, a solicitor general or any other law enforcement agency concerned with keeping public peace and order and protecting life and property.

(5) Employees who do not meet each of the three tests described in section (3) of this rule are not engaged in "law enforcement activities" as that term is used in ORS 653.269(3). Employees who normally would not meet each of these tests include:

(a) Building inspectors (other than those defined in OAR 839-020-0240);

(b) Health inspectors;

(c) Animal control personnel;

(d) Sanitarians;

(e) Civilian traffic employees who direct vehicular and pedestrian traffic at specified intersections or other control points;

(f) Civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices;

(g) Wage and hour compliance officers;

(h) Equal employment opportunity compliance officers;

(i) Tax compliance officers;

(j) Coal mining inspectors; and

(k) Building guards whose primary duty is to protect the lives and property of persons within the limited area of the building.

(6) "Correctional institution" means any government facility maintained as part of a penal system for the incarceration or detention of persons suspected or convicted of having breached the peace or committed some other crime. Typically, such facilities include penitentiaries, prisons, prison farms, county, city and village jails, precinct house lockups and reformatories.

(7) "Security personnel in correctional institutions" include those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution (as in the case of road gangs). These employees are considered to be engaged in law enforcement activities regardless of their rank (e.g., warden, assistant warden or guard) or of their status as "trainee," "probationary," or "permanent," and regardless of their assignment to duties incidental to the performance of their law enforcement activities, or to support activities of the type described in section (5) of this rule, whether or not such assignment is for training or familiarization purposes or for reasons of illness, injury or infirmity.

(8) "Employees employed in law enforcement activities" does not include:

(a) "Civilian" employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatcher, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers;

(b) Employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical services, even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties.

Stat. Auth.: ORS 279.342(3)

Stats. Implemented: ORS 279.342

Hist.: BL 8-1997, f. & cert. ef. 11-13-97

839-020-0230

Limitation on Nonexempt Work

(1) Employees engaged in fire protection or law enforcement activities as defined in OAR 839-020-0220 may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat the exemption in ORS 653.269(3) unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of the person's working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of OAR 839-020-0200 to 839-020-0270.

(2) Public agency fire protection and law enforcement personnel may, at their own option, undertake employment for the same employer on an occasional or sporadic and part-time basis in a different capacity from their regular employment. The performance of such work does not affect the application of the exemption in ORS 653.269(3) with respect to the regular employment. In addition, the hours of work in the different capacity need not be counted as hours worked for overtime purposes on the regular job, nor are such hours counted in determining the 20 percent limitation for nonexempt work discussed in subsection (1) of this section.

Stat. Auth.: ORS 279.342(3)

Stats. Implemented: ORS 279.342

Hist.: BL 8-1997, f. & cert. ef. 11-13-97; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0240

Public Agency Employees Engaged in Both Fire Protection and Law Enforcement Activities

Some public agencies have employees (often called "public safety officers") who engage in both fire protection and law enforcement activities, depending on the agency needs at the time. This dual assignment would not defeat the exemption in ORS 653.269(3), provided that each of the activities performed meets the appropriate tests set forth in OAR 839-020-0220. This is so regardless of how the employee's time is divided between the two activities. However, all time spent

in connection with fire protection or law enforcement functions, or with neither, must be combined for purposes of the 20 percent limitation on nonexempt work as provided in OAR 839-020-0230.

Stat. Auth.: ORS 279.342(3)
Stats. Implemented: ORS 279.342
Hist.: BL 8-1997, f. & cert. ef. 11-13-97

839-020-0250

Effect of Training Time

The attendance at a bona fide fire or police academy or other training facility, when required by the employing agency, constitutes engagement in activities under ORS 653.269(3) only when the employee meets all the applicable tests described in OAR 839-020-0220 (except for the power of arrest for law enforcement personnel), as the case may be. If the applicable tests are met, then basic training or advanced training is considered incidental to, and part of, the employee's fire protection or law enforcement activities.

Stat. Auth.: ORS 279.342(3)
Stats. Implemented: ORS 279.342
Hist.: BL 8-1997, f. & cert. ef. 11-13-97

839-020-0260

Ambulance and Rescue Service Employees

(1) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by ORS 653.269(3) if their services are substantially related to firefighting or law enforcement activities in that:

(a) The ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties; and

(b) The ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents.

(2) Where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

(3) Ambulance and rescue service employees are not exempt under ORS 653.269(3) when they are employees of public agencies engaged in the operation of a hospital or an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institutions.

(4) Ambulance and rescue service employees of private organizations are not exempt from the provisions of ORS 653.269(3) even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency or their employer is under contract with a public agency to provide such services.

Stat. Auth.: ORS 279.342(3)
Stats. Implemented: ORS 279.342
Hist.: BL 8-1997, f. & cert. ef. 11-13-97; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0270

Other Exemptions

Although ORS 653.269(3) provides special exemptions for employees of public agencies engaged in fire protection and law enforcement activities, such workers may also be subject to other exemptions in ORS 653.269, and public agencies may apply such other exemptions if applicable. For example, a high-ranking police official engaged in law enforcement activities who is exempt from the provisions of ORS 653.268 as an employee employed in fire protection activities pursuant to the provisions of ORS 653.269(3) and OAR 839-020-0320, may also be exempt from ORS 653.268 as an "executive" employee by virtue of the exemption for any employee employed as an executive, administrative, supervisory, or professional employee, (as those terms are defined in OAR 839-020-0320) pursuant to the provisions of ORS 653.269(5)(a).

Stat. Auth.: ORS 279.342(3)
Stats. Implemented: ORS 279.342
Hist.: BL 8-1997, f. & cert. ef. 11-13-97

Exemptions Relating to Executive, Administrative, Supervisory and Professional Employees of a Public Agency

839-020-0300

Authority

ORS 653.269(5)(a) requires the Labor Commissioner to define certain terms relating to executive, administrative, supervisory or pro-

fessional employees of a public agency who are exempt from the overtime provisions of ORS 653.268 because of the nature of their employment.

Stat. Auth.: ORS 279.342(5)(a)
Stats. Implemented: ORS 279.342
Hist.: BL 8-1997, f. & cert. ef. 11-13-97

839-020-0310

Generally

(1) OAR 839-020-0300 to 839-020-0350 are adopted pursuant to ORS 653.269(5)(a). The rules define the nature of executive, administrative, supervisory and professional employment for purposes of the overtime pay exemption under ORS 653.268.

(2) The application of OAR 839-020-0300 to 839-020-0350 is limited to public agencies, and does not apply to the employees of any private organization.

Stat. Auth.: ORS 279.342(5)(a)
Stats. Implemented: ORS 279.342
Hist.: BL 8-1997, f. & cert. ef. 11-13-97

839-020-0320

Definitions

As used in ORS 653.268 to 653.269, unless the context requires otherwise:

(1) Employees exempted from overtime because of the executive nature of their employment means employees:

(a) Whose primary duty consists of the management of the public agency in which they are employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly direct the work of two or more other employees therein; and

(c) Who have the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercise discretionary powers; and

(e) Who do not devote more than 20 percent, or, in the case of an employee of a retail or service establishment, who does not devote as much as 40 percent of the employee's hours of work in the work-week to activities which are not directly and closely related to the performance of the work described in subsections (a) through (d) of this section: Provided, that this subsection will not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment; and

(f) Who are compensated for their services on a salary basis at a rate of not less than \$155 per week, exclusive of board, lodging, or other facilities: Provided, that an employee who is compensated on a salary basis at a rate of not less than \$250 per week, exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the agency in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, will be deemed to meet all the requirements of this section.

(2) Employees exempted from overtime because of the administrative nature of their employment means employees:

(a) Whose primary duty consists of either:

(A) The performance of office or non-manual work directly related to management policies or general business operations of their employer or their employer's customers; or

(B) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercise discretion and independent judgment; and

(c) Who regularly and directly assist an employee employed in an executive or administrative capacity (as such terms are defined in this rule); or

(A) Who perform under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or

(B) Who execute under only general supervision special assignments and tasks; and

(d) Who do not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent of the employee's hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in subsections (a) through (c) of this section; and

(e)(A) Who are compensated for their services on a salary or fee basis at a rate of not less than \$155 per week, exclusive of board, lodging, or other facilities; or

(B) Who, in the case of academic administrative personnel, are compensated for services as required by paragraph (e)(A) of this subsection, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: Provided, that an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week, exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in section (a) of this subsection, which includes work requiring the exercise of discretion and independent judgment, will be deemed to meet all the requirements of this section.

(3) Employees exempted from overtime because of the supervisory nature of their employment means employees:

(a) Whose primary duty consists of the management of the enterprise in which they are employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly direct the work of two or more other employees therein; and

(c) Who have the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercise discretionary powers; and

(e) Who do not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent of the employee's hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in sections (a) through (d) of this section: Provided, that this subsection will not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment;

(f) Who are compensated for their services on a salary basis at a rate of not less than \$155 per week, exclusive of board, lodging, or other facilities: Provided, that an employee who is compensated on a salary basis at a rate of not less than \$250 per week, exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the agency in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, will be deemed to meet all the requirements of this section.

(4) Employees exempted from overtime because of the professional nature of their employment means employees:

(a) Whose primary duty consists of the performance of:

(A) Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or

(B) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee; or

(C) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who are employed and engaged in this activity as teachers in the school system or educational establishment or institution by which they are employed; or

(D) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who are employed and engaged in these activities as computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the

computer software field, as provided in OAR 839-020-0350; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who do not devote more than 20 percent of their hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in subsections

(a) Through (c) of this section; and

(e) Who are compensated for services on a salary or fee basis at a rate of not less than \$170 per week, exclusive of board, lodging, or other facilities: Provided, that this subsection will not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in subsection (a)(C) of this section: Provided further, that an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week, exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance either of work described in subsection (a), (A), or (C) or (D) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section: Provided further, that the salary or fee requirements of this paragraph will not apply to an employee engaged in computer-related work within the scope of paragraph (a)(D) of this section and who is compensated on an hourly basis at a rate in excess of \$27.63 per hour.

Stat. Auth.: ORS 279.342(5)(a)

Stats. Implemented: ORS 279.342

Hist.: BL 8-1997, f. & cert. ef. 11-13-97; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0330

Exception to Salary or Fee Basis

(1) An employee who otherwise meets the requirements of OAR 839-020-0310 must not be disqualified from exemption under ORS 653.269(5)(a) on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one workday when accrued leave is not used by an employee because:

(a) Permission for its use has not been sought or has been sought and denied;

(b) Accrued leave has been exhausted; or

(c) The employee chooses to use leave without pay.

(2) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough must not disqualify the employee from being paid "on a salary basis" except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

Stat. Auth.: ORS 279.342(5)(a)

Stats. Implemented: ORS 279.342

Hist.: BL 8-1997, f. & cert. ef. 11-13-97; BLI 1-2002, f. & cert. ef. 1-9-02

839-020-0350

Computer Professionals

Employees exempt from overtime because of the professional nature of their employment includes employees who are computer systems analysts, computer programmers, software engineers, or other similarly skilled workers, whose primary duties consist of the following:

(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system specifications;

(2) The design, development, documentation, analysis, creation,

testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(3) The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(4) A combination of duties described in subsections (1), (2) and (3) of this section, the performance of which requires the same level of skills.

Stat. Auth.: ORS 279.342(5)(a)

Stats. Implemented: ORS 279.342

Hist.: BL 8-1997, f. & cert. ef. 11-13-97; BLI 1-2002, f. & cert. ef. 1-9-02

Civil Penalties

839-020-1000

Violations Separate and Distinct

Each violation is a separate and distinct offense. In the case of continuing violations, each day's continuance is a separate and distinct violation.

Stat. Auth.: ORS 653.040

Stats. Implemented: Ch. 314, 1997 OL

Hist.: BL 9-1997, f. & cert. ef. 11-13-97

839-020-1010

Violations for Which a Civil Penalty May Be Assessed

(1) The commissioner may assess a civil penalty for any of the following willful violations:

(a) Failure to pay the applicable minimum wage for all hours worked in violation of ORS 653.025 and OAR 839-020-0010.

(b) Failure to pay overtime for all hours worked over forty (40) in a week in violation of OAR 839-020-0030.

(c) Payment to mentally or physically handicapped persons less than a fixed minimum hourly wage rate which has been approved by the commissioner in violation of ORS 653.030 and OAR 839-020-0015;

(d) Payment to student-learners less than a fixed minimum hourly wage rate which has been approved by the commissioner in violation of ORS 653.030 and OAR 839-020-0015;

(e) Failure to make required payroll and other records in violation of ORS 653.045 and OAR 839-020-0080;

(f) Failure to keep available required payroll and other records in violation of ORS 653.045 and OAR 839-020-0080;

(g) Failure to supply each of the employer's employees with itemized statements of amounts and purposes of deductions in the manner provided in ORS 652.610 in violation of 653.045, OAR 839-020-0012 and 839-020-0080;

(h) Failure to keep summaries of ORS 653.010 to 653.261 and rules promulgated thereto by the commissioner and the Wage and Hour Commission posted in a conspicuous and accessible place in or about the premises where such employees are employed in violation of ORS 653.050;

(i) Discharging or discriminating in any other manner against any employee in violation of ORS 653.060:

(A) Because the employee has made complaint that the employee has not been paid wages in accordance with ORS 653.010 to 653.261;

(B) Because the employee has caused to be instituted or is about to cause to be instituted any proceedings under or relating to ORS 653.010 to 653.261; or

(C) Because the employee has testified or is about to testify in any such proceedings.

(j) Failure to provide to each employee appropriate meal periods in violation of OAR 839-020-0050;

(k) Failure to provide to each employee appropriate rest periods in violation of OAR 839-020-0050;

(l) Requiring any employee to lift excessive weights in violation of OAR 839-020-0060; or

(m) Employing any employee to work under any conditions in violation of OAR 839-020-0065.

(2) The civil penalty for any one violation will not exceed \$1000. The actual amount of the civil penalty will depend on all the facts and circumstances referred to in OAR 839-020-1020.

(3) The civil penalties set out in this rule will be in addition to any other penalty assessed or imposed by law or rule.

Stat. Auth.: ORS 653.040

Stats. Implemented: Ch. 314, 1997 OL

Hist.: BL 9-1997, f. & cert. ef. 11-13-97; BLI 1-2002, f. & cert. ef. 1-9-02; BLI 15-2002, f. 10-17-02, cert. ef. 10-18-02

839-020-1020

Criteria for Determining a Civil Penalty

(1) The commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed and cite those the commissioner finds to be appropriate:

(a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes or rules;

(b) Prior violations, if any, of statutes or rules;

(c) The magnitude and seriousness of the violation;

(d) Whether the employer knew or should have known of the violation;

(e) The opportunity and degree of difficulty to comply;

(f) Whether the employers' action or inaction has resulted in the loss of a substantive right of an employee.

(2) It shall be the responsibility of the employer to provide the commissioner any mitigating evidence concerning the amount of the civil penalty to be assessed.

(3) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the employer for the purpose of reducing the amount of the civil penalty to be assessed.

Stat. Auth.: ORS 653.040

Stats. Implemented: Ch. 314, 1997 OL

Hist.: BL 9-1997, f. & cert. ef. 11-13-97

DIVISION 21

WAGE AND HOUR COMMISSION

Rules Regulating the Employment of Minors in Oregon

Procedural Rules

839-021-0001

Generally

The procedural rules of the Wage and Hour Commission are contained in OAR 839-022-0000 to 839-022-0060.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.505 - 653.545

Hist.: BL 6-1988, f. & cert. ef. 4-12-88; BLI 3-2002, f. 1-23-02, cert. ef. 1-24-02; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-021-0006

Definitions

As used in ORS 653.305 to 653.370 and in OAR 839-021-0001 to 839-021-0500, unless the context requires otherwise:

(1) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur-bearing animals, or poultry and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market, or to carriers for transportation to market. "Agricultural employment" is employment in "Agriculture" as herein defined.

(2) "Bureau" means Bureau of Labor and Industries of the State of Oregon.

(3) "Commission" means the Wage and Hour Commission of the State of Oregon.

(4) "Commissioner" means the Commissioner of the Bureau of Labor and Industries.

(5) "Employ" has the same meaning as that which appears in ORS 653.010(2).

(6) "Employer" has the same meaning as that which appears in ORS 653.010(3).

(7) "Employment Certificate" means the employment certificate issued to employers for the employment of minors pursuant to ORS 653.307, and the employment permit referred to in ORS 653.320(3).

(8) "Executive Secretary" means the Commissioner of the Bureau of Labor and Industries.

(9) "Harvest Season" means a period of time during which the crop or crops of the agricultural employer for whom a minor is

(a) A period of not less than 30 minutes for rest and meal during which a minor is relieved of all duties and commencing within the first five hours and one minute after reporting for work;

(b) If the minor is 16 years of age or older, a period of not less than 30 minutes in which to eat while continuing to perform duties or remain on call but which is not deducted from the minor's hours worked. This is permitted only in those cases where the nature of the work prevents the minor from being relieved from all duty.

(3) As used in this rule, unless the context requires otherwise, "Appropriate Rest Periods" means a period of rest of not less than 15 minutes without deduction from the minor's hours worked for every four hours or major part thereof worked in one work period. This period of rest must be in addition to time allowed for the usual meal period. Insofar as feasible, considering the nature and type of job or position, such period of rest is to be provided approximately in the middle of each four hour segment or major part thereof. The employer must relieve the minor from all duties during the rest period.

(4) The commission may for good cause shown exempt an employer or class of employers from the requirements of section (1) of this rule.

(5) Application forms for exemption from the requirements of section (1) of this rule, may be obtained at any office of the Bureau of Labor and Industries and must be filed with the Administrator of the Wage and Hour Division, 800 N.E. Oregon #32, Portland, OR 97232.

(a) The administrator will investigate the employment and the facts and circumstances set out in the application in support of the requested exemption and if the administrator determines that the requested exemption will not be detrimental to the health of the minors affected, the administrator will issue a letter of authorization setting out the terms and conditions of the exemption granted and the period of time for which it will be effective.

(b) In the event that the administrator issues the letter of authorization referred to in section (5)(a) of this rule, the administrator will, at the same time, provide the employer with three copies of a notice which the employer is required to post on the business premises in those places most frequented by those minors affected by the requested exemption. The notice will include:

(A) A recitation that the employer has requested an exemption from the requirements of this rule and that the administrator has tentatively granted such exemption; and

(B) The date, time, and place of the next public meeting of the Wage and Hour Commission at which the commission will make final disposition of the application for exemption; and

(C) A recitation to the effect that the Wage and Hour Commission will take public testimony concerning its disposition of the employer's application for exemption and will consider documents relative to this disposition; and

(D) An address to which such documents and correspondence should be addressed.

(6) At the next regularly scheduled meeting of the Wage and Hour Commission, the administrator will report the facts and circumstances of the application, as well as the results of the administrator's investigation to the commission. The commission may adopt, vacate, or modify the administrator's disposition of the application.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653

Hist.: BL 142, f. 6-28-73, ef. 7-15-73; BL 13-1979, f. & ef. 9-6-79; BL 6-1988, f. & cert. ef. 4-12-88; BLI 4-1998, f. & cert. ef. 3-5-98; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-021-0087

Working Conditions

(1) An employer may not employ any minor to work in the State of Oregon, except under the following conditions:

(a) Where a sanitary and safe work area is provided;

(b) Where adequate lighting is provided;

(c) Where adequate ventilation is provided;

(d) Where adequate washrooms are provided;

(e) Where adequate toilet facilities are provided;

(f) Where the employer is in full compliance with provisions of ORS Chapter 654 (The Oregon Safe Employment Act) and the rules and regulations promulgated thereunder. For the purposes of this rule, the compliance status of the employer is determined by the Occupational Safety and Health Division of the Insurance and Finance Department;

(g) Where the employer is in full compliance with the provisions of the following statutes relating to the payment of wages:

(A) ORS 652.110 to 652.190;

(B) ORS 652.610;

(C) ORS 653.010 to 653.265;

(D) ORS 279.348 to 279.365;

(E) **Title 29, U.S.C., 201, et seq.** (Federal Fair Labor Standards Act);

(F) **Title 40, U.S.C., 276a.** (Davis-Bacon Act);

(G) **Title 41, U.S.C., 351, et seq.** (Service Contract Act).

(2) When the following facilities are provided, an employer may not employ any minor to work in the State of Oregon unless:

(a) The rest rooms provided are adequate;

(b) The dressing rooms provided are adequate;

(c) The lunch rooms provided are adequate;

(d) The cot or stretcher provided for use in illnesses, accidents, or other emergencies is adequate.

(3) Upon expiration of ten days after receipt of notice and recommendations of the appropriate governmental agency with respect to temperature and humidity conditions or within such further time after receipt of the notice as may be prescribed by the commission, an employer may not employ any minor without complying with the recommendations.

(4) Every employer must provide to each minor when required by the nature of the work, "suitable seats," "suitable tables," and "suitable work benches":

(a) "Suitable seats" means convenient, comfortable and safe seats where the work is such that minors may sit while working. "Suitable seats" in cannery occupations means one for every three minors who work in or on inspection tables and inspection belts;

(b) "Suitable tables" and "suitable work benches" mean tables and work benches so constructed as to give the greatest possible comfort and convenience to minors where the nature of the work and the safety and convenience of the minor requires a bench or table.

(5) An employer may not require a minor to report for work without providing adequate work to earn a reasonable compensation, or paying to such minor a reasonable compensation in lieu thereof. As used in this paragraph:

(a) "Adequate work" means sufficient work to earn at least 1/2 the amount the minor would have earned at the minor's regular rate had the minor worked the hours that the minor and the employer previously agreed to;

(b) "Reasonable compensation" means the greater of:

(A) The amount the minor receives for one hour of work at the minor's regular rate of pay; or

(B) The amount determined by multiplying the minor's regular rate of pay by one-half the hours the minor and the employer agreed the minor would work.

(6) The provisions of section (5) of this rule do not apply when all the following conditions are met pertaining to the employer providing the minor notice not to report to work:

(a) The employer has a policy describing how notice not to report to work will be given minors; and

(b) The employer posts its notice policy in a conspicuous place frequented by employees at the worksite where the minor is employed; and

(c) The employer communicates this policy to the minor prior to the minor's first day of work; and

(d) The employer makes a good faith attempt to follow its policy so as to give the minor notice before the minor must leave home to travel to work; or

(7) When circumstances beyond the employer's control prevent the performance of the work the minor was to perform during the hours the minor had agreed to or was scheduled to work. Such circumstances include, but are not limited to, acts of nature (e.g., snowstorms, flooding), emergencies (e.g., fires, power outages), and unforeseeable equipment failures.

(8) The employer has the burden to maintain records sufficient to resolve any dispute arising under section (5) of this rule concerning the hours the minor agreed to or was scheduled to work.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 653

Stats. Implemented: ORS 279.348 - 279.365, 652.110 - 652.190, 652.305, 652.610, 653.101 - 653.265 & 654

Hist.: BL 142, f. 6-28-73, ef. 7-15-73; BL 2-1987, f. & ef. 1-16-87; BL 6-1987, f. & ef. 3-19-87; BL 6-1988, f. & cert. ef. 4-12-88; BL 12-1990(Temp), f. 8-16-90, cert. ef. 8-17-90; BL 2-1991, f. 1-23-91, cert. ef. 2-14-91; BL 19-2002, f. 3-28-02, cert. ef. 4-1-02

839-021-0092

Weight Lifting

No minor shall be required to lift excessive weights.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.305

Hist.: BL 142, f. 6-28-73, ef. 7-15-73; BL 2-1987, f. & ef. 1-16-87; BL 6-1987, f. & ef. 3-19-87

Prohibited Employment

839-021-0097

Special Employment Situations

(1) No minor under 16 years of age:

(a) May be employed in an occupation or type of work declared hazardous by the commission (see OAR 839-021-0102);

(b) May be assigned any duties in connection with an organized youth camp prior to 6 a.m. or after 10 p.m., or more than eight hours per day;

(c) May be employed to act as a canvasser, peddler or "outside salesperson" as defined in ORS 653.010(8), from house to house.

(2) Except as provided in subsection (3) of this section, no minor may be employed at any work on or around any unenclosed commercial wharves or docks or in any unenclosed buildings extending over water, unless:

(a) There is located at the site of the work and conspicuously displayed at such site adequate safety equipment including, but not limited to:

(A) For every 30 linear feet of unenclosed area no less than one Type IV personal flotation device containing 16.5 pounds of buoyancy and one polypropylene line no less than 30 feet in length attached thereto;

(B) No less than one pole of not less than ten feet in length with a blunt hook attached thereto; and

(b) The minors so employed have been adequately instructed in the use of such equipment;

(c) There is provision made that no minor employee ever be required to work out of sight and hearing of another employee; and

(d) There is located at the site of the work and conspicuously displayed an alarm device adequate to alert all employees on the job site to the existence of a perilous situation.

(3) Minors may not be employed on or around fishing vessels except under the following conditions:

(a) Minors of 16 and 17 years of age may be employed as assistants on chartered fishing or pleasure boats;

(b) Minors of 14 and 15 years of age may be employed at dock areas used by chartered fishing or pleasure boats; and

(c) Minors may be employed on commercial fishing vessels without an employment certificate when employed and supervised by the minors' grandfather, grandmother, father, mother, brother, sister, uncle, or aunt.

Stat. Auth.: ORS 653.305 & 653.525

Stats. Implemented: ORS 653.305

Hist.: BL 142, f. 6-28-73, ef. 7-15-73; BL 185, f. 1-30-76, ef. 2-1-76; BL 11-1978(Temp), f. 9-18-78, ef. 9-19-78; BL 14-1978, f. 12-13-78, ef. 1-17-79; BL 2-1979, f. & ef. 2-13-79; BL 1-1985, f. 2-21-85, ef. 3-1-85; BL 6-1988, f. & cert. ef. 4-12-88; BL 3-1995, f. 9-8-95, cert. ef. 9-9-95; BL 19-2002, f. 3-28-02, cert. ef. 4-1-02

839-021-0102

Occupations and Types of Work Declared Hazardous for Minors Under 16 Years of Age

(1) Pursuant to OAR 839-021-0097(1)(a), the commission hereby declares the following occupations and types of work to be hazardous and any employment by minors under 16 years of age is hereby prohibited:

- (a) Baking;
- (b) Blast furnaces;
- (c) Breweries;
- (d) Bridge operations;
- (e) Briquet plants;
- (f) Building cleaning (exterior);
- (g) Cattle handling;
- (h) Coal plants or bunkers;

- (j) Cold storage plants;
- (k) Commercial docks;
- (l) Construction (alteration, repair, painting, or demolition of buildings, bridges, and structures);

(m) Cooking (except: cooking with a gas or electric grill that does not have an open flame; using a microwave to warm food; or using a deep fryer that is equipped with a device that automatically raises and lowers the basket);

(n) Creosoting works;

(o) Distilleries;

(p) Electric power plants, lines;

(q) Electric light plants, lines;

(r) Engineering works (construction, improvement, alteration, or repair of steam plants, water power plants, telephone, telegraph, or electric plants or lines or railroads, streets, highways, sewers, harbors, docks, or canals);

(s) Firefighting;

(t) Foundries;

(u) Garbage works;

(v) Gas works;

(w) Grain elevators;

(x) Gravel or sand plant or bunker;

(y) Ice plants;

(z) Kitchen cleaning of equipment when the surface is hotter than 100 degrees Fahrenheit, or filtering or disposing of cooking oil or grease that is hotter than 100 degrees Fahrenheit;

(aa) Railroads;

(bb) Land clearing (with blasting or presence of heavy equipment);

(cc) Logging operations;

(dd) Longshoring;

(ee) Lumber loading;

(ff) Mechanical amusements;

(gg) Milk condenseries;

(hh) Mines;

(ii) Moving buildings, bridges, and structures;

(jj) Peace officer work;

(kk) Powder works;

(ll) Quarries;

(mm) Reduction works;

(nn) Rock crusher;

(oo) Smelters;

(pp) Stockyards;

(qq) Surveying;

(rr) Tanneries;

(ss) Tree surgery;

(tt) Well digging and drilling;

(uu) Window cleaning (outside above ground);

(vv) Wineries;

(ww) Wood cutting, sawing.

(2) The following occupations and types of work are declared to be hazardous for any minor under 16 years of age when the work is performed in rooms or areas having power-driven machinery:

(a) Boat repair shops;

(b) Canneries;

(c) Chop mills;

(d) Creameries;

(e) Cycle repair shops;

(f) Electrotyping plants;

(g) Engraving plants;

(h) Factories (manufacturing, repair, alteration);

(i) Feed mills;

(j) Flour mills;

(k) Garages;

(l) Grain warehouses;

(m) Irrigation works;

(n) Laundries;

(o) Lithographing plants;

(p) Mills;

(q) Motor repair shops;

(r) Photoengraving plants;

(s) Printing plants;

(t) Shipbuilding operations;

(u) Stereotyping plants;

(v) All kinds of work in workshops or any premise, room, or place where power-driven machinery is used in or incidental to adapting articles or goods for sale.

(3) The following occupations or types of work are declared to be hazardous for any minor under 16 years of age and these minors are permitted to perform office work only in the following operations:

- (a) Auto wrecking yards;
- (b) Junk dealers;
- (c) Motor vehicle (transportation);
- (d) Lumbering;
- (e) Water works.

Stat. Auth.: ORS 653.525

Stats. Implemented: ORS 653.305

Hist.: BL 116, f. 10-20-71, ef. 11-1-71, Renumbered from 839-021-0045; BL 6-1988, f. & cert. ef. 4-12-88; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02; BLI 17-2006, f. 5-12-06, cert. ef. 5-15-06

839-021-0104

Occupations Particularly Hazardous or Detrimental to the Health or Well-Being of Minors 16 and 17 Years of Age

(1) Except as provided in OAR 839-021-0285, an employer may not employ a minor 16 or 17 years of age in any occupation declared particularly hazardous or detrimental to their health or well-being, except under terms and conditions specifically set forth by rules of the Wage and Hour Commission.

(2) Those occupations set out in **Title 29 CFR, Part 570.51** to and including **Part 570.68** as amended December 17, 2004 are hereby adopted as occupations particularly hazardous or detrimental to the health and well-being of minors 16 and 17 years of age and the regulations pertaining to these occupations set out in **Title 29 CFR, Part 570.51** to and including **Part 570.68** as amended December 17, 2004 are hereby adopted and incorporated by reference herein and are attached as **Appendix 1**.

[ED. NOTE: Appendices referenced are available from the agency.]

Stat. Auth.: ORS 653.252

Stats. Implemented: ORS 653.305

Hist.: BL 182, f. & ef. 11-14-75; BL 6-1988, f. & cert. ef. 4-12-88; BLI 3-1999, f. & cert. ef. 6-16-99; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02; BLI 17-2006, f. 5-12-06, cert. ef. 5-15-06

839-021-0106

Occupations Involving Use of Explosives

(1) In addition to the provisions of Title 29 CFR, Part 570.51 (Hazardous Occupations Order 1) pertaining to occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components, no minor under the age of 18 may be employed in any occupation where explosive materials are manufactured, stored, or used, except in those occupations specified in subparagraphs (2) and (3) of this rule.

(2) This rule does not apply to the employment of minors in the following occupations:

(a) Occupations in retail establishments including the storage of ammunition in gunshops, sporting goods stores, building supplies and hardware stores, retail fireworks stands, and other retail establishments;

(b) Occupations in gun clubs, trap and skeet ranges, turkey shoots, certain armories, police stations, and other such areas where only small arms ammunition is being stored; and

(c) Occupations performed in a "nonexplosives area" as defined in subparagraph (3) below.

(3) An area meeting the following criteria shall be deemed a *nonexplosives area*:

(a) None of the work performed in the area involves the handling or use of explosives;

(b) The area is separated from the explosives area by a distance not less than that prescribed in the American Table of Distances for the protection of inhabited buildings;

(c) The area is separated from the explosives area by a fence or is otherwise located so that it constitutes a definite designated area; and

(d) Satisfactory controls have been established to prevent employees under 18 years of age within the area from entering any area which does not meet criteria (a) through (c).

Stat. Auth.: ORS 653.305 & 653.525

Stats. Implemented: ORS 653.305 & 653.525

Hist.: BLI 1-2005, f. & cert. ef. 1-3-05

General Record Keeping Requirements

839-021-0170

General Requirements

(1) Every employer employing minors must maintain and preserve records containing the following information and data with respect to each minor employed:

(a) Name in full, as used for social security recordkeeping purposes and on the same record, the minor's identifying symbol or number if such is used in place of name on any time, work or payroll records;

(b) Home address, including zip code;

(c) Date of birth;

(d) Sex and occupation in which the minor is employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss or Ms.);

(e) Time of day and day of week on which the minor's workweek begins;

(f) Hours worked each workday and total hours worked each workweek;

(g) Date the minor became employed by the employer and date employment was terminated.

(2) In addition to the records referred to in section (1) of this rule, every employer employing minors under 16 years of age must maintain and preserve records containing the following information and data with respect to each minor under 16 years of age employed:

(a) The time of day that each minor began working and the time of day that each minor stopped working;

(b) A schedule of the maximum number of hours to be worked each day and each week by each minor.

(3) The records required to be maintained and preserved in sections (1) and (2) of this rule are required in addition to and not in lieu of any other recordkeeping requirement contained in OAR 839-021-0001 to 839-021-0500. However, when one record will satisfy the requirements of more than one rule, only one record will be required.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.307

Hist.: BL 6-1988, f. & cert. ef. 4-12-88; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-021-0175

Records Availability

(1) All records required to be preserved and maintained by OAR 839-021-0001 to 839-021-0500 shall be preserved and maintained for a period of at least two years.

(2) All employers shall keep the records required by OAR 839-021-0001 to 839-021-0500 in a safe and accessible place.

(3) All records required to be preserved and maintained by OAR 839-021-0001 to 839-021-0500 shall be made available for inspections and transcription by the Executive Secretary or duly authorized representative of the Executive Secretary.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.307 & 653.545

Hist.: BL 6-1988, f. & cert. ef. 4-12-88

839-021-0180

Posting Requirements

(1) Every employer required to maintain a schedule of the maximum hours of work by minors under 16 years of age (see OAR 839-021-0170(2)(b)), must post the schedule in a conspicuous place where all such minors have easy access to it.

(2) Every notice required by any law or rule to be posted at the employer's place of business and that has applicability to the employment of minor employees must be displayed in a conspicuous place where all minors have easy access to them.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.315(4)

Hist.: BL 6-1988, f. & cert. ef. 4-12-88; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-021-0185

Verification of Age

(1) The employer must verify the age of all minors by requiring the minor to produce an acceptable proof of age document.

(2) As used in these rules, an acceptable proof of age document includes, but is not limited to:

(a) A birth certificate issued by any state, county, or municipal authority;

(b) A hospital record of birth;

- (c) A state-issued driver's license or a state-issued I.D. card with a photograph, or information, including date of birth;
- (d) A U.S. Military Card;
- (e) A U.S. Passport;
- (f) A Certificate of U.S. Citizenship;
- (g) A Certificate of Naturalization;
- (h) An unexpired foreign passport with attached Employment Authorization;
- (i) An Alien Registration Card with photograph;
- (j) A Social Security Administration record indicating date of birth;
- (k) A Certificate of Age issued by the U.S. Department of Labor;
- (l) A baptismal record;
- (m) Other acceptable proof approved by the bureau.

(3) The employer must retain a record of the document used to verify the minor's age pursuant to the provisions of OAR 839-021-0170 and 839-021-0175. A notation in the minor's personnel file of which document was used to verify the minor's age or retaining a copy of the document will satisfy this requirement.

Stat. Auth.: ORS 653.305 & 653.525

Stats. Implemented: ORS 653.307

Hist.: BL 3-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

Issuance of Employment Certificates for the Employment of Minors

839-021-0220

Employment Certificates for the Employment of Minors 14 through 17 Years of Age

(1) Unless otherwise provided by rule of the commission, no minor 14 through 17 years of age may be employed or permitted to work unless the employer:

- (a) Verifies the minor's age by requiring the minor to produce acceptable proof of age as prescribed by these rules; and
- (b) Complies with the provisions of this rule.

(2) An employer may not employ a minor without having first obtained a validated employment certificate from the Bureau of Labor and Industries. Application forms for an employment certificate may be obtained from any office of the Bureau of Labor and Industries or by contacting the Child Labor Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon Street Suite 1045, Portland, OR 97232, (971) 673-0836.

(a) The Bureau of Labor and Industries will issue a validated employment certificate upon review and approval of the application. The validated employment certificate will be effective for one year from the date it was issued, unless it is suspended or revoked.

(b) If, after the issuance of a validated employment certificate, the duties of the minors are changed from those originally authorized under the employment certificate or the employer wishes to employ minors at an additional establishment, the employer must submit a "Notice of Change (to Annual Employment Certificate)" form to the Child Labor Unit, Wage and Hour Division of the Bureau of Labor and Industries. The "Notice of Change (to Annual Employment Certificate)" form must be submitted within 15 days of the change on a form provided by the bureau. The bureau will approve or deny any change(s) in duties and notify the employer. If the bureau denies the changes, the employer must immediately reassign any affected minor to approved duties or terminate the minor's employment.

(3) The employer must post the validated employment certificate in a conspicuous place where all employees can readily see it. When the employer employs minors in more than one establishment, a copy of the validated employment certificate must be posted at each establishment. As used in this rule, "establishment" means a distinct physical place of business. If a minor is employed by one employer to perform work in more than one location, the minor will be considered employed in the establishment where the minor receives management direction and control.

(4) If the employer employs minors at more than one establishment, a copy of the Summary of Child Labor Laws provided to the employer by the bureau pursuant to OAR 839-021-0221(4) must be provided by the employer to the manager of each establishment where minors will be employed.

(5) The employer must apply for a validated employment certificate once each year by filing a renewal application on a form provided by the Bureau of Labor and Industries. The renewal application must

be received by any office of the bureau no later than the expiration date of the validated employment certificate.

(6) If the bureau's review of any application indicates a failure to comply with any law or rule pertaining to the employment of minors or any order of the commission, the bureau may deny the application and inform the employer of the reason(s) for the denial.

Stat. Auth.: ORS 653.307(1)

Stats. Implemented: ORS 653.307(1)

Hist.: BL 117, f. 10-20-71, ef. 11-1-71, Renumbered from 839-021-0115; BL 6-1988, f. & cert. ef. 4-12-88; BL 3-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 4-1998, f. & cert. ef. 3-5-98; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02; BLI 17-2006, f. 5-12-06, cert. ef. 5-15-06

839-021-0221

Employment Certificates; Required Information

(1) The application form for an employment certificate must include:

- (a) The name and address of the employer;
- (b) The name and address of the company representative completing the application form;
- (c) An estimate of the number of minors to be employed during the twelve month period covered by the application;
- (d) A description of the duties to be performed by the minor(s);
- (e) A description of the machinery or other equipment to be used by the minor(s);
- (f) Whether 14 and 15 year-old minors are to be employed.

(2) The "Notice of Change (to Annual Employment Certificate)" must include:

- (a) The name and address of the employer;
- (b) The name and address of the company representative completing the notice;
- (c) A description of the change in duties previously authorized;
- (d) A description of any machinery or equipment to be used by any minor;
- (e) Any address change(s) or additional establishments where minors are proposed to be employed. As used in this rule, "establishment" has the same meaning as defined in OAR 839-021-0220(3).

(3) The Renewal Application for an employment certificate must include:

- (a) The name and address of the employer;
 - (b) The name and address of the company representative completing the application;
 - (c) The actual number of minors employed during the preceding 12 month period;
 - (d) An estimate of the number of minors to be employed during the 12-month period covered by the application;
 - (e) A description of the duties to be performed and the machinery and equipment to be used if different from the previous year or if there are no changes in duties, a statement to that effect;
 - (f) Any address change(s) or additional establishments where minors are proposed to be employed.
- (4) The bureau will send a summary of the child labor laws and rules to all employers applying for an employment certificate.

(5) The bureau will provide upon request a "Notice of Change (to Annual Employment Certificate)" form with an explanation of its use.

Stat. Auth.: ORS 653.307(1)

Stats. Implemented: ORS 653.307(1)

Hist.: BL 3-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 4-1998, f. & cert. ef. 3-5-98; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

Minors Under 14 Years of Age

839-021-0246

Employment Permits for Minors Under 14 Years of Age

(1) No child under 14 years of age may be employed or permitted to work unless the employer has been issued a validated Employment Permit by the commission authorizing the child to work for that particular employer.

(2) A minor under 14 years of age and an employer desiring to employ the minor under the provisions of ORS 653.320(4) which exempt the minor from the provisions of section (1), (2), or (3) of ORS 653.320, must make a joint application for an Employment Permit using a form supplied by the Wage and Hour Division and available at any office of the Oregon Bureau of Labor and Industries. The application must be delivered to the Administrator of the Wage and Hour

Division, 800 N.E. Oregon #32, Portland, OR 97232. Each application must include:

(a) Minor's name and residence address, and the name and address of parents or legal guardian;

(b) Minor's date of birth and proof of age, consisting of either a certified copy of a birth certificate, hospital certificate, baptismal certificate, or other acceptable proof of age;

(c) Last grade in school completed and the school currently attended and its address;

(d) Name and address of prospective employer and nature of such employer's business;

(e) Amount of compensation to be paid;

(f) The maximum number of hours proposed to be worked on any given day, the maximum number of hours to be worked in any work week, and the maximum number of days proposed to be worked in any work week;

(g) A complete description of the work proposed to be performed;

(h) A separate certification by the employer that the minor will be continuously supervised by a responsible adult.

(3) The administrator of the Wage and Hour Division will investigate the circumstances of the proposed employment and the information contained in the application.

(a) If the administrator determines that the character of the employment is suitable and that the employment will not adversely affect the well-being of the minor, the administrator will issue an Employment Permit, setting out limitations concerning the employment deemed appropriate by the administrator, which limitations should be consistent with the provisions of section (4) of this rule.

(b) The administrator will advise the employer, minor and the minor's parents or legal guardian of the date upon which the commission will adopt, vacate, or modify the Employment Permit.

(4) Except as provided in OAR 839-021-0070(7), employment permits for the employment of minors under 14 years of age may be issued only under the following circumstances:

(a) Hours of employment for minors under 14 years of age during the term when schools are in session will be limited to not more than two hours after school hours; not more than six hours on Saturdays and Sundays; and not more than 18 hours per week, not to exceed five work days in one week;

(b) During any vacation period extending over a period of two weeks or longer, minors under 14 years of age may not be employed more than eight hours in any one day and not more than 40 hours in one week and not more than five work days in one week;

(c) Minors under 14 years of age may not be employed in any enterprise subject to the Federal Fair Labor Standards Act, (29 U.S.C. 201, et seq.), in any establishment where alcoholic beverages are dispensed or served, in any theater or amusement park, in any work that involves the minor in canvassing door to door, or in any establishment catering to adults only;

(d) Except as provided in OAR 839-021-0070, minors under 14 years of age may not be employed before the hour of 8 a.m. or after the hour of 6 p.m.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.320

Hist.: BL 6-1978, f. & cert. ef. 8-7-78; BL 6-1988, f. & cert. ef. 4-12-88; BLI 13-2000, f. 5-31-00, cert. ef. 6-1-00; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

Reporting

839-021-0248

Reports from Employers Employing Minors

Employers employing minors shall file reports that may be required by the Commission.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.545(1)

Hist.: BL 6-1988, f. & cert. ef. 4-12-88

Special Rules for Temporary Employment of Several Minors for a Short Duration

839-021-0255

Special Rules for Temporary Employment of Several Minors for a Short Duration

(1) As used in this rule, unless the context requires otherwise:

(a) "Temporary employment of a short duration" means employ-

ment which terminates on or by the tenth day from the date of hire.

(b) "Several minors" means 10 or more minors.

(2) In circumstances involving temporary employment of a short duration where the employment of several minors is proposed, the prospective employer may comply with the provisions of rules OAR 839-021-0220 to 839-021-0248 (Employment Certificates and Employment Permits) or may address a letter application to the Administrator of the Wage and Hour Division setting out the full and complete circumstances of the proposed employment.

(a) The administrator will investigate the proposed employment and if the administrator determines that the character of the employment is suitable and that such employment will not adversely affect the physical and moral well-being of the minors, the administrator will issue a special permit to the employer.

(b) In the case of those minors under 14 years of age, if a regularly scheduled meeting of the Wage and Hour Commission intervenes between the date of the application and the date of the proposed employment, the administrator will submit to the commission a report of the facts and circumstances of the employment, and the commission may adopt, vacate, or modify any special permit which may have been issued by the administrator.

(3) Notwithstanding the provisions of subsection (1)(a) of this rule, the administrator, for good cause shown, may issue a special permit pursuant to section (2) of this rule for more than 10 days if the administrator determines that the circumstances of the proposed employment otherwise satisfy section (2) of this rule.

(4) Notwithstanding the provisions of section (2) of this rule, the administrator, for good cause shown, may issue a special permit in circumstances other than as prescribed in section OAR 839-021-0246(4) when it appears to the administrator that the employment opportunities of the minor would be impaired and the employment, as determined by the administrator will not adversely affect the physical and moral well-being of the minor. The administrator will report the facts and circumstances of the employment to the commission, and the commission may adopt, vacate, or modify any special permit issued under this section.

Stat. Auth.: ORS 653.305 & 653.525

Stats. Implemented: ORS 653.307

Hist.: BL 6-1988, f. & cert. ef. 4-12-88; BL 14-1988(Temp), f. 8-2-88, cert. ef. 8-12-88; BL 1-1989, f. & cert. ef. 2-6-89; BL 3-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

Employment of Minors in Door to Door Sales; Registration Certificates

839-021-0265

Employment of Minors to Act as Canvassers, Peddlers or Outside Salespersons from House to House

(1) Minors 16 and 17 years of age may not be employed to act as a canvasser, a peddler, or an "outside salesman" as defined in ORS 653.010(8), from house to house, unless the employer obtains and maintains a validated registration certificate issued by the Bureau of Labor and Industries.

(2) To register, an employer may obtain an application form from any office of the Bureau of Labor and Industries. Upon completion, the application must be filed with the Administrator of the Wage and Hour Division, 800 N.E. Oregon #32, Portland, OR 97232. The application form will be prescribed by the Executive Secretary or designee and must include, but not be limited to, space for:

(a) The employer's name, permanent address, and telephone number;

(b) The Oregon address and telephone number if different from permanent address and telephone number;

(c) A contact person's name, address and telephone number;

(d) A brief history of company;

(e) A complete description of the work to be performed by minors who are 16 and 17 years of age;

(f) An estimate of the ages and of the number of minors 16 and 17 years of age that may be employed during the period of certification;

(g) A statement that the employer agrees to comply with the provisions of ORS 653.010 to 653.545, OAR 839-021-0001 to 839-021-0265 and any terms and conditions specified by the commission, the Executive Secretary or the Executive Secretary's designee;

(h) The name and address of the employer's workers' compen-

sation insurer and policy or binder number;

(i) Other information which will assure the Executive Secretary that employment of minors by the employer will be in compliance with any law or rule concerning the employment of minors; and

(j) The signature of the applicant.

(3) In the case of a renewal application, the employer must submit with the application, a report of minors employed during the previous year. The report must include, but not be limited to, the following information:

(a) The number of minors employed;

(b) Whether any workers' compensation insurance claims were filed by or for any minors while employed by the employer and the number of such claims; and

(c) Other information as may be deemed necessary by the Executive Secretary or designee.

(4) The Executive Secretary or designee will conduct an investigation of the facts and circumstances set out in the application for the registration certificate and may issue a certificate to the employer provided the provisions of OAR 839-021-0001 to 839-021-0265 have been met.

(a) The Executive Secretary or designee may set such terms and conditions upon the issuance of the certificate as the Executive Secretary or designee deems necessary or appropriate.

(b) The Executive Secretary or designee may refuse to issue or renew a certificate when it appears to the Executive Secretary or designee that the provisions of OAR 839-021-0001 to 839-021-0265 are not met or when the employer has violated any law or rule pertaining to the employment of minors.

(c) The Executive Secretary or designee will report on the investigation into the facts and circumstances of the application, at the next regularly scheduled meeting of the commission following the investigation. The commission may adopt, vacate, or modify the Executive Secretary's or designee's disposition of the application.

(d) If the facts and circumstances or conditions under which the certificate is issued change, the employer must notify the Executive Secretary or designee of the change. The Executive Secretary may modify the terms and conditions of the certificate, if any, and will report to the commission as in section (5) of this rule.

(e) Employers may apply for a registration certificate at any time and must apply to renew their registration by July 1 of each year. The registration will be effective through the following June 30.

(5) The Executive Secretary or designee may require the removal of minors from the employment of a registered employer when it appears to the Executive Secretary or designee that the employer has failed to comply with any law or rule pertaining to the employment of minors. A report of such action will be made to the commission at its next regularly scheduled meeting. The commission may adopt, vacate or modify such action. Prior to the removal of minors from employment, the Executive Secretary or designee will consider the following factors:

(a) The past history of the employer in taking all necessary measures to prevent or correct violations of statutes and rules;

(b) Past violations, if any, of statutes and rules;

(c) The magnitude and seriousness of the violation; and

(d) Any other mitigating circumstances.

(6) When a registered employer is required by the Executive Secretary or designee to remove the minor employees from employment, the employer may request a hearing in accordance with OAR 839-022-0000 to 839-022-0060.

(7) The commission may revoke the registration certificate when it determines that the employer failed to comply with any rule of the commission or law covering the employment of minors. The employer must be accorded the opportunity of a hearing in accordance with OAR 839-022-0000 to 839-022-0060.

(8) In addition to all other rules of the commission, employers employing persons 16 and 17 years of age to act as a canvasser, peddler or "outside salesman" as defined in ORS 653.010(8), from house to house must provide each minor, before the minor begins work, with an identification card. The identification card must be shown to each customer or potential customer of the minor employed to act as a canvasser, peddler or "outside salesman" by the minor so employed. The identification card will be on a form prescribed by the Executive Secretary. The identification card must include:

(a) A picture of the employee;

(b) The name of the employee;

(c) The name and local address of the employer;

(d) A statement to the effect that the employee is authorized to represent the employer as a canvasser, peddler or "outside salesman";

(e) A statement to the effect that the employer is registered with the Bureau of Labor and Industries, 800 N.E. Oregon #32, Portland, OR 97232 (731-4074);

(f) A statement that the card is not valid for any other employer; and

(g) Other information as the Executive Secretary may require to carry out the purpose of this subsection.

(9) Notwithstanding OAR 839-021-0067, minors 16 and 17 years of age employed to act as a canvasser, a peddler or an "outside salesman," as defined in ORS 653.010(8), from house to house may not be employed past the hour of 9 at night.

(10) The transportation of a minor employed to act as a canvasser, peddler, or "outside salesman" to and from the job site must be provided by the employer and must occur no later than 9 at night. In the case of a minor who wants to provide the minor's own transportation, the employer must obtain the written consent of the minor's parents or legal guardian and maintain such written consent in the employer's files.

(11) No minor employed to act as a canvasser, peddler, or "outside salesman" may be transported to another state without the express written consent of a parent or legal guardian of the minor.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.315(2)(d)

Hist.: BL 1-1985, f. 2-21-85, ef. 3-1-85; BL 6-1988, f. & cert. ef. 4-12-88; BL 19-2002, f. 3-28-02, cert. ef. 4-1-02

Employment of Minors in Agriculture

839-021-0276

Employment Certificates

(1) The provisions addressing Employment Certificates, OAR 839-021-0220 to 839-021-0221, do not apply to the employment of minors in agriculture except as follows:

(a) Minors employed to operate or assist in the operation of power-driven farm machinery;

(b) Minors employed to ride in or on power-driven farm machinery; and

(c) Minors employed to ride in or on equipment, trailers, or similar conveyances connected to power-driven farm machinery for the purpose of transporting, sorting, delivering, or otherwise processing farm products.

(d) Employment Certificates are not required under (a), (b) or (c) if a minor is employed by their parent or person standing in the place of their parent as provided by OAR 839-021-0297.

(2) The Employment Certificate application must be submitted to the Child Labor Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 N.E. Oregon Street #35, Portland, OR 97232.

(3) Employers employing minors to operate power-driven farm machinery, to ride in or on power-driven farm machinery or to ride in or on equipment, trailers, or similar conveyances which are connected to power-driven farm machinery must not permit the minor to operate power-driven farm machinery, assist in the operation of the machinery, to ride in or on the machinery or to ride in or on equipment, trailers or similar conveyances which are connected to power-driven farm machinery, until the employer has complied with OAR 839-021-0280 or 839-021-0282.

Stat. Auth.: ORS 653.307(1), 653.305 & 653.525

Stats. Implemented: ORS 653.307(1) & 653.365

Hist.: BL 5-1987, f. & ef. 2-20-87; BL 6-1988, f. & cert. ef. 4-12-88; BL 11-1991, f. & cert. ef. 10-31-91; BL 4-1995, f. & cert. ef. 11-3-95; BL 14-1998, f. & cert. ef. 3-5-98; BL 19-2002, f. 3-28-02, cert. ef. 4-1-02

Power-Driven Farm Machinery

839-021-0280

Operation or Assisting in the Operation of Power-Driven Farm Machinery

(1) As used in this rule, "assist(ing) in the operation of power-driven farm machinery," includes starting, stopping, adjusting, feeding or any other activity involving physical contact associated with the operation of the machinery.

(2) Minors may not be employed to operate or assist in the oper-

ation of power-driven farm machinery unless:

(a) An Employment Certificate has been issued pursuant to OAR 839-021-0220; or

(b) The minor(s) has obtained a "Certificate of Training" on tractor operation or tractor and machinery operation issued by a 4-H Extension Service Program, or an approved secondary vocational agriculture program.

(A) The employer must obtain proof that the minor has a "Certificate of Training" on the operation of tractors or tractors and machinery operation; and

(B) The employer must retain a copy of such proof for two years from the date the minor was employed.

(3) In the event that neither a 4-H Extension Service nor vocational agricultural safety training program for the "Certificate of Training," as required in section (2)(b) of this rule, is available within 35 miles of a minor's residence, a 16 or 17 year-old minor may be employed to operate or assist in the operation of power-driven farm machinery otherwise prohibited if all of the following conditions are met:

(a) The minor is 16 or 17 years of age and the employer has verified the minor's age;

(b) The employer has completed an Employment Certificate application, pursuant to OAR 839-021-0220; and

(c) The minor, the minor's parent or guardian, and the employer of the minor sign a statement on a form prescribed by the commission certifying to all of the following:

(A) The training is not available within 35 miles of the minor's residence;

(B) The employer has provided to the minor not less than eight hours of instruction, four hours of which must be "hands-on" training under the supervision of an adult experienced in the safe and proper operation of the specific equipment the minor is to use before the minor begins work including, but not limited to, training related to the normal working hazards in agriculture, the equipment's instrument panel, equipment controls, daily maintenance and safety checks, starting and stopping the equipment, control of the equipment on different terrain, and the safe operation of hitches, power take-off and hydraulic controls, where applicable; and

(C) The employer agrees to supervise the minor continuously and closely while the minor operates the power-driven farm machinery, or where such supervision is not feasible, agrees to check on the safety of the minor at intervals of no more than two hours during the operation of the equipment by the minor.

(4) The requirements for obtaining an Employment Certificate and a Certificate of Training do not apply to a minor employed by their parent(s) or person standing in the place of their parent as provided by OAR 839-021-0297.

Stat. Auth.: ORS 653.305 & 653.525

Stats. Implemented: ORS 653.307 & 653.365

Hist.: BL 5-1987, f. & ef. 2-20-87; BL 6-1988, f. 4-12-88, cert. ef. 1-1-89; BL 4-1990, f. & cert. ef. 3-12-90; BL 11-1991, f. & cert. ef. 10-31-91; BL 4-1995, f. & cert. ef. 11-3-95; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-021-0282

Riding In or On Conveyances Connected to Power-Driven Farm Machinery

(1) A minor may not be employed to ride in or on equipment, trailers or similar conveyances which are connected to power-driven farm machinery for the purpose of transporting, sorting, delivering or otherwise processing farm products unless:

(a) An Employment Certificate has been issued pursuant to OAR 839-021-0220; or

(b) The minor(s) has obtained a "Certificate of Training" issued by a 4-H Extension Service Program, or an approved secondary vocational agriculture program as referred to in OAR 839-021-0280(2)(b).

(2) A minor 14 years of age or older who has not obtained a "Certificate of Training" as required by OAR 839-021-0280(2)(b) may be employed to ride in or on equipment, trailers or similar conveyances which are connected to power-driven farm machinery for the purpose of transporting, sorting, delivering, or otherwise processing farm products, if all of the following conditions are met:

(a) The employer has verified the minor's age;

(b) The employer has completed an Employment Certificate application, pursuant to OAR 839-021-0220; and

(c) The employer has provided to the minor not less than two

hours of safety training as required by OR-OSHA rules and these rules relating to the specific machinery which the minor will be employed to ride in or on before the minor begins work including, but not limited to, training related to the normal working hazards in agriculture, safe equipment mounting and dismounting, unsafe practices, and safety features of the machinery; and

(d) The employer must closely supervise the minor while the minor rides in or on conveyances pulled by power-driven machinery. The employer must check on the safety of the minors at intervals of not less than two hours.

(3) The requirements for obtaining an Employment Certificate and a Certificate of Training do not apply to a minor employed by their parent(s) or person standing in the place of their parent as provided by OAR 839-021-0297.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.307 & 653.365

Hist.: BL 5-1987, f. & ef. 2-20-87; BL 6-1988, f. 4-12-88, cert. ef. 1-1-89; BL 4-1990, f. & cert. ef. 3-12-90; BL 4-1995, f. & cert. ef. 11-3-95; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

Applicability of Other Rules to Employment of Minors in Agriculture

839-021-0285

Compliance with Other Rules

Employers employing minors in agriculture shall comply, unless specifically excluded by ORS 653.305 to 653.370 or these rules, with all rules pertaining to the employment of minors, including, but not limited to:

(1) Rules pertaining to rest periods (OAR 839-021-0072);

(2) Rules pertaining to meal periods (OAR 839-021-0072);

(3) Rules pertaining to working conditions and weight lifting (OAR 839-021-0087 and 839-021-0092);

(4) Rules pertaining to hazardous occupations for minors under 16 years of age (OAR 839-021-0102);

(5) Rules pertaining to hazardous occupations for minors between 16 and 18 years of age (OAR 839-021-0104);

(6) Notwithstanding the provisions of subsection (5) of this rule and the provisions of **Title 29 CFR, Part 570.52**, minors 16 and 17 years of age employed in agriculture as defined in OAR 839-021-0006(1) may be employed as motor-vehicle drivers and outside helpers.

Stat. Auth.: ORS 653.252

Stats. Implemented: ORS 653.305

Hist.: BL 5-1987, f. & ef. 2-20-87; BL 1-1989, f. & cert. ef. 2-6-89; BL 6-1991(Temp), f. & cert. ef. 6-21-91; BL 11-1991, f. & cert. ef. 10-31-91; BLI 3-1999, f. & cert. ef. 6-16-99

Employment of Minors in Agricultural Warehouses

839-021-0287

Agricultural Warehouses

(1) Minors under 16 years of age may not be employed in any room or place in an agricultural warehouse where power-driven machinery is used to process agricultural commodities.

(2) Minors 16 and 17 years of age may be employed to operate or assist in the operation of power-driven machinery in an agricultural warehouse provided:

(a) The employment is in connection with the processing of the agricultural commodity produced by the farmer for whom the minor is employed; and

(b) The employment is performed on the farm and for the farmer for whom the minor is employed; and

(c) The minor has been trained in the safe operation of the machinery as required by this rule.

(3) As used in section (2) of this rule:

(a) "Operate(ing)" power-driven machinery includes driving a motorized vehicle;

(b) "Assisting in the operation of power-driven machinery" includes starting, stopping, adjusting, feeding or any other activity involving physical contact associated with the operation of the machinery.

(4) Prior to the employment of minors 16 and 17 years of age to operate or assist in the operation of power-driven machinery in an agricultural warehouse, the employer must obtain proof that the minor has been trained in safe handling and operation of the machinery as

required by OR-OSHA and these rules. The proof of training may be a document issued by a public or private entity other than the farmer attesting to the training. Employers must retain a copy of such proof for two years from the date the minor was employed.

(5) In the event that the safety training required by this rule is not available within 35 miles of the minor's residence, a 16 or 17 year old minor may be employed to operate or assist in the operation of power-driven machinery in an agricultural warehouse provided that the following conditions are continuously met:

(a) The employment is in connection with the processing of the agricultural commodity produced by the farmer for whom the minor is employed;

(b) The employment is performed on the farm and for the farmer for whom the minor is employed; and

(c) The employer provides to the minor before the minor begins work not less than six hours of instruction, two hours of which must be "hands on" training under the supervision of an adult experienced in the safe operation of the specific machinery the minor is to use. The training should include, but not be limited to, training related to the normal working hazards in the warehouse, the machinery's instrument panel, the machinery's controls, daily maintenance and safety checks, starting and stopping the machinery, control of the machinery, and the safe operation of hitches, power take-off and hydraulic controls, where applicable.

(6) The employer must provide close supervision of minors operating or assisting in the operation of the power-driven machinery.

(7) As used in this rule, an "agricultural warehouse" includes a building in which the processing of agricultural commodities is performed. Processing of agricultural commodities includes cleaning, packaging, storing and shipping of the commodities. For purposes of this paragraph, covered areas attached to the warehouse are considered to be part of the warehouse.

(8) As used in this rule, "employment in an agricultural warehouse" means employment confined to the inside of the building where the work is performed. A loading dock attached to the building is considered to be part of the building and employment on the dock is employment in the warehouse. However, employment close to or about the building or in or on structures not attached to the warehouse is not considered to be employment in the warehouse.

Stat. Auth.: ORS 653.305 & 653.525

Stats. Implemented: ORS 653.305 & 653.360

Hist.: BL 4-1995, f. & cert. ef. 11-3-95; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

Hours Worked by Minors Employed in Agriculture

839-021-0290

Hours of Work of Minors Under 16 Years of Age in Agriculture

(1) Minors under 16 years of age may not be employed to work in agriculture while the school they attend is in session. As used in this rule, school is in session during the hours set by the school district in which the minor resides while employed in agriculture in accordance with the official school calendar of the district. A school week is any week in which school is in session for at least three days.

(2) The hours of work by minors in agriculture under 16 years of age may not exceed:

- (a) Three hours a day on school days;
- (b) Ten hours a day on non-school days;
- (c) 25 hours a week during school weeks;

(d) From the last day of the most recently completed school year of the school district in which the minor resides while employed in agriculture to the first day of the school year immediately following the most recently completed school year of the district in which the minor resides while employed in agriculture:

- (A) Ten hours per day; and
- (B) 60 hours per week.

(e) Six days in any week at any time.

(3) Notwithstanding section (2) of this rule, when a minor under 16 years of age is employed in agriculture to operate or assist in the operation of power-driven farm machinery or when such minor is employed to ride in or on power-driven farm machinery as provided in OAR 839-021-0276 to 839-021-0285, the maximum number of hours the minor may work may not exceed:

- (a) Three hours a day on school days;
- (b) Eight hours a day on non-school days;
- (c) Eighteen hours a week during school weeks;

(d) From the last day of the most recently completed school year of the school district in which the minor resides while employed in agriculture to the first day of the school year immediately following the most recently completed school year of the district in which the minor resides while employed in agriculture:

(A) Ten hours per day, 60 hours a week during the harvest season;

(B) Ten hours per day, 44 hours per week outside the harvest season;

(C) A greater number of weekly hours may be permitted when worked outside the harvest season pursuant to a Special Emergency Overtime Permit issued by the commission. However, even though a permit may be issued, the maximum number of hours worked in a week may not exceed 60.

(e) Six days in any week at any time.

(4) Notwithstanding sections (2) and (3) of this rule, the Wage and Hour Commission may issue special permits to employers for the employment of minors under 16 years of age in agriculture for more than the maximum number of hours provided in this rule when the commission determines that such hours of work will not be detrimental to the health and safety of the children so employed.

(a) An employer desiring to employ a minor in agriculture for more than the maximum number of hours provided in this rule may apply in writing to the Administrator of the Wage and Hour Division, Bureau of Labor and Industries, 800 N.E. Oregon St., #32, Portland, OR, 97232.

(b) The administrator will investigate the employment and the facts and circumstances set out in the application. If the administrator determines that the character of the employment is suitable and that the employment will not adversely affect the physical and moral well-being of the minor(s), the administrator will issue a Special Emergency Overtime Permit to the employer, setting out the terms and conditions of the permit and the period of time for which it will be effective.

(c) At the next regularly scheduled meeting of the Wage and Hour Commission, the administrator will report the facts and circumstances of the employment to the commission, and the commission may adopt, vacate or modify the permit issued.

(5) Nothing in this rule should be construed to regulate the daily starting and quitting times on minors under 16 who are employed in agriculture.

Stat. Auth.: ORS 653.525

Stats. Implemented: ORS 653.315

Hist.: BL 11-1991, f. & cert. ef. 10-31-91; BL 2-1997(Temp), f. & cert. ef. 7-21-97; BL 10-1997, f. & cert. ef. 11-26-97; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-021-0292

Hours of Work of Minors 16 and 17 Years of Age in Agriculture

(1) When a minor who is 16 or 17 years of age is employed to operate or assist in the operation of power-driven farm machinery or when such minor is employed to ride in or on power-driven farm machinery as provided in OAR 839-021-0276 to 839-021-0285, the maximum number of hours the minor may work may not exceed:

(a) 25 hours a week during school weeks;

(b) From the last day of the most recently completed school year of the district in which the minor resides while employed in agriculture to the first day of the school year immediately following the most recently completed school year of the district in which the minor resides while employed in agriculture, 60 hours per week (notwithstanding OAR 839-021-0067(1));

(2) As used in this rule, the terms "school week" and "school is in session" have the same meaning as that provided in OAR 839-021-0290(1).

(3) Notwithstanding section (1) of this rule, the Wage and Hour Commission may issue special permits to employers for the employment of minors 16 and 17 years of age in agriculture for more than the maximum number of hours provided in this rule when the commission determines that such hours of work will not be detrimental to the health and safety of the children so employed.

(a) An employer desiring to employ a minor 16 and 17 years of age in agriculture for more than the maximum number of hours provided in this rule may apply in writing to the Administrator of the Wage and Hour Division, Bureau of Labor and Industries, 800 N.E. Oregon St., #32, Portland, OR, 97232.

(b) The administrator will investigate the employment and the facts and circumstances set out in the application. If the administrator determines that the character of the employment is suitable and that

the employment will not adversely affect the physical and moral well-being of the minor(s), the administrator will issue a Special Emergency Overtime Permit to the employer, setting out the terms and conditions of the permit and the period of time for which it will be effective.

(c) At the next regularly scheduled meeting of the Wage and Hour Commission, the administrator will report the facts and circumstances of the employment to the commission, and the commission may adopt, vacate or modify the permit issued.

(4) Nothing in this rule should be construed to regulate the daily starting and quitting times of minors who are 16 or 17 years of age who are employed in agriculture.

Stat. Auth.: ORS 653.525

Stats. Implemented: ORS 653.315

Hist.: BL 11-1991, f. & cert. ef. 10-31-91; BL 2-1997(Temp), f. & cert. ef. 7-21-97; BL 10-1997, f. & cert. ef. 11-26-97; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-021-0293

Hours of Work When School Is in Session on a Year Around Basis

When the schools in the school district in which the minor resides while employed in agriculture during the harvest season are in session on a year around basis and the minor is authorized by the district not to attend classes, for purposes of these rules, school is not in session for the minor.

Stat. Auth.: ORS 653.305 & 653.525

Stats. Implemented: ORS 653.305

Hist.: BL 11-1991, f. & cert. ef. 10-31-91

839-021-0294

Voc-Ed and Cooperative Education Programs

When a student under 16 years of age is enrolled in a course of study and training in a cooperative vocational agricultural training program recognized by the State Board of Education, the commissioner of the Bureau of Labor and Industries may, upon consideration of the circumstances, issue a special permit authorizing the minor to work during the hours that school is in session. The permit will contain such conditions as the commissioner deems appropriate. A report of actions taken pursuant to this rule will be made to the Wage and Hour Commission.

Stat. Auth.: ORS 653.305 & 653.525

Stats. Implemented: ORS 653.315(2)(d)

Hist.: BL 11-1991, f. & cert. ef. 10-31-91; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

Minors Employed by Parents in Agriculture

839-021-0297

Parental Exemption

(1) Notwithstanding any other rule, minors of any age may be employed by their parent or person standing in the place of their parent at any time in any occupation on a farm owned or operated by their parent or person standing in the place of their parent.

(2) A person standing in the place of a parent includes, but is not limited to, the following persons:

(a) Grandfather, grandmother, uncle, aunt, brother or sister;

(b) An agricultural employer who employs a minor in agriculture while the minor lives and works on a farm during any school vacation period of three weeks or more.

(A) The employment arrangement must be agreed to by the agricultural employer and the parents, or other persons having custody or control of the minor; and

(B) A copy of the agreement must be filed with the Wage and Hour Commission.

Stat. Auth.: ORS 653.305 & 653.525

Stats. Implemented: ORS 653.365

Hist.: BL 11-1991, f. & cert. ef. 10-31-91; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

Employment of Minors in the Entertainment Industry

839-021-0300

Definitions

As used in OAR 839-021-0300 to 839-021-0380 unless the context requires otherwise:

(1) "Employment of Minors in the Entertainment Industry" shall include engagements as an entertainer or performer in motion pictures, television, radio, still photography, recording, modeling, theatrical appearances, rodeos, musical performances and any other activity wherein minors perform to entertain the public. Such employment shall not include appearances in school activities, church pageants or

other appearances where minors are not employed as an entertainer or performer. (Performances arising as a result of lessons or classes, for example, are not normally considered to be employment.)

(2) "Long Term Employment" means employment lasting or contemplated to last more than five working days.

(3) "Short Term Employment" means employment lasting or contemplated to last five working days or less.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.305

Hist.: BL 9-1984, f. & ef. 8-7-84; BL 6-1988, f. & cert. ef. 4-12-88

839-021-0305

Application of Rules

OAR 839-021-0001 to 839-021-0285 shall apply to the employment of minors in the entertainment industry. However, when there is a conflict between OAR 839-021-0001 to 839-021-0285 and 839-021-0300 to 839-021-0380, the latter shall apply.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.305

Hist.: BL 9-1984, f. & ef. 8-7-84; BL 6-1988, f. & cert. ef. 4-12-88

Employment Certificates

839-021-0310

Employment Certificates

(1) When minors are employed in the entertainment industry in long term employment, employers must obtain employment certificates in accordance with OAR 839-021-0220 to 839-021-0248.

(2) When minors are employed in the entertainment industry in short term employment, employers may obtain a special permit pursuant to OAR 839-021-0255 or an Employment Certificate in accordance with OAR 839-021-0220 to 839-021-0248.

(3) A registered employer (see OAR 839-021-0320) is not required to obtain a special permit for minors employed in short term employment when all of the following conditions are met:

(a) The employment is in connection with the production of commercial advertising in any media including, but not limited to, radio, television, newspaper or magazines; or

(b) The employment is in connection with films or other entertainment productions which are produced for education, training, or institutional purposes or documentaries; and

(c) The employment does not exceed the hours specified in OAR 839-021-0335; and

(d) The duties to be performed are not prohibited by any law or rule; and

(e) The permission of a parent has been obtained.

Stat. Auth.: ORS 653.305 & 653.525

Stats. Implemented: ORS 653.307

Hist.: BL 9-1984, f. & ef. 8-7-84; BL 6-1988, f. & cert. ef. 4-12-88; BL 3-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-021-0315

Special Hours Variance for Entertainment Employers

Employers, including registered employers, must apply for a special hours variance when the contemplated employment will exceed the maximum hours prescribed in OAR 839-021-0335. Employers must address a letter application to the Executive Secretary or designee setting out the full and complete circumstances of the proposed employment and the reasons why a special hours variance is being requested.

Stat. Auth.: ORS 653.305 & 653.525

Stats. Implemented: ORS 653.305

Hist.: BL 9-1984, f. & ef. 8-7-84; BL 6-1988, f. & cert. ef. 4-12-88; BL 3-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

Employer Registration Certificate

839-021-0320

Registered Employers

(1) In circumstances involving the employment of minors in short term employment, employers may satisfy the requirements of OAR 839-021-0310 by obtaining a registration certificate.

(2) Employers may apply for a registration certificate at any time and may apply to renew their registration by July 1 of each year. The registration will be effective through the following June 30.

(3) To register, an employer may obtain an application form from any office of the Bureau of Labor and Industries. Upon completion, the application must be filed with the Administrator of the Wage and

Hour Division, 800 N.E. Oregon #32, Portland, OR 97232. The application form will be prescribed by the Executive Secretary or designee and will include, but not be limited to, space for:

- (a) The employer's name, permanent address, and telephone number; and
 - (b) The Oregon address and telephone number if different from permanent address and telephone number; and
 - (c) A contact person's name, address and telephone number; and
 - (d) A brief history of company; and
 - (e) A description of the kinds of events, activities, or productions contemplated which may involve the employment of minors in short term employment; and
 - (f) An estimate of the ages and number of minors that may be employed in short term employment; and
 - (g) A brief description of the types of work expected of such minors; and
 - (h) A statement that the employer agrees to comply with the provisions of ORS 653.010 to 653.545, OAR 839-021-0001 to 839-021-0500 and any terms and conditions specified by the commission, the Executive Secretary or the Executive Secretary's designee;
 - (i) Name and address of workers' compensation insurer and policy or binder number;
 - (j) Other information as will assure the Executive Secretary that employment of minors by the employer will be in compliance with any law or rule concerning the employment of minors; and
 - (k) The signature of the applicant.
- (4) No less than 24 hours prior to the employment of minors for a short duration, the registered employer must notify the Child Labor Unit of the Wage and Hour Division which is located at 800 N.E. Oregon #35, Portland, OR 97232. (Telephone Number (503) 731-4074.) The notification may be accomplished by letter, in person or by telephone and must include:

- (a) Approximate number of minors to be employed;
 - (b) Approximate ages of minors to be employed;
 - (c) Description of the duties to be performed by the minors;
 - (d) Approximate hours the minors will work;
 - (e) Dates the minors are to be employed;
 - (f) The physical location where the work is to be performed.
- (5) In the case of a renewal application, the employer must submit with the application, a report of minors employed during the previous year. The report must include, but not be limited to, the following information:
- (a) The number of minors employed in short term employment pursuant to OAR 839-021-0310(3);
 - (b) Whether any worker's compensation insurance claims were filed by or for any minors while employed by the employer and the number of such claims;
 - (c) Other information as may be deemed necessary by the Executive Secretary or designee.
- (6) The Executive Secretary or designee will conduct an investigation of the facts and circumstances set out in the application for the registration certificate and may issue a certificate to the employer provided the provisions of OAR 839-021-0001 to 839-021-0500 have been met.
- (a) The Executive Secretary or designee may set such terms and conditions upon the issuance of the certificate as the Executive Secretary or designee deems necessary or appropriate.
- (b) The Executive Secretary or designee may refuse to issue or renew a certificate when it appears to the Executive Secretary or designee that the provisions of OAR 839-021-0001 to 839-021-0500 are not met or when the employer has violated any law or rule pertaining to the employment of minors.
- (c) The Executive Secretary or designee will report on the investigation into the facts and circumstances of the application, at the next regularly scheduled meeting of the commission following the investigation. The commission may adopt, vacate, or modify the Executive Secretary's or designee's disposition of the application.
- (7) If the facts and circumstances or conditions under which the certificate is issued change, the employer must notify the Executive Secretary or designee of the change. The Executive Secretary or designee may modify the terms and conditions of the certificate, if any,

and will report to the commission as in section (6) of this rule.

(8) The Executive Secretary or designee may require the removal of minors from the employment of a registered employer when it appears to the Executive Secretary or designee that the employer has failed to comply with any law or rule pertaining to the employment of minors. A report of such action will be made to the commission at its next regularly scheduled meeting. The commission may adopt, vacate or modify such action.

(9) Prior to the removal of minors as indicated in section (8) of this rule, the Executive Secretary or designee will consider the following factors:

- (a) The past history of the employer in taking all necessary measures to prevent or correct violations of statutes and rules; and
- (b) Past violations, if any, of statutes and rules; and
- (c) The magnitude and seriousness of the violation; and
- (d) Any other mitigating circumstances.

(10) When a registered employer is required by the Executive Secretary or designee to remove the minor employees from employment, the employer may request a hearing in accordance with OAR 839-022-0000 to 839-022-0060.

(11) The commission may revoke the registration certificate when it determines that the employer failed to comply with any rule of the commission or law covering the employment of minors. The employer must be accorded the opportunity of a hearing in accordance with OAR 839-022-0000 to 839-022-0060.

Stat. Auth.: ORS 653.307(1)

Stats. Implemented: ORS 653.307(1)

Hist.: BL 9-1984, f. & ef. 8-7-84; BL 6-1988, f. & cert. ef. 4-12-88; BLI 4-1998, f. & cert. ef. 3-5-98; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

Education

839-021-0325

School Release/Instruction/Waiver

(1) The employer must obtain a release from the Superintendent, or designee, of the school district in which the minor's school is located, when the employment requires the minor's absence from school for more than five days.

(2) The employer must provide minors under 16 years of age with no less than three hours of instruction per day, excluding Saturday and Sunday. The instruction must be provided by a teacher certified to teach in Oregon or, when the minors travel to Oregon from another state, certified to teach such minors in the state where the minors normally attend school. The instruction must be provided under the following circumstances:

- (a) When the school the minor is attending is in session; and
- (b) When the employment requires the minor's absence from school for more than five days.

(3) The employer is responsible for ensuring that adequate instruction is provided to minors under 16 years of age. If adequate instruction is not available at the job site, the employer must provide the minors with relief from their duties for the purpose of attending a school. As used in this section, "adequate instruction" means educational instruction of no less than three hours per day which is provided by a teacher certified to teach as indicated in section (2) of this rule.

(4) The employer may apply to the Executive Secretary or designee for a special waiver from the provisions of sections (1) and (2) of this rule by submitting a letter application to the Executive Secretary or designee setting out the reasons for the waiver request. In the case of an emergency, the employer may make an application by telephone by calling the Child Labor Unit of the Wage and Hour Division at (503) 731-4074 and setting out the reasons for the waiver request. The Executive Secretary or designee may temporarily grant or deny the application. The commission may adopt, vacate or modify the temporary action at its next regularly scheduled meeting.

(5) As neither the Wage and Hour Commission nor the Bureau of Labor and Industries has authority to certify persons to teach minors, interested persons should contact the Oregon Teacher Standards and Practices Commission, 630 Center Street, N.E., Suite 200, Salem, OR 97310, (503) 378-3586, for information regarding the teaching certification requirements in Oregon.

Stat. Auth.: ORS 653.307(1)

Stats. Implemented: ORS 653.307(1)

Hist.: BL 9-1984, f. & ef. 8-7-84; BL 6-1988, f. & cert. ef. 4-12-88; BLI 4-1998, f. & cert. ef. 3-5-98; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

Supervision**839-021-0330****Supervision**

(1) The employer must provide appropriate care and supervision of each minor at all times during the minor's employment.

(2) The employer must provide a sufficient number of supervisors to ensure the safety of the minors employed. The following number of supervisors are considered to be sufficient to ensure the safety of the minors:

(a) At least one supervisor for nine or fewer minors employed;

(b) At least one supervisor for each multiple of ten, or part thereof, minors employed;

(c) The Executive Secretary or designee may require a greater or fewer number of supervisors as individual circumstances warrant.

(3) Example of the minimum number of supervisors required by section (2) of this rule:

(a) At least one, not more than nine minors employed — Number of supervisors required: One;

(b) At least ten, not more than 19 minors employed — Number of supervisors required: Two;

(c) At least 20, not more than 29 minors employed — Number of supervisors required: Three;

(d) At least 30, not more than 39 minors employed — Number of supervisors required: Four.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.305

Hist.: BL 9-1984, f. & cf. 8-7-84; BL 6-1988, f. & cert. ef. 4-12-88; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

Hours of Work**839-021-0335****Working Hours**

(1) No minor may be employed to work more than six consecutive days.

(2) For purposes of determining the number of consecutive days of work, the following days will be considered as work days:

(a) Days when the transportation of the minor is more than four hours duration;

(b) The minor attends school and does not work.

(3) Example of determining the number of days:

(a) Travel Days: Three hours on one day — School Days: Three — Work Days: Two — Total: Five;

(b) Travel Days: Five hours on one day — School Days: Two — Work Days: Three — Total: Six.

(4) The allowed time at the place of employment as used in this section includes transportation between the employer's studio (or location headquarters) and any location. This time also includes any make-up, hairdress, wardrobe and rehearsal time as required by the employer.

(5) When a school which the minor regularly attends is in session, the minor will be permitted at the place of employment according to the following schedule:

(a) Ages 14–17: 11 hours a day including rest and meal breaks and, when required, an average of three hours of instruction;

(b) Ages 10–13: Ten hours a day including rest and meal breaks and, when required, an average of three hours of instruction;

(c) Ages 6–9: Nine hours a day including rest and meal breaks and, when required, an average of three hours of instruction;

(d) Ages 4–5: Seven hours a day, or eight hours a day if the minor is transported, including meal breaks and an average of three hours of rest, recreation, and instruction when required. Where the minor is enrolled in the first grade or above, an average of three hours of instruction must be provided when required.

(6) When the school in which the minor is enrolled is not in session, the minor will be permitted at the place of employment according to the following schedule:

(a) Ages 14–17: 11 hours a day including rest and meal breaks;

(b) Ages 10–13: Ten hours a day including three hours of rest, recreation, and meal breaks;

(c) Ages 6–9: Nine hours a day including three hours of rest, recreation, and meal breaks;

(d) Ages 4–5: Seven hours a day including three hours of rest, recreation, and meal breaks, or up to eight hours a day if the minor is transported;

(e) Ages 2–3: Six hours a day including three hours of rest, recreation, and meal breaks;

(f) Ages 1–2: Five hours a day including 2-1/2 hours of rest and recreation and meal breaks;

(g) Ages over six months—one: Four hours a day including two hours of rest and recreation and meal breaks;

(h) Ages 15 days–six months: Two hours a day, no more than 20 minutes of which will be spent as work time.

(7) The minor's working day must end according to the following schedule:

(a) Ages over six months–5: 6:30 p.m.;

(b) Ages 6–8: 7:30 p.m.;

(c) Ages 9–10: 9:00 p.m.;

(d) Ages 11–14: 9:30 p.m.;

(e) Ages 15–17: 10:00 p.m. on evenings preceding a day in which the minor will attend the school in which he or she is enrolled; 12:30 a.m. in all other circumstances.

(8) Infants over the age of 15 days and up to and including six months may only work between the hours of 9 a.m. and 4:30 p.m.

(9) Minors over the age of six months and under 14 years may not commence their working days prior to 7 a.m. Minors between the ages of 14 and 18 years may not commence their working day prior to 5:30 a.m.

(10) A minor must receive a 12 hour rest break at the end of the minor's working day and prior to the commencement of the minor's next day of work or attendance at regular school.

(11) The employer may apply to the Executive Secretary or designee for a special waiver from the provisions of sections (1) through (9) of this rule by submitting a letter application to the Executive Secretary or designee setting out the reasons for the waiver request. In the case of an emergency, the employer may make an application by telephone by calling the Child Labor Unit of the Wage and Hour Division at (503) 731-4074 and setting out the reasons for the waiver request. The Executive Secretary or designee may temporarily grant or deny the application. The commission may adopt, vacate or modify the temporary action at its next regularly scheduled meeting.

Stat. Auth.: ORS 653.307(1)

Stats. Implemented: ORS 653.307(1)

Hist.: BL 9-1984, f. & cf. 8-7-84; BL 6-1988, f. & cert. ef. 4-12-88; BL 3-1993(Temp), f. & cert. ef. 4-2-93; BL 13-1993, f. 10-29-93, cert. ef. 11-1-93; BLI 4-1998, f. & cert. ef. 3-5-98; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

Working Conditions**839-021-0340****Rest Periods**

Employers shall provide minors with appropriate rest periods as defined in OAR 839-021-0072(2).

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.305(1)

Hist.: BL 9-1984, f. & cf. 8-7-84

839-021-0345**Meal Periods**

(1) Employers shall provide minors with appropriate meal periods, free and clear of all duty assignments.

(2) As used in this rule, "appropriate meal periods" means a period of not less than 30 minutes for rest and meal commencing within the first five hours and one minute after reporting to work.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.305(1)

Hist.: BL 9-1984, f. & cf. 8-7-84

Other Working Conditions**839-021-0350****Other Working Conditions**

(1) Employers shall, at any time, allow parents or legal guardians access to their minor children employed in the entertainment industry.

(2) Employers must provide the following:

(a) A safe and secure place for minors to rest and play; and

(b) Suitable nursery and rest facilities.

(3) Minors under six months of age may not be exposed to lights of greater than 100 foot candle-light intensity for more than thirty seconds at a time.

(4) Employers shall provide worker's compensation insurance coverage for all minors in accordance with the laws of the State of

Oregon.

(5) Transportation to the closest medical facility providing emergency services must be available at all times while minors are present.

(6) On location, the employer shall provide return transportation for the minor promptly upon dismissal.

(7) Employers shall comply with all statutes and rules of the Commission concerning the employment of minors.

(8) No employer shall expose a minor to undue emotional stress while employing a minor in the entertainment industry.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.305 & 653.320(4)

Hist.: BL 9-1984, f. & ef. 8-7-84

Prohibited Performances

839-021-0355

Prohibited Performances

(1) No employer may employ a minor in the entertainment industry in any occupation declared particularly hazardous pursuant to OAR 839-021-0102 and 839-021-0104 or in employment prohibited by OAR 839-021-0097 and 839-021-0276 to 839-021-0285. However, a safe simulation of such employment may be allowed.

(2) Minors under fifteen days of age may not be employed in the entertainment industry.

(3) Minors under one year of age may not be employed in the entertainment industry unless the employer can demonstrate a need for such minor. A separate letter of application must be submitted to the Executive Secretary or designee setting forth the details of the needed employment. The letter must include:

(a) A complete description of the action in which the minor is expected to participate; and

(b) Certification that the minor will not be engaged for longer than the hours allowed by OAR 839-021-0335; and

(c) A signed statement from the minor's parent permitting the employment; and

(d) A signed statement from a physician licensed by the Oregon State Board of Health attesting that the minor is physically able to perform the expected duties. The physician's statement must be accompanied by the physician's complete address and the physician's agreement to furnish the Bureau of Labor and Industries with any or all of the information necessary to confirm the particulars of such statement.

(4) No employer may employ a minor under one year of age in the entertainment industry unless a registered nurse is present and available to the minor at all times while the minor is present.

(5) No employer may employ a minor in the entertainment industry when the employment would place the minor in a clear and present danger to life and limb. If the minor believes there exists such danger, the employer must, at the same time, discuss the matter with the minor and the minor's parent or guardian together. If the minor persists in the belief that a clear and present danger to life and limb exists, regardless of its validity, the employer must not require the minor to perform the activity the minor believes will present such danger.

(6) No employer may employ a minor to participate in a performance in the entertainment industry unless the minor has been trained to portray it safely.

(7) No employer may employ a minor to participate in, or be present during, an obscene performance or the depiction of an obscene performance in violation of ORS 163.665 to 163.695 or 167.060 to 167.095.

(8) No employer may employ a minor in a place of public amusement or entertainment in violation of ORS 167.830 to 167.840.

(9) No employer may employ a minor to be exhibited in a trance in violation of ORS 167.870.

(10) Notwithstanding the provisions of OAR 839-021-0102 and this rule, upon written request, the commission may, for good cause shown, exempt the employment of a minor under 16 years of age in the entertainment industry from the provisions of OAR 839-021-0102 and this rule after determining that the exemption will not be detrimental to the health or safety of the minor affected. Such exemption will be granted only under circumstances including but not limited to the following:

(a) The employment is not in violation of federal child labor regulations;

(b) The minor employee is adequately trained to perform the duties requested;

(c) The minor employee will be adequately supervised in performing the duties of the position;

(d) The parent or person standing in the place of the minor's parent has given written consent for the employment of the minor to perform duties otherwise prohibited; and

(e) The employer complies with all other applicable provisions of laws and rules.

Stat. Auth.: ORS 653.305 & 653.525

Stats. Implemented: ORS 653.305 & 653.525

Hist.: BL 9-1984, f. & ef. 8-7-84; BL 6-1988, f. & cert. ef. 4-12-88; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02; BLI 10-2004(Temp), 7-29-04 thru 1-24-05; BLI 1-2005, f. & cert. ef. 1-3-05

839-021-0360

Special Permit, Hours Variance or Employment Certificate May Be Refused

When it appears to the executive secretary or designee that the proposed employment would be prohibited by OAR 839-021-0355, the executive secretary or designee may refuse to issue any special permit, hours variance or employment certificate.

Stat. Auth.: ORS 653.305 & 653.525

Stats. Implemented: ORS 653.305 & 653.307

Hist.: BL 9-1984, f. & ef. 8-7-84; BL 3-1995, f. 9-8-95, cert. ef. 9-9-95

Recordkeeping Requirements/Posting

839-021-0365

Required Records

(1) Employers, including registered employers, employing minors in long-term employment and unregistered employers employing minors in short-term employment must maintain the following records for a period of two years from the date of initial employment:

(a) Name, address and telephone number of all minors employed;

(b) Total hours worked each day and each week;

(c) Daily starting and quitting time;

(d) Age of each minor;

(e) Date authorized to employ such minors by the bureau;

(f) Rate of wage and total wages paid each week;

(g) Any deductions, rebates or refunds taken from an employee's total wages and the net amount of wages paid;

(h) Any payroll or other such records pertaining to the employment of minors.

(2) Registered employers employing minors in a single engagement in short term employment must comply with section (1) of this rule. When, in a single engagement, the number of minors employed is more than five, the registered employer must maintain the following records for a period of two years from the date employment began on the particular engagement:

(a) Total number of minors employed on the engagement;

(b) Dates the minors were employed;

(c) Approximate ages of the minors;

(d) Date notification made to the Child Labor Unit pursuant to OAR 839-021-0320(4).

Stat. Auth.: ORS 653.307(1)

Stats. Implemented: ORS 653.307(1)

Hist.: BL 9-1984, f. & ef. 8-7-84; BLI 4-1998, f. & cert. ef. 3-5-98; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-021-0370

Records Availability

All employers must make available to representatives of the Wage and Hour Division of the bureau, records necessary to determine whether the employer is complying with OAR 839-021-0300 to 839-021-0375. Such records include, but are not limited to, the records described in OAR 839-021-0365. Such records must be made available to such representatives for inspection and transcription during normal business hours.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.305 - 653.310 & 653.545

Hist.: BL 9-1984, f. & ef. 8-7-84; BL 6-1988, f. & cert. ef. 4-12-88; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-021-0375

Posting

In addition to other postings required by law, registered employers must post the Registration Certificate in a conspicuous place at their place of business.

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.315(4) & 653.320(4)
Hist.: BL 9-1984, f. & ef. 8-7-84; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

Penalties

839-021-0490 Penalties

(1) In addition to any civil penalties which may be assessed by the Commissioner pursuant to ORS 653.370, the Commission may, at their discretion, revoke the right of an employer to hire minors in the future if it is determined by the Commission that the employer has failed to comply with the provisions of ORS 653.305 to 653.340 or with OAR 839-021-0210 to 839-021-0248.

(2) Prior to the revocation of the right to employ minors in the future an employer may request a contested case hearing pursuant to the Administrative Rules of the Commission for contested case hearings.

(3) If requested, the contested case hearing will be held in accordance with OAR 839-022-0000 to 839-022-0060.

Stat. Auth.: ORS 653
Stats. Implemented: ORS 653.520, 653.535 & 653.545(2)
Hist.: BL 9-1984, f. & ef. 8-7-84; BL 6-1988, f. & cert. ef. 4-12-88, Renumbered from 839-021-0380

Exemptions

839-021-0500 Exemptions

The provisions of ORS 653.305 to 653.370 and OAR 839-021-0001 to 839-021-0500 do not apply to employers employing minors in the following work or occupations:

- (1) Domestic work or chores in or about a private residence.
- (2) Newspaper carrier.
- (3) Newspaper vendor.
- (4) Persons under 18 years of age serving as a referee or assistant referee in a youth or adult recreational soccer match.

Stat. Auth.: ORS 653
Stats. Implemented: ORS 653.315 & 653.355
Hist.: BL 6-1988, f. & cert. ef. 4-12-88; BLI 3-2002, f. 1-23-02, cert. ef. 1-24-02; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

DIVISION 22

ADMINISTRATIVE RULES OF PROCEDURE

839-022-0000 Notice of Proposed Rule

Prior to the adoption, amendment, or repeal of any rule, the Wage and Hour Commission will give notice of the proposed adoption, amendment, or repeal:

(1) In the Secretary of State's Bulletin referred to in ORS 183.360 at least 21 days prior to the effective date.

(2) By mailing a copy of the notice to persons on the Wage and Hour Commission's mailing list established pursuant to ORS 183.335(7).

(3) To the general public, by posting the notice on the bureau's Website.

Stat. Auth.: ORS 183
Stats. Implemented: ORS 653.525
Hist.: BL 180, f. & ef. 10-24-75; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-022-0005 Rules of Procedure for Public Meetings of the Wage and Hour Commission

Public Proceedings, other than contested cases, of the Wage and Hour Commission will be conducted as follows:

(1) To the extent that they do not conflict with any other rules of the commission, Robert's Rules of Order Revised, 75th Anniversary edition, will constitute the rules of procedure for all meetings and hearings of the commission.

(2) All members of the Wage and Hour Commission, including the chairperson, will have the right and duty to vote affirmatively or negatively on all issues before the commission on which a vote is taken.

(3) All motions before the commission will be discussed and put to a vote, without the necessity of a second, if not withdrawn or superseded.

Stat. Auth.: ORS 183 & 653
Stats. Implemented: ORS 653.530
Hist.: BL 48, f. 12-29-60; BL 145, f. 9-5-73; BL 13-1986, f. & ef. 11-26-86; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-022-0010 Model Rules of Practice and Procedure

The Attorney General's Model Rules of Procedure under the Administrative Procedures Act are hereby adopted by reference. The Attorney General's Model Rules of Procedure do not apply to contested case proceedings conducted for violations of ORS 653.305 to 653.545 or OAR 839-021-0006 to 839-021-0500. The rules for contested case proceedings are set forth in OAR 839-022-0020 to 839-022-0060. Any matters not addressed in OAR 839-022-0020 to 839-022-0060 will be governed by the Attorney General's Model Rules of Procedure.

[ED. NOTE: The full text of the Attorney General's Model Rules of Procedure is available from the office of the Attorney General or the Bureau of Labor and Industries.]

Stat. Auth.: ORS 183 & 653
Stats. Implemented: ORS 653.530
Hist.: BL 119(Temp), f. & ef. 2-14-72; BL 124, f. 4-27-72, ef. 5-15-72; BL 166, f. 9-3-74, ef. 9-25-74; BL 196, f. & ef. 2-6-77; BL 7-1978, f. & ef. 8-7-78; BL 4-1982, f. & ef. 3-5-82; BL 13-1986, f. & ef. 11-26-86; BL 6-1988, f. & cert. ef. 4-12-88; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-022-0020 Definitions

(1) "Wage and Hour Commission" means those individuals appointed by the Governor pursuant to ORS 653.505 to administer, execute and carry out the provisions of ORS 653.305 to 653.545. The mailing address for the above is as follows: Wage and Hour Commission, Bureau of Labor and Industries, 800 NE Oregon St. #32, Portland, OR 97232.

(2) "Charging Document" means any document issued by the Wage and Hour Commission stating that any person, entity, or government agency has violated the laws as set forth in ORS 653.305 to 653.545 or OAR 839-021-0006 through 839-021-0500, over which the commission has jurisdiction to enforce.

(3) "Charged Party" means any person, entity, or government agency who has been served with a Charging Document.

(4) "Agency" means, for purposes of these rules for hearings, any employee of the Bureau of Labor and Industries, but does not include the commissioner or the Wage and Hour Commission.

Stat. Auth.: ORS 183 & 653
Stats. Implemented: ORS 653.307 & 653.535
Hist.: BL 13-1986, f. & ef. 11-26-86; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-022-0025 Authority of the Wage and Hour Commission

In cases where the Wage and Hour Commission has issued a Charging Document, the Wage and Hour Commission retains all authority to:

- (1) Regulate the course of the hearing including scheduling, recessing, reconvening and adjourning;
- (2) Make evidentiary rulings, with or without objection;
- (3) Question witnesses at the hearing;
- (4) Issue subpoenas and order the taking of depositions in a manner consistent with rules relating to these powers;
- (5) Allow discovery to the extent necessary and to limit, supervise and control discovery;
- (6) Hold appropriate conferences, if necessary, before or during the course of the hearing;
- (7) Decide matters, including motions for summary judgment or other motions that involve a final determination of the proceeding, and issue a Final Order;

(8) Limit or extend filing periods and grant waivers;

(9) Designate a Hearings Referee to preside over any case before the commission subject to the limitations in OAR 839-022-0030(2);

(10) Relieve a party from a Final Order by reason of default where the Order was entered against the party as a result of excusable mistake or circumstances beyond the control of the party or the Wage and Hour Commission or the Agency;

(11) Take any other action consistent with the duties of a Hearings Referee, as set forth beginning at OAR 839-050-0020, including requesting legal advice from the Attorney General, or policy statements from the Agency.

Stat. Auth.: ORS 183 & 653
Stats. Implemented: ORS 653.307
Hist.: BL 13-1986, f. & ef. 11-26-86; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-022-0030

Procedure for Contested Cases

(1) Where a contested case hearing has been requested, parties will be bound by the rules governing contested case hearings beginning at OAR 839-050-0020, including those rules pertaining to time limitations, motions, discovery, subpoenas, filings and other procedural rules.

(2)(a) Where a contested case hearing has been requested, the Wage and Hour Commission may delegate the authority to handle all procedural matters involved in a contested case hearing to a Hearings Referee. In such cases, the Hearings Referee will follow the rules set forth beginning at 839-050-0020 for the conduct of contested case hearings.

(b) The Hearings Referee does not have the authority to make factual findings or to render a final decision in any matter pending before the Wage and Hour Commission. The Hearings Referee may issue subpoenas and rule on motions regarding postponements, evidence or procedural matters.

(c) The Hearings Referee may, at the request of the Wage and Hour Commission, prepare a draft version of a Final Order for the Wage and Hour Commission. This draft will not be circulated to the parties.

Stat. Auth.: ORS 183 & 653

Stats. Implemented: ORS 653.307 & 653.535

Hist.: BL 13-1986, f. & ef. 11-26-86; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-022-0035

Final Orders

In all cases before the Wage and Hour Commission, a Final Order will be prepared and issued to the Agency and to the parties involved in the case. The Final Order will set forth Findings of Fact, Conclusions of Law, and where appropriate, an Order.

Stat. Auth.: ORS 183 & 653

Stats. Implemented: ORS 653.307 & 653.535

Hist.: BL 13-1986, f. & ef. 11-26-86; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-022-0040

Decisions of the Wage and Hour Commission

(1) Decisions on any motion or issue that is not dispositive of the case pending before the Wage and Hour Commission may be made by the chairperson or any member acting in that capacity.

(2) Any decision that is dispositive of a case must be made by a majority of the commission in accordance with ORS 653.510(2).

Stat. Auth.: ORS 183 & 653

Stats. Implemented: ORS 653.520

Hist.: BL 13-1986, f. & ef. 11-26-86; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-022-0045

Default

(1) When the charged party fails to appear at the specified time and place for the contested case hearing, the Wage and Hour Commission will take evidence to establish a prima facie case in support of the Charging Document. The Wage and Hour Commission will wait no longer than 30 minutes after the scheduled time to commence the hearing.

(2) A Final Order supporting the Charging Document will be rendered only where the contested case record demonstrates a prima facie case supporting that Document.

Stat. Auth.: ORS 183 & 653

Stats. Implemented: ORS 653.307 & 653.535

Hist.: BL 13-1986, f. & ef. 11-26-86; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-022-0050

Relief from Default

(1) The Wage and Hour Commission may, in its discretion and upon such terms as may be just, at anytime within 30 days after the issuance of a Final Order, relieve a party from the terms of the Final Order taken against the party where the party establishes that the default was the result of an excusable mistake or circumstance beyond the control of the Agency or party or the Wage and Hour Commission.

(2) The Request for Relief must be in writing directed to the Wage and Hour Commission and will contain: a written statement, together with appropriate documentation, setting forth the facts supporting the alleged excusable mistake or circumstances beyond the control of the party or the Agency or the Wage and Hour Commission.

Stat. Auth.: ORS 183 & 653

Stats. Implemented: ORS 653.307 & 653.535

Hist.: BL 13-1986, f. & ef. 11-26-86; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-022-0055

Dual Hearings

(1) The Wage and Hour Commission may hold one contested case hearing in conjunction with a contested case hearing held by the commissioner to resolve the allegations in two or more Charging Documents where: The same evidence must be presented in both cases:

(a) The issues in both cases need not be the same nor must the same remedies, damages or penalties be sought.

(b) The procedure will not result in prejudice to any party; and
(c) The Agency and the parties agree by written stipulation to the procedure.

(2) Such hearings may be combined even where the Wage and Hour Commission and the commissioner are each separately responsible for entry of a Final Order.

(3) The same Hearings Referee may be designated by the Wage and Hour Commission to control the procedure of the hearing as was designated by the commissioner to preside over the hearing. The Hearings Referee will not make Findings of Fact for the Wage and Hour Commission, but may, upon their request, submit to the Wage and Hour Commission a draft version of a Final Order. This draft version will not be circulated to the parties.

(4) All other rules governing the issuance of Charging Documents or the conduct or procedure of hearings apply to dual hearings.

Stat. Auth.: ORS 183 & 653

Stats. Implemented: ORS 653.305 - 653.545

Hist.: BL 13-1986, f. & ef. 11-26-86; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

839-022-0060

Consolidation of Hearings

The Wage and Hour Commission may combine hearings under the same circumstances as may the commissioner under OAR 839-050-0190.

Stat. Auth.: ORS 183 & 653

Stats. Implemented: ORS 653.305 - 653.545

Hist.: BL 13-1986, f. & ef. 11-26-86; BLI 9-2002, f. 3-28-02, cert. ef. 4-1-02

DIVISION 25

PREVAILING WAGE RATES ON PUBLIC WORKS

Procedural Rules

839-025-0000

Notice of Proposed Rules

(1) Prior to the permanent adoption, amendment, or repeal of any rule relating to Prevailing Wage Rates on Public Works, the Bureau of Labor and Industries must give notice of intended action as required in OAR 839-002-0002.

(2) The notice provisions in OAR 839-002-0002 do not apply to the determination of prevailing wage rates pursuant to ORS 279C.815(2) or to the adoption of such rates as rule amendments to OAR 839-025-0700 and 839-025-0750.

Stat. Auth.: ORS 279 & 651.060(4)

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96; BLI 26-2000(Temp), f. 12-19-00, cert. ef. 12-20-00 thru 6-18-01; BLI 15-2001, f. & cert. ef. 11-14-01; BLI 9-2004, f. 7-26-04, cert. ef. 7-27-04; Renumbered from 839-016-0000, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0003

Forms

(1) All forms referenced in these rules may be obtained on the bureau's website, www.oregon.gov/boli or at the address listed below.
(2) Completed forms, requests and fees referenced in these rules may be filed with the Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon St. #1045, Portland, OR 97232.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0003, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06

839-025-0004

Definitions

As used in these rules, unless the context requires otherwise:

(1) "Apprentice" means:

(a) A person employed and individually registered in a bona fide

apprenticeship program registered with the U.S. Department of Labor, Bureau of Apprenticeship and Training (BAT) or with any state apprenticeship agency recognized by BAT; or

(b) A person in probationary employment as an apprentice in such an apprenticeship program, but who is not individually registered in the program, but who has been certified by the BAT or a state apprenticeship agency to be eligible for probationary employment as an apprentice.

(2) "The Basic Hourly Rate of Pay" or "Hourly Rate" means the rate of hourly wage, excluding fringe benefits, paid to the worker.

(3) "Bureau" means the Bureau of Labor and Industries.

(4) "Commissioner" means the Commissioner of the Bureau of Labor and Industries, or designee.

(5) "Construction" means the initial construction of buildings and other structures, or additions thereto, and of highways and roads. "Construction" does not include the transportation of material or supplies to or from the public works project by employees of a construction contractor or construction subcontractor.

(6) "Division" means the Wage and Hour Division of the Bureau of Labor and Industries.

(7) "Employ" includes to suffer or permit to work.

(8) "Fringe benefits" means the amount of:

(a) The rate of contribution irrevocably made on a regular basis and not less often than quarterly by a contractor or subcontractor to a trustee or to a third person pursuant to a plan, fund or program; and

(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program which is committed in writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state or local law to provide any of such benefits. Other bona fide fringe benefits do not include reimbursement to workers for meals, lodging or other travel expenses, nor contributions to industry advancement funds (CIAF for example).

(9)(a) "Funds of a public agency" includes any funds of a public agency that are directly or indirectly used, as described below.

(A) "Directly used funds of a public agency" means any revenue, money, or that which can be valued in money that is collected for a public agency or that is derived from a public agency's immediate custody and control, and, except as provided in ORS 279C.810(1)(a)(H) and (J), includes but is not limited to any money loaned by a public agency including the loan of proceeds from the sale of conduit or pass-through revenue bonds for the specific purpose of financing a project, and public property or other assets that is used as payment for all or part of a project.

(B) "Indirectly used funds of a public agency" means that a public agency ultimately bears the cost of all or part of the project, even if a public agency is not paying for the project directly or completing payment at the time it occurs or shortly thereafter. A public agency does not indirectly use funds of a public agency when it elects not to collect land rent that is due. Examples of when an agency "ultimately bears the cost" of all or part of a project include but are not limited to:

(i) Amortizing the costs of construction over the life of a lease and paying these costs with funds of a public agency during the course of the lease;

(ii) A public agency subsidizing the costs of construction that would normally be borne by the contractor.

(iii) Using insurance proceeds that belong to a public agency to pay for construction. Insurance proceeds represent "money collected for the custody and control of a public agency" and therefore are funds of a public agency, whether the contractor obtains payment directly from the insurance company or the public agency; or

(iv) Using or creating a private entity as a conduit for funding a project when the private entity is in fact an alter ego of the public agency.

(b) "Funds of a public agency" does not include:

(A) Funds provided in the form of a government grant to a non-profit organization, unless the government grant is issued for the pur-

pose of construction, reconstruction, major renovation or painting;

(B) Building and development permit fees paid or waived by the public agency;

(C) Tax credits or tax abatements;

(D) Land that a public agency sells to a private entity at fair market value;

(E) The difference between:

(i) The value of land that a public agency sells to a private entity as determined at the time of the sale after taking into account any plan, requirement, covenant, condition, restriction or other limitation, exclusive of zoning or land use regulations, that the public agency imposes on the development or use of the land; and

(ii) The fair market value of the land if the land is not subject to the limitations described in subparagraph (i) of this paragraph;

(F) Staff resources of the public agency used to manage a project or to provide a principal source of supervision, coordination or oversight of a project;

(G) Staff resources of the public agency used to design or inspect one or more components of a project;

(H) Moneys derived from the sale of bonds that are loaned by a state agency to a private entity, unless the moneys will be used for a public improvement;

(I) Value added to land as a consequence of a public agency's site preparation, demolition of real property or remediation or removal of environmental contamination, except for value added in excess of the expenses the public agency incurred in the site preparation, demolition or remediation or removal when the land is sold for use in a project otherwise subject to ORS 279C.800 to 279C.870; or

(J) Bonds, or loans from the proceeds of bonds, issued in accordance with ORS chapter 289 or ORS 441.525 to 441.595, unless the bonds or loans will be used for a public improvement.

(10) "Housing" has the meaning given that term in ORS 279C.800.

(11) "Major renovation" means the remodeling or alteration of buildings and other structures within the framework of an existing building or structure and the alteration of existing highways and roads, the contract price of which exceeds \$50,000.

(12) "Nonprofit organization," as used in subsection (9)(b)(A) of this rule, means an organization or group of organizations described in section 501(c)(3) of the Internal Revenue Code that is exempt from income tax under section 501(a) of the Internal Revenue Code.

(13) "Normal business hours" means the hours during which the office of the contractor or subcontractor is normally open for business. In the absence of evidence to the contrary, the Division will consider the hours between 8:00 a.m. and 5:00 p.m., excluding the hours between 12:00 noon and 1:00 p.m., on weekdays as normal business hours.

(14) "Overtime" means all hours worked:

(a) On Saturdays;

(b) On the following legal holidays:

(A) Each Sunday;

(B) New Year's Day on January 1;

(C) Memorial Day on the last Monday in May;

(D) Independence Day on July 4;

(E) Labor Day on the first Monday in September;

(F) Thanksgiving Day on the fourth Thursday in November;

(G) Christmas Day on December 25.

(c) Over 40 hours in a week; and either

(d) Over eight (8) hours in a day; or

(e) Over 10 hours in a day provided:

(A) The employer has established a work schedule of four consecutive days (Monday through Thursday or Tuesday through Friday) pursuant to OAR 839-025-0034; and

(B) The employer operates in accordance with this established work schedule.

(15) "Overtime rate" means the basic hourly rate of pay multiplied by one and one-half.

(16) "Overtime wages" means the overtime hours worked multiplied by the overtime rate.

(17) "Person" includes a public or private corporation, a partnership, a sole proprietorship, a limited liability company, a government or governmental instrumentality.

(18) "Prevailing wage rate claim" means a claim for wages filed by a worker with the Division.

(19) "Public agency" means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any instrumentality thereof organized and existing under law or charter.

(20)(a) "Public work," "public works" or "public works project" includes but is not limited to:

(A) Roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest;

(B) A project for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building structure or improvement of any type that uses funds of a private entity and \$750,000 or more of funds of a public agency; or

(C) A project for the construction of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and in which 25 percent or more of the square footage of the completed project will be occupied or used by a public agency.

(b) "Public works" does not include:

(A) The reconstruction or renovation of privately owned property that is leased by a public agency; or

(B) The renovation of publicly owned real property that is more than 75 years old by a private nonprofit entity if:

(i) The real property is leased to the private nonprofit entity for more than 25 years;

(ii) Funds of a public agency used in the renovation do not exceed 15 percent of the total cost of the renovation; and

(iii) Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before the effective date of this 2007 act.

(21) "Public works contract" or "contract" means any contract, agreement or understanding, written or oral, into which a public agency enters for any public work.

(22) "Reconstruction" means highway and road resurfacing and rebuilding, the restoration of existing highways and roads, and the restoration of buildings and other structures.

(23) "Reconstruction or renovation of privately owned property which is leased by a public agency" includes improvements of all types within the framework or footprint of an existing building or structure.

(24) "Residential construction project" means:

(a) A public work project that is not exempt under the provisions of ORS 279C.810 for the construction, reconstruction, major renovation or painting of a single family house or apartment building of no more than four (4) stories in height and all incidental items such as site work, parking areas, utilities, streets and sidewalks pursuant to the U.S. Department of Labor's "All Agency Memorandum No. 130" — "Application Of The Standard of Comparison 'Projects Of a Character Similar' Under the Davis-Bacon and Related Acts" dated March 17, 1978. (See Appendix 6.)

(b) Notwithstanding the provisions of subsection (a) of this rule, where it is determined that a different definition of "residential construction" has been adopted by local ordinance or code, or that the prevailing practice of a particular trade or occupation regarding what is considered "residential construction" differs from the U.S. Department of Labor definition of residential construction, the commissioner may consider such information in determining a project to be a "residential construction project."

(25) "Site of work" is defined as follows:

(a) The site of work is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed, and other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the site.

(b) Except as provided in paragraph (c) of this section, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards and similar facilities, are part of the site of work provided they are dedicated exclusively, or nearly so, to the performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them. Such facilities which are established by a supplier of materials for the project after the opening of bids are deemed to be dedicated exclusively to the performance of the contract or project.

(c) Not included in the site of work are permanent home offices,

branch plant establishments, fabrication plants, and tool yards of a contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, and similar facilities of a commercial supplier or materialman which are established by a supplier of materials for the project before opening of bids and not on the project site, are not included in the site of work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract or project.

(26) "Special wage determination" means a wage determination made at the request of a public contracting agency and which is applicable only to specific job classes. A special wage determination is issued in those cases where there is no current wage determination applicable to specific job classes and the use of such job classes is contemplated on a public works project.

(27) "Trade" or "occupation" is defined in accordance with the prevailing practices of the construction industry in Oregon.

(28) "Trainee" means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Bureau of Apprenticeship and Training as meeting its standards for on-the-job training programs and which has been so certified by that bureau.

(29) "Wage determination" includes the original decision and any subsequent amendments made by the commissioner in accordance with ORS 279C.815.

(30) "Wages" or "Prevailing Wages" means the basic hourly rate of pay and fringe benefits as defined in sections (2) and (8) of this rule.

(31) "Worker" means a person employed on a public works project and whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental, professional or managerial. The term "worker" includes apprentices, trainees and any person employed or working on a public works project in a trade or occupation for which the commissioner has determined a prevailing rate of wage. (See OAR 839-025-0035.)

[ED. NOTE: Attachment referenced are available from the agency.]

Stat. Auth.: ORS 279C & 651.060

Stats. Implemented: ORS 279C.800, 279C.870

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 7-1989(Temp), f. 10-2-89, cert. ef. 10-3-89; BL 5-1990, f. 3-30-90, cert. ef. 4-1-90; BL 3-1996, f. & cert. ef. 1-26-96; BL 8-1996, f. 8-26-96, cert. ef. 9-1-96; BL 3-1997(Temp), f. 7-31-97, cert. ef. 8-1-97; BL 1-1998, f. & cert. ef. 1-5-98; BLI 15-2001, f. & cert. ef. 11-14-01; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0004, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06; BLI 19-2006(Temp), f. 5-12-06, cert. ef. 5-15-06 thru 11-10-06; BLI 39-2006, f. 11-8-06, cert. ef. 11-10-06; BLI 20-2007(Temp), f. 7-30-07, cert. ef. 8-1-07 thru 1-27-08

839-025-0005

Determination Requests

(1) A request for a determination as to whether a project or proposed project is a public works under Section 43 of House Bill 2140 (Enrolled), OR Laws 2007, must meet the following requirements before it will be considered by the commissioner:

(a) The request must be in writing, describe all relevant details of the project or proposed project, and be submitted to: Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon St., #1045, Portland, OR, 97232.

(b) A copy of the request must be sent to any public agency known to be associated with the project at the time it is submitted to the Prevailing Wage Rate Unit. The request submitted to the Prevailing Wage Rate Unit must identify the public agencies receiving a copy of the request.

(c) In addition to the written request, the requester must provide all documents, records, and other information necessary to enable the commissioner to make the determination. This information includes but is not limited to copies of advertisements, project plans and specifications, development and disposition agreements, contracts, project financing information, loan agreements, and any other relevant information related to the project or proposed project.

(2)(a) The requester has a continuing duty to provide the Prevailing Wage Rate Unit with all relevant documents, records and other information until a determination is made. A requester must promptly provide documents, records or other information that the commissioner informs the requester is necessary to make a determination. When

the requester is not a public agency and information necessary for a determination is in the custody or control of a public agency, the requester shall obtain the information from the public agency and provide it to the Prevailing Wage Rate Unit.

(b) If any information submitted in connection with a request is modified or superseded in any material respect after being submitted to the Prevailing Wage Rate Unit, the requestor must promptly submit the updated information to the Prevailing Wage Rate Unit.

(c) If a requestor fails or refuses to provide information required under subsection (1) or (2) of this rule, and the commissioner has reasonable grounds to believe such information exists, the commissioner may inform the requestor that the commissioner is unable to issue a determination.

(3) If the commissioner informs a requester that the Prevailing Wage Rate Unit has not received all the information necessary to make a determination, the request shall remain pending for 90 calendar days with the Prevailing Wage Rate Unit. After 90 days, the requester will need to submit a new request for a determination.

(4) When the commissioner issues a determination, it shall be issued to the requester, with copies mailed to any public agencies identified on the request.

(5) After a determination by the commissioner is issued, the requester or any public agency served with a copy of the determination may request that the commissioner reconsider the determination.

(a) A request for reconsideration must be filed within 15 calendar days of the date the determination was mailed. Requests must be filed with the Prevailing Wage Rate Unit. Filing of a request for reconsideration does not toll the time period for requesting an administrative hearing on the determination.

(b) The reconsideration request must be in writing and include the reason or reasons for the request and any documents in support of the request.

(c) The commissioner will accept or reject the request within 15 business days of receipt of the request by the Prevailing Wage Rate Unit. If the commissioner does not accept the request within 15 business days, it shall be deemed denied.

Stat. Auth.: ORS 279C & 651.060, Other Auth. HB 2140, Sec. 45, 2007

Stats. Implemented: ORS 279C.800, 279C.870

Hist.: BLI 20-2007(Temp), f. 7-30-07, cert. ef. 8-1-07 thru 1-27-08

839-025-0006

Purpose and Procedure for Addition of Trade

(1) As a result of technological advancements and/or policy changes, new trades periodically emerge in the construction industry. When this happens, it may be appropriate for the commissioner to add such trades into the prevailing wage rate determinations. The following procedure is designed to insure that new trades are included in prevailing wage rate determinations when appropriate.

(2) Any person may request the addition of a trade by submitting a written request to the Prevailing Wage Rate Unit. This request must, at a minimum, specify:

- (a) Name of proposed trade;
- (b) Minimum education required; and
- (c) Description of minimum skills required and tools used.

(3) The PWR Coordinator will recommend to the commissioner whether or not to conduct a complete study of the proposed trade. The requesting party will be notified in writing by the PWR Coordinator of the commissioner's decision.

(4) If the PWR Coordinator conducts the requested study, the following areas, at a minimum, will be included in the review:

- (a) Relevant practices of the U.S. Department of Labor under the Davis-Bacon Act;
 - (b) Whether the proposed trade is substantially different from trades included in the current wage determination;
 - (c) The relevant prevailing practices in the State of Oregon.
- (5) The PWR Coordinator will submit a report and a recommendation to the commissioner.

(6) The commissioner will decide whether or not to include the proposed trade. The requesting party will be notified in writing of the commissioner's decision.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0006, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0007

Purpose and Procedure for Special Wage Determination

(1) In planning a public works project, public contracting agencies periodically require the use of a trade not normally included in wage determinations. Special wage determinations allow the commissioner to recognize a trade and establish a rate for it. This procedure also allows the commissioner to respond in a timely fashion to the needs of the contracting agency. Special wage determinations are not available when the wage determination is applicable.

(2) Any public contracting agency may submit a written request for a special wage determination to the Prevailing Wage Rate Unit. The request must contain:

- (a) A written description of the work to be performed; and
- (b) An identification of the requested trade(s).

(3) Within two weeks the PWR Coordinator will recommend to the commissioner whether or not a special wage determination should be established.

(4) If a special wage determination is to be allowed, the PWR Coordinator will provide the requesting agency with the instruments, procedures, and minimum requirements for conducting a wage survey. The requesting agency will conduct the wage survey in accordance with bureau procedures and submit the results to the PWR Coordinator.

(5) The PWR Coordinator will review the data for methodological compliance and accuracy and submit it to the commissioner with a recommendation.

(6) The commissioner will approve or disapprove the special wage determination request after considering the PWR Coordinator's recommendation. The contracting agency will be notified, in writing, of the commissioner's final decision.

(7) If the special wage determination is approved, it is valid only for the locality specified in the special wage determination and only until the first day of July following the date of approval unless amended prior to that date.

(8) A copy of the approved special wage determination will be kept on file by the PWR Coordinator and the Wage and Hour Division.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0007, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0008

List of Planned Public Improvements

(1) As used in this rule the term "Public improvement" has the same meaning as it does in ORS 279A.010(aa).

(2) Each public agency must prepare and file with the commissioner a list of every public improvement known to the agency that the agency plans to fund during the subsequent budget period. The list must be submitted to the Prevailing Wage Rate Unit not less than 30 days prior to the adoption of the agency's budget. If the agency revises its list after the adoption of its budget, the agency must file the revised list with the commissioner at that time.

(3) Copies of the lists of planned public improvements filed with the commissioner by public agencies as required by ORS 279C.305(2) are available to the public upon written request to the Prevailing Wage Rate Unit. The request must contain the following information:

- (a) The name of the public agency;
- (b) The name of any division, section or department of the public agency, if applicable; and
- (c) The approximate date of the budget period for which the list was filed.

(4) The cost of supplying copies requested in section (3) of this rule will be calculated in accordance with OAR 839-030-0010, which sets forth the fees to be charged by the bureau when responding to requests for copies of public records.

(5) To assist public contracting agencies in complying with the provisions of ORS 279C.305 and these rules, the commissioner has prepared two forms, **WH-118** and **WH-119**. The use of these forms by the public contracting agency is optional. However, the statutory requirements of ORS 279C.305(2) are satisfied when these forms are completed and mailed to the Prevailing Wage Rate Unit. The forms should be completed as follows:

(a) The Planned Public Improvement Summary form, WH-118, should be used to summarize all planned projects in the subsequent fis-

cal year, noting the project information requested on the form;

(b) ORS 279C.305 requires public contracting agencies to show that they are conforming to state policy when they plan to use their own personnel and equipment on projects estimated to exceed \$125,000. The Capital Improvement Project Cost Comparison Estimate form, **WH-119**, should be completed for the purpose of complying with this provision. In developing cost comparisons, unit costs which can be substantiated by the agency's cost accounting system should be used. Contractor unit prices that reflect bidding data should also be used.

[ED. NOTE: Forms referenced are available from the agency.]

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0008, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

Forms Prescribed by the Labor Commissioner

839-025-0010

Payroll and Certified Statement

(1) The form required by ORS 279C.845 is the Payroll and Certified Statement form, **WH-38**. This form must accurately and completely set out the contractor's or subcontractor's payroll for each week during which the contractor or subcontractor employs a worker upon a public works project.

(2) The contractor or subcontractor may submit the weekly payroll on the **WH-38** form or may use a similar form providing such form contains all the elements of the **WH-38** form. When submitting the weekly payroll on a form other than **WH-38**, the contractor or subcontractor must attach the certified statement contained on the **WH-38** form to the payroll forms submitted.

(3) Each Payroll and Certified Statement form must be submitted by the contractor or subcontractor to the public contracting agency by the fifth business day of each month following a month in which workers were employed upon a public works project.

(4) The Payroll and Certified Statement forms received by the public contracting agency are public records subject to the provisions of ORS 192.410 to 192.505. As such, they must be made available upon request. Pursuant to ORS 279C.845(2), information submitted on certified statements may be used only to ensure compliance with the provisions of ORS 279C.800 through 279C.870.

(5) If the contractor fails to submit its payroll and certified statement forms to the public contracting agency as required by subsection (3) above, the public contracting agency must retain 25 percent of any amount earned by the contractor until the contractor has submitted the required payroll and certified statements to the public contracting agency.

(a) The amount to be retained shall be calculated at 25 percent of the unpaid amount earned by the contractor at the time each payroll and certified statement are due. For example, if the contractor fails to submit its payroll and certified statement by the fifth of the month and the contractor earned \$100,000 in the period since its last payroll and certified statement were submitted to the public contracting agency, the public contracting agency must retain 25 percent of \$100,000 (\$25,000), until such time as the required payroll and certified statement are submitted.

(b) When calculating the amount to be retained, amounts previously retained shall not be included as amounts earned by the contractor.

(c) Once the required payroll and certified statement have been submitted to the public contracting agency, the public contracting agency must pay the amount retained to the contractor within 14 days.

(6) If a first-tier subcontractor fails to submit a payroll and certified statement form to the public contracting agency as required by subsection (3) above, the contractor must retain 25 percent of any amount earned by the first-tier subcontractor until the first-tier subcontractor has submitted the required payroll and certified statements to the public contracting agency.

(a) The amount to be retained shall be calculated at 25 percent of the unpaid amount earned by the first-tier subcontractor at the time each payroll and certified statement are due. For example, if the first-tier subcontractor fails to submit the payroll and certified statement by the fifth of the month and the first-tier subcontractor earned \$100,000 in the period since the last payroll and certified statement were sub-

mitted to the public contracting agency, the contractor must retain 25 percent of \$100,000 (\$25,000), until such time as the required payroll and certified statement are submitted.

(b) When calculating the amount to be retained, amounts previously retained shall not be included as amounts earned by the first-tier subcontractor.

(c) The contractor must verify that the first-tier subcontractor has filed the required payroll and certified statement(s) with the public contracting agency before the contractor may pay the first-tier subcontractor any amount retained under this section.

(d) Once the first-tier subcontractor has filed the required payroll and certified statement with the public contracting agency, the contractor must pay the amount retained to the first-tier subcontractor within 14 days.

(7) Notwithstanding ORS 279C.555 or 279C.570(7), amounts retained pursuant to the provisions of this rule shall be in addition to any other amounts retained.

[ED. NOTE: Forms and Publications referenced are available from the agency.]

Stat. Auth.: ORS 279 & 651.060

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 13-1992, f. & cert. ef. 12-14-9; BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0010, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06

839-025-0013

Notice of Award Form

(1) The notification form required by ORS 279C.835 is the Notice of Award of Public Works Contract form, **WH-81**.

(2) The public contracting agency must file the Notice of Award of Public Works Contract form, **WH-81**, with the Prevailing Wage Rate Unit within 30 days of the date the contract was awarded.

(3) Pursuant to ORS 279C.835, the Notice of Award of Public Works Contract form, **WH-81**, must include a copy of the disclosure of first-tier subcontractors submitted to the public contracting agency by the contractor.

(4) Public contracting agencies are not required to file a Notice of Award of Public Works Contract form when the contract awarded is not regulated under the provisions of ORS 279C.800 to 279C.870.

[ED. NOTE: Forms and Publications referenced are available from the agency.]

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0013, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

Contract Requirements

839-025-0015

Public Works Bonds

(1) The Commissioner of the Bureau of Labor and Industries adopts the language in the Statutory Public Works Bond set forth in **Appendix 5**.

(2) The name of the entity as it appears on the public works bond must be the same as the entity name filed at the Oregon Corporation Division (if applicable).

(a) If the entity is a sole proprietorship, the bond must include the name of the sole proprietor;

(b) If the entity is a partnership, or joint venture, the bond must include the names of all partners or venturers (except limited partners);

(c) If the entity is a limited liability partnership, the bond must be issued in the name of all partners and in the name of the limited liability partnership;

(d) If the entity is a limited partnership, the bond must be issued in the name of all general partners and in the name of the limited partnership and any other business name(s) used. Limited partners do not need to be listed on the bond;

(e) If the entity is a corporation or trust, the bond must be issued showing the corporate or trust name; or

(f) If the entity is a limited liability company, the bond must be issued in the name of the limited liability company.

(3) If at any time an entity changes or amends its entity name, the Construction Contractors Board must be notified within 30 days of the date of the change.

(4) If an entity is a sole proprietorship, partnership, limited liability partnership, limited partnership, joint venture, corporation, limited liability company, business trust or any other entity, and changes

the entity to one of the other entity types, the new entity must supply a new bond.

(5) Riders to existing bonds changing the type of entity bonded will be construed as a cancellation of the bond and will not be otherwise accepted.

(6) The inclusion or exclusion of business name(s) on a bond shall not limit the liability of an entity. Claims against a bonded entity will be processed regardless of business names used by such entity.

[ED. NOTE: Appendix referenced are available from the agency.]

Stat. Auth.: ORS 279C & 651.060

Stats. Implemented: ORS 279C.800 - 279C.870

Hist.: BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06

839-025-0020

Public Works Contracts and Contract Specifications; Required Conditions

(1) For purposes of this rule:

(a) "Construction Manager/General Contractor contract" (or "CM/GC contract") means a contract that typically results in a general contractor/construction manager initially undertaking various pre-construction tasks that may include, but are not limited to: design phase development, constructability reviews, value engineering, scheduling, and cost estimating, and in which a guaranteed maximum price for completion of construction-type work is typically established by amendment of the initial contract, after the pre-construction tasks are complete or substantially complete. "CM/GC" refers to the general contractor/construction manager under this form of contract. Following the design phase, the CM/GC may then act as a General Contractor and begin the subcontracting process. The CM/GC typically coordinates and manages the construction process, provides contractor expertise, and acts as a member of the project team;

(b) "Construction specifications" include the detailed description of physical characteristics of the improvement, design details, technical descriptions of the method and manner of doing the work, quantities or qualities of any materials required to be furnished, descriptions of dimensions, required units of measurement, composition or manufacturer, and descriptions of any quality, performance, or acceptance requirements.

(2) Every public works contract must contain the following:

(a) A condition or clause that, if the contractor fails, neglects, or refuses to make prompt payment of any claim for labor or services furnished to the contractor or a subcontractor by any person, or the assignee of the person, in connection with the public works contract as such claim becomes due, the proper officer or officers of the public contracting agency may pay such claim and charge the amount of the payment against funds due or to become due the contractor by reason of the contract (Reference: ORS 279C.515);

(b) A condition that no person will be employed for more than 10 hours in any one day, or 40 hours in any one week except in cases of necessity, emergency, or where the public policy absolutely requires it, and in such cases the person so employed must be paid at least time and one-half the regular rate of pay for all time worked:

(A) For all overtime in excess of eight hours a day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or

(B) For all overtime in excess of 10 hours a day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and

(C) For all work performed on Saturday and on any legal holiday specified in ORS 279C.540.

(c) A condition that an employer must give notice to employees who work on a public works contract in writing, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work (Reference: ORS 279C.520);

(d) A condition that the contractor must promptly, as due, make payment to any person, co-partnership, association or corporation, furnishing medical, surgical and hospital care or other needed care and attention, incident to sickness or injury, to employees of such contractor, of all sums which the contractor agrees to pay for such services and all moneys and sums which the contractor collected or deducted from the wages of the contractor's employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service (Reference: ORS 279C.530);

(e) A provision that the contractor must pay to the commissioner a fee equal to one tenth of one percent (.001) of the contract price but no less than \$100 nor more than \$5,000 regardless of the contract price; that the fee must be paid no later than 10 days after receipt of the first progress payment or 60 days after work on the contract has begun, whichever comes first; that final adjustments to the fee must be made within 30 days of the final progress payment after completion of the contract.

(3) Every public works contract and subcontract must contain a provision that each worker in each trade or occupation employed in the performance of the contract either by the contractor, subcontractor or other person doing or contracting to do or contracting for the whole or any part of the work on the contract, must be paid not less than the applicable state prevailing rate of wage, or the applicable federal prevailing rate of wage, whichever is higher.

(4)(a) Except as provided in subsections (7) and (8) of this rule, the existing rate of wage is the rate in effect at the time the initial specifications were first advertised for bid solicitations.

(b) If a public agency is required under (a) of this section or section (7) to include the state and federal prevailing rates of wage in the specifications for a contract for public works, the public agency also shall include in the specifications information showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality, as determined by the Commissioner of the Bureau of Labor and Industries under ORS 279C.815(2)(b).

(5) The provisions described in sections (3) and (4), and sections (7) and (8) if applicable, must be included in all specifications for each contract awarded on the project, regardless of the price of any individual contract, so long as the combined price of all contracts awarded on the project is \$50,000 or more (Reference: ORS 279C.830)

(a) A statement incorporating the applicable prevailing wage rate publication and any amendments thereto or Davis-Bacon wage rate determination into the specifications by reference will satisfy these requirements. Such reference must include the title of the applicable wage rates publication or determination and the date of the publication or determination as well as the date of any applicable amendments.

(b) When the prevailing wage rates are available electronically or are accessible on the Internet, the rates may be incorporated into the specifications by referring to the electronically accessible or Internet-accessible rates and by providing adequate information about how to access the rates. Such reference must include the title of the applicable wage rates publication or determination and the date of the publication or determination as well as the date of any applicable amendments.

(6) All specifications for each contract awarded on the project must contain a provision stating that the contractor must pay to the commissioner a fee equal to one tenth of one percent (.001) of the contract price but no less than \$100 nor more than \$5,000 regardless of the contract price pursuant to ORS 279C.825. The fee must be paid no later than 10 days after receipt of the first progress payment or 60 days after work on the contract has begun, whichever comes first; that final adjustments to the fee must be made within 30 days of the final progress payment after completion of the contract (Reference: ORS 279C.830).

(7) When a public agency is a party to a CM/GC contract, the CM/GC contract becomes a public works contract either when the contract first constitutes a binding and enforceable obligation on the part of the CM/GC to perform or arrange for the performance of construction, reconstruction, major renovation or painting of an improvement that is a public works or when the CM/GC contract enters the construction phase, whichever occurs first. The prevailing wage rate in effect at that time shall apply and must be included with the construction specifications for the CM/GC contract. For example, the CM/GC will have a binding and enforceable obligation to perform or arrange for the performance of construction, reconstruction, major renovation or painting of an improvement after the public agency and CM/GC commit to the guaranteed maximum price. For purposes of this rule, the CM/GC contract enters the construction phase when the agency first authorizes the performance of early construction, reconstruction, major renovation or painting work directly related to the improvement project.

(8) A public works project described in ORS 279C.800(6)(a)(B) or (C) that is not a CM/GC contract subject to section (7) is subject to the existing state prevailing rate of wage or, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act that is in effect at the time a public agency enters into an agreement with a pri-

vate entity for the project. After that time, the specifications for any contract for the public works shall include the applicable prevailing rate of wage.

(9) Public contracting agencies may obtain, without cost, a copy of the existing prevailing rate of wages for use in preparing the contract specifications by contacting the Prevailing Wage Rate Unit or any office of the bureau.

Stat. Auth.: ORS 279C & 651.060
Stats. Implemented: ORS 279C.800-279C.870
Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 7-1989(Temp), f. 10-2-89, cert. ef. 10-3-89; BL 5-1990, f. 3-30-90, cert. ef. 4-1-90; BL 3-1996, f. & cert. ef. 1-26-96; BL 3-1997(Temp), f. 7-31-97, cert. ef. 8-1-97; BL 1-1998, f. & cert. ef. 1-5-98; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0020, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06; BLI 19-2006(Temp), f. 5-12-06, cert. ef. 5-15-06 thru 11-10-06; BLI 39-2006, f. 11-8-06, cert. ef. 11-10-06; BLI 2-2007, f. & cert. ef. 1-23-07; BLI 20-2007(Temp), f. 7-30-07, cert. ef. 8-1-07 thru 1-27-08

Records

839-025-0025

Required Records

(1) All contractors and subcontractors performing work on public works contracts shall make and maintain for a period of three (3) years from the completion of work upon such public works records necessary to determine whether the prevailing rate of wage and overtime has been or is being paid to workers upon public works.

(2) In addition to the Payroll and Certified Statement, Form WH-38, records necessary to determine whether the prevailing wage rate and overtime wages have been or are being paid include but are not limited to records of:

- (a) The name and address of each employee;
- (b) The work classification or classifications of each employee;
- (c) The rate or rates of monetary wages and fringe benefits paid to each employee;
- (d) The rate or rates of fringe benefit payments made in lieu of those required to be provided to each employee;
- (e) Total daily and weekly compensation paid to each employee;
- (f) The daily and weekly hours worked by each employee;
- (g) Apprenticeship and Training Agreements;
- (h) Any deductions, rebates or refunds taken from each employee's total compensation and actual wages paid;
- (i) Any payroll and other such records pertaining to the employment of employees upon a public work.

(3) When apprentices and/or trainees are employed on a public works project, the records must clearly distinguish them from other employees.

(4) When a contractor or subcontractor employs a worker on public works projects and non public works projects during the same work week and the worker is paid a rate of pay which is less than the prevailing wage rate when working on a non public works project, the contractor or subcontractor must separately record the hours worked on the public works projects and those hours worked elsewhere.

(5) Contractors shall maintain records documenting that the appropriate fee was paid. Such records shall be maintained for a period of two years and shall include but are not limited to:

- (a) Contract documents showing the contract price;
- (b) Change orders or other adjustments to the final contract price;
- (c) Receipts showing amounts paid.

Stat. Auth.: ORS 279 & 651
Stats. Implemented: ORS 279.348 - 279.380
Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0025, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0030

Records Availability

(1) Every contractor and subcontractor performing work on a public works contract shall make available to representatives of the Wage and Hour Division records necessary to determine if the prevailing wage rate has been or is being paid to workers upon such public work and records showing contract prices and sums paid as fees to the bureau. Such records shall be made available to representatives of the Wage and Hour Division for inspection and transcription during normal business hours.

(2) The contractor or subcontractor shall make the records referred to in section (1) of this rule available within 24 hours of a

request from a representative of the Wage and Hour Division or at such later date as may be specified by the division.

(3) When a prevailing wage rate claim or complaint has been filed with the Wage and Hour Division or when the division has otherwise received evidence indicating that a violation has occurred and upon a written request by a representative of the Division a public works contractor or subcontractor shall send a certified copy of such contractor's or subcontractor's payroll records to the Division within ten days of receiving such request. The Division's written request for such certified copies will indicate that a prevailing wage rate claim has been filed or that the division has received evidence indicating that a violation has occurred.

Stat. Auth.: ORS 279 & 651
Stats. Implemented: ORS 279.348 - 279.380
Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0030, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

Posting

839-025-0033

Posting Requirements

(1) Every contractor or subcontractor must post the prevailing wage rates applicable to the project in a conspicuous place at the site of work. The posting must be easily accessible to employees working on the project. Contractors may obtain a copy of the applicable wage rates by contacting the Prevailing Wage Rate Unit or any office of the bureau.

(2) When a contractor or subcontractor provides for or contributes to a health and welfare plan or pension plan for employees who are working on a public works project, the contractor or subcontractor must post a notice containing the following information:

- (a) A description of the plan or plans;
- (b) Information on how and where claims can be made; and
- (c) Where to obtain more information.

(3) The notice required to be posted in section (2) of this rule must be posted in a conspicuous place at the site of work and be easily accessible to employees working on the project. The notice must be posted in the same location as the prevailing wage rate pursuant to section (1) of this rule.

Stat. Auth.: ORS 279 & 651
Stats. Implemented: ORS 279.348 - 279.380
Hist.: BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0033, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0034

Establishing a Work Schedule

(1) Employers must give written notice to employees who work on a public contract of the days per week and number of hours per day they may be required to work.

(2) The notice required by section (1) of this rule may be given:

- (a) At the time the employee is hired;
- (b) Prior to commencing work on the contract; or
- (c) By posting a notice at a place frequented by and accessible to employees.

(3) If an employer fails to give the notice required by section (1) of this rule, the work schedule will be presumed to be a five-day work schedule.

(4) The work schedule may be changed by the employer if the change is intended to be permanent and is not designed to evade the overtime requirements of ORS 279C.540 and OAR 839-025-0050. Notice of any work schedule changes intended to be made by an employer must be provided in writing to affected employees in advance of the change.

Stat. Auth.: ORS 279 & 651.060
Stats. Implemented: ORS 279.334
Hist.: BL 3-1997(Temp), f. 7-31-97, cert. ef. 8-1-97; BL 1-1998, f. & cert. ef. 1-5-98; Renumbered from 839-016-0034, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

Prevailing Rate of Wage

839-025-0035

Payment of Prevailing Rate of Wage

(1) Every contractor or subcontractor employing workers on a public works project must pay to such workers no less than the applicable prevailing rate of wage for each trade or occupation, as determined by the commissioner, in which the workers are employed.

(a) When a public works project is subject to ORS 279C.800 to 279C.870 and the Davis-Bacon Act (40 U.S.C. 276a):

(A) If the state prevailing rate of wage is higher than the federal prevailing rate of wage, the contractor and every subcontractor on the project shall pay no less than the state prevailing rate of wage as required by ORS 279C.800 to 279C.870; and

(B) If the federal prevailing rate of wage is higher than the state prevailing rate of wage, the contractor and every subcontractor on the project shall pay no less than the federal prevailing rate of wage as required by the Davis-Bacon Act.

(2) Every person paid by a contractor or subcontractor in any manner for the person's labor in the construction, reconstruction, major renovation or painting of a public work is employed and must receive no less than the applicable prevailing rate of wage, regardless of any contractual relationship alleged to exist. Thus, for example, if partners are themselves performing the duties of a worker, the partners must receive no less than the prevailing rate of wage for the hours they are so engaged.

(3) Persons employed on a public works project and who are spending more than 20% of their time during any workweek in performing duties which are manual or physical in nature as opposed to mental or managerial in nature are workers and must be paid the applicable prevailing rate of wage. Mental or managerial duties include, but are not limited to, administrative, executive, professional, supervisory or clerical duties.

(4) Persons employed on a public works project for the manufacture or furnishing of materials, articles, supplies or equipment (whether or not a public agency acquires title to such materials, articles, supplies or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) are not workers required to be paid the applicable prevailing rate of wage unless the employment of such persons is performed in connection with and at the site of the public works project.

(5) Persons employed on a public works project who are employed by a commercial supplier of goods or materials must be paid no less than the applicable prevailing rate of wage when the work is performed at the "site of work" as that term is defined in OAR 839-025-0004(23) or when the work is performed in fabrication plants, batch plants, barrow pits, job headquarters, tool yards or other such places that are dedicated exclusively or nearly so to the public works project.

(6) Persons employed on a public works project by the construction contractor or construction subcontractor to transport materials or supplies to or from the public works project are required to be paid the applicable prevailing wage rate for work performed in connection with the transportation of materials or supplies at the "site of work" as that term is defined in OAR 839-025-0004(23).

(7) Persons employed on a public works project for service work as opposed to construction work are not workers required to be paid the prevailing rate of wage.

(8) Every apprentice, as defined in these rules, must be paid not less than the appropriate percentage of the applicable journeyman's wage rate and fringe benefits as determined pursuant to ORS 279C.800 to 279C.870. Any worker listed on a payroll at an apprentice wage rate, who is not an apprentice as defined in these rules must be paid not less than the applicable prevailing rate of wage for the classification of work actually performed. In addition, if the total number of apprentices employed exceeds the ratio permitted in the applicable standards, all apprentices so employed must be paid not less than the applicable journeyman's prevailing wage rate for work actually performed.

(9) Every trainee, as defined in these rules, must be paid not less than the appropriate percentage of the applicable journeyman's wage rate and fringe benefits determined pursuant to ORS 279C.800 to 279C.870. Any worker listed on a payroll at a trainee wage rate, who is not a trainee as defined in these rules must be paid not less than the applicable prevailing rate of wage for the classification of work actually performed. In addition, if the total number of trainees employed exceeds the ratio permitted in the applicable standards, all trainees so employed must be paid not less than the applicable journeyman's prevailing wage rate for work actually performed.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.350

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 7-1989(Temp), f. 10-2-89, cert. ef. 10-3-89; BL 5-1990, f. 3-30-90, cert. ef. 4-1-90; BL

8-1996, f. 8-26-96, cert. ef. 9-1-96; BL 1-1997(Temp), f. & cert. ef. 4-29-97; BL 4-1997, f. & cert. ef. 8-29-97; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0035, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06

839-025-0037

Residential Construction Projects

(1)(a) For residential construction projects subject to ORS 279C.800 to 279C.870, public agencies shall use federal Davis-Bacon wage rates for residential construction projects unless there is no applicable federal rate for a particular trade or classification on the residential project.

(b) If the applicable federal Davis-Bacon wage rate determination does not include a rate for a particular trade or classification needed on a specific residential construction project, and the project is subject to ORS 279C.800 to 279C.870 but not the federal Davis-Bacon Act, the public agency is required to request a special wage rate, identifying the specific trade or classification, pursuant to OAR 839-025-0007.

(c) The commissioner may consider and approve a residential wage determination for a trade or classification issued by any federal agency within twelve months of the date of any request for a special wage rate pursuant to subsection (b).

(d) Requests for special wage rate determinations for projects subject to both ORS 279C.800 to 279C.870 and the federal Davis-Bacon Act shall be submitted pursuant to Title 29 CFR, Part 5.5(a)(1)(ii) as amended November 20, 2000.

(e) Copies of any special federal wage rate determinations requested and subsequent determination(s) issued pursuant to subsection (d) must be provided to the commissioner by the contracting agency.

(2) Notwithstanding subsection (1) of this rule, the commissioner, consistent with statutory authority, may survey and issue residential rates.

(3) Requests for special wage rates for residential construction projects pursuant to subsection (1)(b) of this rule must be submitted to the Bureau of Labor and Industries by the contracting agency no fewer than fifteen (15) business days prior to the date the specifications for the project are first advertised.

(4) If a contracting agency fails to request special wage rates for a residential construction project pursuant to subsection (1)(b) at least fifteen (15) business days before the date the specifications for the project are first advertised for the project, the Prevailing Wage Rates for Public Contracts published by the Commissioner of the Bureau of Labor and Industries in effect when the specifications are first advertised shall apply to those trades or classifications for which there is no applicable federal residential rate.

(5) The federal Davis-Bacon wage rates apply to residential construction projects subject to ORS 279C.800 to 279C.870 regardless of whether federal law requires Davis-Bacon rates on the project.

(6) Notwithstanding the provisions of this rule, unless otherwise exempt, under no circumstances may a rate less than the minimum wage rate required by ORS 653.025 be paid to any worker on a residential construction project subject to ORS 279C.800 to 279C.870.

Stat. Auth.: ORS 279C & 651.060

Stats. Implemented: ORS 279C.800-279C.870

Hist.: BLI 19-2006(Temp), f. 5-12-06, cert. ef. 5-15-06 thru 11-10-06; BLI 39-2006, f. 11-8-06, cert. ef. 11-10-06

Fringe Benefits

839-025-0040

Payment of Fringe Benefits

(1) Each contractor and subcontractor required to pay workers the prevailing rate of wage must pay no less than the hourly rate of pay and fringe benefits as determined by the Commissioner.

(2) The rate of pay for fringe benefits paid to apprentices and trainees shall be not less than such rate paid to the majority of such apprentices and trainees in the same trade or occupation as determined by the commissioner. If there is no majority in the same trade or occupation, as determined by the commissioner, apprentices and trainees shall be paid the full amount of the fringe benefits.

(3) The requirements of section (1) of this rule are met when the amount of the fringe benefit or benefits is paid to the worker, in cash, in lieu of a third party administering a fringe benefit or benefits program.

(4) When a contractor or subcontractor pays an hourly rate of pay

which exceeds that which is determined by the Commissioner, the amount by which the rate is exceeded may be credited toward payment of the amount of fringe benefits determined by the Commissioner for the trade or occupation.

(5) When a contractor or subcontractor pays a rate for any one fringe benefit which exceeds that which is determined for the fringe benefit, the amount by which the rate is exceeded may be credited toward payment of the amount to be paid for all fringe benefits as determined by the Commissioner for the trade or occupation.

(6) When a contractor or subcontractor pays an amount for fringe benefits which exceeds that which is determined by the Commissioner the amount by which it exceeds the determination may be credited toward payment of the hourly rate of pay as determined by the Commissioner.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.350

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 1-1997(Temp), f. & cert. ef. 4-29-97; BL 4-1997, f. & cert. ef. 8-29-97; Renumbered from 839-016-0040, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0043

Frequency of Payment of Fringe Benefits

(1) Contributions made by a contractor or subcontractor to a fringe benefit program must be made on a regular basis and not less often than quarterly.

(2) Fringe benefit payments made directly to the worker in lieu of a contribution to a fringe benefit program must be paid to the worker as wages on the regularly scheduled pay date.

Stat. Auth.: ORS 279 & 651.060

Stats. Implemented: ORS 279.348

Hist.: BL 1-1998, f. & cert. ef. 1-5-98; Renumbered from 839-016-0043, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0045

Youth Apprentices

Youth apprentices, as defined in ORS 344.745, shall not be employed on public works construction projects (Reference: ORS 344.750(5)).

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0045, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

Overtime Wages

839-025-0050

Overtime Wages Computations

(1) As used in this rule "work day" or "day" means a period of 24 consecutive hours beginning with the time the employee regularly starts work. The beginning of the work day may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of ORS 279C.540. For purposes of overtime wages computation, each work day stands alone.

(2) Contractors and subcontractors required by ORS 279C.540 to pay overtime wages shall pay such wages as follows:

(a) Workers must be paid at least time and one-half the hourly rate of pay, excluding fringe benefits, for all hours worked:

(A) On Saturdays;

(B) On the following legal holidays:

(i) Each Sunday;

(ii) New Year's Day on January 1;

(iii) Memorial Day on the last Monday in May;

(iv) Independence Day on July 4;

(v) Labor Day on the first Monday in September;

(vi) Thanksgiving Day on the fourth Thursday in November;

(vii) Christmas Day on December 25.

(C) Over 40 hours in a week; and either

(D) Over eight (8) hours in a day; or

(E) Over 10 hours in a day provided:

(i) The employer has established a work schedule of four consecutive days (Monday through Thursday or Tuesday through Friday) pursuant to OAR 839-025-0034; and

(ii) The employer operates in accordance with this established work schedule.

(b) Where a worker performs work in one or more classifications which provide for one or more hourly rates of pay the worker must be paid, in addition to the straight time hourly earnings for all hours

worked, a sum determined by multiplying one half the weighted average of the hourly rates by the number of overtime hours worked pursuant to subsection (a) of this rule;

(c) When determining the hourly wage rate for overtime purposes, the amount paid for fringe benefits shall be excluded from the computations. Though the amount paid for fringe benefits must be paid for all hours worked, such amount is not included when determining the overtime rate. For example, a worker who works a five-day work schedule and earns \$15 per hour plus \$3 per hour in fringe benefits and works ten hours in a day is entitled to \$195 ((\$15/hr x 8 hours) + (\$22.50/hr x 2 hours) + (\$3/hr x 10 hours) = \$195) for that day.

(3) Examples of computing overtime wages: See **Appendix 3**.

[ED. NOTE: Appendices referenced are available from the agency.]

Stat. Auth.: ORS 279 & 651.060

Stats. Implemented: ORS 279.334

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & cert. ef. 3-13-84; BL 3-1997(Temp), f. 7-31-97, cert. ef. 8-1-97; BL 1-1998, f. & cert. ef. 1-5-98; Renumbered from 839-016-0050, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0054

Exemption from Overtime Pay Requirements on Public Improvement Projects

(1) As used in ORS 279C.540(4) and in this rule, unless the context requires otherwise:

(a) "A collective bargaining agreement in effect" means a collective bargaining agreement which is recognized as being binding on all parties by the National Labor Relations Board; which is enforceable within the geographic area in which the public improvement is located; and, the terms of which extend to workers who are working on the public improvement project;

(b) "Labor organization" means any organization certified as such by the National Labor Relations Board.

(2) ORS 279C.540(4) provides an exemption from the overtime pay requirements of ORS 279C.540(1), (2) and (3) under the following circumstances:

(a) The contract on which work is performed is a public improvement contract; and

(b) The contractor is a party to a collective bargaining agreement in effect with any labor organization.

(3) The exemption would not apply, for example, under the following circumstances:

(a) To workers employed on a public improvement who are not covered by the terms of a collective bargaining agreement;

(b) When the labor organization has no jurisdiction in the geographical area where work is being performed;

(c) Any other circumstance when the terms of the collective bargaining agreement is not enforceable for workers on public improvement projects.

Stat. Auth.: ORS 651.060

Stats. Implemented: ORS 279.342

Hist.: BL 7-1992, f. & cert. ef. 6-11-92; Renumbered from 839-016-0054, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

Apprentices and Trainees

839-025-0060

Apprentices

(1) Apprentices will be permitted to work upon a public works project at less than the prevailing rate of wage for the work they performed when they are employed and individually registered in a bona fide apprenticeship program registered with:

(a) The U.S. Department of Labor, Bureau of Apprenticeship and Training, (BAT); or

(b) A State Apprenticeship Agency recognized by the BAT; or

(c) If a person is employed in probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State apprenticeship Agency to be eligible for probationary employment as an apprentice.

(2) The allowable ratio of apprentices to journeymen in any craft classification must conform to the apprenticeship standards filed with the Oregon Apprenticeship and Training Council for the particular craft or program in which the contractor's or subcontractor's apprentices are registered.

(3) The contractor or subcontractor will be required to furnish to the contracting officer or a representative of the Wage and Hour Divi-

sion written evidence of the registration of the program and apprentices as well as the appropriate ratios and wage rates (expressed in percentages of the journeymen hourly rates) prescribed in that program. The commissioner has prepared a form, **WH-120**, which can be used by contractors or subcontractors in complying with this rule. Use of this form is optional.

(4) Notwithstanding section (1) of this rule, apprentices must be paid the full prevailing rate of wage when the program in which they are registered is located in a state contiguous to Oregon which does not recognize apprentices registered in a program approved by the Oregon State Apprenticeship and Training Council.

[ED. NOTE: Forms referenced are available from the agency.]

Stat. Auth.: ORS 651.060(4)

Stats. Implemented: ORS 279.348

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 7-1994, f. & cert. ef. 11-16-94; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0060, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0065

Trainees

(1) Trainees will not be permitted to work upon a public works project at less than the prevailing rate of wage for the work performed unless they are employed and individually registered in a program which has received prior approval of the U.S. Department of Labor, Bureau of Apprenticeship and Training.

(2) The ratio of trainees to journeymen must not be greater than permitted under the plan approved by the Bureau of Apprenticeship and Training.

(3) The contractor or subcontractor will be required to furnish the contracting officer or a representative of the Wage and Hour Division written evidence of the certification of the program, the registration of the trainees, and the ratios and wage rates prescribed in that program. The contractor or subcontractor may use form **WH-120** for this purpose. Use of this form is optional.

(4) In the event the Apprenticeship and Training Division withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable prevailing rate of wage for the work performed until an acceptable program is approved.

[ED. NOTE: Forms referenced are available from the agency.]

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0065, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

Enforcement

839-025-0080

Liability to Workers

(1) Any contractor or subcontractor or any surety thereof who fails or refuses to pay at least the prevailing wages and fringe benefits as determined by the Commissioner or any overtime wages as required by ORS 279C.540 is liable to the workers affected for all the unpaid prevailing wages, including fringe benefits, and unpaid overtime wages.

(2) The contractor or subcontractor or surety thereof, referred to in section (1) of this rule, is also liable to all unpaid workers for an amount equal to the unpaid prevailing wages, including fringe benefits, as liquidated damages.

(3) The contractor or subcontractor or surety thereof, referred to in section (1) of this rule, is also liable to all unpaid workers for an amount equal to the unpaid overtime wages as liquidated damages, except that if the unpaid overtime results from willful falsification of payroll records, these liquidated damages shall be twice the amount of unpaid overtime.

(4) Any public agency which fails to include a provision in the advertisement for bids, the request for bids, the contract specifications, the accepted bid or elsewhere in the contract documents that the contractor and any subcontractor shall comply with ORS 279C.840 shall be jointly and severally liable, with any contractor or subcontractor that had notice of the requirement to comply with ORS 279C.840, to the workers affected for any unpaid minimum wages.

(5) As used in section (4) of this rule, "minimum wages" means the prevailing wage, including fringe benefits, as determined by the Commissioner. "Minimum wages" does not mean overtime wages required by ORS 279C.540 nor liquidated damages referred to in sec-

tions (2) and (3) of this rule.

Stat. Auth.: ORS 279 & 651.060

Stats. Implemented: ORS 279.334 & 279.356

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 3-1997(Temp), f. 7-31-97, cert. ef. 8-1-97; BL 1-1998, f. & cert. ef. 1-5-98; Renumbered from 839-016-0080, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0085

Contract Ineligibility

(1) Under the following circumstances, the commissioner, in accordance with the Administrative Procedures Act, may determine that for a period not to exceed three years, a contractor, subcontractor or any firm, limited liability company, corporation, partnership or association in which the contractor or subcontractor has a financial interest is ineligible to receive any contract or subcontract for a public work:

(a) The contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed on public works project as required by ORS 279C.840;

(b) The subcontractor has failed to pay its employees the prevailing rate of wage required by ORS 279C.840 and the contractor has paid the employees on the subcontractor's behalf; or

(c) The contractor or subcontractor has intentionally failed or refused to post the prevailing wage rates as required by ORS 279C.840(4) and these rules.

(2) When the contractor or subcontractor is a corporation, the provisions of section (1) of this rule will apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing wage rates.

(3) As used in section (2) of this rule, any corporate officer or corporate agent responsible for the failure to pay or post the prevailing wage rates or for the failure to pay to a subcontractor's employees amounts required by ORS 279C.840 that are paid by the contractor on the subcontractor's behalf includes, but is not limited to, the following individuals when the individuals knew or should have known the amount of the applicable prevailing wages or that such wages must be posted:

(a) The corporate president;

(b) The corporate vice president;

(c) The corporate secretary;

(d) The corporate treasurer;

(e) Any other person acting as an agent of a corporate officer or the corporation.

(4) The Wage and Hour Division will maintain a written list of the names of those contractors, subcontractors and other persons who are ineligible to receive public works contracts and subcontracts. The list will contain the name of contractors, subcontractors and other persons, and the name of any firms, corporations, partnerships or associations in which the contractor, subcontractor or other persons have a financial interest. Except as provided in OAR 839-025-0095, such names will remain on the list for a period of three (3) years from the date such names were first published on the list.

(5) Before placing a name on the ineligible list referred to in section (4) of this rule, the commissioner will serve a notice of intended action upon the contractor or subcontractor in the same manner as service of summons or by certified mail, return receipt requested. The Notice will include:

(a) A reference to ORS 279C.840;

(b) A short and concise statement of the matters which constitute intentional failure or refusal to pay or post the prevailing rate of wage;

(c) A statement of the party's right to request a contested case hearing and to be represented by counsel at such hearing, provided that any such request must be received by the commissioner in writing within 20 days of service of the notice;

(d) A statement that the party's name will be published on a list of persons ineligible to receive public works contracts or subcontracts, unless the party requests a contested case hearing as provided in subsection (5)(c) of this rule;

(e) A statement that failure to make written request to the commissioner for a contested case hearing within the time specified will constitute a waiver of the right thereto; and

(f) A statement that if a hearing is requested, the contractor or subcontractor will be given information on procedures and rights as required by ORS 183.413(2).

(6) Upon the failure of the contractor or subcontractor to request a contested case hearing within the time specified, the commissioner

or the commissioner's designee will enter an order supporting the bureau's action.

(7) If a contractor or subcontractor makes a timely request for a contested case hearing a hearing will be held in accordance with the Attorney General's Model Rules of Procedure under the Administrative Procedure Act by the commissioner or the commissioner's designee.

Stat. Auth.: ORS 279 & 651
Stats. Implemented: ORS 279.348 - 279.380
Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0085, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0090

List of Ineligibles

(1) The name of the contractor, subcontractor or other persons and the names of any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest whom the Commissioner has determined to be ineligible to receive public works contracts shall be published on a list of persons ineligible to receive such contracts or subcontracts.

(2) The list of persons ineligible to receive contracts or subcontracts on public works shall be known as the List of Ineligibles. In addition to names referred to in section (1) of this rule the list shall contain the date the name was placed on the list and the period of time for which they are ineligible.

(3) The List of Ineligibles shall be published quarterly and amended as needed at any time. Such list shall be furnished to the public upon request, and made available to public contracting agencies as published or amended.

Stat. Auth.: ORS 279 & 651
Stats. Implemented: ORS 279.361
Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; Renumbered from 839-016-0090, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0095

Removal of Names from List

(1) The names of the contractor, subcontractor or other persons and the names of any firm, corporation, partnership or association in which the contractor, subcontractor or other persons have a financial interest shall remain on the list for a period of three (3) years from the date of publication of such name on the list.

(2) The names referred to in section (1) of this rule shall be removed from the list after three (3) years.

(3) The Commissioner may, for good cause shown, direct the removal of a name from the list before the expiration of three (3) years. If the Commissioner determines good cause has been shown, the Commissioner shall issue an order directing the removal of such name or names.

(4) Contractors, subcontractors or other persons, or any firm, corporation, partnership or association in which the contractor, subcontractor or other persons have a financial interest who desire to be removed from the list before the expiration of three (3) years must show good cause for such removal. Such persons may petition the Commissioner at any time during the period of ineligibility.

(5) In reviewing such petitions, the Commissioner shall consider the following matters:

(a) The past history of the petitioner in taking all necessary measures to prevent or correct violations of statutes or rules;

(b) Prior violations, if any, of statutes or rules;

(c) Magnitude and seriousness of the violation;

(d) Other matters which indicate to the Commissioner that the petitioner is not likely to violate ORS 279C.800 to 279C.870. and these rules in the future.

(6) The Commissioner shall grant or deny the petition.

Stat. Auth.: ORS 279 & 651
Stats. Implemented: ORS 279.361
Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; Renumbered from 839-016-0095, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

Exemptions

839-025-0100

Exemptions

(1) All public works are regulated under ORS 279C.800 to 279C.870 except as follows:

(a) Projects for which the total price does not exceed \$50,000. As

used in this section, the price of a project includes, but is not limited to, the value of work performed by every person paid by a contractor or subcontractor in any manner for the person's work on the project, but does not include the value of donated materials or work performed on the project by individuals volunteering to the public agency without pay.

(b) Contracts of a People's Utility District which are regulated under ORS 261.345.

(c) Projects for which no funds of a public agency are directly or indirectly used.

(d) Projects:

(A) That are privately owned;

(B) That use funds of a private entity;

(C) In which less than 25 percent of the square footage of a completed project will be occupied or used by a public agency; and

(D) For which less than \$750,000 of funds of a public agency are used.

(e) Projects for residential construction that are privately owned and that predominantly provide affordable housing. As used in this paragraph:

(A) "Affordable housing" means housing that serves occupants whose incomes are no greater than 60 percent of the area median income or, if the occupants are owners, whose incomes are no greater than 80 percent of the area median income.

(B) "Predominantly" means 60 percent or more.

(C) "Privately owned" includes:

(i) Affordable housing provided on real property owned by a public agency if the real property and related structures are leased to a private entity for 50 or more years; and

(ii) Affordable housing owned by a partnership, nonprofit corporation or limited liability company in which a housing authority, as defined in ORS 456.005, is a general partner, director or managing member and the housing authority is not a majority owner in the partnership, nonprofit corporation or limited liability company.

(2) The provisions of ORS 279C.840 and these rules that regulate payment of the prevailing rate of wage do not apply to:

(a) Inmates of the Oregon Department of Corrections assigned to:

(A) A work release program or otherwise working in gainful private employment pursuant to ORS 144.480, relating to prison inmate labor; or

(B) State Parks and Recreation Department projects to improve, maintain and repair buildings and property at state parks and recreation areas pursuant to ORS 390.195(1).

(b) Oregon Youth Conservation Corps members.

Stat. Auth.: ORS 279 & 651.060
Stats. Implemented: ORS 279.357, 390.195(1) & OL Ch. 628 (2001)
Hist.: BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96; BL 1-1998, f. & cert. ef. 1-5-98; BLI 15-2001, f. & cert. ef. 11-14-01; Renumbered from 839-016-0100, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06; BLI 18-2006, f. 5-12-06, cert. ef. 5-15-06; BLI 20-2007(Temp), f. 7-30-07, cert. ef. 8-1-07 thru 1-27-08

Installation of Art on Public Works Projects and the Payment of the Prevailing Rate of Wage

839-025-0150

Definitions

(1) As used in this rule and OAR 839-025-0155, unless the context requires otherwise, the terms used herein will have the same meaning as that given them in OAR 839-025-0004.

(2) Notwithstanding the meaning given it in OAR 839-025-0004(29), the term "worker" does not include an individual whose primary duty consists of the performance of work that is original and creative in character in a recognized field of artistic endeavor (as contrasted to work which can be produced by an individual endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the individual.

(3) Notwithstanding the meaning of the terms "construction," "reconstruction" and "major renovation" as defined in OAR 839-025-0004(5), (21), and (9), such terms do not include the installation of applied art.

(4) The installation of applied art includes, but is not limited to, the installation of pictures (including paintings, etchings, drawings and photographs), all hangings, pieces of sculpture, statues and other artis-

tic pieces which are independent unto themselves and are not necessary to the structural integrity of the public work.

(5) Installation work necessary to the structural integrity of a public work includes, but is not limited to, the installation of windows, ceiling tiles, brick and concrete masonry, sheet metal or other fascia materials, siding of any kind, lights, support beams and any item necessary to the construction of the actual public work itself, or to the health and safety of persons who use or will use the public work. The painting of a public work, or any of its parts is considered necessary to the structural integrity of the public work.

(6) Work considered to be “de minimus” means work not regulated under ORS 279C.800 to 279C.870 or these rules.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.363

Hist.: BL 8-1984, f. & ef. 6-21-84; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0150, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0155

Payment of Prevailing Rate of Wage for the Installation of Art on Public Works Projects

(1) Workers engaged in the installation of art necessary to the structural integrity of the public work, as defined in these rules, must be paid no less than the applicable prevailing rate of wage as determined by the Commissioner.

(2) Workers engaged in the installation of applied art, as defined in these rules, are not required to be paid the prevailing rate of wage when such work is the only work in which the worker is engaged while employed on the public work project. Such work is considered de minimus as defined in these rules.

(3) Any artist who meets the definition of an individual in OAR 839-025-0150(2) is not required to be paid the prevailing rate of wage, even when the artist is engaged in the installation of art necessary to the structural integrity of the public work when the art is of the artist's own creation.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.342

Hist.: BL 8-1984, f. & ef. 6-21-84; Renumbered from 839-016-0155, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

Fees on Public Works Contracts

839-025-0200

Fees to Be Paid by Contractor

(1) Every contractor awarded a contract for a public work which is regulated under the Prevailing Wage Rate Law (ORS 279C.800 to 279C.870) must pay a fee to the Prevailing Wage Rate Unit.

(2) The amount of the fee must be one tenth of one percent (.001) of the contract price. However, the fee must be no less than \$100 nor more than \$5,000 regardless of the contract price.

(3) The fee must be paid no later than 10 days following receipt by the contractor of the first progress payment on the contract or 60 days after work on the project has begun, whichever date is earlier.

(4) In order to assist contractors in the proper calculation of the fee, the bureau has prepared a form for this purpose. The form is available, on request, from the Prevailing Wage Rate Unit.

(5) As used in this rule:

(a) “Contract price” means the dollar amount of the contract on the date it was awarded to the contractor and the dollar amount of any subsequent change orders or other adjustments.

(b) “Work on the project” means work performed after the date the contract was awarded and for which the contractor is paid as part of the contract price.

(c) The “date work on the project has begun” means the date the contractor actually starts work on the project or, if the contractor cannot determine the date the contractor actually started working on the project, the date the contracting agency establishes as the date work actually started on the project or, if neither the contractor nor the contracting agency can determine the date the contractor actually started work on the project, the date the contracting agency authorized the contractor to begin work on the project.

(d) “Progress payment” means a partial payment to the contractor by the contracting agency for work performed on the contract.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0200, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0210

Adjustment of Fees

(1) Within 30 days of the final progress payment to the contractor by the contracting agency after completion of the contract, the contractor must determine the final contract price. The contractor must consider all change orders or other adjustments to the contract price in making the determination.

(2) The contractor must calculate the fee in accordance with OAR 839-025-0200(2) and must credit the amount paid pursuant to OAR 839-025-0200(3). The difference, if any, must be determined as follows:

(a) In the case of a reduction of more than \$100 in the amount of the fee, the contractor may submit a request to the bureau for a refund of the difference and the bureau will pay a refund to the contractor or subcontractor;

(b) In the case of an increase of more than \$100 in the amount of the fee, the contractor must pay the difference to the bureau.

(3) Requests for refunds and additional payments must be submitted with sufficient documentation to show how the amount to be refunded or to be paid was calculated. All such requests or payments must be made to the Prevailing Wage Rate Unit within 30 days of the date the final progress payment was made to the contractor by the contracting agency after completion of the contract.

(4) In order to assist contractors in the proper calculation of the fee, the bureau has prepared a form for this purpose. The form is available, on request, from the Prevailing Wage Rate Unit.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0210, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0220

Fees for Contract Without Specific Award Amounts

(1) When the project for a public work is anticipated to equal or exceed \$50,000 but the contract is awarded without stating any specific amount, the contract price for purposes of calculating the fee shall be based on the amount the public agency anticipates to be the guaranteed maximum amount of the project.

(2) When the contract is awarded without stating any specific amount, the fee shall be calculated on the guaranteed maximum amount referred to in section (1) of this rule and the fee is payable pursuant to OAR 839-025-0200.

(3) When the contract is completed, adjustments in the fees shall be calculated and paid or a refund may be requested as provided in OAR 839-025-0210.

(4) When the agency has not determined the guaranteed maximum amount, the agency shall provide to the contractor with a good faith estimate of the contract price. The fee shall be calculated on this estimated amount.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0220, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06

839-025-0230

Special Circumstances/No General Contractors

(1) While the general contractor is normally the party that will pay the required fee, there are circumstances when this may not be the case. When the public contracting agency chooses to act as its own general contractor or when the agency contracts with another to act as the construction manager of a public works project, several parties may be responsible for paying a fee.

(2) The required fee must be paid by the contractor who is awarded the public works contract (See ORS 279C.825). Therefore, when a contracting agency acts as its own general contractor and enters into one or several contracts in connection with a public works project of \$50,000 or more, each contractor shall be required to pay the fee in connection with the contract awarded to the contractor. The fee is required on all contracts, regardless of the contract price of any individual contract, so long as the combined price of all contracts awarded on the project is \$50,000 or more.

(3) Section (2) of this rule is also applicable to the circumstance where the contracting agency contracts with a contractor to act as the general manager of a public works project. The contract for general manager services is a public works contract for purposes of these rules and a fee is required just as any other public works contract, since the

contract would not have been entered into but for the public works project.

(4) When a contracting agency enters into an agreement for construction management services or chooses to act as its own general contractor or construction manager, the contract price for purposes of determining whether the project is regulated under the law shall be the sum of all contracts associated with the project or, if the actual sums are not known at the time work begins, the contract price shall be the guaranteed maximum amount for the project or the agency's good faith estimate of the contract price of the project if there is no guaranteed maximum amount. Under these circumstances, when the guaranteed maximum amount of the project or the agency's estimate of the price of the project meets or exceeds \$50,000, each contractor that enters into a contract with the agency shall be responsible for paying a fee pursuant to OAR 839-025-0200.

Stat. Auth.: ORS 279 & 651
Stats. Implemented: ORS 279.348 - 279.380
Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0230, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06

Actions that Circumvent Payment of Prevailing Wages Prohibited

839-025-0300

Generally

No person shall take any action which circumvents the payment of the prevailing wage rate to workers on public works projects.

Stat. Auth.: ORS 279 & 651
Stats. Implemented: ORS 279.348 - 279.380
Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0300, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0310

Division of Projects

(1)(a) A public agency may not divide a public works project into more than one project for the purpose of avoiding compliance with ORS 279C.800 to 279C.870.

(b) When making a determination of whether the public agency divided a public works project to avoid compliance with ORS 279C.800 to 279C.870, the commissioner will consider the facts and circumstances in any given situation including, but not limited to, the following matters:

- (A) The physical separation of project structures;
 - (B) Whether a single public works project includes several types of improvements or structures;
 - (C) The anticipated outcome of the particular improvements or structures the agency plans to fund;
 - (D) Whether the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function;
 - (E) Whether the work on the project is performed in one time period or in several phases as components of a larger entity;
 - (F) Whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project;
 - (G) The manner in which the public agency and the contractors administer and implement the project;
 - (H) Other relevant matters as may arise in any particular case.
- (c) When the commissioner determines that a public agency has divided a public works project for the purpose of avoiding compliance with ORS 279C.800 to 279C.870, the commissioner will issue a written order compelling compliance with ORS 279C.800 to 279C.870. The order will offer the public agency the opportunity to contest the order pursuant to OAR 839-050-0000 through 839-050-0420.

(2) If a project is a public works of the type described in ORS 279C.800(6)(a)(B) or (C), the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsection (1)(b) of this section to separate the parts of the project that include funds of a public agency or that will be occupied or used by a public agency from the parts of the project that do not include funds of a public agency and that will not be occupied or used by a public agency. If the commissioner divides the project, any part of the project that does not include funds of a public agency and that will not be occupied or used by a public agency is not subject to ORS 279C.800 to 279C.870.

(3) If a project includes parts that are owned by a public agency

and parts that are owned by a private entity, the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsections (1)(b) and (2) of this section to separate the parts of the project that are public works from the parts of the project that are not public works. If the commissioner divides the project, parts of the project that are not public works are not subject to ORS 279C.800 to 279C.870.

Stat. Auth.: ORS 279 & 651
Stats. Implemented: ORS 279.348 - 279.380
Hist.: BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0310, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 20-2007(Temp), f. 7-30-07, cert. ef. 8-1-07 thru 1-27-08

839-025-0320

Payment of Prevailing Wage by Persons Other than Contractors or Subcontractors Prohibited

(1) Except as provided herein, no person, other than the contractor or subcontractor, shall pay or contribute any portion of the prevailing rate of wage specified in the contract to workers employed on the public works contract.

(2) Section (1) of this rule does not apply to payments to workers who are enrolled in government-subsidized training or retraining programs.

(3) For purposes of this rule, a person pays or contributes to the payment of the prevailing rate of wage when a contractor or subcontractor receives monies pursuant to a program, plan or other agreement that includes a provision that contributions by members of a labor organization of a part of their wages will be made to the labor organization for the purpose of paying contractors or subcontractors the difference in the wage rate negotiated under the collective bargaining agreement and the wage rate used by the contractor or subcontractor in obtaining a contract. However, a person does not pay or contribute to the payment of the prevailing rate of wage when the contractor or subcontractor receives monies pursuant to such program plan or agreement if the collectively bargained wage rate exceeded the prevailing rate of wage in effect at the time the contractor or subcontractor made a bid on a contract.

Stat. Auth.: ORS 279 & 651
Stats. Implemented: ORS 279.348 - 279.380
Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0320, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0330

Wage Averaging Prohibited

(1) No contractor or subcontractor shall reduce a worker's regular rate of pay for work on projects not subject to the Prevailing Wage Rate Law (ORS 279C.800 to 279C.870) when the reduction in pay has the effect of the worker not receiving the prevailing rate of wage for work performed on the public works project.

(2) As used in this rule, "regular rate" has the same meaning as that defined in OAR 839-020-0030(2)(b).

(3) When making a determination of whether a contractor or subcontractor has reduced a worker's regular rate in violation of section (1) of this rule, the bureau shall consider:

- (a) The timing of the wage rate reduction;
- (b) Whether the wage rate reduction was made pursuant to an established plan;
- (c) Whether the wage rate reduction is applied equally to all workers in similar job classifications;
- (d) Whether the wage rate reductions are applied to workers employed on public works projects but not to workers employed only on projects not subject to the Prevailing Wage Rate Law (ORS 279C.800 to 279C.870);
- (e) Other considerations as the facts and circumstances of a particular matter may reveal.

Stat. Auth.: ORS 279 & 651
Stats. Implemented: ORS 279.348 - 279.380
Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0330, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0340

Other Circumventions

(1) A contracting agency circumvents the payment of the prevailing rate of wage when it knowingly or intentionally:

- (a) Fails or refuses to include a provision stating the existing prevailing rate of wage in the contract specifications in violation of ORS 279C.830;

(b) Fails or refuses to include a provision in the contract that workers on the contract shall be paid no less than the specified minimum hourly rate of wage in violation of ORS 279C.830;

(c) Divides a project for the purpose of avoiding compliance with ORS 279C.800 to 279C.870 in violation of HB 2140 Section 44 (Engrossed) OR Laws 2007.

(d) Awards a contract to a contractor whose name appears on the list of ineligible maintained pursuant to ORS 279C.860.

(2) The "specified minimum hourly rate of wage" as used in subsection (1)(b) of this rule means the applicable prevailing rate of wage.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0340, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 20-2007(Temp), f. 7-30-07, cert. ef. 8-1-07 thru 1-27-08

Civil Penalties for Violation of Prevailing Wage Rates on Public Works Matters

839-025-0500

Definitions

As used in OAR 839-025-0500 to 839-025-0540, a person acts knowingly when the person has actual knowledge of a thing to be done or omitted or should have known the thing to be done or omitted. A person should have known the thing to be done or omitted if the person has knowledge of facts or circumstances that would place the person on reasonably diligent inquiry. A person acts knowingly if the person has the means to be informed but elects not to do so. For purposes of the rule, the contractor, subcontractor and contracting agency are presumed to know the circumstances of the public works construction project.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0500, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0510

Violations Separate and Distinct

Each violation is separate and distinct. In the case of continuing violations, each day's continuance is a separate and distinct violation.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0510, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0520

Criteria to Determine Civil Penalty

(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:

(a) The actions of the contractor, subcontractor or contracting agency in responding to previous violations of statutes and rules;

(b) Prior violations, if any, of statutes and rules;

(c) The opportunity and degree of difficulty to comply;

(d) The magnitude and seriousness of the violation;

(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation.

(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the commissioner with evidence of any mitigating circumstances set out in section (1) of this rule.

(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0520, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0530

Violations for Which a Civil Penalty May Be Assessed

(1) The commissioner may assess a civil penalty for each violation of any provision of the Prevailing Wage Rate Law (ORS

279C.800 to 279C.870) and for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.

(2) Civil penalties may be assessed against any contractor, subcontractor or contracting agency regulated under the Prevailing Wage Rate Law and are in addition to, not in lieu of, any other penalty prescribed by law.

(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

(a) Failure to pay the applicable prevailing rate of wage in violation of ORS 279C.840;

(b) Failure to post the applicable prevailing wage rates in violation of ORS 279C.840(4);

(c) Failure to post the notice describing the health and welfare or pension plans in violation of ORS 279C.840(5);

(d) Failure to include a provision in a subcontract that workers shall be paid not less than the specified minimum hourly rate of wage in violation of ORS 279C.830(1)(c);

(e) Failure to include in a subcontract a provision requiring the subcontractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt in violation of ORS 279C.830(3);

(f) Failure to file with the Construction Contractors Board a public works bond as required pursuant to Oregon Laws 2005, chapter 360, section 2, before starting work on a contract or subcontract for a public works project subject to the provisions of ORS 279C.800 to 279C.870;

(g) Failure to verify that a subcontractor has filed a public works bond as required or has elected not to file a public works bond pursuant to the provisions of Oregon Laws 2005, chapter 360, section 2, prior to permitting a subcontractor to start work on a public works project.

(h) Failure to file certified statements in violation of ORS 279C.845;

(i) Filing inaccurate or incomplete certified statements in violation of ORS 279C.845;

(j) Failure to retain 25 percent of the amount the first-tier subcontractor earned when the first-tier subcontractor fails to submit payroll and certified statement forms to the public contracting agency in violation of ORS 279C.845;

(k) Paying the prevailing rate of wage in violation of ORS 279C.840(6);

(l) Reducing an employee's pay in violation of ORS 279C.840(7);

(m) Taking action to circumvent the payment of the prevailing wage, other than subsections (i) and (k) of this section, in violation of ORS 279C.840(7);

(n) Failure to submit reports and returns in violation of ORS 279C.815(3);

(o) Failure to certify the accuracy of reports and returns in violation of ORS 279C.815(3);

(p) Failure to timely pay the fee required by ORS 279C.825;

(q) Receiving a public works contract or subcontract while on the List of Ineligibles in violation of ORS 279C.860;

(4) The commissioner may assess a civil penalty against a public contracting agency for any of the following violations:

(a) Failure to include a contract provision stating that workers must be paid the applicable prevailing rate of wage in violation of ORS 279C.830(1)(c);

(b) Failure to include a contract provision stating that a fee is to be paid to the commissioner in violation of ORS 279C.830(2);

(c) Failure to include in the contract specifications a provision stating the applicable existing prevailing wage rate in violation of ORS 279C.830(1);

(d) Failure to include in the contract specifications a provision stating that a fee is required to be paid to the commissioner in violation of ORS 279C.830(2);

(e) Failure to include in the specifications for a contract for a public works stating that the contractor and every subcontractor must have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt in violation of ORS 279C.830(3);

(f) Failure to include in a contract for a public works a provision requiring the contractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt in violation of ORS 279C.830(3)(a);

(g) Failure to include in a contract for a public works a provision requiring the contractor to include in every subcontract a provision requiring the contractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt in violation of ORS 279C.830(3)(b);

(h) Failure to notify the commissioner when a contract is awarded in violation of ORS 279C.835;

(i) Dividing a public works project in violation of HB 2140 Section 44 (Engrossed) OR Laws 2007;

(j) Failure to include a copy of the disclosure of first-tier subcontractors with the Notice of Award in violation of ORS 279C.835;

(k) Failure to retain 25 percent of the amount the contractor earned when the contractor fails to submit payroll and certified statement forms to the public contracting agency in violation of ORS 279C.845.

Stat. Auth.: ORS 279 & 651.060

Stats. Implemented: ORS 279.370

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; BL 1-1998, f. & cert. ef. 1-5-98; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0530, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06; BLI 20-2007(Temp), f. 7-30-07, cert. ef. 8-1-07 thru 1-27-08

839-025-0540

Schedule of Civil Penalties

(1) The civil penalty for any one violation will not exceed \$5,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

(2) For purposes of this rule "repeated violations" means violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation.

(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279C.840 regarding the payment of the prevailing rate of wage, the minimum civil penalty will be calculated as follows:

(a) An equal amount of the unpaid wages or \$1,000, whichever is less, for the first violation;

(b) Two times the amount of the unpaid wages or \$3,000, whichever is less, for the first repeated violation;

(c) Three times the amount of the unpaid wages or \$5,000, whichever is less, for second and subsequent repeated violations.

(4) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for violations of ORS 279C.825, OAR 839-025-0200, or 839-025-0220 regarding fees to be paid by the contractor, the minimum civil penalty to be assessed will be calculated as follows:

(a) An equal amount of the unpaid fee or \$1,000, whichever is greater, for the first violation;

(b) Two times the amount of the unpaid fee or \$3,000, whichever is greater, for the second violation;

(c) Three times the amount of the unpaid fee or \$5,000, whichever is greater, for the third and subsequent violations.

(5) The civil penalty for all other violations will be set in accordance with the determinations and considerations referred to OAR 839-025-0520.

(6) The civil penalties set out in this rule are in addition to any other penalty assessed or imposed by law or rule.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0540, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

839-025-0700

Prevailing Wage Rate Determination/Amendments to Determination

(1) Pursuant to ORS 279C.815, the Commissioner of the Bureau of Labor and Industries has determined that the wage rates stated in publications of the Bureau of Labor and Industries entitled *Prevailing Wage Rates on Public Works Contracts in Oregon* and *Prevailing Wage Rates for Public Works Contracts in Oregon subject to BOTH the state PWR and federal Davis-Bacon Act* dated July 1, 2007, are the prevailing rates of wage for workers upon public works in each trade or occupation in the locality where work is performed for the period beginning July 1, 2007, and the effective dates of the applicable special wage determination and rates amendments:

(a) Marine Rates for Public Works Contracts in Oregon (effective

October 4, 2006).

(b) Amendments/Corrections to July 1, 2007 PWR Rates for Public Works Contracts in Oregon subject to BOTH State PWR Law and federal Davis-Bacon Act (reflecting changes to Davis-Bacon rates effective June 22, 2007).

(c) Amendments/Corrections to July 1, 2007 PWR Rates for Public Works Contracts in Oregon subject to BOTH State PWR Law and federal Davis-Bacon Act (reflecting changes to Davis-Bacon rates effective July 6, 2007).

(d) Amendments/Corrections to July 1, 2007 PWR Rates for Public Works Contracts in Oregon subject to BOTH State PWR Law and federal Davis-Bacon Act (reflecting changes to Davis-Bacon rates effective July 13, 2007).

(e) Amendments/Corrections to Oregon Determination 2007-02 and July 1, 2007 PWR Rates for Public Works Contracts in Oregon subject to BOTH State PWR Law and federal Davis-Bacon Act (effective August 7, 2007).

(f) Amendments/Corrections to Oregon Determination 2007-02 and July 1, 2007 PWR Rates for Public Works Contracts in Oregon subject to BOTH State PWR Law and federal Davis-Bacon Act (effective August 17, 2007).

(g) Amendments/Corrections to Oregon Determination 2007-02 and July 1, 2007 PWR Rates for Public Works Contracts in Oregon subject to BOTH State PWR Law and federal Davis-Bacon Act (effective August 24, 2007)

(h) Amendments/Corrections to Oregon Determination 2007-02 and July 1, 2007 PWR Rates for Public Works Contracts in Oregon subject to BOTH State PWR Law and federal Davis-Bacon Act (effective September 7, 2007)

(i) Amendments/Corrections to July 1, 2007 PWR Rates for Public Works Contracts in Oregon subject to BOTH State PWR Law and federal Davis-Bacon Act (reflecting changes to Davis-Bacon rates effective September 14, 2007).

(j) Amendments/Corrections to July 1, 2007 PWR Rates for Public Works Contracts in Oregon subject to BOTH State PWR Law and federal Davis-Bacon Act (reflecting changes to Davis-Bacon rates effective September 21, 2007).

(k) Amendment to Oregon Determination 2007-02 (effective October 1, 2007).

(l) Amendments/Corrections to July 1, 2007 PWR Rates for Public Works Contracts in Oregon subject to BOTH State PWR Law and federal Davis-Bacon Act (reflecting changes to Davis-Bacon rates effective October 1, 2007).

(2) Copies of *Prevailing Wage Rates on Public Works Contracts in Oregon* and *Prevailing Wage Rates for Public Works Contracts in Oregon subject to BOTH the state PWR and federal Davis-Bacon Act* dated July 1, 2007, are available from any office of the Wage and Hour Division of the Bureau of Labor and Industries. The offices are located in Eugene, Medford, Portland and Salem and are listed in the blue pages of the phone book. Copies are also available on the bureau's webpage at www.oregon.gov/boli or may be obtained from the Prevailing Wage Rate Coordinator, Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon Street #1045, Portland, Oregon 97232; (971) 673-0839.

Stat. Auth.: ORS 279C.815, 651.060

Stats. Implemented: ORS 279C.815

Hist.: BLI 7-1998(Temp), f. & cert. ef. 10-29-98 thru 4-27-99; BLI 1-1999, f. 1-8-99, cert. ef. 1-15-99; BLI 4-1999, f. 6-16-99, cert. ef. 7-1-99; BLI 6-1999, f. & cert. ef. 7-23-99; BLI 9-1999, f. 9-14-99, cert. ef. 10-1-99; BLI 16-1999, f. 12-8-99, cert. ef. 1-1-00; BLI 4-2000, f. & cert. ef. 2-1-00; BLI 9-2000, f. & cert. ef. 3-1-00; BLI 10-2000, f. 3-17-00, cert. ef. 4-1-00; BLI 22-2000, f. 9-25-00, cert. ef. 10-1-00; BLI 26-2000, f. 12-14-00 cert. ef. 1-1-01; BLI 1-2001, f. & cert. ef. 1-5-01; BLI 3-2001, f. & cert. ef. 3-15-01; BLI 4-2001, f. 3-27-01, cert. ef. 4-1-01; BLI 5-2001, f. 6-21-01, cert. ef. 7-1-01; BLI 8-2001, f. & cert. ef. 7-20-01; BLI 14-2001, f. 9-26-01, cert. ef. 10-1-01; BLI 16-2001, f. 12-28-01, cert. ef. 1-1-02; BLI 2-2002, f. 1-16-02, cert. ef. 1-18-02; BLI 8-2002, f. 3-25-02, cert. ef. 4-1-02; BLI 12-2002 f. 6-19-02 cert. ef. 7-1-02; BLI 16-2002, f. 12-24-02 cert. ef. 1-1-03; BLI 1-2003, f. 1-29-03, cert. ef. 2-14-03; BLI 3-2003, f. & cert. ef. 4-1-03; BLI 4-2003, f. 6-26-03, cert. ef. 7-1-03; BLI 5-2003, f. 9-17-03, cert. ef. 10-1-03; BLI 9-2003, f. 12-31-03, cert. ef. 1-5-04; BLI 1-2004, f. 4-9-04, cert. ef. 4-15-04; BLI 6-2004, f. 6-25-04, cert. ef. 7-1-04; BLI 11-2004, f. & cert. ef. 10-1-04; BLI 17-2004, f. 12-10-04 cert. ef. 12-13-04; BLI 18-2004, f. 12-20-04, cert. ef. 1-1-05; Renumbered from 839-016-0700, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 8-2005, f. 3-29-05, cert. ef. 4-1-05; BLI 18-2005, f. 9-19-05, cert. ef. 9-20-05; BLI 19-2005, f. 9-23-05, cert. ef. 10-1-05; BLI 26-2005, f. 12-23-05, cert. ef. 1-1-06; BLI 1-2006, f. 1-24-06, cert. ef. 1-25-06; BLI 2-2006, f. & cert. ef. 2-9-06; BLI 4-2006, f. 2-23-06, cert. ef. 2-24-06; BLI 14-2006, f. 3-30-06, cert. ef. 4-1-06; BLI 20-2006, f. & cert. ef. 6-16-06; BLI 21-2006, f. 6-16-06 cert. ef. 7-1-06; BLI 23-2006, f. 6-27-06 cert. ef. 6-29-06; BLI 25-2006, f. & cert. ef. 7-11-06; BLI 26-2006, f. & cert. ef. 7-13-06; BLI 28-2006, f. 7-21-06, cert. ef. 7-24-06; BLI 29-2006, f. 8-8-06, cert. ef. 8-9-06; BLI 32-2006, f.

& cert. ef. 9-13-06; BLI 33-2006, f. 9-28-06, cert. ef. 10-1-06; BLI 36-2006, f. & cert. ef. 10-4-06; BLI 37-2006, f. & cert. ef. 10-19-06; BLI 40-2006, f. 11-17-06, cert. ef. 11-20-06; BLI 43-2006, f. 12-7-06, cert. ef. 12-8-06; BLI 45-2006, f. 12-26-06, cert. ef. 1-1-07; BLI 5-2007, f. 1-30-07, cert. ef. 1-31-07; BLI 6-2007, f. & cert. ef. 3-5-07; BLI 7-2007, f. 3-28-07, cert. ef. 3-30-07; BLI 8-2007, f. 3-29-07, cert. ef. 4-1-07; BLI 9-2007, f. & cert. ef. 4-2-07; BLI 10-2007, f. & cert. ef. 4-30-07; BLI 12-2007, f. & cert. ef. 5-31-07; BLI 13-2007, f. 6-8-07, cert. ef. 6-11-07; BLI 14-2007, f. 6-27-07, cert. ef. 6-28-07; BLI 15-2007, f. & cert. ef. 6-28-07; BLI 16-2007, f. 6-29-07, cert. ef. 7-1-07; BLI 18-2007, f. 7-10-07, cert. ef. 7-12-07; BLI 21-2007, f. 8-3-07, cert. ef. 8-8-07; BLI 22-2007, cert. & ef. 8-30-07; BLI 23-2007, f. 8-31-07, cert. ef. 9-4-07; BLI 24-2007, f. 9-11-07, cert. ef. 9-12-07; BLI 25-2007, f. 9-19-07, cert. ef. 9-20-07; BLI 26-2007, f. 9-25-07 cert. ef. 9-26-07; BLI 27-2007, f. 9-25-07 cert. ef. 10-1-07; BLI 28-2007, f. 9-26-07 cert. ef. 10-1-07

839-025-0750

Residential Prevailing Wage Rate Determinations

(1) Pursuant to ORS 279C.815, the Commissioner of the Bureau of Labor and Industries has determined that the wage rates stated in the following residential rate determinations are the prevailing rates of wage for workers upon said public works projects for the periods of time specified:

(a) *Special Prevailing Wage Rate Determination Extension for Residential Project, New Winds Project*, Project #2006-02, dated August 15, 2006, for the period of July 1, 2007 through December 31, 2007.

(b) *Special Prevailing Wage Rate Determination for Residential Project, Lava Court Project*, Project #2007-01, dated October 30, 2007, for the period of November 2, 2007 through June 30, 2008.

(2) Copies of the rates referenced in section (1) of this rule are available from any office of the Wage and Hour Division of the Bureau of Labor and Industries. The offices are located in Eugene, Medford, Portland and Salem and listed in the blue pages of the phone book. Copies may also be obtained from the Prevailing Wage Rate Coordinator, Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon Street #1045, Portland, Oregon 97232; (971) 673-0839.

Stat. Auth.: ORS 279C.815

Stats. Implemented: ORS 279C.815

Hist.: BLI 5-1999, f. 6-30-99, cert. ef. 7-1-99; BLI 7-1999, f. 8-26-99, cert. ef. 9-15-99; BLI 8-1999, f. & cert. ef. 9-8-99; BLI 10-1999, f. 9-14-99, cert. ef. 9-17-99; BLI 11-1999, f. 9-22-99, cert. ef. 9-27-99; BLI 6-2000, f. 2-14-00, cert. ef. 2-15-00; BLI 12-2000, f. 5-24-00, cert. ef. 7-1-00; BLI 18-2000, f. & cert. ef. 9-1-00; BLI 21-2000, f. 9-15-00, cert. ef. 9-22-00; BLI 23-2000, f. & cert. ef. 9-25-00; BLI 24-2000, f. 10-30-00, cert. ef. 11-1-00; BLI 2-2001, f. & cert. ef. 1-24-01; BLI 6-2001, f. 6-21-01, cert. ef. 7-1-01; BLI 7-2001, f. 7-20-01, cert. ef. 7-24-01; BLI 9-2001, f. 7-31-01, cert. ef. 8-1-01; BLI 10-2001, f. 8-14-01, cert. ef. 8-15-01; BLI 11-2001, f. & cert. ef. 8-22-01; BLI 13-2001, f. 9-26-01, cert. ef. 10-1-01; BLI 6-2002, f. 3-14-02, cert. ef. 3-15-02; BLI 7-2002, f. 3-22-02, cert. ef. 3-25-02; BLI 11-2002, f. & cert. ef. 5-23-02; BLI 13-2002, f. 6-26-02 cert. ef. 7-1-02; BLI 14-2002, f. 8-23-02, cert. ef. 10-1-02; BLI 2-2003, f. & cert. ef. 3-28-03; BLI 2-2004, f. 4-23-04, cert. ef. 5-1-04; BLI 3-2004, f. 5-18-04, cert. ef. 5-19-04; BLI 4-2004, f. & cert. ef. 5-24-04; BLI 5-2004, f. 6-23-04, cert. ef. 6-24-04; BLI 7-2004, f. 7-14-04, cert. ef. 7-15-04; BLI 13-2004, f. & cert. ef. 10-19-04; BLI 14-2004, f. 10-29-04 cert. ef. 11-1-04; BLI 16-2004, f. 11-8-04, cert. ef. 11-10-04; Renumbered from 839-016-0750, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 9-2005, f. 4-15-05, cert. ef. 4-18-05; BLI 10-2005, f. & cert. ef. 5-2-05; BLI 11-2005, f. 5-31-05, cert. ef. 6-1-05; BLI 12-2005, f. & cert. ef. 6-21-05; BLI 13-2005, f. 6-30-05, cert. ef. 7-1-05; BLI 14-2005, f. & cert. ef. 7-22-05; BLI 15-2005, f. 8-9-05, cert. ef. 8-10-05; BLI 17-2005, f. 8-26-05, cert. ef. 8-29-05; BLI 23-2005, f. 10-26-05, cert. ef. 10-28-05; BLI 25-2005, f. 12-22-05, cert. ef. 12-23-05; BLI 6-2006, f. 3-9-06, cert. ef. 3-13-06; BLI 22-2006, f. 6-16-06 cert. ef. 7-1-06; BLI 27-2006, f. 7-17-06, cert. ef. 7-18-06; BLI 30-2006, f. 8-16-06, cert. ef. 8-18-06; BLI 31-2006, f. 9-8-06, cert. ef. 9-11-06; BLI 44-2006, f. 12-18-06, cert. ef. 1-1-07; BLI 17-2007, f. & cert. ef. 7-2-07; BLI 30-2007, f. 11-1-07, cert. ef. 11-2-07

DIVISION 30

PROCEDURAL RULES FOR PUBLIC RECORDS REQUESTS AND PERSONAL SERVICE CONTRACTS

Public Records Requests

839-030-0000

Purpose and Scope

(1) The policy of the State of Oregon gives every person the right to inspect the public records of a public body in this state, as provided in ORS 192.420.

(2) These rules govern Bureau of Labor and Industries procedures for processing public records requests.

(3) In any public records matter not governed by these rules, the Commissioner of the Bureau of Labor and Industries will exercise discretion under the law.

(4) As used in these rules:

(a) "Bureau" means the Bureau of Labor and Industries;

(b) "Commissioner" means the Commissioner of the Bureau of Labor and Industries.

Stat. Auth.: ORS 651.060(4)

Stats. Implemented: ORS 192.420 - 192.430

Hist.: BL 4-1986, f. & ef. 6-16-86; BLI 25-2000, f.11-17-00, cert. ef. 12-1-00

839-030-0010

Public Records Requests

(1) The bureau will make available any record requested by any person pursuant to ORS 192.420, provided that the request is in writing and the record requested is not exempt from disclosure under the provisions of ORS Chapter 192 or other applicable law. The bureau may take a reasonable period of time to locate and retrieve the requested information.

(2) The bureau may charge a fee reasonably calculated to reimburse the bureau for costs of providing and conveying copies of public records. When the fee is estimated to exceed \$25.00 per public records request, the bureau will provide the requestor with written notice of the estimated amount of the fee and require written confirmation that the requestor intends to proceed with the request.

(3) As used in these rules:

(a) "Page" refers to paper either 8 1/2 x 11 inches or 8 1/2 x 14 inches. Staff will not reduce size, or otherwise manipulate records to fit additional records on a page, unless staff concludes that it will be the most effective use of their time. A double-sided copy is charged as two pages. Because of the increased staff time involved in double-sided copying, there is no reduction in the per-page fee;

(b) "Normal and reasonable" staff time is 10 minutes or less per request.

(4) Unless otherwise specified in OAR chapter 839 the bureau will charge a minimum fee of \$5.00 per request for records located in the bureau's office facilities, or \$15.00 per request for records located offsite, plus \$.20 per page, as reimbursement for requests requiring normal and reasonable staff time.

(5) If the time required exceeds normal and reasonable staff time, the actual costs of staff or supervisor time necessary for locating, reviewing, separating, photocopying, certifying and preparing records for mailing or other delivery will be charged for each hour or fraction thereof as follows:

(a) Supervisor or administrator time: \$39.00 per hour;

(b) Investigator, compliance specialist or consultant time: \$32.00 per hour;

(c) Clerical time: \$23.00 per hour.

(6) In addition to staff time, the bureau will charge for supplies and use of equipment for producing records as follows:

(a) Twenty cents per page for photocopies.

(b) Actual cost for postage or other delivery costs.

(c) Fifty cents per page for copies by facsimile (fax) machine with a limit of 20 pages.

(7) The bureau will charge \$41.00 per hour, with a \$12.00 minimum, for public record requests that require electronic reproduction. Charges include but are not limited to staff time spent locating, downloading, formatting, copying and transferring records to media, and any charges by a third party vendor.

(8) The bureau will provide blank reproduction media at the following rates:

(a) Diskettes, 3 1/2-inch: \$1.00 each. (Due to possibility of computer viruses, the bureau will not permit requestors to provide diskettes);

(b) Video cassettes, 2 hours: \$3.00 each;

(c) Audio cassettes: \$2.00 each;

(d) Compact discs 1 1/2 hours: \$1.50 each (Due to possibility of computer viruses, the bureau will not permit requestors to provide compact discs).

(9) The costs of any necessary Attorney General review of requested public records will be charged to the requestor at the rate billed by the Department of Justice to the bureau.

(10) The bureau may require that all fees assessed pursuant to this rule be paid in cash, in exact change, prior to furnishing any copies, material or information.

(11) When a request is made to inspect records, the bureau may impose restrictions regarding the location where the requested information will be made available for inspection. When the bureau allows the person requesting the information to search or inspect bureau

records, the bureau may, as it deems necessary for the protection of the records, assign an employee to supervise the search. The charge for this service will be in accordance with section (5) of this rule.

(12) The bureau may enter into agreements to provide routine, periodic reports in a consistent format for a negotiated price.

(13) The commissioner may waive the requirements to pay the charges described in this rule, or any part thereof, after determining that the waiver is in the public interest because making the record available primarily benefits the general public.

(a) The commissioner may require that a request for a fee waiver be submitted in writing.

(b) In determining whether making the record available primarily benefits the general public, relevant factors include but are not limited to:

- (A) The requestor's identity;
- (B) The intended use of the information;
- (C) The character of the information;
- (D) Whether the requested information is already in the public domain;

(E) Whether the requestor can demonstrate the ability to disseminate the information to the public;

(F) The requestor's inability to pay, although this alone is not sufficient basis to waive a fee.

(c) Even if the commissioner determines that making the record available primarily benefits the general public, the commissioner has discretion whether to grant a fee waiver. Factors relevant to that discretion include but are not limited to, with respect to a particular records request:

- (A) Financial hardship on the agency;
- (B) Impact on the operations of the agency including but not limited to use of staff time, equipment and supplies;
- (C) Extent to which inspection of records would be sufficient for the public interest.

Stat. Auth.: ORS 651.060(4)
 Stats. Implemented: ORS 192.420 - 192.440
 Hist.: BL 4-1986, f. & ef. 6-16-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93; BLI 9-1998, f. & cert. ef. 11-2-98; BLI 25-2000, f.11-17-00, cert. ef. 12-1-00; BLI 15-2006, f. 4-6-06, cert. ef. 4-7-06

Administering Personal Service Contracts

839-030-0300

Personal Service Contracts

(1) The Bureau of Labor and Industries may contract with consultants to provide required services. It is the intent of the bureau to publicly announce requirements for consultant services, and to select consultants on the basis of demonstrated competence and qualifications for the type of professional services required. All such contracts will be executed at a fair and reasonable price.

(2) The personal services contract rules (OAR chapter 125, division 20) of the Oregon Department of Administrative Services are hereby adopted by reference as permanent rules for the Bureau of Labor and Industries, except to the extent modified in this or any other division of OAR chapter 839.

Stat. Auth.: ORS 651.060(4)
 Stats. Implemented: ORS 279
 Hist.: BL 11-1992, f. & cert. ef. 7-29-92; BLI 25-2000, f.11-17-00, cert. ef. 12-1-00

DIVISION 50

CONTESTED CASE HEARING RULES

839-050-0000

Statement of Purpose

(1) The purpose of OAR 839-050-0000 to 839-050-0440 is to insure that the contested case procedures of the Bureau of Labor and Industries comply with ORS 183.413 to 183.470, to provide clear guidelines and an understanding of what is expected of participants, and to provide for thorough and timely hearings.

(2) In an effort to provide timely hearings, OAR 839-050-0000 to 839-050-0440 establish time limits that will be strictly followed. Waiver or extension of set time limits will be granted only under the limited circumstances set forth in these rules.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & ef. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0020; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0010

Model Rules of Procedure

The Attorney General's Model Rules of Procedure adopted pursuant to OAR 839-002-0005 govern operations of the Hearings Unit of the Bureau of Labor and Industries except to the extent they conflict with or are modified by rules in this division or any other division of chapter 839 of the Oregon Administrative Rules. The rules for contested case proceedings are set forth in OAR 839, division 50.

[ED. NOTE: The full text of the Attorney General's Model Rules of Procedure is available from the office of the Attorney General or Bureau of Labor and Industries.]

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 8-1986, f. & ef. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0022; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04; BLI 7-2006, f. 3-16-06 cert. ef. 3-20-06

839-050-0020

Definitions

The following definitions apply, unless the context requires otherwise, to OAR 839-050-0000 through 839-050-0440:

(1) "Administrative law judge" means the commissioner or an individual or a special tribunal designated by the commissioner to preside over any or all aspects of a contested case hearing including motions, oral or written hearings, preparation of the Proposed Order and assistance in preparation of the Final Order. The administrative law judge may or may not be an employee of the Agency.

(2) "Agency" means the Bureau of Labor and Industries and any employee thereof, and includes the bureau when acting as the agent of another governmental entity, but for purposes of these rules does not refer to the administrative law judge or the commissioner.

(3) "Authorized representative" means a member of a partnership, an authorized officer or regular employee of a corporation, association or organized group, or an authorized officer or employee of a governmental agency who has been authorized by the partnership, corporation, association, organized group, or governmental agency to represent that entity during the contested case proceeding.

(4) "Case presenter" means the Agency staff person assigned to present the case for the Agency at the contested case hearing and to handle all related matters, but does not include counsel for the Agency.

(5) "Charging document" means any document issued by the Bureau of Labor and Industries stating that any person, entity, or government agency has violated the laws within this Agency's jurisdiction and includes, but is not limited to:

- (a) Formal Charges;
- (b) Order of Determination;
- (c) Notice of Intent to Revoke License;
- (d) Notice of Intent to Deny License;
- (e) Notice of Intent to Refuse to Renew a License;
- (f) Notice of Intent to Place Name on List of Ineligibles;
- (g) Notice of Intent to Assess Civil Penalties;
- (h) Notice of Intent to Suspend or Revoke License or to Assess Civil Penalty in Lieu Thereof.

(6) "Claimant" means any individual who has filed a wage claim pursuant to ORS 652 or 653 and who has assigned that claim to the commissioner.

(7) "Commissioner" means the Commissioner of the Bureau of Labor and Industries.

(8) "Complainant" means an individual who has, or whose attorney has, filed a complaint pursuant to ORS 658 or 659A, those statutes in ORS 279 enforced by the Bureau of Labor and Industries, and any laws, regulations, or ordinances enforced by the bureau as the agent of another governmental entity.

(9) "Counsel" means an attorney who is a member in good standing with the Oregon State Bar or a member in good standing of the bar of any United States court or the highest court of any state who is permitted to appear in a particular proceeding by order of the administrative law judge. Such permission will be given only in compliance with the requirements of ORS 9.241 and Uniform Trial Court Rule 3.170.

(10) "Counsel for the Agency" means the Attorney General or the

Attorney General's designee. When the Agency's interests require representation by counsel and the Attorney General cannot represent the Agency, the Agency will arrange for the services of a private attorney.

(11) "Good cause" means, unless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or a circumstance over which the participant had no control. "Good cause" does not include a lack of knowledge of the law, including these rules.

(12) "Hearings Unit" means the section of the Bureau of Labor and Industries handling all aspects of contested case hearings. The address for the Unit is: Bureau of Labor and Industries, Hearings Unit, 1045 State Office Building, 800 N.E. Oregon Street, Portland, OR 97232-2162.

(13) "Issuance" means the act of sending out a document from the Hearings Unit. For purposes of these rules, the date of issuance is the date, as noted on the document, that the document was sent out from the Hearings Unit.

(14) "Participant" means any party, including any person or entity granted party status under OAR 137-003-0005, or the Agency.

(15) "Party" means:

(a) Any person, government agency, or entity upon whom a charging document has been served;

(b) Any person, government agency, or entity that has been granted party or limited party status under OAR 137-003-0005.

(16) "Service" means, for purposes of these rules, the method of forwarding documents and includes personal service, registered or certified mail, hand delivery or regular U.S. mail.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & cf. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0025; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0030

Service of Documents

(1) Except as may be otherwise provided in ORS 652.332(1) the charging document will be served on the party or the party's representative by personal service or by registered or certified mail. Service of a charging document is complete upon the earlier of:

(a) Receipt by the party or the party's representative; or

(b) Mailing when sent by registered or certified mail to the correct address of the party or the party's representative.

(2) All other documents may be served on the party or the party's representative by personal service or by mailing to the last known address in the Agency file for the case to be heard. Service of a document other than the charging document is complete upon personal service or mailing, whichever occurs earlier.

(3) Any participant to a contested case proceeding filing a document with the Hearings Unit will serve a copy of such document upon all other participants or their representatives.

(4) Each party must notify the Hearings Unit and the Agency of the party's change of address. Such notice must be in writing and served on the Hearings Unit and the Agency within 10 days of the party's change of address. Unless the Hearings Unit and the Agency have been so notified, they will presume that the party's address on file with the Agency is correct.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & cf. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0030; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0040

Filing of Documents with the Hearings Unit; Calculation of Time and Filing Dates

(1) Except as modified by statute or enlarged by these rules, by order of the commissioner, or by decision of the administrative law judge, a document is filed with the Hearings Unit either on the date the Hearings Unit receives the document, or on the date postmarked on the properly addressed document, whichever is earlier.

(2) Documents are not to be filed by facsimile transmission except with the prior approval of the administrative law judge. The administrative law judge may require the participant filing a document by facsimile transmission to also send the Hearings Unit a copy of the

document by mail or personal delivery and may require the participant to serve the other participants with the document by facsimile transmission in addition to mail or personal delivery.

(3) The computation of any period of time will not include the day from which the designated period begins to run. The computation will include the last day of this period unless it is a Saturday, Sunday, or holiday officially recognized by the State of Oregon or the federal government. If the last day of the time period is a Saturday, Sunday, or holiday, the period will run until 5 p.m. of the next day that is not a Saturday, Sunday, or holiday.

(4) All time periods described in these rules are measured in calendar days.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & cf. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0035; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0050

Timeliness

(1) The administrative law judge may disregard any document that is filed with the Hearings Unit beyond the established number of days for filing.

(2) When a participant requires additional time to submit any document, a written request for such extension must be filed with and received by the Hearings Unit no later than the date set for filing of the document in question, except that the administrative law judge has discretion to permit a participant to make an oral motion for an extension of time. When the administrative law judge allows a participant to make an oral motion for extension of time, the administrative law judge will promptly notify the other participants of the motion and give them an opportunity to respond, either orally or in writing. When a participant files a written motion for extension of time, the other participants will have seven days after service of the motion in which to file a written response, unless that time is altered by order of the administrative law judge.

(3) The administrative law judge may grant such an extension of time only in situations when the requesting participant shows good cause for the need for more time or when no other participant opposes the request. The administrative law judge will promptly notify the participant requesting the extension whether it will be allowed.

(4) When an extension of time is allowed to a participant, the administrative law judge will advise all participants of the new due date, and will state whether the same extension of time applies to the other participants.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & cf. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0040; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04; BLI 6-2005, f. 2-8-05, cert. ef. 2-11-05

839-050-0060

Charging Documents

(1) A charging document will contain:

(a) A reference to the particular statutes or administrative rules involved in the violation;

(b) A short and concise statement of the matters that constitute the violation; and

(c) A statement of the remedies sought and, when appropriate, the penalty imposed.

(2) A charging document may contain statements that:

(a) When a party fails to timely request a hearing, or having made a timely request subsequently withdraws it, the Agency file will be the evidentiary record of the proceeding;

(b) When, following an answer and a request for hearing (when required), the party subsequently notifies the Agency that it will not appear at the hearing, or, without such notice, the party fails to appear at the hearing, the Agency's file may become part of the contested case record; and

(c) A statement that when a party fails to answer a charging document, the Agency file will automatically become part of the contested case record upon default for the purpose of proving a prima facie case.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
Hist.: BL 8-1986, f. & ef. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0050; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0070

Request for a Contested Case Hearing

Except in cases when Formal Charges are issued, any party wishing to contest a charging document must request a contested case hearing. This request must be in writing and filed with the Agency within the time limit established in the charging document. A party that fails to file a request for a hearing within the time limit established in the charging document, or that requests a hearing and subsequently withdraws the request, will be in default as to those charges.

Stat. Auth.: ORS 183 & 651.060(4)
Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
Hist.: BL 8-1986, f. & ef. 9-2-86; BL 12-1986, f. 10-29-86, ef. 10-30-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0051; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0080

Notice of Hearing

(1) When a party makes a timely written request for a contested case hearing, that hearing will be scheduled in accordance with OAR 839-050-0070 and the party will receive a notice of hearing. The Hearings Unit will issue a notice of hearing to the participants.

(2) In cases when Formal Charges are filed, the notice of hearing will accompany the Formal Charges.

(3) The notice of hearing will contain:

(a) A statement of the time and place of the hearing, including the statement that the hearing will reconvene on successive business days thereafter until concluded;

(b) A statement of the authority and jurisdiction under which the hearing is to be held;

(c) A reference to the particular sections of the statutes and rules involved;

(d) A short and plain statement of the matters asserted or charged;

(e) The name of the administrative law judge designated by the commissioner to preside at the hearing and whether the administrative law judge is an employee of the Agency; and

(f) A statement indicating whether the case for the Agency will be presented by the Department of Justice or by an Agency case presenter.

(4) Sections (3)(c) and (d) above are satisfied if the notice of hearing attaches and incorporates a charging document that includes the matters referred to in those paragraphs.

(5) The notice of hearing may contain a statement that:

(a) When a party fails to timely request a hearing, or having made a timely request subsequently withdraws it, the Agency file will be the evidentiary record of the proceeding;

(b) When, following an answer and request for hearing (when required), the party subsequently notifies the Agency that the party will not appear at the hearing, or, without such notice, the party fails to appear at the hearing, the Agency file may become part of the contested case record; and

(c) When a party fails to answer a charging document, the Agency file will become part of the contested case record upon default for the purpose of proving a prima facie case.

Stat. Auth.: ORS 183 & 651.060(4)
Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
Hist.: BL 8-1986, f. & ef. 9-2-86; BL 12-1986, f. 10-29-86, ef. 10-30-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0055; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0090

Location of Contested Case Hearings

Contested case hearings will generally be held in a State of Oregon office building when available, or another appropriate facility, near the location where the action arose.

Stat. Auth.: ORS 183 & 651.060(4)
Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
Hist.: BL 8-1986, f. & ef. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0045; BL 12-1996, f. & cert.

ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0100

Information for Contested Case Hearings

The Hearings Unit will provide a statement of information for all parties involved in a contested case hearing that includes:

(1) Instructions that all filings, correspondence and documents must be transmitted to the administrative law judge, through the Hearings Unit at this address: Bureau of Labor and Industries, Hearings Unit, 1045 State Office Building, 800 N.E. Oregon Street, Portland, OR 97232-2162;

(2) The information required under ORS 183.413(2) concerning the rights of the parties to the hearing;

(3) A statement that an order may be issued upon default if a party requesting a hearing fails to appear at the hearing and if the Agency has presented a prima facie case on the record; and

(4) A statement that the party's address as it appears in the Agency's files, and to which the notice has been sent, will be the address used throughout the proceeding. A party whose address changes must notify the Agency; otherwise, the Agency will presume the address on file to be correct.

Stat. Auth.: ORS 183 & 651.060(4)
Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
Hist.: BL 8-1986, f. & ef. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0056; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0110

Representation of a Party in a Contested Case Proceeding

(1) Any party may be represented by counsel, as that term is defined in OAR 839-050-0020(9). At all stages of the contested case proceeding, all government agencies, partnerships, corporations and unincorporated associations must be represented either by counsel, who may perform all functions consistent with representation of a client, or by an authorized representative, subject to the limitations of sections (2) through (6) of this rule.

(2) For purposes of OAR chapter 839, division 50, "authorized representative" means a member of a partnership, an authorized officer or regular employee of a corporation, association or organized group, or an authorized officer or employee of a governmental agency.

(3) Before appearing in the case, an authorized representative must provide written authorization for the named representative to appear on behalf of the party or limited party. This written authorization must be provided no later than the time that an answer and request for hearing is filed.

(4) An authorized representative may not present legal argument during the contested case proceeding except to the extent authorized by section 5 of this rule. "Legal argument" includes arguments on:

(a) The jurisdiction of the agency to hear the contested case;

(b) The constitutionality of a statute or rule or the application of a constitutional requirement to an agency;

(c) The application of court precedent to the facts of the particular contested case proceeding.

(5) The administrative law judge may allow the authorized representative to present evidence, examine and cross-examine witnesses, and make arguments relating to the:

(a) Application of statutes and rules to the facts in the contested case;

(b) Actions taken by the Agency in the past in similar situations;

(c) Literal meaning of the statutes or rules at issue in the contested case;

(d) Admissibility of evidence; and

(e) Proper procedures to be used in the contested case hearing.

(6) When a party is represented by an authorized representative in a hearing, the administrative law judge will advise such representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change applicable law on waiver or the duty to make timely objection. When such objections may involve legal argument as defined in section 4 of this rule, the administrative law judge will provide reasonable opportunity for the authorized representative to consult legal counsel and permit such legal counsel to file written legal argument within a reasonable time after the conclusion of the hearing.

(7) A party that intends to be represented by counsel during the contested case proceeding, and that is not a government agency, partnership, corporation or unincorporated association, will notify the Hearings Unit of its intent to be represented by counsel as soon as practicable. Once the contested case hearing has begun, no party will be allowed a recess to obtain the services of counsel.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0057; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 4-2002, f. 2-14-02, cert. ef. 2-15-02; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0120

Representation of a Claimant or Complainant in a Contested Case Proceeding

The claimant or complainant may have counsel present at the contested case hearing; however, counsel's participation is limited to rendering advice to counsel's client. Such counsel may not file motions, make objections, examine or cross-examine witnesses or make legal argument, except that such counsel may assert privilege for counsel's client at any point in a contested case proceeding and may participate fully in any deposition of counsel's client.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 8-1986, f. & cert. ef. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0058; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 4-2002, f. 2-14-02, cert. ef. 2-15-02; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0130

Responsive Pleadings

(1) A party filing a written request for a hearing or a party served with Formal Charges must file a written response, referred to as an "answer," to the allegations in the charging document. Except as may be otherwise provided in ORS 652.332(1), the party must file the answer within 20 days after service of the charging document, except that the party must file the answer within 60 days after service of the charging document if that document proposes to deny a license. The answer must include an admission or denial of each factual matter alleged in the charging document and a statement of each relevant defense to the allegations. A general denial is not sufficient to constitute an answer. An answer not including the information required by this rule may be disregarded and a notice of default may be issued in accordance with OAR 839-050-0330, as if no answer had been filed.

(2) Except for good cause shown to the administrative law judge, factual matters alleged in the charging document and not denied in the answer will be deemed admitted by the party. The failure of the party to raise an affirmative defense in the answer is a waiver of such defense. Any new facts or defenses alleged in the answer will be deemed denied by the Agency. Evidence will not be taken at the contested case hearing on any factual or legal issue not raised in the charging document or the answer as originally filed or as amended pursuant to OAR 839-050-0140.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 8-1986, f. & cert. ef. 9-2-86; BL 4-1987, f. 2-11-87, ef. 2-13-87; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0060; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0140

Amendments

(1) Prior to the hearing a participant may amend its pleading once as a matter of course at any time before a responsive pleading is served. Otherwise, a participant may amend its pleading only by permission of the administrative law judge or by written consent of the other participants. Permissible amendments to charging documents include, but are not limited to: additions to or deletions of charges; changes to theories of liability; and increases or decreases to the damages, penalties, or other remedies sought. Permissible amendments to answers include, but are not limited to: additions to defenses other than affirmative defenses or deletions of any defenses. Permission to amend pleadings will be given when justice so requires.

(2)(a) Once the hearing commences, issues other than affirmative defenses not raised in the pleadings may be raised and evidence pre-

sented on such issues, provided there is express or implied consent of the participants. Consent will be implied when there is no objection to the introduction of such issues and evidence or when the participants address the issues. Any participant raising new issues must move the administrative law judge, before the close of the evidentiary portion of the hearing, to amend its pleading to conform to the evidence and to reflect issues presented. The administrative law judge may address and rule upon such issues in the Proposed Order.

(b) If evidence is objected to at hearing on the grounds that it is not within the issues raised by the pleadings, the administrative law judge may allow the pleadings to be amended to conform to the evidence presented. The administrative law judge will allow the amendment when the participant seeking to amend its pleading shows good cause for not having included the new matter in its pleading prior to hearing and the objecting participant fails to satisfy the administrative law judge that it would be substantially prejudiced by the admission of such evidence. The administrative law judge may grant a continuance to enable the objecting participant to meet such evidence.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 8-1986, f. & cert. ef. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0075; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04; BLI 42-2006, f. & cert. ef. 12-6-06

839-050-0150

Motions

Except as otherwise stated in OAR 839-050-0050, all pre-hearing and post-hearing motions will be submitted in writing to the administrative law judge through the Hearings Unit. If the nonmoving participant chooses to respond, the nonmoving participant must file a written response to a written motion within seven days after service of the motion, unless the administrative law judge orders otherwise. Motions include but are not limited to the following:

(1) Motion to dismiss: This motion must be based upon:

- (a) Lack of jurisdiction over the subject matter or person;
- (b) Insufficiency of process or service of process; or
- (c) Failure to state a claim upon which relief can be granted.

(2) Motion to change the place of hearing.

(3) Motion to exclude witnesses:

(a) The motion may be made by any participant at any time prior to or during the hearing.

(b) The administrative law judge may, without a motion being made by a participant, exclude witnesses from the hearing except for a party, counsel, the Agency case presenter, an authorized representative, claimants, complainants and any persons authorized by statute to attend. Notwithstanding this rule, an administrative law judge may expel any person from the hearing if that person engages in conduct that disrupts the hearing.

(4) Motion for summary judgment:

(a) A motion for summary judgment may be made by a participant or by decision of the administrative law judge for an accelerated decision in favor of any participant as to all or part of the issues raised in the pleadings. The motion may be based on any of the following conditions:

(A) Issue or claim preclusion;

(B) No genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings; or

(C) Such other reasons as are just.

(b) When the administrative law judge grants the motion, the decision will be set forth in the Proposed Order.

(5) Motion for a postponement:

(a) Any participant making a request for a postponement of any part of the contested case proceeding must state in detail the reason for the request. The administrative law judge may grant the request for good cause shown. In making this determination, the administrative law judge will consider:

(A) Whether previous postponements have been granted;

(B) The timeliness of the request;

(C) Whether a participant has previously indicated it was prepared to proceed;

(D) Whether there is a reasonable alternative to postponement; for example, submitting a sworn statement of a witness; and

(E) The date the hearing was originally scheduled to commence.

(b) The administrative law judge will issue a written ruling either granting or denying the motion and will set forth the reasons therefore;

(c) If all participants agree to a postponement, in order for the postponement to be effective, the administrative law judge will approve of this agreement. Whether the administrative law judge grants or denies such a motion for postponement, the administrative law judge will issue a written ruling setting forth the reasons therefore.

(6) Motion for consolidation of hearings: This motion must allege facts sufficient to meet the criteria of OAR 839-050-0190.

(7) Motion for hearing by telephone: Any participant may file a motion to conduct the hearing by telephone. The motion must contain:

(a) A statement setting forth the reason(s) for the request;

(b) A statement explaining why no participant will be substantially prejudiced by having a hearing in this manner;

(c) A statement of the location of the majority of witnesses expected to be called;

(d) A statement estimating the number and/or volume of documents to be introduced into the record;

(e) A statement indicating whether the participant intends to call any expert witness; and

(f) A statement indicating whether an interpreter or an assistive communication device under OAR 839-050-0300 will be required for any witness.

(8) Motion for an earlier hearing date: After issuance of a notice of hearing, a participant may request an earlier hearing date upon a showing that the purposes of the law or the interests of justice would otherwise be frustrated.

(9) Motion for a protective order.

(10) Motion for default when a respondent has failed to timely file an answer within the time specified in the charging document.

(11) Motion to amend.

(12) Motion to make more definite and certain.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & ef. 9-2-86; BL 12-1986, f. 10-29-86, ef. 10-30-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0070; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 4-2002, f. 2-14-02, cert. ef. 2-15-02; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04; BLI 13-2006, f. 3-23-06, cert. ef. 3-24-06

839-050-0160

Disqualification of Administrative Law Judge

(1) An administrative law judge may withdraw from a proceeding whenever the administrative law judge determines disqualification to be necessary. Any party to any contested case may claim that the person designated as administrative law judge is prejudiced against any party or counsel or the interest of any party or counsel appearing in such case. Such prejudice must be established by a motion supported by an affidavit establishing that the designated administrative law judge is prejudiced against the party or counsel, or against the interest of the party or counsel, such that the party or counsel cannot, or believes that he or she cannot, have a fair and impartial hearing before the administrative law judge, and that it is made in good faith and not for the purpose of delay. Grounds upon which a motion may be made, or upon which the administrative law judge may determine that disqualification is necessary, include but are not limited to a family relationship with the complainant or claimant or with any party or counsel, or a financial interest in the property or business of any of those individuals. The fact that the administrative law judge is an employee of the Oregon Bureau of Labor and Industries is not a ground for disqualification of the administrative law judge.

(2) The motion and affidavit must be filed together within 14 days after service of the notice of hearing. No motion to disqualify an administrative law judge may be made after the administrative law judge has ruled upon any motion, other than a motion to extend time in the case, or after the hearing has commenced, whichever is earlier.

(3) The administrative law judge will issue a written ruling on the motion for withdrawal or disqualification, setting forth the grounds therefore, within ten days of the receipt of the motion. The ruling will be sent to the commissioner, the Agency, and all parties.

(4) When an administrative law judge has been disqualified, the commissioner will designate another administrative law judge to preside over the contested case proceeding. The Hearings Unit will notify the participants of this designation.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & ef. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0065; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0170

Joinder of Parties, Claimants, or Complainants

(1) Complainants or claimants: Any number of persons may be joined in one action as complainants or claimants if they assert a right to relief arising out of the same or similar transaction(s) or occurrence(s) and if questions of law or fact common to all these persons will arise in the action.

(2) Parties: Any number of persons may be joined in one action as parties if there is asserted against them any right to relief arising out of the same transaction(s) or occurrence(s) and if questions of law or fact common to all these persons will arise in the action.

(3) The Final Order may find for or against one or more of the complainants or claimants or parties according to their respective rights or liabilities.

(4) Misjoinder of complainants, claimants, or parties is not a ground for dismissal of an action. Parties may be added or deleted by order of the administrative law judge upon the motion of any participant, upon the administrative law judge's own motion, or upon the application of any person or entity seeking party or limited party status, at any stage of the contested case proceeding. When necessary to complete disposition of the case, the administrative law judge may postpone the hearing to allow a newly added complainant, claimant, or party to prepare for the hearing.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & ef. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0085; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0180

Dual Hearings

(1) The commissioner may hold a hearing in conjunction with the Wage and Hour Commission to resolve the allegations set forth in two or more charging documents when:

(a) The same evidence will be presented in both cases; and

(b) There will not be substantial prejudice to any party.

(2) The issues in both cases need not be the same, nor must the same enforcement means or damages be sought.

(3) Such hearings may be combined even when the commissioner and the Wage and Hour Commission will issue separate Final Orders.

(4) The same administrative law judge may be designated by the commissioner as is designated by the Wage and Hour Commission to conduct the hearing. Conduct of the hearing includes establishing the procedure for the hearing, questioning of witnesses, and ruling on motions and objections to evidence.

(5) The administrative law judge will issue a Proposed Order to the commissioner in the case. All other rules governing the issuance of any charging document or the hearings process apply to dual hearings.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & ef. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0090; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0190

Consolidation of Hearings

The administrative law judge may order a joint contested case hearing for two or more cases when the administrative law judge determines that the cases involve common questions of law or fact. The administrative law judge, in conducting the hearing, may establish procedures necessary to avoid additional costs or delay.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & ef. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0095; BL 12-1996, f. & cert.

ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0200

Discovery

(1) The administrative law judge has the discretion to order discovery by a participant in appropriate cases. This rule does not require the administrative law judge to authorize any discovery. If the administrative law judge does authorize discovery, the administrative law judge will control the methods, timing, and extent of discovery, but nothing in this rule prevents informal exchanges of information. When the administrative law judge orders discovery, the administrative law judge will notify the participants of the possible sanction, pursuant to section (11) of this rule, for failure to provide the discovery ordered.

(2) Discovery may include but is not limited to one or more of the following:

- (a) Disclosure of names and addresses of witnesses expected to testify at the hearing;
- (b) Production of documents;
- (c) Production of objects for inspection or permission to enter upon land to inspect land or other property;
- (d) Written interrogatories to be served on a participant; and
- (e) Requests for admission.

(3) Depositions are strongly disfavored and will be allowed only when the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of a motion to depose a particular witness.

(4) Except as provided in sections (6) and (9) of this rule, before requesting a discovery order, a participant must seek the discovery through an informal exchange of information.

(5) Except as provided in sections (6) and (9) of this rule, a request for a discovery order must be filed with the Hearings Unit, be in writing, and must include a description of the attempts to obtain the requested discovery informally. The administrative law judge will consider any objections by the participant from whom discovery is sought.

(6) A participant seeking information from another participant by means of written interrogatories may serve that participant with up to 25 interrogatories, including all discrete subparts, to be answered by the participant served, or, in the case of a corporation, unincorporated association, or government agency, by its officer or agent. A participant wishing to serve another participant with more than 25 interrogatories must file a motion identifying the participant to be served, setting forth a general description of the nature of the information to be sought and its relevance, and explaining why the additional interrogatories are necessary. Each interrogatory must be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party must state the reasons for objection and must answer to the extent the interrogatory is not objectionable. The answers are to be signed by the person making them. The participant served with interrogatories must serve its answers and objections, if any, within 14 days after service of the interrogatories. The administrative law judge may alter the deadline for answers to interrogatories upon motion by either participant.

(7) Any discovery request must be reasonably likely to produce information that is generally relevant to the case. If the relevance of the requested discovery is not apparent, the administrative law judge may require the participant requesting discovery to explain how the request is likely to produce relevant information. If the request appears unduly burdensome, the administrative law judge may require an explanation of why the requested information is necessary or is likely to facilitate resolution of the case.

(8) The administrative law judge will issue an order granting or denying a discovery request in whole or in part. Participants must comply with such orders and have a continuing obligation, through the close of the hearing, to provide the other participants with any newly discovered material that is within the scope of the discovery order.

(9) Unless limited by the administrative law judge, the participants may issue subpoenas in support of discovery. Counsel representing a party may issue subpoenas in the same manner as subpoenas are issued in civil actions, as set forth in the Oregon Rules of Civil Procedure. The administrative law judge may issue subpoenas in support of discovery for any party not represented by counsel. The Bureau of Labor and Industries may apply to the circuit court to compel obedience to a subpoena.

(10) A party wishing the administrative law judge to issue a subpoena on its behalf must file a motion with the Hearings Unit as soon as practicable after it is served with the notice of hearing, but in no event less than seven days prior to hearing. The motion must include a showing of general relevance and reasonable scope of the evidence sought. If the motion is granted, the Hearings Unit will deliver the subpoena to the party that requested it. The party will then be responsible for serving the subpoena and for paying any applicable witness fees.

(11) The administrative law judge may refuse to admit evidence that has not been disclosed in response to a discovery order or subpoena, unless the participant that failed to provide discovery shows good cause for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10). If the administrative law judge admits evidence that was not disclosed as ordered or subpoenaed, the administrative law judge may grant a continuance to allow an opportunity for the other participant(s) to respond.

(12) The authority to order and control discovery rests with the administrative law judge.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & ef. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-30-115; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0210

Case Summary

(1) Prior to any contested case hearing, the administrative law judge may issue a discovery order directing the participants to prepare a case summary containing any or all of the following:

(a) A list of all persons to be called as witnesses, including expert witnesses, at the hearing, except that impeachment or rebuttal witnesses need not be included on the witness list;

(b) The qualifications of any expert witnesses and the substance of the facts and opinions to which the experts are expected to testify;

(c) Identification and description of any document or other physical evidence to be offered into evidence at the hearing, together with two copies of any such document, except that evidence offered solely for impeachment or rebuttal need not be identified or furnished;

(d) Statement of any defenses to the claim;

(e) Statement of the elements of the claim;

(f) Statement of any agreed or stipulated facts;

(g) Statement of remedies proposed by the Agency and the reasons therefor, together with any damage computations;

(h) Statement, when appropriate, of any applicable agency policies together with, in the discretion of the Agency, any supporting documents or information on which such policies are based.

(2) When a party is unrepresented by counsel, the administrative law judge may order the party to produce a summary of the case containing only the information and documents described in subsections (1)(a), (b), and (c) of this rule.

(3) Each participant must serve a copy of its case summary, including all documents or other physical evidence to be offered into evidence at the hearing as described in (1)(c) of this rule, on the other participants. Following production of the case summary and before the start of the hearing, a participant must, as soon as practicable, file and serve the other participants with an addendum to its case summary if the participant intends to offer as evidence at the hearing any additional documents, physical exhibits, or testimony that was not identified in the original case summary. The addendum must meet the requirements of paragraphs (1)(a), (1)(b), and (1)(c) of this rule, as applicable. As with the original case summary, evidence to be offered solely for impeachment or rebuttal need not be identified or furnished.

(4) When the administrative law judge orders a case summary, the administrative law judge will notify the participants of the possible sanction, pursuant to OAR 839-050-0210(5), for failure to provide the case summary.

(5) The administrative law judge may refuse to admit evidence that has not been disclosed in response to a case summary order, unless the participant that failed to provide the evidence offers a satisfactory reason for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10). If the administrative law judge admits evidence not pro-

vided in response to a case summary order, the administrative law judge may grant a continuance to allow an opportunity for the other participants to respond.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 8-1986, f. & ef. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 6-1989, f. & cert. ef. 9-5-89; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0071; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 4-2002, f. 2-14-02, cert. ef. 2-15-02; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0220

Informal Disposition of Contested Case

(1) An informal disposition of a contested case occurs when, after the Agency issues a charging document, a case is resolved by stipulation, agreed settlement, consent order, settlement agreement, or default.

(2) When a party is interested in settling a case prior to the contested case hearing, the party should contact the Agency case presenter or other individual named in the notice of hearing who is scheduled to present the case for the Agency. Settlement negotiations do not serve as a basis for a postponement of the hearing, and participants should continue to prepare for hearing until they reach an agreement to settle and the Hearings Unit is so notified. An agreement to settle is reached when the participants have made an agreement to resolve the contested case and have agreed, orally or in writing, to the specific conditions of their agreement.

(3) When an agreement to settle is reached before the date of hearing, the participants will immediately notify the Hearings Unit. If such notice is given before the case summary due date, the case summary need not be filed by the participants that have reached an agreement to settle. The participants will file settlement documents with the Hearings Unit as soon as they are fully executed. If the participants have not filed fully executed documents with the Hearings Unit before the time set for hearing, at that time the participants must:

(a) Submit all necessary settlement documents, fully executed; or

(b) Put the settlement terms in writing and fully execute the written document as provided in subsection (8) of this rule.

(4) When the participants notify the Hearings Unit before a hearing that an agreement to settle has been reached, but fail to submit fully executed settlement documents before or at the time set for hearing and disagree on the record as to the specific terms of the agreement to settle, the administrative law judge may hold the hearing as scheduled if the participants agree or reschedule the hearing as soon as practicable, with the date being determined by the administrative law judge. Unless the administrative law judge and all participants agree, the new date of hearing will be no sooner than 14 days from the original date set for hearing. No further postponement will be allowed on the basis of a purported settlement and the case summary requirement will not be waived for the rescheduled hearing as provided in subsection (3) of this rule.

(5) Fully executed settlement documents submitted to the Hearings Unit will not contain terms that the Agency lacks the authority to enforce or is not a party to, such as an agreement by the claimant(s) or complainant(s) not to pursue legal actions against respondent(s) other than the claim or complaint being settled.

(6) Fully executed settlement documents submitted to the Hearings Unit will not contain provisions requiring the settlement terms to be confidential or requiring the claimant(s), complainant(s), or the Agency to keep the settlement terms confidential.

(7) Participants waive their right to a contested case hearing by their signatures on fully executed settlement documents.

(8) When a contested case is resolved by informal disposition other than default (see OAR 839-050-0330), the administrative law judge will incorporate the settlement terms into a Final Order on Informal Disposition. When an Order of Determination or Notice of Intent has been issued, but a Notice of Hearing has not been issued, the fully executed settlement document may be incorporated into a Final Order on Informal Disposition by either the Administrator of the Wage and Hour Division or an administrative law judge.

(a) The Hearings Unit will deliver or mail a copy of a Final Order on Informal Disposition issued by an administrative law judge, and the Wage and Hour Division will deliver or mail a copy of a Final Order on Informal Disposition issued by the Administrator of the

Wage and Hour Division, to each participant and, if applicable, to the participant's attorney of record.

(b) A Final Order on Informal Disposition is not subject to ORS 183.470.

(c) A Final Order on Informal Disposition is not subject to judicial review.

(d) Within 60 days after a Final Order on Informal Disposition is issued, a participant may petition the Bureau of Labor and Industries to set aside the order on the ground that the informal disposition was obtained by fraud or duress.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 183.415(5), 279.361, 279.370, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820 & 659A.850
 Hist.: BL 8-1986, f. & ef. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 6-1989, f. & cert. ef. 9-5-89; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0200; BL 12-1996, f. & cert. ef. 12-10-96; BLI 3-1998, f. & cert. ef. 2-11-98; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04; BLI 6-2005, f. 2-8-05, cert. ef. 2-11-05

839-050-0230

Authority of the Case Presenter

(1) The case presenter is authorized by ORS 183 to appear on behalf of and represent the Agency. The case presenter may perform any function not prohibited by this rule.

(2) The case presenter may not present legal argument during the contested case proceeding except to the extent authorized by section 3 of this rule. "Legal argument" includes arguments on:

(a) The jurisdiction of the agency to hear the contested case;

(b) The constitutionality of a statute or rule or the application of a constitutional requirement to an agency;

(c) The application of court precedent to the facts of the particular contested case proceeding.

(3) The administrative law judge may allow the case presenter to present evidence; examine and cross-examine witnesses; and make arguments relating to the:

(a) Application of statutes and rules to the facts in the contested case;

(b) Actions taken by the Agency in the past in similar situations;

(c) Literal meaning of the statutes or rules at issue in the contested case;

(d) Admissibility of evidence; and

(e) Proper procedures to be used in the contested case hearing.

(4) When a case presenter is representing the Agency in a hearing, the administrative law judge will advise such representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change applicable law on waiver or the duty to make timely objection. When such objections may involve legal argument as defined in section 2 of this rule, the administrative law judge will provide reasonable opportunity for the case presenter to consult legal counsel and permit such legal counsel to file written legal argument within a reasonable time after the conclusion of the hearing.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0059; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0240

Responsibilities of the Administrative Law Judge

The commissioner designates as administrative law judges those employees who are employed by the Agency as hearings officers and those persons who are appointed to preside at particular hearings. The commissioner delegates to such designee the authority to:

(1) Rule on all motions filed prior to the hearing.

(2) Issue subpoenas and otherwise oversee the discovery process in a manner consistent with rules relating to these powers.

(3) Hold appropriate conferences, if necessary, before or during the course of the hearing to discuss the conduct of the proceedings or the issues to be presented.

(4) Regulate the course of the hearing, including scheduling, reconvening, and adjourning.

(5) Maintain order during the course of the hearing, including the authority to expel persons whose conduct is disruptive.

(6) Make rulings on motions or evidence, with or without objec-

tion, during the hearing.

(7) Question witnesses at the hearing and set time limitations for argument or presentation.

(8) Limit or extend filing periods.

(9) Decide procedural matters, but not grant motions for summary judgment or other motions by a party that involve final determination of the proceeding, but to issue a Proposed Order as provided for in these rules. Nothing in this section may be construed to prohibit the administrative law judge from making a routine disposition of a hearing proceeding based on a settlement, on the Agency's withdrawal of the charging document, or on other reasons not requiring a Final Order by the commissioner.

(10) Prepare a Proposed Order at the conclusion of the contested case hearing and send it to the Agency, the commissioner, and all parties to the case; and at the request of the commissioner, assist in responding to any exceptions and the preparation of the Final Order.

(11) Take any other action consistent with the duties of an administrative law judge.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & ef. 9-2-86; BL 12-1986, f. 10-29-86, ef. 10-30-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0100; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0250

Conduct of Hearings

The hearing will be conducted by and under the control of the administrative law judge.

(1) The administrative law judge will open the hearing with a brief introduction of the Agency, the parties and issues, including all information required by ORS 183.413(2) and 183.415(7).

(2) Each participant may be given an opportunity to make an opening statement describing the evidence and issues to be presented at the hearing.

(3) The Agency will present evidence in support of the charging document.

(4) Any person, government agency, or entity granted party status may present additional evidence in support of the charging document.

(5) Each party opposing the charging document must present evidence in support of the party's position.

(6) Participants will have the right to conduct cross-examination of adverse witnesses.

(7) Participants may present rebuttal evidence.

(8) Participants may be given the opportunity to make a closing statement at the conclusion of the testimony.

(9) The administrative law judge has the right to question any witness. The administrative law judge may request any participant to provide additional evidence, and may recess the hearing when necessary to allow the participant the opportunity to gather and present the requested evidence.

(10) In any proceeding the administrative law judge may call the participants together for a pre-hearing conference in order to ascertain what is disputed, hear argument on motions, order discovery, or resolve procedural matters. At any time during the hearing, the administrative law judge may recess the hearing in order to conduct such a conference. The results of any conference will be summarized on the record, except that argument on motions will be recorded verbatim.

(11) When the testimony of a witness not present at the hearing is necessary to the complete and fair adjudication of the case, the administrative law judge may admit testimony of the witness by telephone or other two-way communication device. In such cases:

(a) The testimony of the witness will be broadcast simultaneously to all participants and to the administrative law judge;

(b) All rules governing the questioning of witnesses present at the hearing apply to witnesses whose testimony is taken by telephone; and

(c) The participant presenting the witness by telephone will provide the witness's telephone number and the approximate time that the witness will be available.

(12) The Agency has the right to submit a statement of policy concerning any issue that may arise in the course of the hearing.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & ef. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-

0105; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0255

Telephone Hearings

(1) A "telephone hearing" is one in which at least one participant is not physically present at the hearing but participates by telephone or other two-way communication device.

(2) The administrative law judge has the discretion to hold a hearing or portion of a hearing by telephone. Nothing in this rule precludes the administrative law judge from allowing some parties or witnesses to attend by telephone while others attend in person.

(3) The administrative law judge may direct that a hearing be held by telephone upon request or on the administrative law judge's own motion.

(4) Unless otherwise ordered by the administrative law judge, up to ten days before the telephone hearing each participant must deliver to the Hearings Unit and each other participant copies of documentary evidence that it will seek to introduce into the record and a list of all persons to be called as witnesses.

(5) The administrative law judge may refuse to admit evidence not disclosed as required by section (4) of this rule, unless the participant that failed to provide the documentary evidence and the list of witnesses offers a satisfactory reason for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10). If the administrative law judge admits evidence that was not disclosed as required, the administrative law judge may grant a continuance to allow an opportunity for the other participant(s) to respond.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 4-2002, f. 2-14-02, cert. ef. 2-15-02; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0260

Evidence

(1) All evidence of the type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs, including hearsay if reliable, will be admissible.

(2) Irrelevant, immaterial, or unduly repetitious evidence may be excluded.

(3) The burden of presenting evidence to support a fact or proposition rests on the proponent of that fact or proposition.

(4) The burden of presenting evidence to establish a prima facie case rests with the Agency.

(5) When appropriate, the burden of proving failure to mitigate damages rests with the party.

(6) Any witness, including Agency staff, may submit evidence to the administrative law judge.

(7) All offered evidence to which there is no objection may be received by the administrative law judge subject to the administrative law judge's power to exclude irrelevant, immaterial, or unduly repetitious matters.

(8) Evidence on which an objection is made may be taken by the administrative law judge. Rulings on the admissibility or exclusion of this evidence will be made at the hearing or at the time the Proposed Order in the case is issued.

(9) Any affidavit, certificate, or document included with a case summary or that a participant serves on the other participants at least ten days before hearing may be offered and received into evidence unless cross-examination is requested of the affiant, certificate preparer, or other document preparer or custodian no later than five days prior to hearing or, for good cause shown, by such other date as the administrative law judge may set. An affidavit or certificate may be offered and received with the same effect as oral testimony.

(10) If cross-examination is requested of the affiant, certificate preparer or other document preparer or custodian as provided in section (9) of this rule and the preparer is not made available for cross-examination, but the affidavit, certificate or other document is offered in evidence, the same may be received in evidence, provided the administrative law judge determines that:

(a) The contents of the document are otherwise admissible; and

(b) The participant requesting cross-examination would not be substantially prejudiced by the lack of cross-examination.

(11) The administrative law judge will accept an offer of proof made for excluded evidence. The administrative law judge has the discretion to decide when and in what form the offer of proof will be made and may place reasonable time or page limits on the offer of proof.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 8-1986, f. & ef. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0120; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0270 Exhibits

(1) Hearing participants must premark their exhibits. Agency exhibits will be marked with "A" (for example, A-1, A-2, etc.), and respondent exhibits will be marked with "R" (for example, R-1, R-2, etc.). The administrative law judge will preserve the exhibits received as part of the record of the proceedings.

(2) All paper exhibits must be no larger than 8 1/2 by 11 inches in size and the participant presenting this exhibit must bring two copies of the exhibit to the hearing in addition to the copies already provided with the case summary. Participants must bring four copies of rebuttal or impeachment exhibits to the hearing unless those exhibits were previously submitted with the case summary, in which case only two additional copies are required at the hearing.

(3) Larger exhibits are allowed; however, in order to be included in the record, the information contained in the exhibit must be reduced to paper 8 1/2 by 11 inches in size.

(4) Variation from the exhibit size requirements will be allowed only when there is no reasonable alternative.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 8-1986, f. & ef. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0125; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 4-2002, f. 2-14-02, cert. ef. 2-15-02; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0280 Stipulation

(1) Prior to the hearing, participants to a contested case may agree to all or some of the facts involved in the controversy. This may be done through a written and signed stipulation or an oral stipulation made on the record during a prehearing conference. Such a stipulation of facts is binding upon those who agree to it and will be regarded and used as evidence at the hearing. During the hearing, participants may stipulate to facts involved in the controversy. The administrative law judge is bound by the facts set forth in a stipulation, but not by any conclusion drawn from those facts.

(2) Any party interested in stipulating to all or any part of the facts involved in the case should contact the Agency case presenter identified in the notice of hearing. The Agency may also contact any party requesting that a stipulation be entered on all or any part of the facts.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 8-1986, f. & ef. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0135; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0290 Witnesses

All testimony to be taken at the hearing, except matters officially noticed or entered by stipulation, will be sworn or affirmed. This may include testimony given on deposition, by affidavit, or in answers to interrogatories.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 8-1986, f. & ef. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0140; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0300

Interpreters and Assistive Communication Devices

(1) When a person unable to speak or understand the English

language, or having a physical hearing or speaking impairment, is involved in a contested case hearing, such person is entitled to a qualified interpreter or appropriate assistive communication device. All interpreters will be appointed by the administrative law judge. A participant wishing to obtain the services of an interpreter or to obtain an assistive communication device must notify the administrative law judge no later than 20 days before the hearing. Such notification must include:

(a) The name of the person needing a qualified interpreter or assistive communication device;

(b) The person's status as a party or a witness in the proceeding; and

(c) If the request is on behalf of:

(A) A person with a physical hearing or speaking impairment, the nature and extent of the person's impairment, and the type of aural interpreter, or assistive communication device needed or preferred; or

(B) A person unable to speak or understand the English language, the language spoken by the person unable to speak or understand the English language.

(2) If a person with a physical hearing or speaking impairment is a party or a witness in a hearing:

(a) The administrative law judge will appoint a qualified interpreter and make available appropriate assistive communication devices whenever it is necessary to interpret the proceedings to, or to interpret the testimony of, the person with a physical hearing or speaking impairment.

(b) No fee will be charged to the person with a physical hearing or speaking impairment for the appointment of an interpreter or use of an assistive communication device. No fee will be charged to any person for the appointment of an interpreter or the use of an assistive communication device if appointment or use is made to determine whether the person has a physical hearing or speaking impairment.

(3) If a person unable to speak or understand the English language is a party or a witness in a hearing:

(a) The administrative law judge will appoint a qualified interpreter whenever it is necessary to interpret the proceedings to a party unable to speak or understand the English language, to interpret the testimony of a party or a witness unable to speak or understand the English language, or to assist the administrative law judge in performing the duties of the administrative law judge.

(b) No fee will be charged to any person for the appointment of an interpreter to interpret the testimony of a party or witness unable to speak or understand the English language, or to assist the administrative law judge in performing the duties of the administrative law judge. No fee will be charged to a party unable to speak or understand the English language who is unable to pay for the appointment of an interpreter to interpret the proceedings to the party unable to speak or understand the English language. No fee will be charged to any person for the appointment of an interpreter if an appointment is made to determine whether the person is unable to pay or is a person unable to speak or understand the English language.

(c) A party unable to speak or understand the English language will be considered unable to pay for a qualified interpreter for purposes of this rule if:

(A) The party makes a verified statement and provides other information in writing under oath showing financial inability to pay for a qualified interpreter and provides any other information required by the agency concerning the inability to pay for such an interpreter; and

(B) It appears to the agency that the party is in fact unable to pay for a qualified interpreter.

(d) The administrative law judge has the authority to determine whether the party is unable to pay for a qualified interpreter.

(4) When a participant requests the services of an interpreter, the administrative law judge will appoint a qualified interpreter who has been certified under ORS 45.291. If no certified interpreter is available, able or willing to serve, the administrative law judge will appoint a qualified interpreter. For the purposes of these rules, a "qualified interpreter" means:

(a) For a person with a physical hearing or speaking impairment, a person readily able to communicate with the person with the impairment, interpret the proceedings and accurately repeat and interpret the statements of the person with the impairment to the administrative law judge.

(b) For a person unable to speak or understand the English language, a person readily able to communicate with the person unable to speak or understand the English language and who can orally transfer the meaning of statements to and from English and the language spoken by the person unable to speak or understand the English language. A qualified interpreter must be able to interpret in a manner that conserves the meaning, tone, level, style and register of the original statement, without additions or omissions. "Qualified interpreter" does not include a person who is unable to interpret the dialect, slang or specialized vocabulary used by the party or witness.

(5) When the hearing begins, the administrative law judge will require the person serving as an interpreter to state the person's name on the record and whether the person is certified under ORS 45.291. If the interpreter is certified, the interpreter will not be required to make the oath or affirmation required by ORS 40.325 or to submit the interpreter's qualifications on the record. If an interpreter is not certified under ORS 45.291, the administrative law judge will require the interpreter to state or submit the interpreter's qualifications on the record and make an oath or affirmation to make a true and impartial interpretation of the proceedings in an understandable manner using the interpreter's best skills and judgment in accordance with the standards and ethics of the interpreter profession.

(6) The administrative law judge will not appoint any person under these rules if:

(a) The person has a conflict of interest with any of the participants or witnesses;

(b) The person is unable to understand the administrative law judge, participants or witnesses or cannot be understood by the administrative law judge, participants or witnesses; or

(c) The person is unable to cooperate with administrative law judge, the person in need of an interpreter, or the counsel for that person.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & ef. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0145; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 4-2002, f. 2-14-02, cert. ef. 2-15-02; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04; BLI 13-2006, f. 3-23-06, cert. ef. 3-24-06

839-050-0310

Ex Parte Communications

The administrative law judge will place on the record a statement of the substance of any ex parte communication on a fact in issue made to the administrative law judge while the proceeding is pending. Participants will be given notice of such ex parte communication and of their right to rebut the substance of the ex parte communication on the record.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & ef. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0101; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0320

Official Notice

The administrative law judge and commissioner may take notice of judicially cognizable facts and of general, technical, or scientific facts within the specialized knowledge of the administrative law judge or commissioner. Participants will be notified at any time during the proceeding of material officially noticed, and they will be afforded the opportunity to contest the fact so noticed. The notice required by this section may be given to the participants during the hearing, prior to the issuance of the Proposed Order, or in the Proposed Order in the matter.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & ef. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0130; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 4-2002, f. 2-14-02, cert. ef. 2-15-02; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0330

Default

(1) Default may occur when:

(a) A party fails to file a required response, including a request for hearing or an answer, within the time specified in the charging document;

(b) A party withdraws a request for hearing;

(c) The Hearings Unit has scheduled a hearing and a party notifies the Agency or the administrative law judge that the party will not appear at the specified time and place; or

(d) A party fails to appear at the scheduled hearing.

(2) When a party notifies the Agency that it will not appear at the specified time and place for the contested case hearing or, without such notification, fails to appear at the specified time and place for the contested case hearing, the administrative law judge will take evidence to establish a prima facie case in support of the charging document and will then issue a Proposed Order to the commissioner and all participants pursuant to OAR 839-050-0370. Unless notified by the party, the administrative law judge will wait no longer than 30 minutes from the time set for the hearing in the notice of hearing to commence the hearing.

(3) When a party is in default and the administrative law judge has not granted relief from default, the administrative law judge will not permit the party to participate in any manner in the subsequent hearing, including, but not limited to, presentation of witnesses or evidence on the party's own behalf, examination of Agency witnesses, objection to evidence presented by the Agency, making of motions or argument, and filing exceptions to the Proposed Order.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & ef. 9-2-86; BL 4-1987, f. 2-11-87, ef. 2-13-87; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0185; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0340

Relief from Default

(1) Relief from default may be granted when good cause is established within ten days after any of the following:

(a) A Final Order by default has been issued by the administrator of the Wage and Hour Division;

(b) A notice of default has been issued; or

(c) A party has failed to appear at a hearing.

(2) The request for relief from default must be in writing and be accompanied by a written statement, together with appropriate documentation, setting forth the facts supporting the claim of good cause.

(3) A request for relief from default made after a Final Order by default has been issued by the administrator of the Wage and Hour Division must be addressed to the administrator of the Wage and Hour Division and ruled upon by an administrative law judge. When the administrator of the Wage and Hour Division receives a request for relief from default, the administrator will forward that request to the Hearings Unit for assignment to an administrative law judge, along with a copy of the Final Order by default. The administrator may also file a response to the request for relief from default. Any response the administrator files will be served on the requesting party.

(4) A request for relief from default made after a notice of default has been issued or after the party has failed to appear at a hearing will be addressed to and ruled upon by the administrative law judge.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850

Hist.: BL 8-1986, f. & ef. 9-2-86; BL 4-1987, f. 2-11-87, ef. 2-13-87; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0190; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0350

Record of Proceeding

(1) A verbatim, written and/or mechanical record of the proceeding will be made that includes:

(a) All pleadings, motions, legal memoranda, correspondence, and rulings made by the administrative law judge;

(b) The case summary submitted by any participant;

(c) Evidence received or considered;

(d) Stipulations approved by the administrative law judge;

(e) A statement of matters officially noticed;

(f) Questions asked, offers of proof and objections and rulings made during the hearing;

- (g) A statement of any ex parte communications on a fact at issue made to the administrative law judge;
 - (h) The Proposed Order by the administrative law judge;
 - (i) Exceptions filed by any participant;
 - (j) Nonconfidential advice from counsel to the Agency;
 - (k) Policy statements submitted by the Agency; and
 - (l) The commissioner's Final Order.
- (2) The record in the case does not close until the Hearings Unit has received all documents, statements, and advice requested. The administrative law judge will determine the date upon which the record closed.
- (3) The written or mechanical record ordinarily will not be transcribed unless requested for purposes of court review.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 8-1986, f. & ef. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0150; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0360

Post-Hearing Briefs

- (1) The administrative law judge may request a post-hearing brief from a participant. The administrative law judge will state the specific issues to be briefed and the deadline for filing the brief.
- (2) If a party's brief contains legal argument as defined in OAR 839-050-0110(4), the party must file its brief through counsel, except if the party is an individual who is not required under OAR 839-050-0110(1) to be represented by counsel and personally files the brief. The Agency may respond to the administrative law judge's request by filing a legal brief from the Attorney General or an Agency statement of policy.

- (3) Nothing in this rule limits the administrative law judge's authority to request a statement of policy from the Agency.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820 & 659A.850
 Hist.: BL 8-1986, f. & ef. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0155; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04; BLI 6-2005, f. 2-8-05, cert. ef. 2-11-05

839-050-0370

Proposed Orders

- (1) The administrative law judge will prepare and serve upon the commissioner and all participants a Proposed Order including the following:
 - (a) Rulings, motions, or objections, including those rulings previously reserved;
 - (b) Findings of fact, including those matters at issue that are either agreed to as fact at the hearing or by stipulation, or that, when disputed, are determined by the administrative law judge to be a fact over contentions to the contrary, and will include:
 - (A) A concise statement of facts supporting the findings as to each contested issue of fact;
 - (B) Ultimate facts required to support the Agency's order; and
 - (C) Credibility findings when credibility is of importance in the decision of the case, including the evidence relied on to reach this finding and the relevance of that evidence.
 - (c) Conclusions of law;
 - (d) An opinion explaining the rationale for the findings of fact and conclusions of law; and
 - (e) An order setting forth the administrative law judge's suggested determination, when the proposed decision is adverse to the party, of the amount owed by the party and any other relief within the authority of the commissioner.
- (2) Proposed Orders will include a statement that written exceptions, if any, must be filed by participants within ten days of the date of issuance of the Proposed Order.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 8-1986, f. & ef. 9-2-86; BL 12-1986, f. 10-29-86, ef. 10-30-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0160; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0380

Exceptions to Proposed Order

- (1) Any participant may file exceptions to the Proposed Order. Exceptions must be specific and must be in writing. No oral argument is allowed on exceptions unless requested by the administrative law judge. Any new facts presented or issues raised in exceptions will not be considered by the commissioner in the Final Order.
- (2) Exceptions filed by the Agency may include factual summaries, statements of policy, corrections, and prior Agency decisions, but may not include legal argument as defined in OAR 839-050-0110(4) unless the Agency is represented by counsel.
- (3) Exceptions filed by a party's authorized representative may include factual summaries, statements of policy, corrections, and prior Agency decisions, but may not include legal argument as defined in OAR 839-050-0110(4). A party that is a government agency, corporation, or unincorporated association, including a limited liability company, may include legal argument in its exceptions only if those exceptions are filed by counsel.
- (4) Participants must file any exceptions within ten days of the date of issuance of the Proposed Order. Exceptions must be filed with the administrative law judge through the Hearings Unit. Participants may request an extension of time to file exceptions as provided in OAR 839-050-0050.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 8-1986, f. & ef. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0165; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0400

Agency Policy

- The administrative law judge may, at any time during a contested case proceeding and before the issuance of a Final Order, request that the Agency submit a written statement indicating the Agency's policy with regard to any statute or administrative rule at issue in the case. The administrative law judge will provide a copy of such request and Agency statement to the commissioner and all parties in the case and will include the statement in the record of the proceeding.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 8-1986, f. & ef. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0175; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0410

Reopening the Contested Case Record

- On the administrative law judge's own motion or on the motion of a participant, the administrative law judge will reopen the record when the administrative law judge determines additional evidence is necessary to fully and fairly adjudicate the case. A participant requesting that the record be reopened to offer additional evidence must show good cause for not having provided the evidence before the record closed.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 8-1986, f. & ef. 9-2-86; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0195; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0420

Final Order

- (1) Except as provided in OAR 839-050-0220, 839-050-0430, or 839-050-0440, on the basis of the record considered as a whole, the commissioner will issue a Final Order in writing that includes findings of fact, conclusions of law, and an opinion and order. The Final Order will also contain a notice that the Final Order may be appealed to the Oregon Court of Appeals.
- (2) The Final Order may include different findings, conclusions, or interpretations of law than the Proposed Order.
- (3) The Final Order may provide for a different determination of liability, alternative means of enforcement, damages, or penalties, than the Proposed Order.
- (4) A copy of the Final Order will be served on participants to a

contested case in accordance with OAR 839-050-0030.

(5) Unless otherwise provided by law, a final order remains in effect during appeal, reconsideration or rehearing until stayed or changed.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 8-1986, f. & cert. ef. 9-2-86; BL 10-1988, f. & cert. ef. 6-16-88; BL 4-1993(Temp), f. 4-7-93, cert. ef. 4-12-93; BL 8-1993, f. & cert. ef. 9-3-93, Renumbered from 839-030-0180; BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 4-2002, f. 2-14-02, cert. ef. 2-15-02; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0430

Final Order by Default

(1) The administrator of the Wage and Hour Division may issue a Final Order by default when:

(a) A party is given an opportunity to request a hearing and file an answer within the time specified in the charging document and fails to do so; or

(b) A party withdraws the party's request for hearing.

(2) A Final Order by default may be issued only after a prima facie case in support of the charging document is made on the record. A prima facie case may be made from the Agency's file, if designated as the record in the charging document, provided that the charging document contained a statement advising the party that a failure to request a hearing would result in a Final Order.

(3) The participants will be served with a copy of the Final Order by default in accordance with OAR 839-050-0030.

(4) When a party has requested a hearing but either fails to attend the hearing or notifies the Agency that it will not attend, the administrative law judge will issue a Proposed Order pursuant to OAR 839-050-0330(2) and the commissioner will issue a Final Order pursuant to OAR 839-050-0420.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BL 12-1996, f. & cert. ef. 12-10-96; BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

839-050-0440

Expedited Hearings

(1) Expedited contested case hearings are governed by the procedures set forth in OAR 839, division 50, except to the extent those procedures are modified by this rule.

(2) The administrator of the Wage and Hour Division may request that any contested case proceeding arising out of that division be expedited. The request for an expedited hearing must be signed by the division administrator or the administrator's designee, must be included with the request for hearing submitted to the Hearings Unit, and must be served on the other participants.

(3) An administrative law judge will be assigned and will rule on the request for an expedited hearing within three business days of the date it is received by the Hearings Unit.

(4) If the administrative law judge grants the request for an expedited hearing, the notice of hearing will issue together with the order granting the request.

(5) The expedited hearing will be set for a date no earlier than 20 days after the date of issuance of the charging document, except that the hearing may be set for an earlier date when all participants agree and the administrative law judge assigned to the case is available.

(6) The commissioner delegates to the administrative law judge the authority to prepare and issue Final Orders in expedited hearings. No Proposed Order will be issued in an expedited hearing.

Stat. Auth.: ORS 183 & 651.060(4)
 Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850
 Hist.: BLI 2-2000, f. & cert. ef. 1-27-00; BLI 15-2004, f. 11-1-04, cert. ef. 11-3-04

DIVISION 51

CONFIDENTIALITY AND INADMISSIBILITY OF MEDIATION COMMUNICATIONS

839-051-0010

Confidentiality and Inadmissibility of Mediation Communications

(1) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110 and 36.234.

(2) Nothing in this rule affects any confidentiality created by other law. Nothing in this rule relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690. Whether or not they are confidential under this or other rules of the agency, mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(3) This rule applies only to mediations in which the agency is a party or is mediating a dispute as to which the agency has regulatory authority. This rule does not apply when the agency is acting as the "mediator" in a matter in which the agency also is a party as defined in ORS 36.234.

(4) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408), notwithstanding any provisions to the contrary in section (9) of this rule.

(5) Mediations Excluded. Sections (6)–(10) of this rule do not apply to:

(a) Mediation of workplace interpersonal disputes involving the interpersonal relationships between this agency's employees, officials or employees and officials, unless a formal grievance under a labor contract, a tort claim notice or a lawsuit has been filed; or

(b) Mediation in which the person acting as the mediator will also act as the hearings officer in a contested case involving some or all of the same matters;

(c) Mediation in which the only parties are public bodies;

(d) Mediation involving two or more public bodies and a private party if the laws, rule or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential;

(e) Mediation involving 15 or more parties if the agency has designated that another mediation confidentiality rule adopted by the agency may apply to that mediation.

(6) Disclosures by Mediator. A mediator may not disclose or be compelled to disclose mediation communications in a mediation and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless:

(a) All the parties to the mediation and the mediator agree in writing to the disclosure; or

(b) The mediation communication may be disclosed or introduced into evidence in a subsequent proceeding as provided in subsections (c)–(d), (j)–(l) or (o)–(p) of section (9) of this rule.

(7) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in sections (8)–(9) of this rule, mediation communications are confidential and may not be disclosed to any other person, are not admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent proceeding, or introduced as evidence by the parties or the mediator in any subsequent proceeding.

(8) Written Agreement. Section (7) of this rule does not apply to a mediation unless the parties to the mediation agree in writing, as provided in this section, that the mediation communications in the mediation will be confidential and/or nondiscoverable and inadmissible. If the mediator is the employee of and acting on behalf of a state agency, the mediator or an authorized agency representative must also sign the agreement. The parties' agreement to participate in a confidential mediation must be in substantially the following form. This form may be used separately or incorporated into an "agreement to mediate." [Table not included. See ED. NOTE.]

(9) Exceptions to confidentiality and inadmissibility.

(a) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding.

(b) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential or privileged under state or federal law.

(c) A mediation communication is not confidential and may be disclosed by any person receiving the communication to the extent that

person reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential and may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(d) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule is not confidential and may be disclosed to the extent necessary to make such a report.

(e) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential or that all or part of the mediation communications may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential, privileged or otherwise prohibited from disclosure under state or federal law.

(f) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS Chapter 40 or other provision of law. A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.

(g) An employee of the agency may disclose confidential mediation communications to another agency employee so long as the disclosure is necessary to conduct authorized activities of the agency. An employee receiving a confidential mediation communication under this subsection is bound by the same confidentiality requirements as apply to the parties to the mediation.

(h) A written mediation communication may be disclosed or introduced as evidence in a subsequent proceeding at the discretion of the party who prepared the communication so long as the communication is not otherwise confidential under state or federal law and does not contain confidential information from the mediator or another party who does not agree to the disclosure.

(i) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(j) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential and may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(k) When a mediation is conducted as part of the negotiation of a collective bargaining agreement, the following mediation communications are not confidential and such communications may be introduced into evidence in a subsequent administrative, judicial or arbitration proceeding:

(A) A request for mediation; or

(B) A communication from the Employment Relations Board Conciliation Service establishing the time and place of mediation; or

(C) A final offer submitted by the parties to the mediator pursuant to ORS 243.712; or

(D) A strike notice submitted to the Employment Relations Board.

(l) To the extent a mediation communication contains information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, that portion of the communication may be disclosed as required by statute.

(m) Written mediation communications prepared by or for the agency or its attorney are not confidential and may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding to the extent the communication does not contain confidential information from the mediator or another party, except for those written mediation communications that are:

(A) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the commu-

nication would not waive the privilege; or

(B) Attorney work product prepared in anticipation of litigation or for trial; or

(C) Prepared exclusively for the mediator or in a caucus session and not given to another party in the mediation other than a state agency; or

(D) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(E) Settlement concepts or proposals, shared with the mediator or other parties.

(n) A mediation communication made to the agency may be disclosed and may be admitted into evidence to the extent the Commissioner of the Bureau of Labor and Industries determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(o) The terms of any mediation agreement are not confidential and may be introduced as evidence in a subsequent proceeding, except to the extent the terms of the agreement are exempt from disclosure under ORS 192.410 to 192.505, a court has ordered the terms to be confidential under ORS 30.402 or state or federal law requires the terms to be confidential.

(p) The mediator may report the disposition of a mediation to the agency at the conclusion of the mediation so long as the report does not disclose specific confidential mediation communications. The agency or the mediator may use or disclose confidential mediation communications for research, training or educational purposes, subject to the provisions of ORS 36.232(4).

(10) When a mediation is subject to section (7) of this rule, the agency will provide to all parties to the mediation and the mediator a copy of this rule or a citation to the rule and an explanation of where a copy of the rule may be obtained. Violation of this provision does not waive confidentiality or inadmissibility.

[ED. NOTE: Tables referenced are available from the agency.]

Stat. Auth.: ORS 36.224

Stats. Implemented: ORS 36.224, 36.228, 36.230 & 36.232

Hist.: BLI 5-1998(Temp), f. & cert. ef. 10-6-98 thru 3-27-99; BLI 10-1998, f. & cert. ef. 12-17-98

839-051-0020

Confidentiality and Inadmissibility of Workplace Interpersonal Dispute Mediation Communications

(1) This rule applies to workplace interpersonal disputes, which are disputes involving the interpersonal relationships between this agency's employees, officials or employees and officials. This rule does not apply to disputes involving the negotiation of labor contracts or matters about which a formal grievance under a labor contract, a tort claim notice or a lawsuit has been filed.

(2) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110 and 36.234.

(3) Nothing in this rule affects any confidentiality created by other law.

(4) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408), notwithstanding any provisions to the contrary in section (9) of this rule.

(5) Disclosures by Mediator. A mediator may not disclose or be compelled to disclose mediation communications in a mediation and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless:

(a) All the parties to the mediation and the mediator agree in writing to the disclosure; or

(b) The mediation communication may be disclosed or introduced into evidence in a subsequent proceeding as provided in subsections (c) or (h)-(j) of section (7) of this rule.

(6) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in section (7) of this rule, mediation communications in mediations involving workplace interpersonal disputes are confidential and may not be disclosed to any other person, are not admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent proceeding, or intro-

duced into evidence by the parties or the mediator in any subsequent proceeding so long as:

(a) The parties to the mediation and the agency have agreed in writing to the confidentiality of the mediation; and

(b) The person agreeing to the confidentiality of the mediation on behalf of the agency:

(A) Is neither a party to the dispute nor the mediator; and

(B) Is designated by the agency to authorize confidentiality for the mediation; and

(C) Is at the same or higher level in the agency than any of the parties to the mediation or who is a person with responsibility for human resources or personnel matters in the agency, unless the agency head or member of the governing board is one of the persons involved in the interpersonal dispute, in which case the Governor or the Governor's designee.

(7) Exceptions to confidentiality and inadmissibility.

(a) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding.

(b) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential or privileged under state or federal law.

(c) A mediation communication is not confidential and may be disclosed by any person receiving the communication to the extent that person reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential and may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(d) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential or that all or part of the mediation communications may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential, privileged or otherwise prohibited from disclosure under state or federal law.

(e) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS Chapter 40 or other provision of law. A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning

the subject matter of the mediation, if all the parties agree.

(f) A written mediation communication may be disclosed or introduced as evidence in a subsequent proceeding at the discretion of the party who prepared the communication so long as the communication is not otherwise confidential under state or federal law and does not contain confidential information from the mediator or another party who does not agree to the disclosure.

(g) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(h) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential and may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(i) To the extent a mediation communication contains information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, that portion of the communication may be disclosed as required by statute.

(j) The mediator may report the disposition of a mediation to the agency at the conclusion of the mediation so long as the report does not disclose specific confidential mediation communications. The agency or the mediator may use or disclose confidential mediation communications for research, training or educational purposes, subject to the provisions of ORS 36.232(4).

(8) The terms of any agreement arising out of the mediation of a workplace interpersonal dispute are confidential so long as the parties and the agency so agree in writing. Any term of an agreement that requires an expenditure of public funds, other than expenditures of \$1,000 or less for employee training, employee counseling or purchases of equipment that remain the property of the agency, may not be made confidential.

(9) When a mediation is subject to section (6) of this rule, the agency will provide to all parties to the mediation and to the mediator a copy of this rule or an explanation of where a copy of the rule may be obtained. Violation of this provision does not waive confidentiality or inadmissibility.

Stat. Auth.: ORS 36.224

Stats. Implemented: ORS 36.230(4)

Hist.: BLI 10-1998, f. & cert. ef. 12-17-98
