

BEFORE THE WAGE AND HOUR COMMISSION
OF THE
STATE OF OREGON

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 intended action as required in OAR 839-002-0002.

839-022-0010

Model Rules of Practice and Procedure

- (1) The Attorney General's Model Rules of Procedure under the Administrative Procedures Act are hereby adopted.
- (2) The Model Rules of Procedure shall govern operations of the Contested Case Hearings Unit of the Wage and Hour Commission 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.]

Investigative Subpoenas and Enforcement of Subpoenas

839-022-0100

Purpose and Scope

- (1) ORS 653.530 authorizes the Wage and Hour Commission to conduct investigations in all matters relating to the commission's duties.
- (2) While conducting these investigations, ORS 653.530 gives the commission the authority to issue subpoenas ad testificandum and subpoenas duces tecum, administer oaths, obtain evidence and take testimony.
- (3) These rules govern the commission's gathering of information through subpoenas or testimony and establish procedures through which a subpoenaed party may object to answering questions or producing any document or other thing subpoenaed.

839-022-0105

Definitions

- (1) "Commission" means the Wage and Hour Commission.
- (2) "Document" means any existing written, printed, typed, or recorded matter of any kind or nature, however produced or reproduced, including but not limited to all mechanical, electronic, sound or video recordings or their transcripts, photographs, electronic files and computer stored data.
- (3) "Other thing" means any existing tangible object that is not a "document."

- (4) “Party” means any person who has been served by a subpoena under these rules.
- (5) “Person” means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character.
- (6) “Subpoena ad testificandum” is a subpoena that requires an individual to appear and give testimony under oath.
- (7) “Subpoena duces tecum” is a subpoena that requires the production of documents or other things.

839-022-0110

Who and What May Be Subpoenaed

The commission may issue subpoenas to persons to compel testimony and the production of documents or other things that are relevant to the commission’s lawful investigative purpose and reasonable in scope under matters relating to the duties required under ORS 653.535.

839-022-0115

Circumstances Under Which a Subpoena May be Issued

- (1) The commission may issue a subpoena ad testificandum to compel an individual to testify under oath when:
 - (a) The commission determines that the individual is a material witness in an investigation being conducted by the commission under ORS 653.535;
 - (b) The information sought from the individual is relevant to a lawful investigative purpose and is reasonable in scope; and
 - (c) The commission has been unable to interview the individual after having made reasonable attempts to do so, or the individual states that he or she will only consent to an interview if first served with a subpoena.
- (2) The commission may also issue a subpoena ad testificandum to compel an individual to testify under oath about the contents of documents or other things produced in response to a subpoena duces tecum served on the same individual.
- (3) The commission may issue a subpoena duces tecum to compel a person to produce documents or other things when:
 - (a) The commission determines that the documents or other things are relevant to the commission’s investigation being conducted under ORS 653.535;
 - (b) The documents or other things sought are relevant to a lawful investigative purpose and are reasonable in scope; and
 - (c) The commission has made a written request for production of documents or other things and the person to whom the request was made has failed to comply within the time specified by the commission, unless the commission finds a subpoena is necessary to protect the documents and things from destruction.

839-022-0120

Who May Issue Subpoenas

The commission or the commission’s designees may issue subpoenas.

839-022-0125

Subpoena Duces Tecum

- (1) A subpoena duces tecum may be issued to any individual who has custody, possession, or control of documents or other things named in the subpoena duces tecum when the conditions set out in 839-022-0115(3) have been met.
- (2) A subpoena duces tecum will not require production of documents or other things less than 14 days from the date of service upon the individual required to produce and permit inspection of the documents or other things unless the commission finds a shorter period necessary to protect the documents and other things from destruction or if the commission has an immediate need for the documents or other things being subpoenaed.
- (3) The commission may also command the individual to whom a subpoena duces tecum is issued to produce documents and other things by mail or otherwise, at a time and place specified in the subpoena, without commanding inspection of the originals. The individual to whom the subpoena is directed certifies if the individual produces copies of the specified items in the specified manner and certifies that the copies are true copies of all documents and other things responsive to the subpoena.
- (4) The subpoenaed documents and other things must be produced at the location, time, and date required in the subpoena.

839-022-0130

Subpoena Ad Testificandum

- (1) A subpoena ad testificandum may be issued to any individual when the conditions set out in 839-022-0115(1) or 839-022-0115(2) have been met.
- (2) The subpoena ad testificandum must give the individual a reasonable time for preparation and travel to the place of attendance and the place of attendance must be in a suitable place in the vicinity to which testimony is applicable.

839-022-0135

Method of Service

- (1) Except as noted in subsections (2) and (3) of this rule, subpoenas must be served in person by delivering a copy to the witness personally and, at the same time, giving or offering to the witness the fees to which the individual is entitled for travel to and from the place where the witness is commanded to appear, along with one day's attendance fee. A subpoena may be served by any individual 18 years of age or older.
- (2) Subpoenas ad testificandum may be served by mail under the following circumstances:
 - (a) The commission must have, by personal or telephone contact, confirmed the witness's willingness to appear if subpoenaed and certify this on the return of service;
 - (b) The commission made arrangements for payment to the witness of fees and mileage satisfactory to the witness and pays those fees and mileage; and
 - (c) The subpoena is sent by certified mail to the witness more than 10 days before the date set for appearance or production of documents or other things and the commission receives a return receipt signed by the witness more than three days prior to that date.

(3) A subpoena duces tecum that commands production of documents or other things but is not accompanied by a subpoena ad testificandum may be served by mail by mailing the subpoena to the individual required to produce and permit inspection of the documents or other things by first class mail and by certified or registered mail, return receipt requested.

839-022-0140

Fees

All persons subpoenaed by the commission must be paid the mileage and per diem set out in ORS 44.415(2).

839-022-0145

Time and Manner of Objecting to Subpoenas

- (1) Any person served with an investigative subpoena may object to testifying or providing the documents or other things sought. Grounds for objections include:
- (a) The information sought is irrelevant to a lawful investigative purpose;
 - (b) The information sought is unreasonable in scope;
 - (c) The witness is ordered to appear to give testimony in a place that is not suitable or not in the vicinity to which the testimony is applicable;
 - (d) The time and expense involved in copying the documents sought. In order to have this objection considered, a person making this objection must include a written estimate of the time involved and number of copies to be made in order to comply with the subpoena;
 - (e) Reasonable cause to refuse to comply; and
 - (f) Any other basis that may be asserted under Oregon law.
- (2) Objections to subpoenas must be in writing and must be received by the commission at least seven calendar days before the time that the witness is subpoenaed to testify or provide documents or other things.
- (3) If a subpoenaed witness refuses to answer specific questions while giving testimony, the witness must state the reason for his or her objection at the time that the witness refuses to answer the questions.

839-022-0150

Response to Objections

- (1) The commission will respond in writing to any objections timely received under OAR 839-022-0145(2).
- (2) If the objection made is the time and expense involved in copying the documents sought, the commission will provide a check to the person subpoenaed to pay for the estimated time and expense, calculated at the rates set out in OAR 839-030-0010. The commission may provide this check before or at the time the witness is subpoenaed to provide documents or other things.

839-022-0155

Method of Taking Testimony

(1) When a witness appears to give testimony in response to a subpoena ad testificandum, an oath or affirmation will be administered to the witness prior to his or her testimony. The oath or affirmation will be administered by an officer authorized to administer oaths in Oregon, generally a notary public.

(2) The witness's testimony will be preserved by an audio or video recording. Upon request, the commission will give the witness a copy of the recording at no cost.

839-022-0160

Failure to Appear

If a person served with a subpoena fails to appear and has not filed any prior objections, the commission will conclude that the person has refused, without reasonable cause, to answer any question or to produce any document or other thing.

839-022-0165

Enforcement of Subpoena

If a person served with a subpoena refuses, without reasonable cause, to be examined, to answer any question or to produce any document or other thing as required by the subpoena, the commission may petition the circuit court in the county in which the investigation is pending for an order directing the person to show cause why the person has not complied with the subpoena and should not be held in contempt. The commission shall serve the court's order upon the person in the manner provided by ORCP 55 D.

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