

BEFORE THE WAGE AND HOUR COMMISSION OF THE  
STATE OF OREGON

In the matter of procedural rules pertaining )  
to rules regulating the employment of ) PROPOSED RULES  
minors; investigative subpoenas and )  
enforcement of subpoenas )

**[839-021-0001**  
***Generally***

*The procedural rules of the Wage and Hour Commission are contained in OAR 839-022-0000 to 839-022-0060].*

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

**[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:*

Note: Material in [brackets] and *italics* is material to be deleted. Material that is **underlined** and **bold** is material to be added.

*(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*(3) All motions before the commission will be discussed and put to a vote, without the necessity of a second, if not withdrawn or superseded.]*

**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[ *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*].

**(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.]

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**[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.*

**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;*

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*(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 fourth beginning at OAR 839-050-0020, including requesting legal advice from the Attorney General, or policy statements from the Agency.*

**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.*

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*(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.*

**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.*

**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).*

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**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.*

**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.*

**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*

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*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.*

#### **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.]*

#### **Investigative Subpoenas and Enforcement of Subpoenas**

#### **839-022-0100**

##### **Purpose and Scope**

Note: Material in [brackets] and *italics* is material to be deleted. Material that is **underlined** and **bold** is material to be added.

- (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.

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(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:

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- (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

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time and place specified in the subpoena, without commanding inspection of the originals. The individual to whom the subpoena is directed complies 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:

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(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;

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(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.

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**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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