

**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 441.174, 652.355, 653.060, 659A.199, 659A.200 to 659A.233 and OL Ch 519, Sec.7 2013, prohibiting discrimination based on whistleblowing disclosures or 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 441.174, 652.355, 653.060, 659A.199, 659A.200 to 659A.233, OL Ch 519, Sec. 7 2013 or these rules may file a complaint with the Civil Rights Division, as provided in OAR 839-003-0025.

(4) The Oregon Safe Employment Act (OSEA) protects employees complaining regarding ORS 654.001 to .295, providing for safety and health conditions in places of employment, workplace safety committees; hazard communication and hazardous substances, and health and sanitation inspections.

ORS 654.412 to .423, providing for safety of health care employees; ORS 654.750 to .780, providing for hazardous chemicals in agriculture. Rules for OSEA are found in chapter 839 division 4.

Stat. Auth.: ORS 652.355, 653.060, 659A.221, 659A.805.

Stats. Implemented: ORS 441.174, 652.355, 653.060, 659A.199, 659A.200 - 659A.233, OL Ch 519, Sec. 7 2013

**Disclosures by Public Employees**

**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) "Agency" for the purposes of OAR 839-010-0010 to 839-010-0060 refers to the state or any agency of or political subdivision in the state.

(3) "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.

(4) "Disclosure" means a formal or informal internal or extra-agency communication, not including a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee providing the disclosure reasonably believes that the disclosure evidences:

(a) A violation of any federal or state law, rule, or regulation by the agency;

(b) Mismanagement;

(c) Gross misuse or waste of public resources or funds;

(d) Abuse of authority in connection with the administration of a public program or the execution of a public contract;

or

(e) A substantial and specific danger to public health or safety resulting from agency action.

(5) "Employee" means a person:

(a) Employed by or under contract with the state or any agency of or political subdivision in the state;

(b) Employed by or under contract with 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) Employed by the public corporation created under ORS 656.751;

(d) Employed by the public corporation established under ORS 741.001;

(e) Employed by 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

(f) Employed by or under contract with any person authorized by contract to act on behalf of the state, agency or subdivision.

(6) "Gross waste of funds" means an expenditure that is significantly out of proportion to the benefit expected to accrue to the agency and is more than a debatable expenditure.

(7) "Mismanagement" means serious agency misconduct having the effect of actually or potentially undermining the agency's ability to fulfill its public mission.

(8) "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.

(9) "Reckless disregard for its truth or falsity" means a conscious disregard of a substantial and justifiable risk that the information disclosed is false.

(10) "Substantial and specific danger" means a specified 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; OL Ch. 78 Sec. 2 2014

### **839-010-0020**

#### **Prohibited Discrimination by Public Employers**

(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

#### **Protection from Discrimination for Reporting Violations of Law or Aiding Criminal, Civil or Administrative Proceeding**

### **839-010-0100**

#### **Prohibited Discrimination by Employers**

(1) ORS 659A.199 prohibits any employer with one or more employees in Oregon from discharging, demoting, suspending, or in any manner discriminating or retaliating against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that the employee has in good faith reported information to anyone that the employee believes is evidence of a violation of any state or federal law, rule or regulation.

(2) 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, or the employer believes the employee has:

(a) Reported to any person, orally or in writing, criminal activity by any person;

(b) Reported to any person, orally or in writing, any activity the employee believed to be criminal;

(c) Caused criminal charges to be brought against any person, whether by the complainant's information or by a complaint, as defined in ORS 131.005(3) and (4);

(d) Cooperated with a law enforcement agency criminal investigation, whether or not under subpoena;

(e) Brought a civil proceeding against an employer; or

(f) Testified at a civil proceeding or criminal trial, whether or not under subpoena. (With regard to civil proceedings, see also OAR 839-010-0140.)

(3) ORS 659A.233 prohibits any employer with one or more employees in Oregon from discriminating or retaliating against a current, former, or any other employer's employee because the employee has in good faith:

(a) Reported possible violations of ORS chapter 441, ORS 443.400 to 443.455;

(b) Testified at an unemployment compensation hearing; or

(c) Testified at a hearing conducted pursuant to ORS chapter 657.

(4) ORS 652.355 prohibits any employer with one or more employees in Oregon from discriminating or retaliating against a current, former, or any other employer's employee because:

(a) The employee has made a wage claim or has discussed with anyone, inquired of anyone, or consulted an attorney or agency about a wage claim; or

(b) The employee has caused to be instituted, has testified in or is about to testify in any proceedings under or related to ORS 652.310 to 652.414.

(5) ORS 653.060 prohibits any employer with one or more employees in Oregon from discriminating or in any other manner discriminating against a current, former, or any other employer's employee because:

(a) The employee has made an oral or written complaint to anyone that the employee has not been paid wages in accordance with ORS 653.010 to 653.261;

(b) The employee has caused to be instituted or is about to cause to be instituted or has testified or is about to testify in any proceeding under or related to ORS 653.010 to 653.261.

Stat. Auth.: ORS 659A.805; 652.355(2); 653.060(2)  
Stats. Implemented: ORS 659A.230, 652.355, 653.060, 659A.199

### 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

#### 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; .174; .178

### **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 violation 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

### **Whistleblowing Disclosures Regarding Violations of Election Laws**

### **839-010-0300**

#### **Application**

These rules apply to a person who pays money or offers other valuable consideration for obtaining signatures of electors on a state initiative, referendum, or recall petition or on a prospective petition of a state measure to be initiated.

Stat. Auth.: ORS 659A.805

Stats. Implemented: OL Ch. 519, Sec. 7 2013

### **839-010-0305**

#### **Unlawful Employment Practice**

In addition to the conduct prohibited in ORS 659A.199, it is an unlawful employment practice for a person described in OAR 839-010-0300 to discriminate or retaliate against another person with respect to hire or tenure, compensation or other terms, conditions or privileges of employment for the reason that the person has in good faith reported information that the person believes is evidence of a violation of a state or federal election law, rule or regulation.

Stat. Auth.: ORS 659A.805

Stats. Implemented: OL Ch. 519, Sec. 7 2013

### **839-010-0310**

#### **Inspection**

(1) The Commissioner of the Bureau of Labor and Industries may inspect the accounts of a chief petitioner of an initiative or referendum petition relating to a state measure who pays any person money or other valuable consideration to obtain signatures on the petition or prospective petition, under reasonable circumstances at any time before the deadline for filing signatures on the petition or during the period specified for retention of the accounts, as provided in ORS 260.262 (4).

(2) The right of inspection may be enforced by a writ of mandamus issued by any court of competent jurisdiction.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 260.262 (4)