

whose compensation is funded in whole or part by the department, an area agency or other public agency; and who provides either hourly or live-in home care services.

(b) “Employee” does not include:

(A) An employee who receives paid sick time under federal law;

(B) An independent contractor;

(C) A participant in a work training program administered under a state or federal assistance program;

(D) A participant in a work-study program that provides students in secondary or post-secondary educational institutions with employment opportunities for financial assistance or vocational training;

(E) A railroad worker exempted under the federal Railroad Unemployment Insurance Act; and

(F) An individual employed by a sole proprietorship in which the sole proprietor is the individual’s parent, spouse, or child.

(3) “Employer” means any person that employs one or more employees working anywhere in this state, a political subdivision of the state or any county, city, district, authority, public corporation or entity, and any instrumentality of a county, city, district, authority, public corporation or entity, organized and existing under law or charter. “Employer” does not include the federal government.

(4) “Employer located in a city with a population exceeding 500,000” means an employer that maintains a business location (office, store, restaurant or establishment) within the city of Portland. An employer located within the city of Portland on a temporary basis (e.g., a construction trailer or produce stand) that maintains another permanent location within

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the state and does not intend to maintain the Portland location beyond the duration of the temporary project or season is not an employer located in a city with a population exceeding 500,000.

[(2)]**(5)** “Family member” means an employee’s spouse, same-gender domestic partner, custodial parent, non-custodial parent, adoptive parent, foster parent, biological parent, stepparent, parent-in-law, a parent of an employee’s same-gender domestic partner, an employee’s grandparent or grandchild, or a person with whom the employee is or was in a relationship of in loco parentis.

“Family member” also includes the biological, adopted, foster child or stepchild of an employee or the child of an employee's same-gender domestic partner. An employee's child in any of these categories may be either a minor or an adult at the time qualifying leave pursuant to these rules is taken.

[(3)]**(6)** “Health care provider” means:

(a) A person who is primarily responsible for providing health care to an eligible employee or a family member of an eligible employee, who is performing within the scope of the person’s professional license or certificate and who is:

- (A) A physician licensed under ORS chapter 677;
- (B) A dentist licensed under ORS 679.090;
- (C) A psychologist licensed under ORS 675.030;
- (D) An optometrist licensed under ORS 683.070;
- (E) A naturopath licensed under ORS 685.080;
- (F) A registered nurse licensed under ORS 678.050;
- (H) A nurse practitioner certified under ORS 678.375;
- (I) A direct entry midwife licensed under ORS 687.420;

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(J) A licensed registered nurse who is certified by the Oregon State Board of Nursing as a nurse midwife nurse practitioner;

(K) A regulated social worker authorized to practice regulated social work under ORS 675.510 to 675.600;

(L) A chiropractic physician licensed under ORS 684.054, but only to the extent the chiropractic physician provides treatment consisting of manual manipulation of the spine to correct a subluxation demonstrated to exist by X-rays; or

(M) A physician's assistant licensed under ORS 677.512.

(b) A person who is primarily responsible for the treatment of an eligible employee or a family member of an eligible employee solely through spiritual means, including but not limited to a Christian Science practitioner.

[(4)]**(7)** "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(11) as well as overtime hours worked.

[(5)]**(8)** "Regular rate of pay" means the regular hourly rate that an employee earns for the [workweek]**pay period** in which the employee uses paid sick time and which is no less than the applicable statutory minimum wage rate. [*An employer must apply a consistent methodology when calculating the regular rates of pay to similarly situated employees.*] An employee's regular rate of pay shall be determined as follows:

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(a) For employees paid on the basis of a single hourly rate, the regular rate of pay means the same hourly rate the employee would have earned for the period of time in which sick time is used.

(b) For employees who are paid multiple hourly rates of pay, the regular rate of pay means either:

(A) The wages the employee would have been paid, if known, for the period of time in which sick time is used; or

(B) The weighted average of all regular rates of pay [*during*]**for** the [*previous*]pay period **during** **which the employee used sick time.**

(c) For employees paid a salary, the regular rate of pay means the employee's total wages earned during the pay period covered by the salary divided by the number of hours agreed to be worked in the pay period which the salary is intended to compensate. For example, if an employee is paid a weekly salary of [~~\$525~~]**\$980** and it is understood that the salary is compensation for a regular work week of 35 hours, the employee's regular rate of pay is [~~\$15~~]**\$28** per hour (~~[\$525]~~**\$980** divided by 35 hours). For an employee paid a salary whose hours of work vary from work week to work week, for the purpose of calculating the regular rate of pay to be used for the payment of sick time, the employee is presumed to work 40 hours in each work week.

[(d) For employees paid on a commission basis, the regular rate of pay means the rate of pay agreed upon by the employer and the employee. In the absence of a previously established regular rate of pay, sick time shall be compensated at a rate of no less than the applicable statutory minimum wage.]

*[(e)](d) For employees paid on a piece-rate, [*or*]fee-for-service **or commission only** basis, the regular rate of pay [*means the rate of pay agreed upon by the employer and the employee. In the**

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absence of a previously established regular rate of pay, sick time shall be compensated at a rate no less than the applicable statutory minimum wage **is determined by adding together the employee's total earnings for the pay period during which the employee used sick time and dividing this sum by the number of hours worked by the employee in the pay period, but in no case will the regular hourly rate be less than the applicable statutory minimum wage rate. For example, the regular rate of pay for an employee who has worked 40 hours during a pay period and has earned \$750 in piece-rate wages is \$18.75 per hour. Any sick time used by the employee during the same pay period must be paid at the rate of \$18.75 per hour.**

[(f)]**(e)** The regular rate of pay does not include:

(A) Overtime, holiday pay, or other premium rates. However, where an employee's regular rate of pay includes a differential meant to compensate the employee for work performed under differing conditions (for example, a shift differential for working at night), such a differential rate is not considered to be a premium;

(B) Bonuses or other types of incentive pay; and

(C) Tips.

(f) In the event that an employee paid multiple hourly rates or on a piece-rate, fee-for-service or commission only basis uses sick time in a pay period during which no work is performed, the regular rate of pay for the pay period during which the employee last worked will be used to calculate the regular rate of pay to be paid for sick time.

[(6)]**(9)** "Spouse" includes:

(a) Individuals in a marriage recognized under state law in the state in which the marriage was entered into;

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- (b) Individuals in a marriage validly performed in a foreign jurisdiction;
- (c) Individuals in a common law marriage that was entered into in a state that recognizes such marriages; and
- (d) Individuals who have lawfully established a civil union, domestic partnership or similar relationship under the laws of any state. Individuals described in this subsection are not required to obtain a marriage license, establish a record of marriage or solemnize their relationship.

[(7)]**(10)** “Undue hardship” means significant difficulty for an employer’s business and includes consideration of the impracticability of permitting sick time to be taken in hourly increments. Factors to consider in determining whether the use of sick time in hourly increments imposes an undue hardship on the employer include, but are not limited to:

- (a) The number of persons employed or working at the particular worksite and their qualifications or ability to timely relieve the employee using sick time, given the employer’s operations; the total number of persons employed by the employer; the number, type and geographic separateness of the employer’s worksites; and
- (b) The effect of providing sick time in hourly increments on worksite operations involving: the startup or shutdown of machinery in continuous-operation industrial processes; intermittent and unpredictable workflow not in the control of the employer or employee; the perishable nature of materials used on the job; the perishable or live nature of products being harvested or processed; the time-sensitive or high-volume nature of the employer’s operations, if such operations have a direct impact on the public; and the safety and health of other employees, patients, clients or the public.

Stat. Auth: [*OL Ch. 537, 2015*]**ORS 653.656**
Stats. Implemented: [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661**

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

839-007-0005

Jointly Employed Employees

(1) All joint employers are responsible, both individually and jointly, for ensuring compliance with the provisions of [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661** and these rules. The bureau will be guided by joint employment standards found in Title 29, Code of Federal Regulations, Part 791, Section 2 and Part 825, Section 106.

(2) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality.

(3) A type of company that is often called a Professional Employer Organization (PEO) contracts with client employers to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies. The determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be based upon all the facts and circumstances. A PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs such administrative functions. On the other hand, if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the client's employees, or benefits from the work that the employees perform, such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon the facts and circumstances.

(4) In joint employment relationships, the primary employer is responsible for giving required notices to its employees, providing sick time leave and other leave and maintenance of health benefits. Factors to be considered in determining which employer is the primary employer include but are not limited to: authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary placement

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agencies, for example, the placement agency most commonly would be the primary employer. Where a PEO is a joint employer, the client employer most commonly would be the primary employer.

(5) A secondary employer is jointly liable with the primary employer for sick time earned while the employee worked for the secondary employer. For example, if an employee worked for a staffing agency (primary employer) from January through December and worked for a client company (secondary employer) from September through December, the client company is only liable for sick time earned by the employee from September through December. In this example, the primary employer is liable for sick time earned by the employee from January to December.

(6) Pursuant to ORS 653.606(5)(a), a secondary employer is not required to pay for sick time for an employee until the employee has been employed for 90 days by the secondary employer, regardless of the amount of time the employee has been employed by the primary employer.

(7) Pursuant to ORS 653.641(2), a secondary employer may not discriminate against an employee because of absences qualifying as sick time with the primary employer.

Stat. Auth: [OL Ch. 537, 2015]**ORS 653.656**

Stats. Implemented: [OL Ch. 537, 2015]**ORS 653.601 to 653.661**

839-007-0007

Front-loading Sick Time

(1) In lieu of awarding at least one hour of sick time for every 30 hours an employee works, an employer may satisfy its obligations under [*subsection (1) of OL Ch. 537, Sec. 3, 2015,*]**ORS 653.606(1)** and these rules, by front-loading at least 40 hours of sick time or time off at the beginning of each year used to calculate the accrual and usage of sick time or time off; or, if the

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employer invokes the “undue hardship” exception of subsection [(1)(b) of *OL Ch. 537, Sec. 7, 2015,* **ORS 653.621(1)(b)** and requires its employees to use sick time in minimum increments of more than 1 hour, by front-loading 56 hours of sick time or time off at the beginning of each year used to calculate the accrual and usage of sick time or time off.

(a) “Front-load,” except as provided in paragraph (b) of this subsection, means to assign and make available a certain number of hours of sick time to an employee as soon as the employee becomes eligible to use sick time and on the first day of the immediate subsequent year, without regard to an accrual rate.

(b) For employees employed by an employer for less than a full year, “front-load” means to assign and make available to an employee as soon as the employee becomes eligible to use sick time a number of hours of sick time that is the pro rata percentage of the hours to which the employee would be entitled for an entire year based on the number of hours the employee was actually employed by the employer for the year. For example, if an employer uses the calendar year to calculate usage of sick time or time off, and, on January 1 of each year, regularly front-loads 40 hours of sick time or time off for employees regularly scheduled to work 40 hours per week or more, then the employer, as soon as the employee becomes eligible to use sick time, would front-load 20 hours of sick time or time off to an employee whose first day of employment is July 1 and who is regularly scheduled to work 40 hours per week.

(2) An employer may award sick time on an accrual basis for certain classes of employees while front-loading sick time hours for other classes of employees, as long as any distinctions the employer makes in how it awards sick time to different classes of employees are based on customary employment classifications established by the employer for reasons unrelated to its obligation to provide sick time. For example, an employer may award sick time on an accrual

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basis for employees paid on an hourly wage basis, while front-loading sick time for employees paid on a salary basis, if it customarily maintains different employment classifications for hourly and salaried employees. Similarly, an employer may award sick time on an accrual basis for part-time or temporary employees, while front-loading sick time for full-time employees, if it customarily maintains different employment classifications for part-time, temporary, and full-time employees.

(3) An employer may adopt a system whereby it awards sick time or time off on an accrual basis for employees until they have worked for the employer for a designated length of time, while front-loading sick time or time off for all employees in similar job classifications once they have achieved that designated length of service. For example, an employer may adopt a system whereby hourly employees are awarded sick time or time off on an accrual basis from their start date until the beginning of the year that the employer uses to calculate the accrual and usage of sick time, or the first such year that follows the first anniversary of the employee's initial employment.

(a) When an employer converts an employee from an accrual-based system to a system in which it front-loads the employee's sick time or time off, and the employee has accrued less than 40 hours of sick time or time off on the date of the change (or less than 56 hours, if the employer requires sick time to be taken in minimum increments of more than one hour but no more than four hours under the undue hardship exception set forth in subsection [*1(b) of OL Ch. 537, Sec. 7, 2015*]**ORS 653.621(1)(b)**, the employer satisfies the requirements of [*subsection (1) of OL Ch. 537, Sec. 3, 2015,*]**ORS 653.606(1)** by front-loading the sum of: (a) the amount of hours the employee has accrued under the employee's accrual system; and (b) the difference between 40 hours (or 56 hours, if the employer requires sick time to be taken in minimum increments of four

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hours under the undue hardship exception set forth in [*subsection (1) of OL Ch. 537, Sec. 3, 2015*]ORS 653.621(1)(b) and that amount of accrued hours.

(b) If an employee has accrued more than 40 hours of sick time or time off on the date that an employer converts from an accrual system to a front-loading system for awarding the employee sick time or time off (or more than 56 hours, if the employer requires sick time to be taken in minimum increments of more than one hour but no more than four hours under the undue hardship exception set forth in [*subsection 1(b) of OL Ch. 537, Sec. 7, 2015*]ORS 653.261(1)(b), the employer may not front-load an amount of hours that is less than the amount of hours the employee has already accrued.

(4) An employer may front-load by paying employees for at least 40 hours of sick time at the beginning of the year and allowing the employee to take at least 40 hours of sick time during the year. Sick time taken after the initial front-load payment does not have to be paid at the time sick time is taken.

(5) Pursuant to ORS 653.601(5)(b), a temporary employer who subsequently hires a jointly-employed employee as a permanent employee and who chooses to front-load sick time to the employee may front-load a pro rata percentage of the hours of sick time the employee would be entitled to for an entire year based on the number of hours the employee was actually employed by the employer for that year. The employee may use front-loaded sick time after the employee has been employed by the employer by 90 calendar days, including any time the employee was jointly employed by a temporary employer and another employer.

Stat. Auth: [*OL Ch. 537, 2015*]ORS 653.656

Stats. Implemented: [*OL Ch. 537, 2015*]ORS 653.601 to 653.661

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

839-007-0008

Restoration of Sick Time Hours to Reemployed Employee

(1) Pursuant to the provisions of ORS 653.606(11), an employer is required to restore previously accrued unused sick time to an employee who is reemployed by that employer within 180 days of separation from employment with the employer.

(2) If an employee leaves employment with an employer before the 91st day of employment and subsequently is reemployed by that employer within 180 days of separation from employment, the employer shall restore the accrued sick time balance the employee had when the employee left the employment of the employer. The employee may use accrued sick time after the combined total of days of employment with the employer exceeds 90 calendar days. For example, if an employee was employed from August 1 through September 15 (a total of 34 days) and accrued 8.8 hours of sick time (264 hours worked divided by 30 hours), terminated employment effective September 16, and was subsequently reemployed by the employer on November 1, the employer must restore the 8.8 hours of accrued sick time upon reemploying the employee, and the employee would immediately resume accruing sick time for hours worked after being reemployed. The employer would not be required to provide any sick time accrued by the employee until the employee was employed an additional 56 days for a total of 90 days employed.

(3) An employer is not required to restore any previously accrued unused sick time to an employee who is reemployed by the employer more than 180 days after separation from employment with the employer. Under such circumstances, the employee would be subject to the sick time accrual and use provisions of ORS 653.606 as a new employee. For example, if an employee was employed from August 1 through September 15 (a total of 34 days) and accrued 8.8 hours of sick time (264 hours worked divided by 30 hours),

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terminated employment effective September 16, and was subsequently reemployed by the employer on March 1 of the following year, because more than 180 days elapsed between the dates of the employee's termination and reemployment, the employer may, but would not be required to, restore the 8.8 hours of sick time previously accrued by the employee.

Although the employee would immediately begin to accrue sick time upon being reemployed, the employer would not be required to provide sick time accrued by the employee until May 30; the employee's 91st calendar day of employment.

(4) An employer may, but is not required to, authorize an employee to use accrued sick time prior to the 91st calendar day of employment.

Stat. Auth: ORS 653.656

Stats. Implemented: ORS 653.601 to 653.661

839-007-0010

Determining the Number of Sick Time Hours Accrued for Employees for Whom Recording Hours Worked is not Required

(1) For purposes of determining the number of sick time hours accrued by an employee for whom recording the number of hours worked is not otherwise required by state and federal law, an employer may establish a reasonable method of calculating the number of hours worked by the employee.

(2) Except as provided in section (3) of this rule, a reasonable method for determining the number of hours worked by an employee for whom recording the number of hours worked is not otherwise required by state and federal law includes:

(a) The number of hours in a work schedule agreed upon by the employer and the employee;

(b) Billing hours; or

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(c) Any other established practice which provides a reasonable approximation of the hours actually worked by the employee.

(3) An employee engaged in administrative, executive, professional, or outside sales work who is exempt from the minimum wage and overtime requirements is presumed to work 40 hours in each workweek unless the actual number of work hours is regularly less than 40, in which case the number of sick time hours will accrue on the basis of actual hours worked.

Stat. Auth: [*OL Ch. 537, 2015*]**ORS 653.656**

Stats. Implemented: [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661**

839-007-0012

Employees with Both Unpaid and Paid Sick Time

When the number of employees employed by an employer fluctuates from year to year, so that the employer's obligation to provide sick time alternates between paid sick time and unpaid sick time, an employee is entitled to use sick time in the manner that it was earned. For example, if an employer was required to provide paid sick time during the period of time in which an employee accrued such leave, the employee, when using sick time, is entitled to be paid for sick time accrued during this period even if the employer is no longer required to provide paid sick time. Conversely, sick time does not need to be paid when used if, at the time the employee accrued the sick time, the employer was only required to provide unpaid sick time. When an employee has available for use both paid sick time and unpaid sick time, the employee has the option of using either or both to cover the use of sick time.

Stat. Auth: [*OL Ch. 537, 2015*]**ORS 653.656**

Stats. Implemented: [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661**

839-007-0015

Calculating the Number of Employees Employed

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(1) An employer shall count all employees who perform work for the employer in the state of Oregon for the purpose of determining the number of employees the employer employs, including full-time employees, part-time employees, and temporary employees.

(2) Employees jointly employed by two employers pursuant to OAR 839-007-0005 must be counted by both employers when determining the number of employees that each employer employs.

(3) The number of employees employed by an employer shall be calculated based on the average number of employees employed by the employer per day during each of at least 20 workweeks in the calendar or fiscal year in which an employee's sick time is to be taken, or in the year immediately preceding the year in which an employee's sick time is to be taken.

(4) The requirement to provide paid sick time shall apply to any employer employing an average of 10 or more employees per day in Oregon or an average of at least six employees per day in Oregon if the employer maintains a location in a city in Oregon with a population exceeding 500,000 during each of at least 20 workweeks in the calendar or fiscal year immediately preceding the year in which an employee's sick time is to be taken. For example, if during 20 or more workweeks in a calendar or fiscal year, an employer employed an average of 10 employees per day or an average of at least six employees per day if the employer maintains a location in a city in Oregon with a population exceeding 500,000 the employer will be required to provide paid sick time in the following year.

(5) An employer that has been in business for less than 20 weeks shall comply with the provisions of OAR 839-007-0032.

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(6) Employees jointly employed by two employers must be counted by both employers, whether or not they are maintained on one of the employers' payroll, when determining employer coverage and employee eligibility.

(a) An employee on leave who is working for a secondary employer is considered employed by the secondary employer and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that the employee will return to employment with that employer.

(b) In those cases in which a Professional Employer Organization (PEO) is determined to be a joint employer of a client employer's employees, the client employer is only required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employs those employees.

(7) Individuals excluded from the definition of "employee" in OAR 839-007-0000(2)(b) are not required to be included in calculating the number of employees employed by an employer for purposes of ORS 653.606.

Stat. Auth: [OL Ch. 537, 2015]**ORS 653.656**

Stats. Implemented: [OL Ch. 537, 2015]**ORS 653.601 to 653.661**

839-007-0020

Permissible Use of Sick Time

An employee may use sick time earned pursuant to [OL Ch. 537, Sec. 6, 2015]**ORS 653.616** and these rules for any of the following:

(1) For an employee's mental or physical illness, injury or health condition; need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; or need for preventive medical care.

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

(2) For care of a family member with a mental or physical illness, injury or health condition; care of a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition; or care of a family member who needs preventive medical care.

(3) For the following purposes specified in ORS 659A.159:

(a) To care for an infant or newly adopted child under 18 years of age, or for a newly placed foster child under 18 years of age, or for an adopted or foster child older than 18 years of age if the child is incapable of self-care because of a mental or physical disability. Leave under this subsection must be completed within 12 months after birth or placement of the child, and an eligible employee is not entitled to any period of leave under this subsection after the expiration of 12 months after birth or placement of the child.

(b) To care for a family member with a serious health condition as defined in OAR 839-009-0210(20).

(c) To recover from or seek treatment for a serious health condition of the employee as defined in OAR 839-009-0210(20) that renders the employee unable to perform at least one of the essential functions of the employee's regular position.

(d) To care for a child of the employee who is suffering from an illness, injury or condition that is not a serious health condition as defined in OAR 839-009-0210(20), but that requires home care.

(e) To deal with the death of a family member within 60 days of the date on which the eligible employee receives notice of the death of a family member by:

(A) Attending the funeral or alternative to a funeral of the family member;

(B) Making arrangements necessitated by the death of the family member; or

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(C) Grieving the death of the family member.

(4) For the following purposes specified in ORS 659A.272:

(a) To seek legal or law enforcement assistance or remedies to ensure the health and safety of the employee or the employee's minor child or dependent, including preparing for and participating in protective order proceedings or other civil or criminal legal proceedings related to domestic violence, harassment, sexual assault or stalking.

(b) To seek medical treatment for or to recover from injuries caused by domestic violence or sexual assault to or harassment or stalking of the eligible employee or the employee's minor child or dependent.

(c) To obtain, or to assist a minor child or dependent in obtaining, counseling from a licensed mental health professional related to an experience of domestic violence, harassment, sexual assault or stalking.

(d) To obtain services from a victim services provider for the eligible employee or the employee's minor child or dependent.

(e) To relocate, pursuant to OAR 839-009-0345, or take steps to secure an existing home to ensure the health and safety of the eligible employee or the employee's minor child or dependent.

(5) To donate accrued sick time to another employee if the other employee uses the donated sick time for a purpose specified in this rule and the employer has a policy that allows an employee to donate sick time to a coworker for a purpose specified in this rule.

(6) In the event of a public health emergency, including, but not limited to:

(a) Closure of the employee's place of business, or the school or place of care of the employee's child, by order of a public official due to a public health emergency;

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(b) A determination by a lawful public health authority or by a health care provider that the presence of the employee or the family member of the employee in the community would jeopardize the health of others, such that the employee must provide self-care or care for the family member; or

(c) The exclusion of the employee from the workplace under any law or rule that requires the employer to exclude the employee from the workplace for health reasons.

(7) Sick time provided pursuant to the Oregon Family Leave Act in ORS 659A.159 or ORS Domestic Violence Leave in 659A.272 runs concurrently with sick time provided pursuant to [OL Ch. 537, 2015]**ORS 653.601 to 653.661**.

Stat. Auth: [OL Ch. 537, 2015]**ORS 653.656**

Stats. Implemented: [OL Ch. 537, 2015]**ORS 653.601 to 653.661**

839-007-0025

Increments of Sick Time to Be Taken by Employee

(1) An employee shall use accrued sick time in hourly increments, unless the employer permits the employee to use sick time in increments of less than one hour.

(2) If an employer can demonstrate that to provide sick leave in hourly increments would pose an undue hardship on the employer as defined in OAR 839-007-0000(6), the employer may require an employee to use accrued sick time in increments of more than one hour but no more than four hours, provided the employer allows the employee to use at least 56 hours of paid sick leave per year.

(3) When an employer does not provide sick time to employees in hourly increments, and is able to make the required showing of undue hardship under section (2) of this rule, the employer shall first provide to each employee a notice provided by the Commissioner of the Bureau of Labor and Industries in the language used by the employer to communicate with the employee

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regarding what increments of sick leave will be used. The employer shall retain and keep available to the commissioner a copy of the notice for the duration of the employee's employment and for no less than six months after the termination date of the employee. Notices that comply with this subsection are available upon request from the bureau.

(4) If an employer fails to provide the undue hardship notice required in section (3) to an employee, the employer may not require the employee to take sick time in increments of more than one hour.

(5) An employer shall apply a consistent policy to all similarly situated employees related to increments of time in which sick time is required to be used.

(6) If an employer requires employees to take leave in increments of more than one hour and an employee lacks sufficient accrued sick time to cover the additional time away from work that the employer is requiring, the employer may not discipline the employee for taking the additional time or include the additional hours as violations of an absence control policy.

(7) **An employer satisfying the undue hardship requirements and having a policy requiring leave to be taken in increments greater than one hour may choose to allow employees to return to work earlier than the duration specified in the employer's policy. If the employer chooses to do so, they must pay the employee for any time worked and also pay them for sick time used. The employer may also choose to pay the full duration of sick time required by the policy. For example, if an employer's policy requires sick leave to be taken in increments of four hours but allows employees to return to work after an absence of one hour, the employer may pay the employee for four hours of sick time and must also pay the employee for all hours actually worked in that day.**

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(8) An employer required by ORS 342.610 to pay a substitute teacher a salary based on one-half of the daily minimum salary or, if working for more than one-half day, a full day's salary, may require the substitute teacher to use accrued sick time in increments of no more than four hours

Stat. Auth: [*OL Ch. 537, 2015*]**ORS 653.656**

Stats. Implemented: [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661**

839-007-0030

Payment of Sick Time

(1) Sick time must be paid no later than the payday for the next regular pay period after the sick time was used by the employee.

(2) An employer may not reduce an employee's benefits, including but not limited to health care benefits, because the employee uses accrued sick time to which the employee is entitled pursuant to [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661** and these rules.

(3) If an employer has requested written documentation or verification of use of sick time pursuant to [*OL Ch. 537, Sec. 8, 2015*]**ORS 653.626** and OAR 839-007-0045, the employer is not required to pay sick time until the employee has provided such documentation or verification.

(4) If an employer chooses to require written documentation or verification of use of sick time pursuant to [*OL Ch. 537, Sec. 8, 2015*]**ORS 653.626** and OAR 839-007-0045, such a requirement, as well as the employer's policy regarding any consequences resulting from an employee's failure or delay in providing such documentation or verification, must be included in the employer's written sick time policies.

(5) An employer who has not provided to an employee a copy of its written policy for providing notice of the need to use sick time may not deny sick time to the employee based on non-compliance with such a policy.

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(6) An employer must apply a consistent methodology when calculating the regular rates of pay to similarly situated employees.

Stat. Auth: [OL Ch. 537, 2015]**ORS 653.656**

Stats. Implemented: [OL Ch. 537, 2015]**ORS 653.601 to 653.661**

839-007-0032

Application of Sick Time Provisions to New Businesses

(1) An employer that has been in business for less than 20 workweeks shall allow employees to accrue sick leave pursuant to the provisions of [*subsection (3) of OL Ch. 537, Sec. 3, 2015*]**ORS 653.606(3)**.

(2) An employer that has been in business for less than 20 weeks shall calculate the number of employees employed pursuant to OAR 839-007-0015(1) after the employer has employed one or more employees for 90 calendar days.

(3) If, after employing one or more employees for 90 calendar days, the employer employs 10 or more employees in Oregon, or if the employer is located in a city with a population exceeding 500,000 and employs at least six employees in Oregon, the employer shall pay for sick time accrued and used by an employee, unless the employer has a good-faith belief that the employer will not employ an average of 10 or more employees in Oregon for each workday for at least 20 workweeks, or an average of at least six employees per day in Oregon if the employer maintains a location in a city in Oregon with a population exceeding 500,000, in which case the employer is not required to pay for sick time accrued and used.

(4) After 20 workweeks of operation, the employer shall calculate the number of employees employed pursuant to [*OL Ch. 537, Sec. 3, 2015*]**ORS 653.606** and OAR 839-007-0015.

(5) If the employer has employed an average of 10 or more employees in Oregon for each workday during the 20 workweeks of operation, or if the employer has employed an average of

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at least six employees per day in Oregon if the employer maintains a location in a city in Oregon with a population exceeding 500,000, for each workday during the 20 workweeks of operation, employees are required to be paid for sick leave accrued and taken thereafter unless the employer ceases to employ an average of 10 or more employees in Oregon, or if the employer maintains a location in a city in Oregon with a population exceeding 500,000 ceases to employ an average of at least six employees per day in Oregon for each workday for 20 workweeks in any year preceding the use of accrued sick leave by any employee.

(6) If, after 20 workweeks of operation, the employer has employed an average of 10 or more employees in Oregon for each workday during the 20 workweeks of operation, or if the employer employed an average of at least six employees per day in Oregon if the employer maintains a location in a city in Oregon with a population exceeding 500,000, for each workday during the 20 workweeks of operation, the employer shall pay any employee not paid for sick time accrued and taken during those 20 workweeks pursuant to [*OL Ch. 537, Sec. 3, 2015*]**ORS 653.606**.

(7) An employer may not deduct or otherwise recover any sick time paid to an employee if the employer subsequently is not required to pay for accrued sick time.

Stat. Auth: [*OL Ch. 537, 2015*]**ORS 653.656**

Stats. Implemented: [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661**

839-007-0035

Sick Time for Shifts of Indeterminate Length or On-Call Shifts

(1) If an employee uses sick time for a shift of indeterminate length (for example, a shift that is defined by business needs rather than a specified number of hours), the employer may determine the amount of sick time used by the employee based on the number of hours worked by a replacement employee in the same shift or a similarly situated employee who works the same shift or who has worked a similar shift in the past.

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(2) On-call employees are entitled to use sick time for hours they have been scheduled to work. Being “scheduled to work” does not include shifts for which an employee has been asked to be available or on-call, unless the employee is working while on-call as defined in OAR 839-020-0041(3). If, by agreement with the employer, an on-call employee is to be paid for a scheduled shift regardless of whether the employee actually works the shift, the employer must provide sick time.

Stat. Auth: [*OL Ch. 537, 2015*]**ORS 653.656**

Stats. Implemented: [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661**

839-007-0040

Employee Notice Policy and Procedures

(1) An employer may require an employee to comply with the employer’s usual and customary written notice and procedure requirements for foreseeable absences for requesting time off if those requirements do not interfere with the ability of the employee to use sick time. Such requirements may include notice by a reasonable time and by reasonable means including but not limited to calling a designated telephone number, applying a uniform call-in procedure or by using another means of communication accessible to the employee.

(2) If the reason for sick time is a foreseeable absence, such as a pre-scheduled medical appointment, the employer may require employees to provide advance notice of their intention to use sick time, not to exceed 10 calendar days prior to the date the sick time is to begin or as soon as practicable, but in no case may an employee be required to provide such notice more than 10 calendar days prior to the date sick time is to begin.

(3) When an employee uses sick time for a foreseeable absence, the employee shall make a reasonable effort to schedule the sick time in a manner that does not unduly disrupt the operations of the employer. For example, the employee should make a reasonable attempt not to

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schedule medical appointments during peak business hours, when work is time-sensitive or when mandatory meetings are scheduled.

(4) The employee shall inform the employer of any change in the expected duration of the sick time as soon as is practicable.

(5) If the reason for sick time is unforeseeable, such as an emergency, accident, or sudden illness, the employee shall provide notice before the start of the employee's shift or, when circumstances prevent the employee from providing notice before the start of the employee's shift, as soon as is practicable. In all cases, whether and when an employee can practicably provide notice depends upon the individual facts and circumstances of the situation.

(6) An employer may discipline an employee for violating workplace policies and procedures if the employee fails to provide notice as required by these rules or if the employee fails to make a reasonable effort to schedule leave in a manner that does not unduly disrupt the operations of the employer as provided in section (3) of this rule. The employer may not discipline the employee for use of sick time.

Stat. Auth: [*OL Ch. 537, 2015*]**ORS 653.656**

Stats. Implemented: [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661**

839-007-0045

Verification and Certification for Sick Time Use

(1) If an employee uses sick time for more than three consecutive scheduled workdays:

(a) For a purpose provided in [*OL Ch. 537, Sec. 6 (1) or (2), 2015*]**ORS 653.616(1) or (2)** or ORS 659A.159(1)(b)-(d) the employer may require the employee to provide verification within 15 calendar days from a health care provider of the need for the sick time.

(b) For purposes of [*OL Ch. 537, Sec. 6 (4), 2015*]**ORS 653.616(4)** for use of sick time for a purpose specified in ORS 659A.272 relating to domestic violence, sexual assault, harassment or

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stalking, the employer may require the employee to provide certification of the need for leave as provided in ORS 659A.280 and subsection (3) of this rule.

(2) “Three consecutive scheduled workdays” means three consecutive scheduled workdays, not including scheduled days off. For example, if an employee is scheduled to work Monday, Wednesday, and Friday only, and the employee uses sick time for all three days, the employee has used sick time for three consecutive scheduled workdays.

(3) Pursuant to ORS 659A.280, for purposes of certification of the need for leave for purposes of ORS 659A.272 relating to domestic violence, sexual assault, harassment or stalking, any of the following constitutes sufficient certification:

(a) A copy of a police report indicating that the eligible employee or the employee’s minor child or dependent was a victim of domestic violence, harassment, sexual assault or stalking;

(b) A copy of a protective order or other evidence from a court, administrative agency or attorney that the eligible employee appeared in or was preparing for a civil, criminal or administrative proceeding related to domestic violence, harassment, sexual assault or stalking;

(c) Documentation from an attorney, law enforcement officer, health care professional, licensed mental health professional or counselor, member of the clergy or victim services provider that the eligible employee or the employee’s minor child or dependent was undergoing treatment or counseling, obtaining services or relocating as a result of domestic violence, harassment, sexual assault or stalking.

(4) If an employee commences sick time without providing prior notice required by the employer under OAR 839-007-0040:

(a) Medical verification shall be provided to the employer within 15 calendar days after the employer requests the verification; or

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(b) Certification as specified in ORS 659A.280 and subsection (3) of this rule for the purposes of ORS 659A.272 relating to domestic violence, sexual assault, harassment or stalking shall be provided to the employer within a reasonable time after the employee receives the request for certification.

(5) If the need for sick time is foreseeable and projected to last more than three scheduled workdays and an employee is required to provide notice under [*OL Ch. 537 sec. 7, 2015*]**ORS 653.621** and OAR 839-007-0040, the employer may require that verification or certification be provided before the sick time commences or as soon as otherwise practicable.

(6) An employer must pay any reasonable costs for providing any medical verification or certification required, including lost wages, that are not paid under a health benefit plan in which the employee is enrolled.

(7) An employer may not require that any verification or certification required explain the nature of the illness or details related to the domestic violence, sexual assault, harassment, or stalking that necessitates the use of sick time.

(8) If an employer obtains health information about an employee or an employee's family member, such information shall be treated as confidential to the extent provided by law.

(9) Pursuant to ORS 659A.280, all records and information kept by an employer regarding use of sick time for purposes related to domestic violence, harassment, sexual assault, or stalking, including the fact that the employee has requested or obtained use of sick time, are confidential and may not be released without the express permission of the employee, unless otherwise required by law.

(10) If an employee fails to provide verification or certification as required by [*OL Ch. 537, Sec. 8, 2015*]**ORS 653.626** and these rules, the employer is not required to pay for the use of sick

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time for the absence taken until the employee provides verification or certification verifying that the absence was for a qualifying reason as defined by [*OL Ch. 537, Sec. 6, 2015*]**ORS 653.616** and these rules. The employer may discipline the employee for violating policies and procedures but not for using sick time.

(11) If an employer reasonably suspects that an employee is abusing sick time, including engaging in a pattern of abuse, the employer may require verification from a health care provider of the need of the employee to use sick time, regardless of whether the employee has used sick time for more than three consecutive days. As used in this section, “pattern of abuse” includes, but is not limited to, repeated use of unscheduled sick time on or adjacent to weekends, holidays, vacation days or paydays.

Stat. Auth: [*OL Ch. 537, 2015*]**ORS 653.656**

Stats. Implemented: [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661**

839-007-0050

Required Employer Notices

(1) Employers are required to provide to each employee:

(a) Written notification at least quarterly of the amount of accrued and unused sick time available for use by the employee. Inclusion of this information on the statement required under ORS 652.610 meets the requirements of this subsection. If an employee has not worked during the previous quarter, the employer is not required to provide a quarterly notice.

(b) Written notice of the requirements of [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661**and these rules.

(2) Employers may use notices provided by the Bureau of Labor and Industries to comply with the requirements of section (1) or may create their own written notice, as long as the notice includes all of the substantive information provided in the bureau’s notice.

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(3) The notices provided in this rule must be in the language the employer typically uses to communicate with the employee.

(4) Employers shall provide the written notice required in subsection (1)(b) no later than the end of the employer's first pay period after the effective date of [*OL Ch. 537, 2015*] **ORS 653.601 to 653.661** or, for employees hired after the effective date, the end of the first pay period for those employees.

(5) An employer may comply with the requirement to provide the written notice required in subsection (1)(b) by:

(a) Distributing the written notice to each employee personally, by regular mail or email, or by including it with a paycheck;

(b) Incorporating the written notice into a handbook or manual made available to employees, whether in a print or electronic format; or

(c) Posting the written notice in a conspicuous and accessible location in each workplace of the employer.

Stat. Auth: [*OL Ch. 537, 2015*] **ORS 653.656**

Stats. Implemented: [*OL Ch. 537, 2015*] **ORS 653.601 to 653.661**

839-007-0055

Substantial Equivalency

An employer's own sick leave, paid vacation, paid personal time off, or other paid time off policy is substantially equivalent to sick time required under [*OL Ch. 537, 2015*]ORS 653.611 when such a policy provides for at least the same number of sick time hours an employee would earn under [*OL Ch. 537, Sec. 3, 2015*]ORS 653.606 and complies with all other minimum requirements as listed in [*OL Ch. 537, Sections 2-16, 2015*]ORS 653.601 to 653.646. These requirements include but are not limited to provisions related to when employees can use sick

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time; the rate of accrual; the regular rate of pay; qualifying absences; conditions of notice and documentation; and employment protections.

Stat. Auth: [*OL Ch. 537, 2015*]**ORS 653.656**

Stats. Implemented: [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661**

839-007-0060

Exemption for Certain Employees Covered by Collective Bargaining Agreements

(1) The provisions of [*OL Ch. 537, 2015*]**ORS 653.601 to 653.646** do not apply to an employee who meets all of the following requirements:

- (a) Whose terms and conditions of employment are covered by a collective bargaining agreement;
- (b) Who is employed through a hiring hall or similar referral system operated by the labor organization or third party; and
- (c) Whose employment-related benefits are provided by a joint multi-employer-employee trust or benefit plan.

(2) The existence of a collective bargaining agreement alone is not sufficient to meet the requirements of this limited exemption.

Stat. Auth: [*OL Ch. 537, 2015*]**ORS 653.656**

Stats. Implemented: [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661**

839-007-0065

Unlawful Employment Practices

(1) It is an unlawful employment practice for an employer or any other person to deny, interfere with, restrain or fail to pay for sick time to which an employee is entitled.

(2) It is an unlawful employment practice for an employer or any other person to retaliate or in any way discriminate against an employee because the employee has:

- (a) Inquired about the provisions of [*OL Ch. 537, 2015*]**ORS 653.601 to 653.646**;

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- (b) Submitted a request for sick time;
 - (c) Taken sick time;
 - (d) Participated in any manner in an investigation, proceeding or hearing related to [*OL Ch. 537, 2015*]**ORS 653.601 to 653.646**; or
 - (e) Invoked any provision of [*OL Ch. 537, 2015*]**ORS 653.601 to 653.646**.
- (3) It is an unlawful employment practice for an employer or any other person to apply an absence control policy that includes sick time absences covered under [*OL Ch. 537, 2015*]**ORS 653.601 to 653.646** as an absence that may lead to or result in an adverse employment action against the employee.

Stat. Auth: [*OL Ch. 537, 2015*]**ORS 653.656**

Stats. Implemented: [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661**

839-007-0100

Civil Penalties

- (1) The Commissioner of the Bureau of Labor and Industries may assess a civil penalty for any of the following willful violations of [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661** and these rules:
- (a) Failure to permit any employee to make use of accrued sick time;
 - (b) Failure to pay any employee the full amount of paid sick time when the employee uses accrued sick time;
 - (c) Failure to provide written notice of the sick time requirements to any employee;
 - (d) Failure to provide written notification at least quarterly to each employee of the amount of accrued and unused sick time available for use by the employee; or,
 - (e) Reducing benefits for which an employee is eligible because the employee has used accrued sick time.

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(2) The civil penalty for any one violation may not exceed \$1000. The actual amount of the civil penalty will depend on all the facts and circumstances referred to in OAR 839-007-0120.

(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: [*OL Ch. 537, 2015*]**ORS 653.656**

Stats. Implemented: [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661**

839-007-0120

Criteria for Determining a Civil Penalty for Violation of [*OL Ch. 537, 2015*]ORS 653.601 to 653.661****

(1) The Commissioner of the Bureau of Labor and Industries 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 employer's 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.

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Stats. Implemented: [*OL Ch. 537, 2015*]**ORS 653.601 to 653.661**

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