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ARCHIVES DIVISION
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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 839
BUREAU OF LABOR AND INDUSTRIES

FILED
08/28/2018 11:24 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: New rules implement Equal Pay law, including definitions, work of comparable character, exceptions, posting notice.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 09/28/2018 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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Filed By:
Marcia Ohlemiller
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 09/28/2018

TIME: 9:00 AM - 11:00 AM

OFFICER: Agency Official

ADDRESS: Oregon Bureau of Labor
and Industries

800 NE Oregon St. #1045

Portland, OR 97232

SPECIAL INSTRUCTIONS:

None

NEED FOR THE RULE(S):

The rules are necessary to implement HB 2005 (2017). The statute authorizes the Agency to enforce the law and rules are necessary to effectuate the specific requirements and enforcement details of the law.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

No documents were relied upon.

FISCAL AND ECONOMIC IMPACT:

Any fiscal or economic impact is as a result of the requirements of the newly enacted statutes. The rules may actually help employers comply more easily with the new law and thus lower any fiscal or economic impact that may result from the statutes.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the

rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

The rules implement House Bill 2005 (2017). The legislation requires employers to pay same wages for work of comparable character, with some exceptions. To the extent there is an economic effect it is the result of the underlying legislation rather than the rules. All small business employers with 2 or more employees are subject to the statute and the rules. There are no reporting, recordkeeping or administrative activities unique to the statute or rules. Some employers may elect to engage professional services to conduct an equal pay analysis as required by the law, not by the rules.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The Rules Advisory Committee included representatives of small businesses.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

839-008-0000, 839-008-0005, 839-008-0010, 839-008-0015, 839-008-0020, 839-008-0025, 839-008-0030, 839-008-0035, 839-008-0040

ADOPT: 839-008-0000

RULE SUMMARY: Establishes definitions as used in Pay Equity laws enacted by OL Ch. 197(2017).

CHANGES TO RULE:

839-008-0000

Definitions: Pay Equity

As used in ORS 652.210 to 652.235 and these rules:¶

(1) "Benefits" means:¶

(a) The rate of contribution that an employer makes irrevocably to a trustee or to a third person under a plan, fund or program; or¶

(b) The rate of costs to the employer in providing benefits to an employee beyond what is required by federal, state or local law pursuant to an enforceable commitment to carry out a financially responsible plan or program which is committed to the employee affected, including, but not limited to, the following:¶

(A) Medical or hospital care;¶

(B) Pensions on retirement or death;¶

(C) Compensation for injuries or illness resulting from occupational activity;¶

(D) Insurance to provide any of (A) through (C);¶

(E) Unemployment benefits;¶

(F) Life insurance;¶

(G) Disability insurance;¶

(H) Sick leave pay;¶

(I) Accident insurance; ¶

(J) Vacation or holiday pay; or¶

(K) Defraying costs of other bona fide fringe benefits. Other bona fide fringe benefits do not include reimbursement to workers for meals, lodging or other travel expenses.¶

(2) "Bonus" means an amount that is paid or something of monetary or quantifiable value that is given to an employee by an employer in addition to the employee's regular rate of pay, typically as a means of encouragement or in recognition of superior performance. Bonuses include, but are not limited to, the following: ¶

- (a) Signing or job acceptance bonuses.¶
- (b) Attendance bonuses.¶
- (c) Loyalty bonuses.¶
- (d) Performance bonuses; and¶
- (e) Productivity bonuses. ¶
- (3)(a) "Compensation" includes wages, salary, bonuses, benefits, fringe benefits and equity-based compensation. ¶
- (b) Compensation does not include tips or reimbursement for any actual costs incurred including, but not limited to, relocation reimbursements, mileage, and out-of-pocket expenses.¶
- (4) "Employee" means any individual who, otherwise than as a copartner of the employer, as an independent contractor or as a participant in a work training program administered under the state or federal assistance laws, renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate. However, when services are rendered only partly in this state, an individual is not an employee unless the contract of employment of the employee has been entered into, or payments thereunder are ordinarily made or to be made, within this state.¶
- (5)(a) "Employer" means any person employing one or more employees, including the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter.¶
- (b) "Employer" does not include the federal government.¶
- (6) "Equal-pay analysis" means an evaluation process to assess and correct wage disparities among employees who perform work of comparable character.¶
- (7)(a) "Equity-based compensation" means non-cash payments that represent ownership, membership interests, or opportunity for investment in the employer's business and may include, but is not limited to, restricted stock awards, stock options, employee stock purchase plans, stock appreciation rights and other similar compensation schemes. ¶
- (b) "Equity-based compensation" does not include a one-time buyout. ¶
- (8) "Fringe benefits" means benefits as described in section (1) of this rule.¶
- (9) "Protected class" means a group of persons distinguished by race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age.¶
- (10) "Rate" with reference to wages means:¶
 - (a) The basis of compensation for services by an employee for an employer; and¶
 - (b) Compensation based on the time spent in the performance of the services, on the number of operations accomplished or on the quantity produced or handled.¶
- (11) "Salary" has the meaning provided in OAR 839-020-0004(29) and means a predetermined amount constituting all or part of the employee's compensation paid for each pay period of one week or longer (but not to exceed one month). The predetermined amount may not be any amount less than the equivalent of a monthly salary calculated by multiplying the wage set pursuant to ORS 653.025 by 2,080 hours per year, then dividing by 12 months.¶
- (12) "Sexual orientation" has the meaning given that term in ORS 174.100 and means an individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth.¶
- (13) "Unpaid wages" means the difference between the wages actually paid to an employee and the wages required under ORS 652.220 to be paid to the employee.¶
- (14) "Veteran status" means an individual is a veteran as defined in ORS 408.225.¶
- (15) "Wages" means all compensation for performance of service by an employee for an employer, whether paid by the employer or another person or paid in cash or any medium other than cash.¶
- (16) "Working conditions" includes work environment, hours, time of day, physical surroundings and potential hazards encountered by an employee, as those terms are defined in OAR 839-008-0010.¶
- (17) "Work of comparable character" means work that requires substantially similar knowledge, skill, effort,

responsibility and working conditions in the performance of work as defined in OAR 839-008-0010.

Statutory/Other Authority: ORS 659A.805

Statutes/Other Implemented: ORS 652.210-652.235

ADOPT: 839-008-0005

RULE SUMMARY: Establishes rule to implement salary history unlawful employment practice provisions of OL Ch. 197 (2017).

CHANGES TO RULE:

839-008-0005

Seeking and Screening Job Applicants Based on Compensation

(1) Pursuant to ORS 659A.355, it is an unlawful practice under ORS chapter 659A for an employer or prospective employer to seek the salary history of an applicant or employee from the applicant or employee or a current or former employer of the applicant or employee. ¶

(2) Pursuant to ORS 652.220(1)(a), it is an unlawful employment practice under ORS chapter 659A for an employer to screen job applicants based on current or past compensation. As used in ORS 652.220(1)(c) and these rules, "to screen job applicants based on current or past compensation" includes using information, however obtained, about a job applicant's current or past compensation to determine:¶

(a) A job applicant's suitability for employment to group, sort, or select at any stage of the hiring process; or¶

(b) A current employee's eligibility for an internal transfer, move or hire to a new position with the same employer. However, after determining the eligibility of an employee, an employer may consider the compensation of a current employee during the transfer, move or hire of the employee to a new position with the same employer.¶

(3) The unsolicited disclosure of a job applicant's current or past compensation by a job applicant, employee or a current or former employer of the applicant or employee that is not considered by an employer does not constitute a violation of ORS 659A.355 or ORS 652.220(1)(c).¶

(4) Pursuant to ORS 659A.355, it is an unlawful practice under ORS chapter 659A for an employer to determine compensation for a position based on current or past compensation of a prospective employee.¶

(5) Sections (1) and (2) of this rule are not intended to prevent an employer from requesting from a prospective employee written authorization to confirm prior compensation after the employer makes an offer of employment to the prospective employee that includes an amount of compensation.

Statutory/Other Authority: ORS 659A.805

Statutes/Other Implemented: ORS 652.220, ORS 659A.355

ADOPT: 839-008-0010

RULE SUMMARY: Establishes criteria used for evaluation of factors for work of comparable character as established in OL Ch. 197 (2017).

CHANGES TO RULE:

839-008-0010

Work of Comparable Character

(1) As used in ORS 652.210 to ORS 652.235 and these rules, "work of comparable character" includes substantially similar knowledge, skill, effort, responsibility and working conditions as defined or described as follows, with no single factor being determinative: ¶

(a) Knowledge considerations may include, but are not limited to, the following: ¶

(A) Certifications, licenses and certificates; ¶

(B) Education; ¶

(C) Experience; or ¶

(D) Training. ¶

(b) Skill considerations may include, but are not limited to, the following: ¶

(A) Ability; ¶

(B) Agility; ¶

(C) Coordination; ¶

(D) Efficiency; or ¶

(E) Experience. ¶

(c) Effort considerations may include, but are not limited to, the following: ¶

(A) Amount of physical or mental exertion needed; ¶

(B) Amount of sustained activity; or ¶

(C) Complexity of job tasks performed. ¶

(d) Responsibility considerations may include, but are not limited to, the following: ¶

(A) Accountability, decision-making discretion, or impact of an employee's exercise of their job functions on the employer's business; ¶

(B) Amount, level, or degree of significance of job tasks; ¶

(C) Autonomy or extent to which the employee works without supervision; ¶

(D) Extent to which the employee exercises supervisory functions; or ¶

(E) Extent to which an employee's work or actions expose an employer to risk or liability. ¶

(e) Working condition considerations include the following: ¶

(A) Work environment; ¶

(B) Hours, which may include, but are not limited to, the following considerations: ¶

(i) Alternative scheduling such as split shifts; ¶

(ii) Level of busyness during hours of work; ¶

(iii) Limited duration assignments; ¶

(iv) Number of hours; ¶

(v) Overtime hours; or ¶

(vi) Part time or full time. ¶

(C) Time of day, which may include, but is not limited to, the consideration of shift differentials related to the day of the week or time of day work shifts are scheduled; ¶

(D) Physical surroundings, which may include, but are not limited to, the following considerations: ¶

(i) Air quality; ¶

(ii) Distractions; ¶

(iii) Dust; ¶

(iv) Exposure to weather; ¶

(v) Isolation; ¶

(vi) Lighting;¶

(vii) Noise; ¶

(viii) Physical design or layout of workspace;¶

(ix) Temperature;¶

(x) Ventilation; or¶

(xi) Wetness.¶

(E) Potential hazards, which may include, but are not limited to, the following considerations:¶

(i) Degree or severity of potential injury;¶

(ii) Frequency of exposure;¶

(iii) Intensity;¶

(iv) Physical hazards;¶

(v) Risk of injury; or¶

(vi) Toxicity.¶

(2) Minor differences in knowledge, skill, effort, responsibility, and working conditions will not prevent jobs from being comparable.

Statutory/Other Authority: ORS 659A.805

Statutes/Other Implemented: ORS 652.220

ADOPT: 839-008-0015

RULE SUMMARY: Establishes criteria used for evaluation of factors that may contribute to a compensation differential under Pay Equity laws, OL Ch. 197 (2017).

CHANGES TO RULE:

839-008-0015

Bona Fide Factors that May Be Considered in Paying Employees Performing Work of Comparable Character at Different Compensation Levels

(1) Pursuant to ORS 652.220(2), employees may receive different levels of compensation for work of a comparable character if the entire compensation differential is based on one or more bona fide factors related to the position in question. The bona fide factors that may be considered in determining the compensation differential between individuals are as follows:¶

(a) A seniority system that recognizes and compensates employees based on length of service with the employer. A seniority system utilized by an employer may be considered as a bona fide factor by the employer's successor in interest, as defined by OAR 839-005-0014;¶

(b) A merit system that provides for variations in pay based upon employee performance as measured through job-related criteria, for example, a written performance evaluation plan or policy that measures employee performance using a set numerical or other established rating scale, such as from "unsatisfactory" to "exceeds expectations," and takes employees' ratings into account in determining employee pay rates; ¶

(c) A system that measures earnings by quantity or quality of production, including piece rate work;¶

(d) Notwithstanding any other applicable federal, state, or local laws, workplace location considerations may include, but are not limited to, the following: ¶

(A) Cost of living;¶

(B) Desirability of worksite location; ¶

(C) Access to worksite location;¶

(D) Minimum wage zones; or¶

(E) Wage and hour zones. ¶

(e) Necessary and regular travel, which does not include normal travel between home and work;¶

(f) Education considerations may include substantive knowledge acquired through relevant coursework, as well as any completed certificate or degree program; ¶

(g) Training considerations may include on the job training acquired in current or past positions as well as training acquired through a formal training program; ¶

(h) Experience considerations include any relevant experience that may be applied to the particular job;¶

(i) Any combination of the factors described in subsections (a)-(h) of this rule, if the combination of those factors accounts for the entire compensation differential.¶

(2) As used in subsections (1)(a)-(c) of this rule, "system" means a devised coherent, consistent, verifiable and reasonable method that was in use at the time of the alleged violation to identify, measure and apply appropriate variables in an orderly, logical and effective manner.

Statutory/Other Authority: ORS 659A.805

Statutes/Other Implemented: ORS 652.220

ADOPT: 839-008-0020

RULE SUMMARY: Establishes rule to clarify benefits as a component of compensation under Pay Equity laws, OL Ch. 197 (2017).

CHANGES TO RULE:

839-008-0020

Determining Benefits as Part of Compensation

For purposes of ORS 652.210 to 652.235 and these rules, an employer may provide different benefits to employees performing work of a comparable character if:

(1) The same benefit options are offered to all employees performing work of a comparable character. For example, an employer may provide and pay for a more expensive health care policy that covers an employee and the employee's spouse and dependent children, as compared to another employee performing work of a comparable character that does not have a spouse or dependent children, so long as both employees are provided the same health care options. For another example, an employer may offer an array of benefit options to employees performing work of a comparable character to select from, with or without cost caps, so long as each employee performing work of a comparable character is provided the same options.

(2) The cost of a bona fide benefit offered by an employer, but declined by an employee, may be considered as part of the total amount of compensation paid to the employee. For example, if an employee chooses not to take advantage of a health insurance policy offered by an employer because the employee is covered under their spouse's plan, the cost of providing the benefit that would have been incurred by the employer to provide the employee with the benefit offered may be included as part of the employee's total compensation rate for purposes of calculating the employee's total compensation under this law.

Statutory/Other Authority: ORS 659A.805

Statutes/Other Implemented: ORS 652.220, ORS 652.210

ADOPT: 839-008-0025

RULE SUMMARY: Establishes rule to clarify provision that an employer may not reduce an employee's compensation in order to comply with Pay Equity laws, OL Ch. 197 (2017).

CHANGES TO RULE:

839-008-0025

Reductions in Employee Compensation

(1) Pursuant to ORS 652.220(4), an employer may not reduce the compensation level of an employee to comply with the provisions of ORS 652.210 to 652.235 and these rules.¶

(2) Red circling, freezing, or otherwise holding an employee's salary constant, as other salary positions come into alignment, are not considered reductions in compensation level for the employee whose wage is being held constant.

Statutory/Other Authority: ORS 659A.805

Statutes/Other Implemented: ORS 652.220

ADOPT: 839-008-0030

RULE SUMMARY: Establishes rule to clarify manner of conducting Equal Pay Analyses to adhere to the provisions of Pay Equity laws, OL Ch. 197 (2017).

CHANGES TO RULE:

839-008-0030

Equal-Pay Analysis Surveys

An employer who surveys employees in an Equal Pay Analysis to elicit protected class status information must inform employees of the purpose of the survey and must give employees the means and option to complete the survey without including their name.

Statutory/Other Authority: ORS 659A.805

Statutes/Other Implemented: ORS 652.235

ADOPT: 839-008-0035

RULE SUMMARY: Establishes provisions for posting notice of Pay Equity laws, OL Ch. 197 (2017).

CHANGES TO RULE:

839-008-0035

Required Posting and Notice Requirements: Pay Equity

(1) The Bureau of Labor and Industries shall make available to employers a template that meets the required notice provisions of ORS 652.220(7).¶

(2) Employers shall display the poster in every establishment where employees work. If displaying the poster is not feasible, an employer may comply with the requirement to provide written notice as required in ORS 652.220 by any of the following: ¶

(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 or via electronic format that is reasonably conspicuous and accessible.

Statutory/Other Authority: ORS 659A.805

Statutes/Other Implemented: ORS 652.220

ADOPT: 839-008-0040

RULE SUMMARY: Establishes rule to clarify unlawful practice occurrences under Pay Equity laws, OL Ch. 197 (2017).

CHANGES TO RULE:

839-008-0040

Individual Acts of Remuneration as Distinct Violations: Pay Equity

An employer commits an unlawful practice each time an employee is remunerated in violation of ORS 652.220.

Statutory/Other Authority: ORS 659A.805

Statutes/Other Implemented: ORS 652.220, ORS 659A.875