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LAVONNE GRIFFIN-VALADE
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CHERYL MYERS
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AND TRIBAL LIAISON



ARCHIVES DIVISION

STEPHANIE CLARK
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

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CHAPTER 839

BUREAU OF LABOR AND INDUSTRIES

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FILING CAPTION: Amends rule applicable to meal and rest periods provided to employees.

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CONTACT: Josh Nasbe

971-269-4431

josh.d.nasbe@boli.oregon.gov

1800 SW 1st Ave, Suite 500

Portland, OR 97201

Filed By:

Josh Nasbe

Rules Coordinator

RULES:

839-020-0004, 839-020-0050

AMEND: 839-020-0004

NOTICE FILED DATE: 09/18/2023

RULE SUMMARY: Amends rule to define additional terms and make technical adjustments to existing definitions.

CHANGES TO RULE:

839-020-0004

Definitions Generally ¶¶

As used in ORS 653.010 to 653.261 and these rules, unless the context requires otherwise:¶¶

(1) "Acute care in hospital settings" means care provided in an acute inpatient care facility.¶¶

(2) "Acute inpatient care facility" has the meaning given that phrase in ORS 442.470.¶¶

(3) "Administrator" means the Administrator of the Wage and Hour Division.¶¶

(24) "Adult" means an individual of 18 years of age or more.¶¶

(35) "Adult foster home" means any family home or facility in which residential care is provided in a homelike environment for five or fewer adults who are not related to the provider by blood or marriage has the meaning given that phrase in ORS 443.705.¶¶

(46) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur-bearing animals, or poultry and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. "Agricultural employment" is employment in "Agriculture" as herein defined.¶¶

(57) "Bureau" means Bureau of Labor and Industries.¶¶

(68) "Casual basis" as used in ORS 653.020(2) and these rules means employment which is irregular and intermittent and which is not performed by an individual whose vocation is providing domestic services.¶¶

(79) "Child care service person" means an individual who performs child care services in the home of the individual or the child and who during any part of a 24 hour period provides custodial care and protection to infants or children.¶¶

(810) "Commissioner" means the Commissioner of the Bureau of Labor and Industries.¶¶

(~~911~~) "Commissions" or "pay on a commission basis" means payment based on a percentage of total sales, or of sales in excess of a specified amount, or on a fixed allowance per unit agreed upon as a measure of accomplishment or on some other formula and may be the sole source of compensation or may be payment in addition to other compensation.¶

(102) "Companionship services", as used in ORS 653.020(~~14~~) and in these rules, means those services ~~which~~that provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the elderly or infirm person such as meal preparation, bed making, washing of clothes and other similar services. They may also include the performance of general household work: provided, however, that such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. Individuals employed in domestic service employment in or about a family home to provide companionship services are not required to be employed by the individual for whom they provide such services. The term "companionship services" does not include services relating to the care and protection of the elderly or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a family home.¶

(113) "Division" means the Wage and Hour Division of the Bureau of Labor and Industries.¶

(124) "Domestic service" means services of a household nature performed by an employee in or about a family home (permanent or temporary) of the person by whom the employee is employed. The term includes, but is not limited to, employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, gardeners, and ~~companion~~providers of companionship services to the elderly and infirm.¶

(135) "Domicile" means the permanent residence of a person or the place to which that person intends to return even though that person may actually reside elsewhere.¶

(146) "Employed on a seasonal basis at", as used in ORS 653.020(~~10~~) and in these rules, means employment that occurs during the time the organized camp provides services to campers at the camp site where campers are located. The term includes employment at the camp site in duties preparatory to the opening or closing of the camp site. The term includes employment during the camping season only and does not include full time, year around employment.¶

(157) "Employer" has the ~~same~~meaning as that given that term in ORS 653.010(~~3~~).¶

(168) "Fair market value" means an amount not to exceed the retail price customarily paid by the general public for the same or similar meals, lodging or other facilities or services provided to the employee by the employer. In determining the fair market value of meals, lodging and other facilities and services, the bureau will be guided by these rules and by Title 29, CFR Part 531 - Wage Payments under the Fair Labor Standards Act of 1938, where applicable.¶

(179) "Family home", as used in ORS 653.020(~~2~~) and this section, means a residence, the purpose of which is to provide an abode for the owner or renter of the residence and any family members of the owner or renter. For example, a boarding house or an adult foster care home are not family homes for purposes of ORS 653.020(~~2~~) and these rules. However, when casual domestic service work is performed in structures where the owner or renter resides and operates a business, such work may qualify as exempt under ORS 653.020(~~2~~) depending upon all the facts of the particular arrangement.¶

(~~1820~~) "Homeworker" means any employee suffered or permitted to produce goods or services for an employer in or about a home, apartment or room in a residence in which that employee or other employees of an employer resides, regardless of the source of the materials used by the homeworker in such production.¶

(219) "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~~).¶

(202) "Immediate family" means grandfather, grandmother, father, mother, son, daughter, sister, brother, uncle or aunt.¶

(213) "Minimum wage" means the rate of pay prescribed in ORS 653.025 and 653.030.¶

(224) "Minor" means an individual of 17 years of age or less.¶

(235) "Organized camp" has the ~~same~~meaning as given that phrase in ORS 653.010(~~6~~).¶

(246) "Primary duty" means, as a general rule, the major part, or over 50 percent, of an employee's time. However, a determination of whether an employee has management as the employee's primary duty must be based on all the facts of a particular case. Time alone is not the sole test and in situations where the employee does not spend over 50 percent of the employee's time in managerial duties, the employee might have management as a primary duty if other pertinent factors support such a conclusion. Factors to be considered include, but are not limited to, the relative importance of the managerial duties as compared with other duties, the frequency with which the employee exercises discretionary powers, the relative freedom from supervision and the relationship between the

salary paid the employee and wages paid other employees for the kind of non-exempt work performed by the supervisor.¶

(257) "Primary school" means a learning institution containing any combination of grades Kindergarten - 8 or age level equivalent.¶

(268) "Region" means a geographic area for which ORS 653.025 establishes a minimum rate of wage.¶

(279) "Reside" means a personal presence at some place of abode with no present intention of definite and early removal and with the intent to remain for an undetermined period, but not necessarily combined with the intent to stay permanently.¶

(2830) "Resident manager" means an employee of an adult foster home who is domiciled at the home and who is directly responsible for the care of residents in the home on a day to day basis.¶

(2931) "Salary" 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.¶

(302) "Salary basis" means a salary as defined in ~~section (29)~~ of this rule, which is not subject to deduction because of lack of work for part of a work week, however, deductions for absences of one day or more may be made if the employee is absent for other reasons. Deductions may not be made for absences of less than one day, except as permitted for employers covered by the federal Family and Medical Leave Act of 1993, Public Law 103-3, for part-day absences due to leave pursuant to that law. Employees who are not paid for workweeks in which they performed no work are considered to be on a salary basis provided they are paid on a salary basis in workweeks when work is performed.¶

(a) Payment of additional compensation is not inconsistent with the salary basis of payment.¶

(b) Compensation paid in the form of fees is not inconsistent with the salary basis of payment, provided the fees paid in each pay period are not less than the amount required to be paid pursuant to ORS 653.025 and meet the requirements for fee payments under Title 29, Code of Federal Regulations, Part 541.605 ~~and related regulations as amended April 23, 2004.~~¶

(313) "Secondary school" means a learning institution containing any combination of grades 9-12 or age level equivalent and includes those institutions that provide junior high schools which include 9th grade.¶

(324) "Violation" means a transgression of any statute or rule, or any part thereof and includes both acts and omissions.¶

(335) "Willfully" means knowingly. An action is done knowingly when it is undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person "should have known the thing to be done or omitted" if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts willfully if the person has the means to inform the person's self but elects not to do so. For purposes of these rules, the employer is presumed to know the requirements of ORS 653.010 to 653.261 and these rules.

Statutory/Other Authority: ~~ORS 651.060(4) & ORS 653.040, OL Ch. 012, 2016~~

Statutes/Other Implemented: ~~OL Ch. 012, 2016~~, ORS 653.025

RULE SUMMARY: Amends rule to prescribe timing of meal periods in certain hospital settings.

CHANGES TO RULE:

839-020-0050

Meal and Rest Periods ¶¶

- (1) The purpose of this rule is to prescribe minimum meal periods and rest periods for the preservation of the health of employees.¶
- (2)(a) Except as otherwise provided in this rule, every employer shall provide to each employee, for each work period of not less than six or more than eight hours, a meal period of not less than 30 continuous minutes during which the employee is relieved of all duties.¶
- (b) Except as otherwise provided in this rule, if an employee is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire 30-minute meal period.¶
- (c) An employer is not required to provide a meal period to an employee for a work period of less than six hours. When an employee's work period is more than eight hours, the employer shall provide the employee the number of meal periods listed in Appendix A of this rule.¶
- (d) The timing of the meal period shall be as follows:¶
- (A) If the work period is seven hours or less, the meal period is to be taken after the conclusion of the second hour worked and completed prior to the commencement of the fifth hour worked.¶
- (B) If the work period is more than seven hours, the meal period is to be taken after the conclusion of the third hour worked and completed prior to the commencement of the sixth hour worked.¶
- (C) Notwithstanding paragraphs (A) and (B) of this subsection, for employees of an acute inpatient care facility the meal period must be provided in accordance with this paragraph, when applicable. If the work period is more than seven hours, but less than ten hours, the meal period must be taken after the conclusion of the third hour worked and completed prior to the commencement of the sixth hour worked. If the work period is ten hours or more, the meal period must be taken after the conclusion of the third hour worked and completed prior to the conclusion of the ninth hour worked.¶
- (3) If an employer does not provide a meal period to an employee under section (2) of this rule, the employer has the burden to show that:¶
- (a) To do so would impose an undue hardship on the operation of the employer's business as provided in section (4), and that the employer has complied with section (5) of this rule;¶
- (b) Industry practice or custom has established a paid meal period of less than 30 minutes (but no less than 20 minutes) during which employees are relieved of all duty; or¶
- (c) The failure to provide a meal period was caused by unforeseeable equipment failures, acts of nature or other exceptional and unanticipated circumstances that only rarely and temporarily preclude the provision of a meal period required under section (2) of this rule. If an employee is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire 30-minute meal period.¶
- (4) As used in section (3)(a) of this rule, "undue hardship" means significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business. For the purpose of determining whether providing a meal period requires significant difficulty or expense, the following factors may be considered:¶
- (a) The employer's cost of complying with the requirement to provide a meal period under section (2) of this rule.¶
- (b) The overall financial resources of the employer.¶
- (c) The number of persons employed at the particular worksite and their qualifications to relieve the employee; the total number of persons employed by the employer; and the number, type and geographic separateness of the employer's worksites.¶
- (d) The effect of providing the meal period required under section (2) of this rule 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; and the safety and health of other employees, patients, clients or the public.¶
- (5) When an employer does not provide a meal period to an employee under section (2) of this rule, and is able to make the required showing under section (3)(a) of this rule:¶
- (a) The employer shall instead provide the employee adequate paid periods in which to rest, consume a meal, and use the restroom; and¶

(b) The employer shall first provide to each employee a notice provided by the commissioner of the Bureau of Labor and Industries regarding rest and meal periods in the language used by the employer to communicate with the employee. 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. ~~This subsection takes effect on March 16, 2009.~~

(6)(a) Except as provided in subsection (b) of this section, every employer shall provide to each employee, for each segment of four hours or major part thereof worked in a work period, a rest period of not less than ten continuous minutes during which the employee is relieved of all duties, without deduction from the employee's pay.

(A) As the nature of the work allows, the employer shall provide the rest period approximately in the middle of each segment of four hours or major part thereof worked in a work period. When the employee's work period is more than eight hours, the employer shall provide the employee the number of rest periods listed in Appendix A of this rule.

(B) The employer shall provide rest periods in addition to and taken separately from the time provided for a meal period. An employer may not require or allow an employee to add the rest period to a meal period or deduct the rest period from the beginning or end of the employee's work period to reduce the overall length of the work period.

(C) An employer has the burden to show that the employer provided the rest periods required under this section.

(b) An employer is not required to provide a rest period to an employee when all of the following conditions are met:

(A) The employee is 18 years of age or older;

(B) The employee works less than five hours in any period of 16 continuous hours;

(C) The employee is working alone;

(D) The employee is employed in a retail or service establishment, i.e., a place where goods and services are sold to the general public, not for resale; and

(E) The employee is allowed to leave the employee's assigned station when the employee must use the restroom facilities.

(7) The provisions of this rule regarding meal periods and rest periods may be modified by the terms of a collective bargaining agreement if the provisions of the collective bargaining agreement entered into by the employees specifically prescribe rules concerning meal periods and rest periods.

(8)(a) Pursuant to the provisions of ORS 653.261(5), if an employer agrees, an employee may waive a meal period if all of the following conditions are met:

(A) The employee is employed to serve food or beverages, receives tips, and reports the tips to the employee's employer;

(B) The employee is at least 18 years of age;

(C) The employee voluntarily requests to waive the employee's meal periods no less than seven calendar days after beginning employment;

(D) The employee's request to waive the employee's meal periods is in writing in the language used by the employer to communicate with the employee, on a form provided by the commissioner, and is signed and dated by both the employee and employer;

(E) The employer retains and keeps available to the commissioner a copy of the employee's request to waive the employee's meal period during the duration of the employee's employment and for no less than six months after the termination date of the employee;

(F) The employee is provided with a reasonable opportunity to consume food during any work period of six hours or more while continuing to work;

(G) The employee is paid for any and all meal periods during which the employee is not completely relieved of all duties;

(H) The employee is not required to work longer than eight hours without receiving a 30-minute meal period during which the employee is relieved of all duties;

(I) The employer makes and keeps available to the commissioner accurate records of hours worked by each employee that clearly indicate whether or not the employee has received meal periods; and

(J) The employer posts a notice provided by the commissioner regarding rest and meal periods in a conspicuous and accessible place where all employees can view it.

(b) Either the employer or employee may revoke the agreement for the employee to waive the employee's meal periods by providing at least seven (7) calendar days written notice to the other.

(c) Notwithstanding subsection (b) of this section, an employee who has requested to waive meal periods under this section may request to take a meal period without revoking the agreement to waive such periods. The request to take a meal period must be submitted in writing to the employer no less than 24 hours prior to the meal period requested.

- (d) An employer may not coerce an employee into waiving a meal period.¶
- (e) An employer will be considered to have coerced an employee into waiving the employee's meal period under the following circumstances:¶
- (A) The employer requests or requires an employee to sign a request to waive meal periods;¶
- (B) An employee is required to waive meal periods as a condition of employment at the time of hire or at any time while employed;¶
- (C) The employer requests or requires any person, including another employee, to request or require an employee to waive meal periods; or¶
- (D) The employee signs a form requesting to waive meal periods prior to being employed for seven calendar days.¶
- (f) Employee waiver forms and notices regarding rest and meal periods that comply with this section are available upon request from the bureau.¶
- (9) Notwithstanding sections (2) and (6) of this rule, a public school district, education service district, or public charter school may provide any person substituting for a regular teacher with the same rest and meal periods to which the regular teacher is entitled under any applicable law, employment contract, policy, or collective bargaining agreement.¶
- (10) Rest and meal period requirements specific to minors under 18 years of age are provided in OAR 839-021-0072.¶
- (11) As used in this rule:¶
- (a) "Work period" means the period between the time the employee begins work and the time the employee ends work.¶
- (b) "Work period" includes a rest period as provided in section (6) of this rule, and any period of one hour or less (not designated as a meal period) during which the employee is relieved of all duties.¶
- (c) "Work period" does not include a meal period unless the meal period is paid work time as provided in section (2) or (5) of this rule.

Statutory/Other Authority: ORS 651.060, ORS 653.040, ORS 651.060(4)3.261

Statutes/Other Implemented: ORS 653.261

Appendix A

Length of work period	Number of rest breaks required	Number of meal periods required
2 hrs or less	0	0
2 hrs 1 min - 5 hrs 59 min	1	0
6 hrs	1	1
6 hrs 1 min - 10 hrs	2	1
10 hrs 1 min - 13 hrs 59 min	3	1
14 hrs	3	2
14 hrs 1 min - 18 hrs	4	2
18 hrs 1 min - 21 hrs 59 min	5	2
22 hrs	5	3
22 hrs 1 min - 24 hrs	6	3