



PERMANENT ADMINISTRATIVE ORDER

BLI 2-2022

CHAPTER 839

BUREAU OF LABOR AND INDUSTRIES

FILED

03/21/2022 1:38 PM
ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Implementation of legislation related to activity protected by Oregon Safe Employment Act.

EFFECTIVE DATE: 04/01/2022

AGENCY APPROVED DATE: 03/17/2022

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RULES:

839-004-0003, 839-004-0021

AMEND: 839-004-0003

NOTICE FILED DATE: 12/29/2021

RULE SUMMARY: Implementation of 2021 legislation related to activity protected by Oregon Safe Employment Act.

CHANGES TO RULE:

839-004-0003

Definitions: Discrimination for Opposition to Practices Prohibited by Oregon Safe Employment Act (OSEA) ¶¶

As defined in ORS 654.005:¶¶

(1) "Discrimination" includes but is not limited to:¶¶

(a) Barring or discharging an individual from employment;¶¶

(b) Treating an individual differently than others in compensation, terms, conditions or privileges of employment;¶¶

(c) Retaliating against or harassing an individual for participating in activities protected by ORS 654.062(5); or¶¶

(d) Actions described in (a)-(c) of this section taken against individuals by persons that are not the individual's employer or prospective employer, such as, but not limited to, labor organizations and employment agencies.¶¶

(2) "Employee" includes:¶¶

(a) Any individual, including a minor whether lawfully or unlawfully employed, who engages to furnish services for remuneration, financial or otherwise, subject to the direction and control of an employer;¶¶

(b) Salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations; and¶¶

(c) Any individual including but not limited to a volunteer who is provided with workers' compensation coverage as a subject worker pursuant to ORS Chapter 656, whether by operation of law or by election.¶¶

(3) "Employer" includes:¶¶

(a) Any person who has one or more employees;¶¶

(b) Any sole proprietor or member of a partnership who elects workers' compensation coverage as a subject worker pursuant to ORS 656.128; and¶¶

(c) Any successor or assignee of an employer. As used in this paragraph, "successor" means a business or enterprise that is substantially the same entity as the predecessor employer according to criteria adopted by the Oregon Department of Consumer and Business Services in OAR 437-001-0015.¶¶

(4) "Person" means one or more individuals, legal representatives, partnerships, joint ventures, associations,

corporations (whether or not organized for profit), business trusts, any organized group of persons, the state, state agencies, counties, municipal corporations, school districts and other public corporations or subdivisions.¶

(5) "Place of employment" includes:¶

(a) Every place, whether indoors or out or underground, and the premises and structures appurtenant thereto, where either temporarily or permanently an employee works or is intended to work; and¶

(b) Every place where there is carried on any process, operation or activity related, either directly or indirectly, to an employer's industry, trade, business or occupation, including a labor camp, wherever located, provided by an employer for employees or by another person engaged in providing living quarters or shelters for employees.¶

(6) "Place of employment" does not include:¶

(a) Any place where the only employment involves non subject workers employed in or about a private home; and¶

(b) Any corporate farm where the only employment involves the farm's family members, including parents, spouses, sisters, brothers, daughters, sons, daughters-in-law, sons-in-law, nieces, nephews or grandchildren.¶

(7) "Rebuttable Presumption" of an unlawful employment practice occurs when a person bars or discharges an employee or prospective employee from employment or otherwise discriminates against an employee or prospective employee within 60 days after the employee or prospective employee has engaged in any of the protected activities identified in ORS 654.062(5).¶

(a) The person may rebut the presumption by a demonstration of a preponderance of the evidence that the violation did not occur. ¶

(b) If a person bars or discharges an employee or prospective employee from employment or otherwise discriminates against the employee or prospective employee more than 60 days after the employee or prospective employee has engaged in any of the protected activities such action does not create a presumption in favor of or against finding that a violation has occurred.¶

(A) Where such action has occurred more than 60 days after the protected activity, 7(b) does not modify any existing rule of case law relating to the proximity of time between a protected activity and an adverse employment action.¶

(B) Where such action has occurred more than 60 days after the protected activity, the burden of proof remains on the employee or prospective employee to demonstrate by a preponderance of the evidence that a violation occurred.

Statutory/Other Authority: ORS 654.062(5);, ORS 659A.805

Statutes/Other Implemented: ORS 654.005, ORS 654.062, Senate Bill 483, 2021

AMEND: 839-004-0021

NOTICE FILED DATE: 12/29/2021

RULE SUMMARY: Implementation of 2021 legislation related to activity protected by Oregon Safe Employment Act.

CHANGES TO RULE:

839-004-0021

Procedures for Complaints; Statutes of Limitation; Private Right of Action; Statutory Construction; Remedies ¶

(1) Employees or prospective employees alleging violations of ORS 654.062(5) of the Oregon Safe Employment Act (OSEA) may file a complaint with the Civil Rights Division (division) of the Bureau of Labor and Industries as aggrieved persons as provided in ORS 659A.820 and OAR 839-003-0031.¶

(2) Aggrieved persons alleging violations of ORS 654.062(5) must contact the division within ~~90 days~~one year after the date on which the aggrieved person has reasonable cause to believe they have been discriminated against. An aggrieved person would have reasonable cause to believe a violation has occurred on the earliest date that the aggrieved person:¶

(a) Believed discrimination had occurred against the aggrieved person for opposing practices prohibited by OSEA; and¶

(b) Knew or should have known of the right to file a complaint with the division and of the requirement to contact the division within ~~90 days~~one year after the alleged discrimination.¶

(A) If a notice required by OSEA, as provided in OAR 437-001-0275(2)(a), was properly posted in the employee's workplace, continuously on and following the date of the alleged retaliation, the division will find that the employee knew or should have known of the requirement to contact the division within ~~90 days~~one year after the alleged discrimination.¶

(B) If the employer failed to post the required OSEA poster, the requirement to contact the division within ~~90 days~~one year after the alleged discrimination will begin on the date the employee learned of the right to file a complaint and of the ~~90 day~~one year requirement. The employee may establish this date based on the employee's own statement or other evidence offered by the employee.¶

(C) If the employer disagrees with the employee's presented date as the date the employee learned of the right to file a complaint, the burden is on the employer to show that the employee knew or should have known on an earlier date.¶

(D) If extenuating circumstances exist, the division may extend the ~~90 day~~one year period as provided in 29 CFR §1977.15(3).¶

(3) Upon receipt of a complaint the commissioner of the Bureau of Labor and Industries (commissioner) will process the complaint under the procedures, policies and remedies established by ORS chapter 659A and the policies established by ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780 in the same way and to the same extent that the complaint would be processed if the complaint involved allegations of unlawful employment practices under ORS 659A.030(1)(f).¶

(4)(a) If the commissioner dismisses the complaint, the commissioner will issue a notice to the aggrieved person pursuant to ORS 659A.880 that a civil action may be filed within 90 days of the dismissal.¶

(b) The aggrieved person may appeal the dismissal to the Oregon Occupational Safety and Health Division within 15 calendar days of issuance of the determination.¶

(5) Provisions of OSEA are to be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Occupational Safety and Health Act of 1970, 29 USC ch.15 §651-678 as amended (OSHA).¶

(6) An affected employee or prospective employee may bring a civil action in any circuit court of the State of Oregon against any person alleged to have violated ORS 654.062(5). The civil action must be commenced within one year after the employee or prospective employee has reasonable cause to believe a violation has occurred, unless a complaint has been timely filed under ORS 659A.820.¶

(7) The commissioner or the circuit court may order all appropriate relief including rehiring or reinstatement to the employee's former position with back pay.

Statutory/Other Authority: ORS 654.062(5), ORS 659A.805

Statutes/Other Implemented: ORS 654.062(5), ORS 659A.030(1)(f), House Bill 2420, 2021