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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

BLI 8-2021
CHAPTER 839
BUREAU OF LABOR AND INDUSTRIES

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ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Implementation of Senate Bill 483, 2021

EFFECTIVE DATE: 07/19/2021 THROUGH 01/14/2022

AGENCY APPROVED DATE: 07/19/2021

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NEED FOR THE RULE(S):

During the 2021 Legislative Session, the legislature passed Senate Bill 483 establishing a rebuttable presumption if an employee or prospective employee experienced retaliation or discrimination within 60 days after the employee or prospective employee has engaged in any of the protected activities under the Oregon Safe Employment Act (OSEA). The measure included an emergency clause and a provision that the rebuttable presumption applied retroactively to complaints if a final decision had not been made by BOLI as of the effective date. The measure became effective on June 15, 2021. Therefore, complaints that meet the criteria of the measure must now be investigated based on the rebuttable presumption, thus shifting the burden of proof and the investigatory process of the Civil Rights Division (CRD).

The rebuttable presumption is a new investigatory standard for CRD that requires new rules to implement. However, the June 15, 2021 effective date, does not provide the agency with sufficient time to complete the permanent rulemaking process before it will be required to investigate complaints under the rebuttable presumption.

JUSTIFICATION OF TEMPORARY FILING:

Failure to adopt temporary rules will harm the individuals subject to a pending retaliation complaint or any retaliation complaint filed with the Civil Rights Division (CRD) after the measure became effective. The complainant and respondent would suffer harm because the agency would have to delay the investigation of any complaints, whether existing or filed after the 15th, for multiple months in order to complete the permanent rulemaking process. This will delay justice for both the respondent and complainant.

The agency must act immediately to ensure that it has the ability to meet the new investigatory standard under the rebuttable presumption because the measure became effective on June 15, 2021. An individual alleging they

experienced retaliation or discrimination within 60 days after engaging in any of the protected activities under Oregon Safe Employment Act (OSEA) must have their complaint investigated as a rebuttable presumption in which the employer must demonstrate by the preponderance of the evidence that the violation did not occur. Failure to take immediate action would prevent the agency from implementing the law in accordance with the emergency clause, subsequently delaying the investigation and justice.

By enacting temporary rules, the agency will have the ability to immediately respond and investigate complaints brought in accordance with Senate Bill 483 and will address an avoidable delay in justice for complainant and respondents.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Senate Bill 483, 2021 - <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/SB483>

AMEND: 839-004-0003

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

RULE SUMMARY: Implementation of Senate Bill 483, 2021

RULE TEXT:

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