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**NOTICE OF PROPOSED RULEMAKING**  
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 839  
BUREAU OF LABOR AND INDUSTRIES

**FILED**

10/27/2023 2:01 PM  
ARCHIVES DIVISION  
SECRETARY OF STATE

FILING CAPTION: Amends rule to implement Enrolled House Bill 2649 (2023).

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 12/22/2023 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.*

*A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.*

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**NEED FOR THE RULE(S)**

During the 2023 legislative session, the Legislative Assembly adopted House Bill 2469, which established apprentice utilization requirements and demographic goals for women, racial and ethnic minorities and veterans working on public improvement projects over \$3 million and on subcontracts of \$750,000 or more. The Bureau of Labor and Industries is tasked with the collection of apprentice utilization and demographic information from qualifying agencies. These administrative rule amendments are necessary to describe the manner in which the specified information will be collected by qualifying agencies and reported to the Bureau.

**DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE**

Enrolled House Bill 2649 (2023) is available at:  
<https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/HB2649>

**STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE**

These rules are unlikely to have an impact on racial equity in this state. The rules are intended to create an efficient process by which qualifying governmental agencies collect information specified by Enrolled House Bill 2649 (2023) and report it to the Bureau. The Bureau does anticipate that the underlying legislation will have a positive impact on racial equity in Oregon by providing policy makers with insights into the demographic composition of the relevant workforce, by specifically requiring outreach, recruitment and retention of minority individuals and by increasing apprenticeship utilization requirements.

**FISCAL AND ECONOMIC IMPACT:**

The Bureau does not anticipate these rule amendments creating a fiscal impact. The rules implement data collection that is required by law and endeavor to do so with minimal economic burden. The rules provide for, but do not require, a

specific form that can be used in the collection and reporting of the data. It is likely that costs of the statutorily-required data collection will be borne by qualifying government agencies, either in the form of staff time or in increased fees for contractually provided services. It is, however, possible that a qualifying agency could pass these costs along to contractors.

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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).

Qualifying agencies specified in the bill, at both the state and local level, will be impacted by the underlying legislation. As indicated above, these rule amendments endeavor to implement this legislation in a cost-effective manner. 395 construction businesses are classified as Emerging Small Businesses on Oregon's Certification Office for Business Inclusion and Diversity (COBID). According to the U.S. Small Business Administration, there are approximately 400,000 small businesses operating in Oregon and the U.S. Census' Statistics of U.S. Business lists 12,651 Oregon construction businesses with between 1-19 employees. A very small subset of these small businesses will be likely to be a party to a public improvement contract in excess of \$3 million or a related subcontract of \$750,000 or more. Those businesses are required by the legislation to collect compliance information, as well as demographic and other worker-related project information. The rule provides an optional form for this purpose and clarifies the manner in which existing rules apply to these projects. For these reasons, the cost of complying with these rule amendments is expected to be minimal. Similarly, because the rules provide a mechanism to collect and report the required information to qualifying agencies, the Bureau does not anticipate the rule amendments will impose costs associated with professional services, equipment supplies, labor or increased administration, apart from the underlying legislation.

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

The Bureau assembled a Rules Advisory Committee for these rules. Invitations to participate were extended to a number of small businesses that are COBID designated as an Emerging Small Business, Minority Business Enterprise or Women Business Enterprise. In addition, small businesses are invited to provide comment on these rules and the Bureau is providing notice of the proposed rules via its website, mailing list and the Oregon bulletin.

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WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

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AMEND: 839-025-0010

RULE SUMMARY: Amends rule to implement Enrolled House Bill 2649 (2023).

CHANGES TO RULE:

839-025-0010

Payroll and Certified Statement Requirements ¶¶

~~(1) The form required by ORS 279C.845 is the Payroll and Certified Statement form, WH-38. This form must accurately and completely set out the~~ As used in this rule:¶¶

(a) "Public improvement project subject to enhanced reporting" means a public improvement contract with a contract price exceeding \$3 million, that is entered into by a qualifying agency.¶¶

(b) "Public improvement contract" has the meaning given that phrase in ORS 279A.010.¶¶

(c) "Qualifying agency" has the meaning given that phrase in ORS 279C.533.¶¶

(d) "Subcontractor's or" means a subcontractor's payroll records, including the name and address of each worker, the worker's correct classifica required to report payroll certified statements under the provisions of ORS 279C.800 to 279C.870 or ORS 279C.533.¶¶

~~(2)(a) Except as provided in subsection (b) of this section, rate of pay, daily and weekly number of hours worked and the gross wages the worker earned each week during which the contractor or subcontractor employs a worker upon a public works project.¶¶~~

~~(2) The form required by ORS 279C.845 is the Payroll and Certified Statement form, WH-38. The WH-38 form must be submitted in accordance with ORS 279C.845 and include the information required by ORS 279C.845.¶¶~~

~~(b) For public improvement projects subject to enhanced reporting, the form required by ORS 279C.533 and 279C.845 is the Enhanced Payroll and Certified Statement form, Enhanced WH-38. The Enhanced WH-38 form must be submitted in accordance with ORS 279C.845 and include the information required by ORS 279C.533 and 279C.845.¶¶~~

~~(3)(a) The contractor or subcontractor may submit the weekly payroll to the public agency or qualifying agency on the WH-38 form or may use Enhanced WH-38 form, or a similar form providing suched the form contains all the elements of the WH-38 or Enhanced WH-38 form. When submitting the weekly payroll to the public agency or qualifying agency on a form other than WH-38 or Enhanced WH-38 form, the contractor or subcontractor must attach include the certified cation statement contained on the WH-38 or Enhanced WH-38 form to on the payroll forms submitted.¶¶~~

~~(3b) Each Payroll and Certified Statement form must be submitted by the contractor or sub Not later than 30 days after making a final payment to a contractor to the on a public agency by the fifth business day of each month following a month in which workers were employed upon a public works project.¶¶~~

~~(4) The Payroll and Certified Statement forms received by the public agency are public records subject to the provisions of ORS 192.410 to 192.505. As such, they must be made available upon request. Pursuant to ORS 279C.845(4), information submitted on certified statements may be used only to ensure compliance with the provisions of ORS 279C.800 through 279C.870.¶¶~~

~~(5) If the contractor improvement project requiring enhanced reporting, a qualifying agency must make the required report to the Bureau of Labor and Industries in a format and via an electronic method specific by the Bureau in writing.¶¶~~

~~(4) If the contractor on a public works project or a public improvement project subject to enhanced reporting fails to timely submit its payroll and certified statement forms to the public agency as required by subsection (3) of this rule, the public in accordance with ORS 279C.845, the public agency or qualifying agency must retain 25 percent of any amount earned by the contractor until the contractor has submitted the required payroll and certified statements to the public agency.¶¶~~

~~(a) The amount to be retained shall be calculated at 25 percent of the unpaid amount earned by the contractor at the time each payroll and certified statement are due. For example, if the contractor fails to submit its payroll and certified statement by the fifth of the month and the contractor earned \$100,000 in the period since its last payroll and certified statement were submitted to the public agency, the public agency must retain 25 percent of \$100,000 (\$25,000), until such time as the required payroll and certified statement are submitted.¶¶~~

~~(b) When calculating the amount to be retained, amounts previously retained shall not be included as amounts earned by the contractor.¶¶~~

~~(c) Once the required payroll and certified statement have been submitted to the public agency, the public agency must pay the amount retained to the contractor within 14 days.¶¶~~

~~(65) If a first-tier subcontractor on a public works project or a public improvement project subject to enhanced reporting fails to timely submit a payroll and certified statement form to the public agency as required by subsection (3) of this rule in accordance with ORS 279C.845, the contractor must retain 25 percent of any amount earned by the first-tier subcontractor until the first-tier subcontractor has submitted the required payroll and certified statements to the public agency.¶¶~~

~~(a) The amount to be retained shall be calculated at 25 percent of the unpaid amount earned by the first-tier subcontractor at the time each payroll and certified statement are due. For example, if the first-tier subcontractor fails to submit the payroll and certified statement by the fifth of the month and the first-tier subcontractor earned \$100,000 in the period since the last payroll and certified statement were submitted to the public agency, the contractor must retain 25 percent of \$100,000 (\$25,000), until such time as the required payroll and certified statement are submitted.¶¶~~

~~(b) When calculating the amount to be retained, amounts previously retained shall not be included as amounts earned by the first-tier subcontractor.¶¶~~

~~(c) The contractor must verify that the first-tier subcontractor has filed the required payroll and certified statement(s) with the public agency before the contractor may pay the first-tier subcontractor any amount retained under this section.¶¶~~

~~(d) Once the first-tier subcontractor has filed the required payroll and certified statement with the public agency, the contractor must pay the amount retained to the first-tier subcontractor within 14 days.¶¶~~

~~(76) Notwithstanding ORS 279C.555 or 279C.570(7), amounts retained pursuant to the provisions of this rule shall be in addition to any other amounts retained.¶¶~~

~~(87)~~(a) If a project is a public works of the type described in ORS 279C.800(6)(a)(B), and no public agency awards a contract to a contractor for the project, the contractors and any subcontractors employing workers upon the public works project shall submit weekly payrolls as required by ORS 279C.845 and this rule to the public agency or agencies providing funds for the project.¶

(b) When more than one public agency provides funds for a project, the public agencies may designate one agency to receive the contractor's and any subcontractors' payrolls.¶

~~(98)~~(a) If a project is a public works of the type described in ORS 279C.800(6)(a)(C), and no public agency awards a contract to a contractor for the project, the contractors and any subcontractors employing workers upon the public works project shall submit weekly payrolls as required by ORS 279C.845 and this rule to the public agency or agencies that will occupy or use the completed project.¶

(b) When more than one public agency will occupy or use the completed project, the public agencies may designate one agency to receive the contractor's and any subcontractors' payrolls.¶

~~(109)~~ If a project is a public works of the type described in ORS 279C.800(6)(a)(D), and no public agency awards a contract to a contractor for the project, the contractors and any subcontractors employing workers upon the public works project shall submit weekly payrolls as required by ORS 279C.845 and this rule to the public agency that owns the land, premise(s), structure(s) or building(s) on which the solar radiation device(s) will be constructed or installed.¶

~~(110)~~ If a project is a public works of the type described in ORS 279C.800(6)(a)(E), and no public agency awards a contract to a contractor for the project, the contractors and any subcontractors employing workers upon the public works project shall submit weekly payrolls as required by ORS 279C.845 and this rule to the public university listed in ORS 352.002 that owns the real property.¶

[ED. NOTE: Forms and Publications referenced are available from the Wage and Hour Division of the Bureau of Labor and Industries.]

Statutory/Other Authority: ORS 651.060~~(4)~~, ORS 279C.808

Statutes/Other Implemented: ORS 279C.800- to 279C.870