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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 839
BUREAU OF LABOR AND INDUSTRIES

FILED

12/19/2023 8:01 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Amends rule to delete definitions applicable to Oregon Military Family Leave Act and corrects citation.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 02/09/2024 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)

Effective January 1, 2024, Enrolled House Bill 2032 (2023) eliminates the requirement that parties to an Oregon domestic partnership be of the same sex. The current definition of "domestic partnership" in this rule is expressly limited to individuals of the same sex. The current definition of "domestic partnership" in this rule is also expressly limited to Oregon domestic partnerships and fails to recognize domestic partnership entered into in other states. Deleting this definition eliminates both of those limitations. The rule amendments also make two technical adjustments, by deleting the related definition of "domestic partner" and correcting an erroneous citation to the definition of "spouse." Significantly, this definition of "spouse" will continue to include individuals in a domestic partnership established under the laws of any state.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Enrolled House Bill 2032 (2023): <https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/HB2032>.

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

The substantive effect of the rule amendments is for the phrase "domestic partnership" to recognize domestic partnerships entered into in any state between two persons, regardless of sex. To the extent that opposite-sex domestic partnerships entered into in any other state are entered into disproportionately by people of color, the rule amendments would be likely to have a positive effect on racial equity by promoting an inclusive environment in this State.

FISCAL AND ECONOMIC IMPACT:

The Bureau does not anticipate these rule amendments creating a fiscal impact. The inclusion of opposite-sex, in-state

domestic partnerships is mandated by statute. The inclusion of out-of-state, opposite-sex domestic partnerships is arguably compelled by the U.S. Constitution. Moreover, the current, applicable administrative definition of "spouse" expressly includes individuals who have lawfully established a domestic partnership or similar relationship under the laws of any state. For these reasons, these rule amendments operate to clarify current law and are unlikely to create a fiscal or economic impact.

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).

All state agencies and units of local government, and private employers who meet the definition of an "employer" in ORS 659A.090, are subject to these rules. All state agencies and units of local government will be economically affected by the need to update any policies that utilized the previous definition of "domestic partnership" and the Bureau will be affected in needing to allocate additional staff time to train businesses on the new rules and update training materials. For private sector entities, the definition of "employer" is limited to those that employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks, while the applicable definition of "small business" under the Administrative Procedures Act is limited to entities that employ 50 or fewer employees. Thus, the small businesses to which these rules apply are limited to those employing between 25 and 50 employees. According to the Oregon Employment Department (OED), there are nearly 165,000 small businesses in Oregon with at least one payroll employee and nearly 92% of those small businesses have fewer than 20 employees. Based on the OED data, there are fewer than 8,000 Oregon businesses with more than 25 employees, but fewer than 50. As indicated above, the Bureau understands these rule amendments to clarify current law. As a consequence, there are no additional reporting, recordkeeping or administrative activities to comply with these rule amendments. Similarly, beyond updating any employer policies, the Bureau estimates that there are no additional costs of professional services, equipment supplies, labor and increased administration necessary to comply with these rule amendments.

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

Small businesses, as well as the public at-large, are invited to comment on these rules. In addition, the Bureau will post notice of this rulemaking on its webpage and in the Oregon bulletin, while also disseminating the notice to the Bureau's rulemaking mailing list.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

Because the rule amendments were required by Oregon law, or otherwise operate to clarify Oregon law, the Bureau believes that any issues related to these rule amendments are likely to be most efficiently surfaced via this public rulemaking notice.

AMEND: 839-009-0380

RULE SUMMARY: Amends rule to delete definitions and corrects citation.

CHANGES TO RULE:

839-009-0380

OMFLA: Definitions ¶

(1) "Active duty or call to active duty status" means duty under a call or order to active duty, or notification of an impending call or order to active duty, during a contingency operation, pursuant to Title 10 of the United States

Code. "Contingency operation" means a military operation that:¶

(Aa) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or¶

(Bb) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. (See 10 U.S.C. §101(a)(13))¶

(2) "Covered employer" means:¶

(a) The State of Oregon and a department, agency, board or commission of the State of Oregon;¶

(b) A local government, including but not limited to a county, city, town, municipal corporation, independent public corporation or political subdivision of the State of Oregon; and¶

(c) A person, firm, corporation, partnership, legal representative, or other business entity that engages in any business, industry, profession, or activity in the state of Oregon and that employs 25 or more individuals in the state of Oregon for each working day during each of 20 or more calendar workweeks in the year in which an eligible employee takes OMFLA leave or in the year immediately preceding the year in which an eligible employee takes OMFLA leave.¶

(3) "Domestic partner" means an individual joined in a domestic partnership.¶

~~(4) "Domestic partnership" for the purposes of ORS chapter 659A means two individuals of the same sex who have received a Certificate of Registered Domestic Partnership from the State of Oregon in compliance with ORS 432.405(1) and rules adopted by the State Registrar of the Center for Health Statistics.¶~~

(5) "Eligible employee" means an individual who performs services for compensation for an employer for an average of at least 20 hours per week and includes all individuals employed at any site owned or operated in Oregon by an employer, but does not include independent contractors.¶

(a) In determining an average of at least 20 hours per week, the employer must count actual hours worked using guidelines set out pursuant to the federal Fair Labor Standards Act. (See 29 CFR § 785)¶

(b) For the purpose of qualifying as an eligible employee, the employee need not perform services solely in the state of Oregon.¶

(c) Eligibility of employees reemployed following a period of uniformed service: The federal Uniformed Services Employment and Reemployment Act, 38 USC 43 (USERRA) provides that an employee reemployed following a period of uniformed service is entitled to the seniority and seniority-based rights and benefits that the employee had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if the employee had remained continuously employed. U.S. Department of Labor regulation 20 CFR §1002.210 provides that in determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute. Under USERRA, a reemployed service member would be eligible for OMFLA leave if the number of days and the number of hours of work for which the service member was employed by the civilian employer, together with the number of days and number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet the eligibility requirements of these rules. In the event that a service member is denied OMFLA leave for failing to satisfy the days and hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under OMFLA.¶

(d) ORS 659A.082-659A.088 provides that an employee reemployed following a period of uniformed service is entitled to the seniority and seniority-based rights and benefits that the employee had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if the employee had remained continuously employed. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. If a reemployed service member was eligible for leave under OMFLA prior to the date uniformed service began, OMFLA's eligibility requirements are considered met.¶

(64) "Intermittent leave" means leave taken in multiple blocks of time and/or requiring an altered or reduced work schedule.¶

(75) "Period of Military Conflict" means a period of war:¶

(a) Declared by the United States Congress;¶

(b) Declared by executive order of the President of the United States; or¶

(c) In which a reserve component of the Armed Forces of the United States is ordered to active duty pursuant to Title 32 of the United States Code or section 12301 or 12302 of Title 10 of the United States Code.¶

(86) "Spouse" has the meaning given in OAR 839-009-0210(21).

Statutory/Other Authority: ORS 659A.093(6)

Statutes/Other Implemented: ORS 659A.090 - 659A.099