



January 5, 2022

RE: Oregon Bureau of Labor and Industries - Notice of Rulemaking

To Interested Parties,

During the 2021 Legislative Session, two measures passed that amended OSEA: Senate Bill 483 and House Bill 2420. Therefore, the agency needs to amend its rules to implement and make them consistent with the newly enacted legislation.

Senate Bill 483 established 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 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 the Bureau of Labor and Industries (BOLI) as of the effective date of the measure. Therefore, effective June 15, 2021, complaints that met the criteria of the measure had to be investigated based on the rebuttable presumption, thus shifting the burden of proof and the investigatory process of the Civil Rights Division (CRD). To meet the requirements under the emergency clause, the agency adopted temporary rules to implement the rebuttable presumption as the new investigatory standard for CRD. The agency is proposing to make the current temporary rules permanent.

House Bill 2420 extended the timeline from 90 days to one year to file a complaint with BOLI alleging retaliation or discrimination for reporting unlawful practice or exercising rights relating to safety and health in the workplace. In order to make the rules consistent with the newly enacted legislation, the agency must amend its rules by replacing all references to the 90-day filing timeline with the new filing timeline of one year.

There will be a public hearing on January 26, 2022, 10:00 – 10:30 AM.

The hearing will be conducted using Microsoft Teams

Join on your computer or mobile app

[Click here to join the meeting](#)

Or call in (audio only)

[+1 503-446-4951](tel:+15034464951), [784192209#](tel:+1784192209) United States, Portland

Phone Conference ID: 784 192 209#

The deadline for public comment is 5:00 p.m. on January 31, 2022. Comments may be emailed to

erin.seiler@boli.oregon.gov

A copy of the Notice and proposed rule are attached

Sincerely,

Erin Seiler, Senior Policy Advisor

OFFICE OF THE SECRETARY OF STATE

SHEMIA FAGAN
SECRETARY OF STATE

CHERYL MYERS
DEPUTY SECRETARY OF STATE



ARCHIVES DIVISION

STEPHANIE CLARK
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 839
BUREAU OF LABOR AND INDUSTRIES

FILED

12/29/2021 3:42 PM
ARCHIVES DIVISION
SECRETARY OF STATE

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

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 01/31/2022 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.

CONTACT: erin seiler
503-382-7934
erin.seiler@boli.oregon.gov

800 NE Oregon
Portland, OR 97232

Filed By:
Erin Seiler
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 01/26/2022

TIME: 10:00 AM - 10:30 AM

OFFICER: erin seiler

ADDRESS: Microsoft Teams (see special instructions)

800 NE Oregon

Portland, OR 97232

SPECIAL INSTRUCTIONS:

The public may attend the hearing over Microsoft Teams using the web address or phone number provided.

Join on your computer or mobile app

Click here to join the meeting: [https://teams.microsoft.com/l/meetup-](https://teams.microsoft.com/l/meetup-join/19%3ameeting_ODEzMDgzNzMtNDU5NS00OWMzLTkzOGMtMGFIZThkNDY0YjI1%40thread.v2/0?context=%7b%22Ti)

[join/19%3ameeting_ODEzMDgzNzMtNDU5NS00OWMzLTkzOGMtMGFIZThkNDY0YjI1%40thread.v2/0?context=%7b%22Ti](https://teams.microsoft.com/l/meetup-join/19%3ameeting_ODEzMDgzNzMtNDU5NS00OWMzLTkzOGMtMGFIZThkNDY0YjI1%40thread.v2/0?context=%7b%22Ti)

[fa7c-47b4-a0ce-a598cad161cf%22%2c%22Oid%22%3a%223c0410d6-6a93-4cb1-9dd6-f50da0bd98fe%22%7d](https://teams.microsoft.com/l/meetup-join/19%3ameeting_ODEzMDgzNzMtNDU5NS00OWMzLTkzOGMtMGFIZThkNDY0YjI1%40thread.v2/0?context=%7b%22Ti)

Or call in (audio only)

+1 503-446-4951,,784192209# United States, Portland

Phone Conference ID: 784 192 209#

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The public may also submit written comments about the proposed rules until Monday, January 31, 2022, at 5 p.m. by emailing comments to erin.seiler@boli.oregon.gov.

Please contact Erin Seiler at

erin.seiler@boli.oregon.gov or 503-382-7934 if you have questions or need assistance participating in the public comment process.

NEED FOR THE RULE(S)

The Oregon Occupational Safety and Health Administration Division (OR-OSHA) of the Department of Consumer and Business Services administers the Oregon Safe Employment Act of 1973 (OSEA). The OSEA requires that employers provide safe and healthy workplaces for their employees and ensure that workers have the necessary training and equipment to do their jobs safely. Employers are required to post a notice from OR-OSHA that outlines employees' rights under the OSEA. It is an unlawful employment practice for employers to retaliate or discriminate against employees or prospective employees because they have opposed unsafe or unhealthy working conditions or have complained or assisted in an occupational safety and health proceeding under state law. Employees may file a civil rights complaint or civil suit if they believe they have been subjected to retaliatory or discriminatory action.

During the 2021 Legislative Session, two measures passed that amended OSEA: Senate Bill 483 and House Bill 2420. Therefore, the agency needs to amend its rules to implement and make them consistent with the newly enacted legislation.

Senate Bill 483 established 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 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 the Bureau of Labor and Industries (BOLI) as of the effective date of the measure. Therefore, effective June 15, 2021, complaints that met the criteria of the measure had to be investigated based on the rebuttable presumption, thus shifting the burden of proof and the investigatory process of the Civil Rights Division (CRD). To meet the requirements under the emergency clause, the agency adopted temporary rules to implement the rebuttable presumption as the new investigatory standard for CRD. The agency is proposing to make the current temporary rules permanent.

House Bill 2420 extended the timeline from 90 days to one year to file a complaint with BOLI alleging retaliation or discrimination for reporting unlawful practice or exercising rights relating to safety and health in the workplace. In order to make the rules consistent with the newly enacted legislation, the agency must amend its rules by replacing all references to the 90-day filing timeline with the new filing timeline of one year.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

OL CH. 293, 2021

OL CH. 336, 2021

FISCAL AND ECONOMIC IMPACT:

The proposed rules make the agency rules consistent with current statute or statute that becomes effective on January 1, 2022. Therefore, no fiscal or economic impact is anticipated as a result of the rules.

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).

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected

by the rule(s).

The administrative rules have no economic impact on state agencies or local governments. The rules will have no economic impact on the public.

(2) Effect on Small Businesses:

(a) Estimate the number and type of small businesses subject to the rule(s);

Oregon has approximately 246,000 small businesses with fewer than 50 employees*. Since all businesses in Oregon with one or more employees are subject to OSEA laws, all small business employers will be subject to the proposed rules.

* 2020 Oregon Employment Department data.

(b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s);

There are no reporting, recordkeeping, and administrative activities or costs required by the proposed rules.

(c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

There are no equipment, supplies, labor, or increased administration required or anticipated under the proposed rules.

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

Small businesses were not involved in the development of the administrative rules.

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

The agency did not utilize a rulemaking advisory committee to develop the proposed rules. The proposed rules only make the current rules consistent with the recently adopted legislation.

RULES PROPOSED:

839-004-0003, 839-004-0021

AMEND: 839-004-0003

RULE SUMMARY: Implementation of Senate Bill 483, 2021

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

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