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

CHAPTER 839  
BUREAU OF LABOR AND INDUSTRIES

**FILED**

10/31/2023 12:36 PM  
ARCHIVES DIVISION  
SECRETARY OF STATE

FILING CAPTION: Amends rules to account for Senate Bill 907 (2023) and to update OSEA-related rules.

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)

Enrolled Senate Bill 907 (2023) requires the Director of the Department of Consumer and Business Services to adopt rules regarding hazardous conditions at places of employment. As a result, several substantive provisions of these rules need to be amended to avoid a conflict. The law continues to require the Bureau of Labor and Industries to receive and investigate discrimination complaints and several additional provisions in these rules are updated accordingly.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Enrolled Senate Bill 907 (2023) is available here:  
<https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/SB907>

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

These rule amendments likely have little to no impact on racial equity in this state. Existing rule provisions must be deleted to coincide with the adoption of new rules by the Department of Consumer and Business Services, as described in Enrolled Senate Bill 907 (2023). These amendments to the Bureau's rules are also intended to simplify the rules and make them more accessible by, for example, deleting provisions that duplicate other sources of law. The Bureau does not anticipate that these rule amendments will impact racial equity in this state.

FISCAL AND ECONOMIC IMPACT:

The Bureau does not anticipate that these rule amendments will result in a fiscal impact. Portions of the Bureau's existing rules will be replaced with substantive standards adopted by the Department of Consumer and Business Services. Neither the deletion of the Bureau's existing standards, nor any of the updates to these rules, is likely to result in a fiscal 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).

The rule applies to employees and employers and thus may impact state agencies, units of local government and members of the public in those capacities. According to the U.S. Small Business Administration, there are approximately 400,000 small businesses operating in Oregon. While any of those businesses may need to address hazardous conditions in the workplace pursuant to ORS 654.062, it is unlikely that a substantial number of them will be presented with an actionable fact pattern. Regardless of the frequency with which this issue arises, the substance of the Bureau's rule amendments is unlikely to result in a fiscal or economic impact to employers and employees. All employers, including small businesses, will remain subject to an investigation by the Bureau for violating ORS 654.062(5) and related rules. The rule amendments, however, are unlikely to result in new reporting, recordkeeping or administrative activities or costs. As a consequence, the Bureau does not expect an increase in the costs of professional services, equipment supplies, labor or increased administration in order to comply with these rules.

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

Small businesses have not been involved in the development of these rule amendments to date. Small businesses, as well as the public at large, 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.

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

The primary purpose of the rule amendments is to repeal rule provisions that will be replaced by rules adopted by the Department of Consumer and Business Services. The secondary purpose of the rule amendments is to improve their readability and otherwise update these rules. This invitation for comment from the public at large is likely to efficiently surface suggestions relevant to these purposes.

RULES PROPOSED:

839-003-0031, 839-004-0001, 839-004-0003, 839-004-0016, 839-004-0021

AMEND: 839-003-0031

RULE SUMMARY: Amends rule to clarify filing options and delete provisions duplicated in other rules.

CHANGES TO RULE:

839-003-0031

Filing a Complaint under the Oregon Safe Employment Act (OSEA) ¶¶

(1) An aggrieved person or the aggrieved person's attorney may file a complaint under the Oregon Safe Employment Act, ORS 654.001 to 654.295, 654.412 to 654.423, 654.750 to 654.780 and 654.991 (OSEA), in person or by mail, with the division of Consumer and Business Services (CBS) online, by mail or in person at any Bureau office in the state of Oregon. ¶¶

(2) "Complaint" means a written statement signed by the aggrieved person that: ¶¶

(a) Gives the name and address of the aggrieved person and the respondent; ¶¶

(b) Identifies the protected class activity that forms the basis of the complaint; ¶¶

(c) Is signed by the aggrieved person; ¶¶

(d) Describes the actions complained of, including: ¶¶

(A) The date(s) of occurrence; ¶¶

(B) What the action was and how it harmed the aggrieved person; and ¶¶

(C) The causal connection between the aggrieved person's protected class and the alleged harm. ¶¶

(3) A person alleging discrimination or retaliation for reporting or opposing unsafe or unhealthy work conditions

under ORS 654.062 must contact the division within 90 days of having reasonable cause to believe that such violation has occurred. An employee would have reasonable cause to believe a violation has occurred on the earliest date that the employee:

(a) Believed retaliation had occurred against the employee for opposing employee health and safety hazards; and  
(b) Knew or should have known of the right to file a complaint with the division and of the requirement that the complaint be filed within 90 days of the alleged retaliation.

(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 90-day filing requirement.

(B) If the employer failed to post the required OSEA poster, the 90-day filing requirement will begin on the date the employee learned of the right to file a complaint and of the 90-day filing 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 period as provided in 29 CFR 1977.15 (3) activity and the alleged harm.

Statutory/Other Authority: ORS 659A.805, ORS 651.060

Statutes/Other Implemented: ORS 654.062, ORS 659A.800 - 659A.865

REPEAL: 839-004-0001

RULE SUMMARY: Repeals rule provisions that duplicate statute or other rules.

CHANGES TO RULE:

~~839-004-0001~~

~~Background, Purpose and Scope of the Oregon Safe Employment Act and these Rules~~

~~(1) The Oregon Safe Employment Act (OSEA) includes the statutes described below:¶¶~~

~~(a) ORS 654.001 to .295, providing for safety and health conditions in places of employment, workplace safety committees, hazard communication and hazardous substances, and health and sanitation inspections.¶¶~~

~~(b) ORS 654.412 to .423, providing for safety of health care employees.¶¶~~

~~(c) ORS 654.750 to .780, providing for hazardous chemicals in agriculture.¶¶~~

~~(2) ORS 654.062 provides that:¶¶~~

~~(a) An employee should notify the employer of any violation of law, regulation or standard pertaining to safety and health in the place of employment when the violation comes to the knowledge of the employee.¶¶~~

~~(b) Any employee or representative of the employee may complain of such violation to the Oregon Department of Consumer and Business Services (DCBS) whether or not the employee notifies the employer. DCBS will follow the procedures provided by ORS 654.062(3) and (4).¶¶~~

~~(c) The Civil Rights Division (division) of the Bureau of Labor and Industries has jurisdiction to enforce ORS 654.062(5), which provides that it is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee because that individual has opposed any practice prohibited by OSEA; made any complaint or instituted or caused to be instituted any proceeding under or related to OSEA; testified or is about to testify in any such proceeding or exercised on behalf of the employee, prospective employee or others any right afforded by OSEA.¶¶~~

~~(3) Employees and prospective employees are also protected from discrimination under ORS 654.062(5):¶¶~~

~~(a) By any person, whether or not the person is the employee's or prospective employee's employer;¶¶~~

~~(b) If the employee or prospective employee is perceived to take any protected actions described in subsection (2)(c) of this rule; or¶¶~~

~~(c) If the employee or prospective employee opposed a practice that the employee or prospective employee in good faith believed was prohibited under OSEA.~~

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

~~Statutes/Other Implemented: ORS 654.062(5)~~

AMEND: 839-004-0003

RULE SUMMARY: Amends rule to clarify application and cite to statutory definitions.

CHANGES TO RULE:

839-004-0003

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

~~As defined in used in these rules and ORS 654.00562:¶~~

~~(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 "or  
"discrimination" means to take an adverse action motivated by an employere 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;e's conduct described in  
OAR 839-004-0016, including but not limited to:¶~~

~~(ba) 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; andBarring, discharging or constructively discharging an employee or prospective employee from employment;¶~~

~~(cb) 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  
Treating an employee or prospective employee worse than others in compensation, terms, conditions or privileges of employment:¶~~

~~(c) Demoting, disciplining, failing to promote, reducing pay, furloughing, reducing force, or otherwise taking action that adversely affects the terms, conditions or privileges of employment of an employee or prospective employee; ¶~~

~~(d) Retaliating against or harassing an employee or prospective employee from employment or otherwise; or¶~~

~~(e) Actions ~~discriminates~~ against an employee or prospective employee within 60 days after thebed in (a)-(d) of this section taken against employees 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 ans by any person, whether or not the person is the individual's employer or~~

prospective employee from employment or otherwise discriminates against the employee or prospective employee more than 60 days after the employee or prospective employee 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 the meaning given that term in ORS 654.005.¶

(2) "Employee" has the meaning given that term in ORS 654.005.¶

(3) "Employer" has the meaning given that term in ORS 654.005.¶

(A4) 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 "Oregon Safe Employment Act" or "OSEA" has the meaning given that term in ORS 654.001.¶

(B4) 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 the meaning given that term in ORS 654.005.¶

(5) "Place of employment" has the meaning given that term in ORS 654.005.

Statutory/Other Authority: ~~ORS 654.062(5)~~ 9A.805, ~~ORS 659A.805~~ 1.060

Statutes/Other Implemented: ~~ORS 654.005, ORS 654.062~~, Senate Bill 483, 2021 162

AMEND: 839-004-0016

RULE SUMMARY: Amends rule to allow for implementation of Enrolled Senate Bill 907 (2023) and to clarify terms.

CHANGES TO RULE:

839-004-0016

Scope of Protection under ORS 654.062(5) ¶

(1) ORS 654.062(5) prohibits discrimination against an employee or prospective employee ("~~individual~~") ~~because the individual~~ ~~because the employee or prospective employee:~~ ¶

(a) Made any complaint or instituted or caused to be instituted any proceeding under or related to ~~the Oregon Safe Employment Act (OSEA)~~ OSEA; ¶

(b) Testified or is about to testify in any such proceeding; ¶

(c) Exercised on behalf of the ~~individual~~ employee or prospective employee, or others, any right afforded by OSEA; ¶

(d) Engaged in a practice provided for by OSEA; ~~or~~ ¶

(e) Opposed any practice prohibited by OSEA or which the ~~individual~~ employee or prospective employee in good faith believed was prohibited by OSEA; ~~or~~ ¶

(f) Is perceived to take any actions described in subsections (a) through (e) of this rule. ¶

(2) ORS 654.062(5) does not state to whom or in what manner an ~~individual~~ employee or prospective employee must oppose a practice in order to be protected from discrimination. Protected actions include the ~~individual~~ employee or prospective employee communicating opposition to practices prohibited by OSEA, ~~or which the individual~~ ~~that the employee or prospective employee~~ in good faith believes are prohibited by OSEA, to anyone, including but not limited to: ¶

(a) Coworkers; ¶

(b) Employers; and ¶

(c) Newspapers and other media. ¶

~~(3) The protection of ORS 654.062(5) for opposing practices does not generally extend to an individual refusing to work or walking off the job. However, an individual would have protection under ORS 654.062(5) for such actions if the individual has reasonable cause to believe that:~~ ¶

~~(a) The work, work area, equipment or other factors pose an imminent risk of serious injury or death due to hazardous conditions not inherent in the job; ¶~~

~~(b) There is insufficient time or opportunity, or it would be futile for the individual to inform the employer of the risk factors and request that the employer address them because the employer is not available or denies the risk factors exist or refuses to address the risk factors; and ¶~~

~~(c) There is insufficient time or opportunity to seek assistance from regulatory enforcement authorities. ¶~~

~~(4) ORS 654.062(5) does not protect an employee who refuses to comply with OSEA or the employer's legitimate safety rules.~~

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

Statutes/Other Implemented: ORS 654.062(5)

AMEND: 839-004-0021

RULE SUMMARY: Amends rule to clarify filing obligation and to remove provisions.

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~~SEA may file a complaint with the Bureau of Labor and Industries.¶¶

~~(2)(a) The complaint must be filed with the Bureau~~ within one year after the date on which the aggrieved person ~~employee or prospective employee~~ 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 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~~The employee or prospective employee may establish the date on which the employee or prospective employee had reasonable cause to believe they have been discriminated against based on 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 one year after the alleged discrimination, prospective employee's own statement or other evidence offered by the employee or prospective employee.¶¶

~~(Bb) If the employer failed to post the required OSEA poster, the requirement to contact the division within one year after the alleged discrimination will begin on the date the employee learned of the right to file a complaint and of the 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~~disagrees with the date the employee or prospective employee had reasonable cause to believe they have been discriminated against, 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 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) or prospective employee had reasonable cause at an earlier date.~~¶¶

~~(3)(a) Upon receipt of a complaint the Bureau~~ 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 654.780SEA 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~~b) The employee or prospective employee 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~~Bureau 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)9A.805, ORS 659A.8051.060

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



