

**Oregon Bureau of Labor and Industries****REPORT ON RULEMAKING****Division 4: Implementation of legislation related to activity protected by Oregon Safe Employment Act.****March 14, 2022****Proposed Rule Action:****Permanent Rulemaking:**

Amend Administrative Rules: OAR 839-004-0003, 839-004-0021

Background:

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 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.

Rulemaking Timeline

- Temporary rule filed: **7/19/21**
- Filed Notice with Secretary of State: **12/29/21**
- Notice published in Secretary of State Bulletin: **1/1/22**
- Notice sent to Interested Parties: **1/6/22**
- Notice sent to legislators as applicable: **1/6/22**
- Public Rulemaking Hearing: **1/26/2022 @ 10 a.m.**
- End of Written Comment Period: **1/31/22 @ 5 p.m.**
- Finalize rule and effective date: **4/1/22**

**Summary of Hearing:**

On January 26, 2022 at 10:00 a.m., I convened the rulemaking hearing on the proposed amendments to the rules related to the implementation of legislation related to activity protected by Oregon Safe Employment Act.

There was no one in attendance at the meeting and no public comment was offered. The meeting was adjourned at 10:30 a.m.

The hearing was recorded and available for review.

Public Comment:

BOLI filed notice of the proposed rule and hearing with the Oregon Secretary of State on December 29, 2021 and notified interested parties and legislators on January 6, 2022. BOLI provided four weeks for the public to comment including holding a public hearing on January 26, 2022. In addition, the rule was posted on the rulemaking webpage.

The public comment period closed on January 31, 2022. The agency did not receive any written comment.

Final Action:

Having received no public comment regarding the proposed rule, the recommendation is to adopt the rule as proposed, to be effective on April 1, 2022.

Erin Seiler, Senior Policy Advisor

Enclosures

1. Permanent Administrative Order showing rule changes.

PERMANENT ADMINISTRATIVE ORDER

CHAPTER 839

BUREAU OF LABOR AND INDUSTRIES

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

EFFECTIVE DATE: 04/01/2022

AGENCY APPROVED DATE: 03/17/2022

CONTACT:

Erin Seiler

503-382-7934

erin.seiler@boli.oregon.gov

800 NE Oregon

#1045

Portland,OR 97232

RULES:

839-004-0003, 839-004-0021

AMEND: 839-004-0003

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

RULE SUMMARY: Implementation of 2021 legislation related to activity protected by Oregon Safe Employment Act.

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

AMEND: 839-004-0021

RULE TITLE: Procedures for Complaints; Statutes of Limitation; Private Right of Action; Statutory Construction; Remedies

RULE SUMMARY: Implementation of 2021 legislation related to activity protected by Oregon Safe Employment Act.

RULE TEXT:

(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 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 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 one year after the alleged discrimination.

(B) 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, 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) 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

