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

CHAPTER 839  
BUREAU OF LABOR AND INDUSTRIES

**FILED**

08/02/2023 1:38 PM  
ARCHIVES DIVISION  
SECRETARY OF STATE

FILING CAPTION: Amends rules applicable to the payment of sub-minimum wage.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 09/22/2023 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)**

In 2019, the Legislative Assembly enacted Senate Bill 494, which began the process of phasing out payment of sub-minimum wages to certain individuals with disabilities. Beginning July 1, 2023, these individuals are required to be paid the minimum wage. The legislation left in place the ability of the Commissioner of the Bureau of Labor and Industries to authorize a sub-minimum wage for student learners. These rule amendments are needed to conform to that legislation and eliminate the application process related to the payment of a sub-minimum wage to individuals with a disability.

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

No documents were relied upon in the formulation of these rules.

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

Because these rule amendments are required to conform to statute, it is unlikely that the adoption of the rules will affect racial equity in this state. To the extent the rules do result in a tangible impact, they would likely decrease the possibility that individuals of color with a disability would be inequitably compensated, relative to their peers.

**FISCAL AND ECONOMIC IMPACT:**

Any fiscal impact resulting from the policy change in these rules is a function of the underlying legislation and the resulting inability to pay less than the minimum wage to certain individuals. That is, state statutory law currently prohibits paying a sub-minimum wage to individuals solely because they have a disability. These rule amendments eliminate the prior process by which employers could seek permission to pay a sub-minimum wage to individuals with a disability.

**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).

These rule amendments will not result in an economic impact on state agencies, units of local government or members of the public. Any economic effect is a function of the underlying legislation. (a) All small businesses are subject to the rule amendments. According to the U.S. Small Business Administration Office of Advocacy, there were more than 400,000 small businesses in Oregon in 2022. While the inability to pay individuals with a disability less than minimum wage may impact all business types and industries, that impact is a function of the underlying legislation and the rules themselves do not impose costs. (b) The rule amendments do not impose any new reporting, recordkeeping or administrative activities or costs. Any such activities or costs are a function of the underlying legislation. (c) The rule amendments do not impose any costs of professional services, equipment supplies, labor or increased administration. Any such costs are a function of the underlying legislation.

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

Although small businesses were afforded notice of this rulemaking on the same terms as all others, no small businesses were involved in the development of these rules because the amendments are required by ORS 653.030 and 653.033. Small businesses, as well as the general public, are invited to provide public comment on whether other options should be considered for achieving the rule's substantive goals while reducing the negative economic impact of the rule on business.

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

The rule amendments were required by statute.

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RULES PROPOSED:

839-020-0015, 839-020-1010

AMEND: 839-020-0015

RULE SUMMARY: Amending rule to implement ORS 653.030 and 653.033.

CHANGES TO RULE:

839-020-0015

Fixed Minimum Hourly Wage Rates Lower than the Minimum Wage Rate ¶¶

(1) Pursuant to ORS 653.025 and 653.030 the commissioner will consider the employment of specific types of persons or of individual persons themselves at a fixed minimum hourly wage rate lower than the rate required by 653.025, when the commissioner has determined that the application of these requirements would substantially curtail employment opportunities for the specific types of persons or individuals involved. The types of persons for whom a lower rate may be set upon a showing of good cause as set out below ~~include, but are not limited to, individuals with mental or physical disabilities who cannot perform all of the bona fide job requirements within a reasonable period of time expected of those at the entry level and are limited to~~ student learners as defined in 653.070.¶¶

(2) Rules for the employment of ~~specific named individuals~~ at less than the minimum wage:¶¶

(a) An employer must submit an application for the payment of a fixed minimum hourly wage rate lower than the rate required by ORS 653.025 on a form provided by the commissioner ~~stating~~. The application must specifically identify each student learner for whom the employer seeks to establish the lower rate and must state each and every reason why the employer believes a lower rate should be established. Forms may be obtained ~~at any office~~ off from the Bureau of Labor and Industries;¶¶

(b) The application form must be signed by the employer, the prospective employee and, if the student learner has a legal guardian; or other person legally empowered to act for such employee to whom the lower wage rate is

~~proposed to be paid the student learner, the legal guardian or other person;~~¶

(c) The commissioner may require additional information from the employer or prospective employee to verify the conditions or reasons specified in the application including, but not limited to, medical reports;¶

(d) In considering the application, the Civil Rights Division of the Oregon Bureau of Labor and Industries, or other appropriate governmental agencies may be consulted for technical assistance to reasonably assure that no approval will be granted that will conflict with the rights of workers under other laws;¶

(e) The commissioner will grant the application only when the commissioner has determined that the application of ORS 653.025 would substantially curtail opportunities for employment of the prospective employee named in the application. The application may be granted under such terms and conditions as the commissioner deems appropriate;¶

(f) The commissioner will consider each application on an individual basis and will not grant blanket authorization in advance for a specific type or group of persons unless the conditions set out in section (3) of this rule are met.¶

(3) Rules for general authorization for an employer to employ unnamed individuals with mental or physical disabilities at less than the minimum wage;¶

(a) Under certain circumstances, the commissioner may grant blanket approval for an employer to employ persons with mental or physical disabilities or others when good cause is shown at a fixed minimum hourly wage rate lower than the rate required by ORS 653.025.¶

(b) An employer desiring blanket authority to employ individuals with mental or physical disabilities at less than the minimum wage must apply to the commissioner for such authority;¶

(c) The application should include:¶

(A) The name of the organization;¶

(B) The purpose for which it was created;¶

(C) A detailed statement of the organization and its activities;¶

(D) The method and procedure by which the applicant obtains its employees;¶

(E) A detailed statement of the duties the employees will perform and a description of the end product produced from the performance of such duties;¶

(F) The hours the employees will work;¶

(G) How many individuals it intends to employ under;¶

(d) The commissioner will grant the application only when the commissioner has determined that the application of ORS 653.025 would substantially curtail opportunities for employment of the prospective employee named in the application. The application may be granted under such terms and conditions as the commissioner deems appropriate; and¶

(e) The commissioner will consider each application on an individual basis and will not grant blanket authorization, if granted, and for how long;¶

(H) The rate of pay it will pay such individuals if authorization is granted.¶

(d) The applicant will be required to submit such other information as the commissioner deems necessary;¶

(e) The commissioner will grant the application only when it has determined that the application of ORS 653.025 would substantially curtail opportunities for employment;¶

(f) If the commissioner grants the application the commissioner may do so under such terms and conditions as the commissioner deems appropriate;¶

(g) Employers operating nonprofit rehabilitation programs or organizations which are organized and conducted for the education and training of individuals with mental or physical disabilities, who desire blanket authorization to pay less than the minimum wage required by ORS 653.025, must apply for such authorization to the U.S. Department of Labor, Wage and Hour Division, Federal Office Building, 1111 Third Avenue, Suite 605, Seattle, WA 98101-3212, utilizing the application procedures set out in Title 29, CFR, Part 525. Pursuant to an agreement with the U.S. Department of Labor, the commissioner may review the application material submitted to the U.S. Department of Labor. A certificate issued by the U.S. Department of Labor authorizing the payment of special minimum wage rates under the Fair Labor Standards Act will be deemed by the commissioner to satisfy the requirements of this rule in advance for a specific type or group of persons.¶

[NOTE: Publications referenced are available from the agency.]

Statutory/Other Authority: ORS 183,653653.030, ORS 651.060

Statutes/Other Implemented: ORS 653.030, ORS 653.033

AMEND: 839-020-1010

RULE SUMMARY: Eliminates civil penalty to conform to ORS 653.030 and 653.033.

CHANGES TO RULE:

839-020-1010

Violations for Which a Civil Penalty May Be Assessed ¶¶

(1) The commissioner may assess a civil penalty for any of the following willful violations: ¶¶

(a) Failure to pay the applicable minimum wage for all hours worked in violation of ORS 653.025 and OAR 839-020-0010. ¶¶

(b) Failure to pay overtime for all hours worked over forty (40) in a week in violation of OAR 839-020-0030 or, for domestic workers, failure to pay overtime in violation of ORS 653.547 and OAR 839-020-0030. ¶¶

~~(c) Payment to persons with mental or physical disabilities less than a fixed minimum hourly wage rate which has been approved by the commissioner in violation of ORS 653.030 and OAR 839-020-0015; ¶¶~~

~~(d) Payment to student-learners less than a fixed minimum hourly wage rate which has been approved by the commissioner in violation of ORS 653.030 and 839-020-0015; ¶¶~~

~~(ed) Failure to make required payroll and other records in violation of ORS 653.045, OAR 839-020-0050, 839-020-0080, and 839-020-0082; ¶¶~~

~~(fe) Failure to keep available required payroll and other records in violation of ORS 653.045, OAR 839-020-0050, 839-020-0080, 839-020-0082, and 839-020-0083; ¶¶~~

~~(gf) Failure to supply each of the employer's employees with itemized statements of amounts and purposes of deductions in the manner provided in ORS 652.610 in violation of 653.045, OAR 839-020-0012 and 839-020-0080; ¶¶~~

~~(hg) Failure to keep summaries of ORS 653.010 to 653.261 and rules promulgated thereto by the commissioner posted in a conspicuous and accessible place in or about the premises where such employees are employed in violation of ORS 653.050; ¶¶~~

~~(ih) Discharging or discriminating in any other manner against any employee in violation of ORS 653.060; ¶¶~~

~~(A) Because the employee has made complaint that the employee has not been paid wages in accordance with ORS 653.010 to 653.261; ¶¶~~

~~(B) Because the employee has caused to be instituted or is about to cause to be instituted any proceedings under or relating to ORS 653.010 to 653.261; or ¶¶~~

~~(C) Because the employee has testified or is about to testify in any such proceedings. ¶¶~~

~~(ji) Failure to provide to each employee appropriate meal periods in violation of OAR 839-020-0050; ¶¶~~

~~(kj) Coercing an employee into waiving a meal period in violation of ORS 653.261(5)(b); ¶¶~~

~~(lk) Failure to provide to each employee appropriate rest periods in violation of OAR 839-020-0050; ¶¶~~

~~(ml) Intentional failure to provide a reasonable rest period to accommodate an employee who needs to express breast milk in violation of ORS 653.077 and OAR 839-020-0051; ¶¶~~

~~(nm) Requiring any employee to lift excessive weights in violation of OAR 839-020-0060; ¶¶~~

~~(on) Employing any employee to work under any conditions in violation of OAR 839-020-0065; ¶¶~~

~~(po) Failure to provide a domestic worker who resides in the home of the employer with an uninterrupted rest period of at least eight consecutive hours within each 24-hour period in violation of ORS 653.547 and OAR 839-020-0042(4); ¶¶~~

~~(qp) Failure to provide a domestic worker with a rest period of at least 24 consecutive hours in each work week in violation of ORS 653.547 and OAR 839-020-0052(1); ¶¶~~

~~(rg) Failure to provide a domestic worker not less than three paid personal days off in violation of ORS 653.547 and OAR 839-020-0052(2); ¶¶~~

~~(sr) Failure to pay a domestic worker for personal days off in violation of ORS 653.547 and OAR 839-020-0052(2); ¶¶~~

~~(ts) Requiring or permitting an employee subject to ORS 653.265 to work more hours than permitted under ORS 653.265(2)(a), (b) or (c); ¶¶~~

~~(ut) Requiring or permitting an employee subject to ORS 653.265 to work more than 55 hours in any one workweek without obtaining the employee's request or consent in writing, in violation of ORS 653.265 (2)(b) or (5)(b); ¶¶~~

~~(vu) Permitting an employee subject to ORS 653.265 to work up to the maximum hours permitted by ORS 653.265(2)(c) when the employer is not eligible for an undue hardship exemption; ¶¶~~

~~(wv) Failure to make available to the commissioner, upon request, a copy of an employee's written request or consent as required by OAR 839-020-0417(3) and OAR 839-020-0420(5); or ¶¶~~

~~(xw) Failure to provide notice of the undue hardship period to the commissioner within seven (7) calendar days of~~

the date on which the undue hardship period began. ¶

(2) Except as provided in ORS 653.261(5)(c), ORS 653.265(9)(a), and section (3) of this rule, the civil penalty for any one violation will not exceed \$1,000. The actual amount of the civil penalty will depend on all the facts and circumstances referred to in OAR 839-020-1020. ¶

(3) When the commissioner determines that an employer has violated ORS 653.265 by coercing an employee into consenting to work more than 55 hours in one workweek, the civil penalty shall not exceed:¶

(a) \$2,000 for any one violation if the employer coerced an employee to work more than 55 hours per workweek under ORS 653.265(2)(b); or ¶

(b) \$3,000 for any one violation if the employer coerced an employee to work more than 55 hours per workweek during a period of undue hardship under ORS 653.265(5)(b).¶

(4) For the purpose of section (3) this rule, an employer will be considered to have coerced an employee into consenting to work more than 55 hours in one workweek under the following circumstances:¶

(a) The employer requires an employee to consent in writing to work more than 55 hours per workweek;¶

(b) The employer requires an employee to consent to work more than 55 hours per workweek as a condition of employment at the time of hire; or¶

(c) The employer requests or requires any person, including another employee, to require an employee to consent in writing to work more than 55 hours per workweek.¶

(5) The civil penalties set out in this rule will be in addition to any other penalty assessed or imposed by law or rule. Statutory/Other Authority: ORS 651.060(4), ORS 653.040

Statutes/Other Implemented: ORS Chapter 653, ORS 653.547, ~~OL Ch. 685 (2017)~~ RS 653.265