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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

BLI 13-2021

CHAPTER 839

BUREAU OF LABOR AND INDUSTRIES

FILED

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ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Implementation of House Bill 2818, 2021

EFFECTIVE DATE: 08/06/2021 THROUGH 02/01/2022

AGENCY APPROVED DATE: 08/06/2021

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NEED FOR THE RULE(S):

The Wage Security Fund (WSF) protects Oregon workers from wage loss by paying the final wages of employees when a business closes without sufficient funds to pay final wages. Currently, a worker can only qualify for payment from the WSF if the employer is no longer in business, does not have sufficient funds to pay their final wages, and the wage claim can be verified. The maximum amount which may be paid from the WSF is \$10,000 and is limited to either the amount of wages earned and unpaid in the 60 calendar days immediately before the business closed or the amount of wages earned and unpaid within 60 days of your last day of employment if your claim was filed before the business closed.

During the 2021 Legislative Session, the Legislature passed House Bill 2818 expanding the ability of worker with a wage claim to access payment from the WSF. The measure allows a worker to access the WSF for wages due to a worker from a judgment or a final order issued by the Labor Commissioner regardless of whether the business has ceased business or lacks sufficient assets. The measure had an emergency clause and became effective June 23, 2021.

Current administrative rules are narrowly tailored to limit access to the WSF only to circumstances when the employer is no longer in business and does not have sufficient funds to pay their final wages. In order to implement the measure in accordance with the effective date, the agency needs to issue temporary rules to enable a worker who has a judgment, or a final order issued by the Labor Commissioner, as of the effective date, to access the WSF for the wages they are due.

JUSTIFICATION OF TEMPORARY FILING:

An objective of the legislation is to ensure workers who obtain a judgement or final order can receive swift recovery of the wages due from their employer, while the agency pursues collection from the employer. The collection of wages from an employer is frequently a lengthy process with no guarantee that the wages can ever be collected for a worker, a worker who has suffered significant financial while waiting. Therefore, the agency must adopt temporary rules to ensure that it can implement the measure in accordance with the emergency clause, thus ensuring that workers' eligible

for payment from the WSF can receive the wages they are owed without additional delay and do not suffer further financial harms.

By enacting temporary rules, the agency will have the ability to immediately to implement the measure and mitigate further harms to workers who are owed wages by their employer.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

ORS 651.060(4) - https://www.oregonlegislature.gov/bills_laws/ors/ors651.html

ORS 652 - https://www.oregonlegislature.gov/bills_laws/ors/ors652.html

House Bill 2818, 2021 - <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/HB2818>

RULES:

839-001-0500, 839-001-0510, 839-001-0515, 839-001-0520, 839-001-0550

AMEND: 839-001-0500

RULE TITLE: Definitions for Wage Security Fund Regulations

RULE SUMMARY: Add definition of Final Order and Judgment as temporary rules due to changes implemented in HB 2818

RULE TEXT:

As used in OAR 839-001-0500 to 839-001-0560 unless the context requires otherwise:

- (1) "Assets" include real and personal property of whatsoever nature, excluding such property which the employer has a right to claim exempt.
- (2) "Bureau" means Bureau of Labor and Industries.
- (3) "Commissioner" means the Commissioner of the Bureau of Labor and Industries.
- (4) "Division" means the Wage and Hour Division of the Bureau of Labor and Industries.
- (5) "Employee" has the same meaning given it in ORS 652.310(2), except "employee" does not include a principal officer or director of a corporation who is also a stockholder.
- (6) "Employer" has the same meaning given it in ORS 652.310(1).
- (7) "Final Order" means final agency action expressed in writing as required by OAR 839-050-0420 or OAR 839-050-0430.
- (8) "Fringe Benefits" means the amount of compensation which accompanies or is in addition to a person's regular salary or wages and includes, but is not limited to, payment for profit sharing plans, retirement or pension plans, insurance, sick leave, holidays, severance, or vacation.
- (9) "Fund" means the Wage Security Fund established by ORS 652.409(1); income earned on moneys in the Wage Security Fund, as provided for in 652.409(1); amounts recovered by the Commissioner on wage claims paid out of the "Fund"; and amounts of eligible wage claim payments which are disallowed because of the inability to locate the wage claimant.
- (10) "Judgment" has the definition set forth in ORS 18.005.
- (11) "Promptly," as used in OAR 839-001-0500 to 839-001-0560, means the next regular payday established by the employer, or 35 days from the last payday, whichever is sooner.
- (12) "Successor" means one who follows an employer in ownership or control of a business so far as such employer has

not paid employees in full. A successor employer may be any successor to the business of any employer, or any lessee or purchaser of any employer's business property for the continuation of the same business.

(13) "Wage Claim" has the same meaning given it in ORS 652.320(7). However, in the case of claims against the Fund, "wage claim" refers to actual wages earned only. It does not include any other item of compensation considered to be a fringe benefit, nor does it include any damages, civil penalties or interest otherwise provided by law.

STATUTORY/OTHER AUTHORITY: ORS 652.414(6)

STATUTES/OTHER IMPLEMENTED: ORS 652.414

AMEND: 839-001-0510

RULE TITLE: Eligibility for Wage Payment from the Wage Security Fund

RULE SUMMARY: Incorporates changes to Wage Security Fund implemented in HB 2818

RULE TEXT:

(1) An employee is eligible for the payment of a wage claim from the Fund when the Commissioner makes the following determinations:

- (a) The employer has ceased doing business in Oregon; and
- (b) The employer is without sufficient assets to fully and promptly pay the wage claim at the cessation of doing business; and
- (c) The wage claim cannot otherwise be fully and promptly paid; and
- (d) The wage claim is valid; and
- (e) The amount claimed was earned within 60 days of the date of the cessation of business or if the claimant filed a wage claim before the cessation of business, the amount claimed was earned within 60 days before the last day the claimant was employed.

(2) When the Commissioner obtains a judgment or issues a final order, including an order of determination that has become final, an employee is eligible for the payment of the amount of unpaid wages due pursuant to the judgment or final order from the Fund, except as provided in OAR 839-001-0520(3) and (4).

STATUTORY/OTHER AUTHORITY: ORS 651.060(4), 652

STATUTES/OTHER IMPLEMENTED: ORS 652.414

AMEND: 839-001-0515

RULE TITLE: Factors to Be Considered in Making Determinations Related to Eligibility for Payment from the Wage Security Fund When Employer Has Closed

RULE SUMMARY: Incorporates changes to Wage Security Fund implemented in HB 2818

RULE TEXT:

(1) In determining that an employer has ceased doing business the Commissioner may consider:

- (a) Whether the business premises are no longer occupied by the employer;
- (b) Whether business operations are being conducted;
- (c) Whether customers of the employer are being served;
- (d) Whether the employer is employing employees;
- (e) Any other information indicating whether the business has ceased its operations.

(2) In determining that an employer is without sufficient assets to fully and promptly pay the wage claim at the cessation of business, the Commissioner may consider:

- (a) Whether the debts of the employer exceed the total amount of assets;
- (b) Whether the liquid assets of the employer are not sufficient to pay the wages due;
- (c) Whether the accounts receivable of the employer are not sufficient to pay the wages due;
- (d) Whether the claims of a secured creditor on the assets of the employer would exceed the amount due in wages;
- (e) Whether the employer has filed for protection under the Bankruptcy Code (The filing of bankruptcy in and of itself does not determine the insufficiency of assets.);
- (f) Whether the assets of the employer are in the process of being involuntarily liquidated;
- (g) Any other information indicating that the assets of the employer are insufficient to promptly pay the wage claim at the cessation of business.

(3) In determining that a wage claim cannot otherwise be fully and promptly paid the Commissioner may consider:

- (a) Whether the employee has a right of claim against a bond or deposit held by the employer, which may be used for the purpose of paying wage claims;
- (b) Whether the business is in receivership and the type of receivership;
- (c) Whether there is a successor to the employer's business;
- (d) Any other information indicating that the wage claim cannot otherwise be fully and promptly paid.

(4) In determining that the wage claim is valid the Commissioner may consider:

- (a) Whether there is judgment of the court;
- (b) Whether there is a final administrative order issued pursuant to statute or rule;
- (c) Whether the employer acknowledges the amount of wages owed;
- (d) The results of the Division's investigation of the wage claim;
- (e) Any other information indicating that the wage claim is valid.

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

STATUTORY/OTHER AUTHORITY: ORS 409, OL 1985, Sec. 7(4) (Amended 6/94)

STATUTES/OTHER IMPLEMENTED: ORS 409, OL 1985, Sec., (Amended 6/94)

AMEND: 839-001-0520

RULE TITLE: Amount of Claim to Be Paid from the Wage Security Fund

RULE SUMMARY: Incorporates changes to Wage Security Fund implemented in HB 2818

RULE TEXT:

(1) Except as provided in sections (3) and (4) of this rule, after a wage claim is determined to be eligible for payment from the Fund, the amount to be paid shall be:

- (a) The unpaid amount of wages earned within 60 days before the date of the cessation of business; or
- (b) If the claimant filed a wage claim before the cessation of business, the unpaid amount of wages earned within 60 days before the last day the claimant was employed.

(2) Except as provided in sections (3) and (4) of this rule, when the Commissioner obtains a judgment or issues a final order, including an order of determination that has become final, the amount to be paid from the Fund shall be the amount of unpaid wages due pursuant to the judgment or final order.

(3) The commissioner shall pay the amount of wages earned as provided in sections (1) and (2) only to the extent of \$10,000.

(4) When the amount of a valid wage claim determined to be eligible for payment is greater than the amount available in the Fund for paying such claims, payments on wage claims shall be prorated in accordance with OAR 839-001-0530.

STATUTORY/OTHER AUTHORITY: ORS 651.060(4), 652

STATUTES/OTHER IMPLEMENTED: ORS 652.414, OL CH. 444, 2019

AMEND: 839-001-0550

RULE TITLE: Procedure for Timely and Cost Efficient Method for the Payment of Wages from the Wage Security Fund

RULE SUMMARY: Incorporates changes to Wage Security Fund implemented in HB 2818

RULE TEXT:

(1) When it has been determined that an employer has ceased doing business in Oregon, the Division shall approve or deny payment from the Fund within 30 days of the date the completed wage claim has been filed or the employer has ceased doing business, whichever is later. At the Division's discretion, the 30 day time period may be extended to 45 days.

(2) When the Commissioner obtains a judgment or issues a final order allowing the claimant to be paid from the Fund and the amount due is not due upon demand by the Commissioner, the Division shall approve payment from the Fund within 30 days of the date after all appeals of the judgment or final order have been exhausted or the wage claimant has provided all necessary documents to proceed, whichever is later. At the Division's discretion, the 30 day time period may be extended to 45 days.

(3) Payments from the Fund for wage claims shall be made not less than once in any month.

(4) It is the responsibility of the employee to provide and keep the Division advised of the employee's current mailing address and telephone number and the name, mailing address, and telephone number of another individual who will generally always be able to advise the Division of the employee's whereabouts and current address and phone number.

(5) The Division will mail payments from the Fund to the last known address of the employee as reflected in the Division's records. If the mail is returned, the Division will make one attempt to locate the employee by contacting the individual reflected in the Bureau's records as the person who will generally always know the employee's whereabouts.

(6) If the employee cannot be located within 45 days after the payment was first mailed to the employee's last known current address as reflected in the Division's records, the wage claim shall be disallowed as eligible for payment from the Fund and the amount of the payment shall revert and be irrevocably added back into the Fund.

(7) Notwithstanding the provisions of section (5) of this rule, an employee whose claim has been disallowed because the employee could not be located within the time provided for in section (5) of this rule may refile the wage claim with the Division; provided, however, that such refiled wage claim shall be deemed and treated for all purposes as a newly filed wage claim.

STATUTORY/OTHER AUTHORITY: ORS 652.414(6)

STATUTES/OTHER IMPLEMENTED: ORS 652.414