

House Bill 2413

LC 2638

2019 Regular Session

12/14/18 (TSB/ps)

D R A F T

SUMMARY

Provides that injured worker is eligible for vocational assistance unless average weekly wage exceeds 95 percent of weekly wage paid for employment in which worker was engaged at time of injury. Includes value of employer-paid health insurance benefits in definition of earned income for purposes of determining whether worker is entitled to vocational rehabilitation because worker cannot engage in suitable employment. Provides that for purposes of determining suitable employment, worker's weekly wage must be at least 95 percent of the average weekly wage paid for employment that was worker's regular employment.

Provides that if insurer or self-insured employer approves training program for worker who actively engages in training, insurer or self-insured employer shall pay temporary disability compensation for entire time during which worker is engaged in training program, up to maximum of 21 months.

A BILL FOR AN ACT

1
2 Relating to vocational training benefits related to workers' compensation
3 claim; creating new provisions; and amending ORS 656.340.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 656.340 is amended to read:

6 656.340. (1)(a) [*The*] **An** insurer or self-insured employer shall cause vo-
7 cational assistance **in returning to work** to be provided to an injured
8 worker who is eligible for assistance [*in returning to work*].

9 (b) For [*this*] **the purpose described in paragraph (a) of this sub-**
10 **section**, the insurer or self-insured employer shall contact a worker with a
11 claim for a disabling compensable injury or claim for aggravation for eval-
12 uation of the worker's eligibility for vocational assistance within five days
13 of:

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 (A) Having knowledge of the worker's likely eligibility for vocational as-
2 sistance, from a medical or investigation report, notification from the
3 worker, or otherwise; or

4 (B) The time the worker is medically stationary, if the worker has not
5 returned to or been released for the worker's regular employment or has not
6 returned to other suitable employment with the employer at the time of in-
7 jury or aggravation and the worker is not receiving vocational assistance.

8 (c) [*Eligibility may be redetermined by*] The insurer or self-insured em-
9 ployer [*upon receipt of*] **may redetermine eligibility after receiving** new
10 information that would change the eligibility determination.

11 (2) Contact under subsection (1) of this section [*shall include*] **includes**
12 informing the worker about reemployment rights, the responsibility of the
13 worker to request reemployment, and wage subsidy and job site modification
14 assistance and the provisions of the preferred worker program [*pursuant to*]
15 **under** rules adopted by the Director of the Department of Consumer and
16 Business Services.

17 (3) Within five days after notification that the attending physician or
18 nurse practitioner authorized to provide compensable medical services under
19 ORS 656.245 has released a worker to return to work, the insurer or self-
20 insured employer shall inform the worker about the opportunity to seek re-
21 employment or reinstatement under ORS 659A.043 and 659A.046. The insurer
22 shall inform the employer of the worker's reemployment rights, wage subsidy
23 and the job site modification assistance and the provisions of the preferred
24 worker program.

25 (4) As soon as possible, and not more than 30 days after the contact re-
26 quired by subsection (1) of this section, the insurer or self-insured employer
27 shall cause an individual certified by the director to provide vocational as-
28 sistance to determine whether the worker is eligible for vocational assist-
29 ance. The insurer or self-insured employer shall notify the worker of the
30 decision regarding the worker's eligibility for vocational assistance. If the
31 insurer or self-insured employer decides that the worker is not eligible, the

1 worker may apply to the director for review of the decision as provided in
2 subsection (16) of this section. A worker determined ineligible upon evalu-
3 ation under subsection (1)(b)(B) of this section, or because the worker's el-
4 igibility has fully and finally expired under standards prescribed by the
5 director, may not be found eligible thereafter unless *[that]* **the director re-**
6 **jects the** eligibility determination *[is rejected by the director]* under sub-
7 section (16) of this section or the worker's condition worsens so as to
8 constitute an aggravation claim under ORS 656.273. A worker is not entitled
9 to vocational assistance benefits *[when]* **if** possible eligibility for such bene-
10 fits arises from a worsening of the worker's condition that occurs after the
11 expiration of the worker's aggravation rights under ORS 656.273.

12 (5)(a) The objectives of vocational assistance are to return the worker to
13 employment which is as close as possible to the worker's regular employment
14 at a wage as close as possible to the weekly wage currently being paid for
15 employment which was the worker's regular employment even though the
16 wage available following employment may be less than the wage prescribed
17 by subsection (6) of this section.

18 (b) As used in this subsection and subsection (6) of this section, "regular
19 employment" means:

20 (A) The employment the worker held at the time of the injury or the
21 claim for aggravation under ORS 656.273, whichever gave rise to the poten-
22 tial eligibility for vocational assistance; or[,]

23 (B) For a worker not employed at the time of the aggravation, the em-
24 ployment the worker held on the last day of work prior to the aggravation.

25 (6)(a) A worker is eligible for vocational assistance if the worker will not
26 be able to return to the previous employment or to any other available and
27 suitable employment with the employer **that was the worker's employer**
28 at the time of injury or aggravation, and the worker has a substantial
29 handicap to employment.

30 (b) As used in this subsection:

31 (A) A "substantial handicap to employment" *[exists when]* **means** the

1 worker, because of the injury or aggravation, lacks the necessary physical
2 capacities, knowledge, skills and abilities to be employed in suitable em-
3 ployment.

4 (B) "Suitable employment" means:

5 (i) Employment of the kind for which the worker has the necessary
6 physical capacity, knowledge, skills and abilities;

7 (ii) Employment that is located where the worker customarily worked or
8 is within reasonable commuting distance of the worker's residence; and

9 (iii) Employment that produces a weekly wage [*within 20*] **that is not less**
10 **than 95** percent of [*that*] **the weekly wage that is** currently being paid for
11 employment that was the worker's regular employment as defined in sub-
12 section (5) of this section. The director shall adopt rules providing methods
13 of calculating the weekly wage currently being paid for the worker's regular
14 employment for use in determining eligibility and for providing assistance
15 to eligible workers. If the worker's regular employment was seasonal or
16 temporary, the worker's wage [*shall*] **must** be averaged based on a combi-
17 nation of the worker's earned income and any unemployment insurance pay-
18 ments. Only earned income evidenced by verifiable documentation, such as
19 federal or state tax returns, [*shall*] **may** be used in the calculation. Earned
20 income **includes employer-paid health benefits, but** does not include
21 fringe benefits or reimbursement of the worker's employment expenses.

22 (7) Vocational evaluation, help in directly obtaining employment and
23 training [*shall*] **must** be available under conditions prescribed by the direc-
24 tor. The director may establish other conditions for providing vocational
25 assistance, including those relating to the worker's availability for assist-
26 ance, participation in previous assistance programs connected with the same
27 claim and the nature and extent of assistance that may be provided. Such
28 conditions [*shall*] **must** give preference to direct employment assistance over
29 training.

30 (8) An insurer or self-insured employer may utilize [*its*] **the insurer's or**
31 **self-insured employer's** own staff or may engage any other individual

1 [certified by] the director **certifies** to perform the vocational evaluation re-
2 quired by subsection (4) of this section.

3 (9) The director shall adopt rules providing:

4 (a) Standards for and methods of certifying individuals qualified by edu-
5 cation, training and experience to provide vocational assistance to injured
6 workers;

7 (b) Standards for registration of vocational assistance providers;

8 (c) Conditions and procedures under which the certification of an indi-
9 vidual to provide vocational assistance services or the registration of a vo-
10 cational assistance provider may be suspended or revoked for failure to
11 maintain compliance with the certification or registration standards;

12 (d) Standards for the nature and extent of services a worker may receive,
13 for plans for return to work and for determining when the worker has re-
14 turned to work; and

15 (e) Procedures, schedules and conditions relating to the payment for ser-
16 vices performed by a vocational assistance provider, that are based on pay-
17 ment for specific services performed and not fees for services performed on
18 an hourly basis. Fee schedules [*shall*] **must** reflect a reasonable rate for
19 direct worker purchases and for all vocational assistance providers and
20 [*shall*] **must** be the same within suitable geographic areas.

21 (10) Insurers and self-insured employers shall maintain records and make
22 reports to the director of vocational assistance actions at times and in the
23 manner as the director may prescribe. The requirements prescribed [*shall*]
24 **must** be for the purpose of assisting the Department of Consumer and
25 Business Services in monitoring compliance with this section to insure that
26 workers receive timely and appropriate vocational assistance. The director
27 shall minimize to the greatest extent possible the number, extent and kinds
28 of reports required. The director shall compile a list of organizations or
29 agencies registered to provide vocational assistance. **The director shall**
30 **distribute** a current list [*shall be distributed by the director*] to all insurers
31 and self-insured employers. The insurer shall send the list to each worker

1 with the notice of eligibility.

2 (11) [When] **If** a worker is eligible to receive vocational assistance, the
3 worker and the insurer or self-insured employer shall attempt to agree on the
4 choice of a vocational assistance provider. If the worker agrees, the insurer
5 or self-insured employer may utilize [its] **the insurer's or the self-insured**
6 **employer's** own staff to provide vocational assistance. If [they are unable
7 to] **the worker and the insurer or self-insured employer cannot** agree
8 on a vocational assistance provider, the insurer or self-insured employer
9 shall notify the director and the director shall select a provider. Any change
10 in the choice of vocational assistance provider is subject to the approval of
11 the director.

12 (12) Notwithstanding ORS 656.268, **if an insurer or self-insured em-**
13 **ployer approves a training program for** a worker **who** actively [engaged]
14 **engages** in training, [may receive] **the insurer or self-insured employer**
15 **shall pay** temporary disability compensation for [a maximum of 16 months.
16 *The insurer or self-insured employer may voluntarily extend the payment of*
17 *temporary disability compensation to a maximum of 21 months. The director*
18 *may order the payment of temporary disability compensation for up to 21*
19 *months upon good cause shown by the injured worker.] **the entire time***

20 **during which the worker is engaged in the training program, up to a**
21 **maximum of 21 months.** The costs related to vocational assistance training
22 programs may be paid for periods longer than 21 months, but in no event
23 may temporary disability benefits be paid for a period longer than 21 months.

24 (13) As used in this section, "vocational assistance provider" means a
25 public or private organization or agency that provides vocational assistance
26 to injured workers.

27 (14)(a) Determination of eligibility for vocational assistance does not en-
28 title all workers to the same type or extent of assistance.

29 (b) Training [shall] **may** not be provided to an eligible worker solely be-
30 cause the worker cannot obtain employment, otherwise suitable, that will
31 produce the wage prescribed in subsection (6) of this section unless such

1 training will enable the worker to find employment [*which*] **that** will
2 produce a wage significantly closer to that prescribed in subsection (6) of
3 this section.

4 (c) [*Nothing in*] This section [*shall be interpreted to*] **does not** expand the
5 availability of training under this section.

6 (15) A physical capacities evaluation [*shall*] **must** be performed in con-
7 junction with vocational assistance or determination of eligibility for such
8 assistance at the request of the insurer or self-insured employer or worker.
9 The request [*shall*] **must** be made to the attending physician or nurse prac-
10 titioner authorized to provide compensable medical services under ORS
11 656.245. The attending physician or nurse practitioner, within 20 days of the
12 request, shall perform a physical capacities evaluation or refer the worker
13 for such evaluation or advise the insurer or self-insured employer and the
14 worker in writing that the injured worker is incapable of participating in a
15 physical capacities evaluation.

16 (16)(a) The Legislative Assembly finds that vocational rehabilitation of
17 injured workers requires a high degree of cooperation between all of the
18 participants in the vocational assistance process. Based on this finding, the
19 Legislative Assembly concludes that disputes regarding eligibility for and
20 extent of vocational assistance services should be resolved through nonad-
21 versarial procedures to the greatest extent possible consistent with consti-
22 tutional principles. The director shall adopt by rule a procedure for resolving
23 vocational assistance disputes in the manner provided in this subsection.

24 (b) If a worker is dissatisfied with an action of the insurer or self-insured
25 employer regarding vocational assistance, the worker must apply to the di-
26 rector for administrative review of the matter. Application for review must
27 be made not later than the 60th day after the date the worker was notified
28 of the action. The director shall complete the review within a reasonable
29 time.

30 (c) If the worker's dissatisfaction is resolved by agreement of the parties,
31 the agreement [*shall*] **must** be reduced to writing, and the director and the

1 parties shall review the agreement and either approve or disapprove it. The
2 agreement is subject to reconsideration by the director under limitations
3 prescribed by the director, but is not subject to review by any other forum.

4 (d) If the worker's dissatisfaction is not resolved by agreement of the
5 parties, the director shall resolve the matter in a written order based on a
6 record sufficient to permit review. The order is subject to review under ORS
7 656.704. The request for a hearing must be filed within 60 days of the date
8 the order was issued. At the hearing, the order of the director [*shall*] **may**
9 be modified only if [*it*] **the order**:

10 (A) Violates a statute or rule;

11 (B) Exceeds the statutory authority of the agency;

12 (C) Was made upon unlawful procedure; or

13 (D) Was characterized by abuse of discretion or clearly unwarranted ex-
14 ercise of discretion.

15 (e) For purposes of this subsection, the term "parties" does not include
16 a noncomplying employer.

17 **SECTION 2. The amendments to ORS 656.340 by section 1 of this**
18 **2019 Act apply to claims for compensation that arise before, on or after**
19 **the effective date of this 2019 Act but that have not been closed on or**
20 **before the effective date of this 2019 Act.**

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