

**TEMPORARY FILING  
INCLUDING STATEMENT OF NEED & JUSTIFICATION**

*For internal agency use only.*

Oregon Department of Human Services (ODHS)  
Office of Developmental Disabilities Services (ODDS)

411

Agency and Division Name

Administrative Rules Chapter Number

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**FILING CAPTION**

*(15 words or less)*

ODDS: Standards for Common Law Employers for Personal Support Workers

Agency Approved Date: [ November 18, 2021 ]

Effective Date: [ November 23, 2021 ] through [ May 21, 2022 ]

**RULEMAKING ACTION**

*List each rule number separately (000-000-0000). Attach clean text for each rule at the end of the filing*

**AMEND:**

411-375-0055

**RULE SUMMARY:**

*Include a summary for each rule included in this filing.*

The Oregon Department of Human Services (ODHS), Office of Developmental Disabilities Services (ODDS) is immediately amending OAR 411-375-0055 about Standards for Common Law Employers for Personal Support Workers to specify a Common Law Employer:

- May not discriminate; and
- May make hiring and termination decisions based on the vaccination status of a Personal Support Worker, including COVID-19 vaccination status.

**STATEMENT OF NEED AND JUSTIFICATION**

**Need for the Rule(s):**

ODDS needs to temporarily amend OAR 411-375-0055 about Standards for Common Law Employers for Personal Support Workers to specify a Common Law Employer:

- May not discriminate; and
- May make hiring and termination decisions based on the vaccination status of a Personal Support Worker, including COVID-19 vaccination status.

ODDS needs to proceed by filing temporary rule changes to immediately prevent workforce discrimination against protected classes and allow individuals receiving services to make informed decisions about their health and safety.

**Justification of Temporary Filing:**

Failure to act promptly and temporarily amend OAR 411-375-0055 will result in serious prejudice to individuals receiving developmental disabilities services, Common Law Employers, Personal Support Workers, Community Developmental Disabilities Programs, Brokerages, and ODDS.

Failure to act promptly and temporarily amend OAR 411-375-0055 may fail to prevent discrimination based on protected class and prevent Common Law Employers from creating a healthy and safe environment for individuals receiving services.

OAR 411-375-0055 needs to be temporarily amended to immediately specify a Common Law Employer:

- May not discriminate; and
- May make hiring and termination decisions based on the vaccination status of a Personal Support Worker, including COVID-19 vaccination status.

**Documents Relied Upon, and where they are available:**

None.

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**OREGON DEPARTMENT OF HUMAN SERVICES  
OFFICE OF DEVELOPMENTAL DISABILITIES SERVICES  
OREGON ADMINISTRATIVE RULES**

**CHAPTER 411  
DIVISION 375**

**INDEPENDENT PROVIDERS DELIVERING DEVELOPMENTAL  
DISABILITIES SERVICES**

**411-375-0055 Standards for Common Law Employers for Personal  
Support Workers**

*(Temporary Effective 11/23/2021 - 05/21/2022)*

(1) A common law employer is required when a personal support worker is selected by an individual, or as applicable their legal or designated representative, to deliver supports. Only one common law employer is permitted to be the employer for all personal support workers delivering services to an individual.

(2) The Department, provider agencies, or case management entities may not act as the common law employer for a personal support worker.

(3) The relationship between a personal support worker and an individual, or their designated common law employer, is an employee and employer relationship.

(4) Common law employers do not qualify for any benefits including, but not limited to, financial compensation.

**(5) COMMON LAW EMPLOYER REQUIREMENTS.**

(a) Common law employers may be one of the following:

(A) The individual.

(B) The legal or designated representative of the individual.

(C) A person who is designated by the individual, or as applicable their legal or designated representative, to act as the designated common law employer on behalf of the individual.

(i) A designated common law employer or proxy must sign a Department-approved form affirming the designated common law employer or proxy is able to fulfill the responsibilities, or responsibilities delegated to them, as outlined in subsection (b) of this section.

(ii) A designated common law employer must not have any of the following:

(I) A history of substantiated abuse of an adult as described in OAR 407-045-0250 through 407-045-0370.

(II) A history of substantiated abuse of an adult as described in OAR chapter 411, division 020.

(III) A history of founded abuse of a child as described in ORS 419B.005.

(IV) A conviction of any crime in ORS 443.004.

(iii) A common law employer must not currently be employed as a provider in any capacity for the individual receiving services.

(iv) A common law employer must meet federal and state requirements to enter into an employment relationship.

(v) A common law employer may not have an indictment or conviction of fraud according to 42 CFR 455.23.

(b) Common law employers have the following responsibilities:

(A) Locating, screening, and hiring a qualified personal support worker.

(i) A common law employer may not discriminate on the basis of race, color, religion, sex, gender identity, sexual orientation, national origin, marital status, age, disability, source of income, duration of Oregon residence, or other protected classes under federal and Oregon Civil Rights laws.

(ii) A common law employer may make hiring and termination decisions based on the vaccination status of a personal support worker, including COVID-19 vaccination status.

(B) Assisting in developing a Service Agreement with the case management entity as needed.

(C) Ensuring services are delivered in accordance with the Service Agreement.

(D) Supervising and training the personal support worker.

(E) Scheduling work, leave, and coverage.

(F) Tracking the hours worked and verifying the authorized hours completed by the personal support worker.

(G) Recognizing, discussing, and attempting to correct, with the personal support worker, any performance deficiencies and provide appropriate and progressive disciplinary action as needed.

(H) Notifying the case management entity of any suspected fraud or abuse by the personal support worker.

(I) Discharging an unsatisfactory personal support worker.

(J) Understanding and acting upon correspondence from the Department or the Department's contractors related to their role as the employer.

(c) A common law employer must meet all of the employer responsibilities described in subsection (b) of this section. By January 1, 2021, common law employers must agree to meet the employer responsibilities on a Department approved form.

(d) The Department or case management entity may be required to intervene as described in section (6) of this rule when a common law employer, proxy, or a designated common law employer has demonstrated an inability to meet one or more of the employer responsibilities described in subsection (b) of this section. Indicators that a common law employer, proxy, or a designated common law employer may not be meeting one or more of the responsibilities include, but are not limited to the following:

(A) Complaints to the case management entity or Department from the personal support worker.

(B) Scheduling personal support workers for more time than authorized in the Service Agreement.

(C) Scheduling multiple personal support workers for the same time period without authorization.

(D) Approving time worked without verifying services were delivered as described in the Service Agreement.

(E) Verifying time not actually worked by a personal support worker.

(F) Refusal to verify time worked by a personal support worker for services delivered as described in the Service Agreement.

(G) Complaints to Medicaid fraud involving the common law employer, proxy, or designated common law employer.

(H) Documented observation by the case management entity or Department services are not being delivered as identified in a Service Agreement.

(e) In the event an individual is unable or unwilling to perform the duties of a common law employer and has not already designated a common law employer, the individual, or as applicable their legal or designated representative, must either:

(A) Designate a proxy meeting the requirements of a designated common law employer described in subsection (a)(C) of this section.

(i) A proxy may not be delegated all of the responsibilities of the common law employer.

(ii) The proxy may not perform any common law employer tasks not delegated to the proxy on a Department approved form.

(iii) The employer responsibilities described in section (b) of this rule must be assigned to either the individual common law employer or the proxy on a Department approved form. By January 1, 2021, the individual common law employer and the proxy must agree to fulfill the assigned responsibilities on a Department approved form.

(B) Select a designated common law employer as outlined in subsection (a)(C) of this section.

(f) A designated common law employer must be able to fulfill all of the duties outlined in subsection (b) of this section and may not utilize a proxy.

(g) If an individual is unable to fulfill the responsibilities of a common law employer and is unable to select a proxy or designated common law employer who meets the requirements outlined in subsection (a)(C) of this section, the individual may only select services from providers who are not personal support workers.

(6) INTERVENTION.

(a) For the purposes of this rule, "intervention" means the action the Department or the case management entity requires when a common law employer fails to meet the responsibilities described in section (5)(b) of this rule.

(b) Interventions may include any of the following:

(A) A review of the employer responsibilities described in section (5)(b) of this rule.

(B) Training related to employer responsibilities or referral to a Department approved resource for training.

(C) Corrective action taken as a result of a personal support worker filing a complaint with the Department or the case management entity.

(D) Recommending alternative designation of common law employer responsibilities, such as a new designated common law employer or proxy.

(c) Any intervention initiated by the Department or the case management entity against a common law employer designated prior to October 1, 2016 must include the common law employer accepting, on a Department approved form, the responsibilities outlined in section (5)(b) of this rule.

#### **(7) REMOVAL OF COMMON LAW AND DESIGNATED COMMON LAW EMPLOYERS AND PROXIES.**

(a) The individual, or their legal or designated representative, may remove a designated common law employer or proxy at any time, for any reason. Such an action by the individual, or their legal or designated representative, is not subject to sections (7)(b) through (8) of this rule.

(b) Prior to the removal of any common law employer, designated common law employer, or proxy by the Department or case



management entity, the Department or case management entity must intervene at least once, as described in section (6) of this rule, unless:

(A) There is an imminent danger to the health and safety of the individual receiving services, including any of the following:

(i) Pending charges against or conviction of the designated common law employer or proxy for any crime in ORS 443.004.

(ii) An open protective services case for an allegation of abuse as defined in OAR 407-045-0260 against the designated common law employer or proxy.

(iii) Finding of substantiated abuse of an adult as described in OAR 407-045-0250 through 407-045-0370.

(iv) Finding of substantiated abuse of an adult as described in OAR chapter 411, division 020.

(v) Finding of abuse of a child as described in ORS 419B.005.

(B) There is a credible allegation, indictment, or conviction of fraud according to 42 CFR 455.23.

(C) The common law employer has committed fiscal improprieties.

(c) The Department or case management entity shall remove any designated common law employer or proxy for any violation of section (5)(a)(C)(ii) or subsection (b) of this section.

(d) Any common law employer, designated common law employer, or proxy may be removed by the case management entity or Department for failure to meet the responsibilities of a common law employer as referenced in section (5)(b) after a documented intervention as outlined in section (6) of this rule.

(e) A common law employer, designated common law employer, or proxy, who is removed by the case management entity or Department may not act in any capacity as a common law employer or proxy for any individual receiving Department-funded services effective:

(A) 30 calendar days from the date of removal; or

(B) Immediately if removed for reasons listed under section (5)(b) of this rule.

(f) If a designated common law employer or proxy is removed, the individual, or their legal or designated representative, may select another designated common law employer or proxy. If a designated common law employer or proxy is not selected and the individual is unable or unwilling to serve as their own common law employer, the individual may only select providers who are not personal support workers.

(8) NOTIFICATION OF DESIGNATED COMMON LAW EMPLOYER OR PROXY REMOVAL. The Department or case management entity shall notify the designated common law employer or proxy, the individual and their legal or designated representative (as applicable), and any personal support workers currently employed by the designated common law employer or proxy of the removal of the designated common law employer or proxy.

(9) REQUEST FOR REINSTATEMENT OF COMMON LAW EMPLOYER, DESIGNATED COMMON LAW EMPLOYER, OR PROXY STATUS.

(a) An individual, designated common law employer, or proxy, is eligible to request reinstatement of their previous common law employer status if:

(A) The common law employer was the individual; or

(B) The designated common law employer or proxy no longer meets the criteria in section (7)(b) of this rule or is removed

under section (7)(c) of this rule and the individual or their legal or designated representative agrees to the reinstatement.

(b) Requests for reinstatement:

(A) Must be submitted to the case management entity.

(B) Must include evidence of improvement in the areas for which they were removed. Evidence may include, but is not limited to:

(i) Improvements in health and cognitive functioning; or

(ii) Participation in a Department or case management entity approved training plan.

(C) May be approved by the case management entity when there is evidence of improvement in the ability to perform the responsibilities of being a designated common law employer and the individual agrees with the reinstatement.

(c) A request for reinstatement may not be submitted more than once in a six-month period unless approved by the case management entity.

Stat. Auth.: ORS 409.050

Stats. Implemented: ORS 409.010, 410.600, 410.606-410.619, 427.007