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ARCHIVES DIVISION
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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 471
EMPLOYMENT DEPARTMENT

FILED

11/17/2017 8:12 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Aligning Unemployment Insurance Eligibility Requirements for School Employees with Federal Guidance

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 12/22/2017 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.

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875 Union St NE
Salem, OR 97311

Filed By:
Cristina Koreski
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 12/22/2017

TIME: 2:00 PM - 4:00 PM

OFFICER: Staff

ADDRESS: Oregon Employment
Department Auditorium

875 Union St NE

Salem, OR 97311

SPECIAL INSTRUCTIONS:

Conference Call Line: 888-850-4523

(Passcode # 440528)

NEED FOR THE RULE(S):

On December 22, 2016, the U.S. Department of Labor issued Unemployment Insurance Program Letter 5-17 concerning unemployment insurance (UI) benefit eligibility requirements for employees of educational institutions. The Employment Department is amending the two rules in order to make sure Oregon's definition of the term "reasonable assurance" and other related requirements are consistent with the federal requirements. These amendments to rule may affect employees of educational institutions and their employers but only after an employee has filed a UI claim when the employee loses work through no fault of their own or does not have reasonable assurance to return to work.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

UIPL 5-17. A copy of the letter is available at http://wdr.doleta.gov/directives/attach/UIPL/UIPL_5-17_acc.pdf or from the agency.

Oregon Revised Statutes, available online at www.oregonlegislature.gov or from the agency; and Oregon Administrative Rules, available online at: http://sos.oregon.gov/archives/Pages/oregon_administrative_rules.aspx or from the agency.

FISCAL AND ECONOMIC IMPACT:

All educational institutions and their employees, both public and private, will be subject to the rule. The Employment Department is unable to reliably determine how many educational institutions and their employees the change in rule will impact but, based on data from prior years, estimates that it will impact approximately 200 employees per biennium at an approximate cost of \$1.2 million per biennium in additional unemployment insurance (UI) benefits being paid. The large majority of these payments would be resulting from employers who reimburse UI benefit payments dollar for dollar; therefore the department only anticipates minimal net impact to the UI Trust Fund. Only payments resulting from UI tax-paying private institutions would result in net charges to the UI Trust Fund. The majority of the \$1.2 million will be funded by UI tax-reimbursing institutions.

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).

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

Other than the impact to educational institutions identified in the Fiscal and Economic Impact Statement on this filing, there is no additional cost of compliance for state agencies, units of local governments or the public.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

Small businesses and types of businesses and industries with small businesses that are private educational institutions could be affected by this rule. The Employment Department does not have any reliable way to provide a specific number because this information has not been historically captured by the department, but estimates there is a very small number, if any, of businesses and types of business and industries with small businesses which would be subject to the rule.

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

There is no increase in costs for projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services, as a result of the adoption of this rule.

c. Equipment, supplies, labor and increased administration required for compliance:

There is no increase in costs for equipment, supplies, labor and increased administration required for compliance as a result of the adoption of this rule.

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

Small businesses were not specifically involved in the development of this rule, however, the department will continue

to seek input from small businesses during the public comment and public hearing process.

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

The department does not have an Administrative Rule Advisory Committee. However, as specified under ORS 657.695, the department does have an Employment Department Advisory Council which includes an equal number of employer and employee representatives. Additionally, the Employment Department has been actively engaged with stakeholder groups (e.g. Legislators, school employee union organizations, school board associations, school districts, educational service districts, universities, community colleges, and UI third party administrators). We will continue to seek input from stakeholders during the public comment and public hearing stage for the permanent rule, and seek input from the Employment Department Advisory Council.

RULES PROPOSED:

471-030-0074, 471-030-0075

AMEND: 471-030-0074

RULE SUMMARY: This change in rule clarifies how the following circumstances impact whether or not school employees have reasonable assurance:

- 1) Contracts;
- 2) Academic terms whether or not successive;
- 3) Economic conditions;
- 4) Employment contingencies;
- 5) The totality of circumstances;
- 6) Employees that cross over from, using the federal definitions, "professional" to "nonprofessional" positions and vice versa;
- 7) Academic year; and
- 8) Employees who work for multiple institutions.

The Employment Department requests public comment on whether other options should be considered for achieving the rules substantive goals, while reducing the negative economic impact of the rule on businesses. The agency is holding a public hearing for this rule on Friday, December 22, 2017 from 2:00 p.m. - 4:00 p.m. in the Employment Department Auditorium (875 Union St NE, Salem, OR 97311). Anyone interested in providing the department feedback on the rule is welcome to attend the public hearing in person. If you are unable to attend the hearing in person but want to provide comments on the rule, you have the option of calling the conference line at 888-850-4523 (Passcode # 440528). Written comments may also be submitted via e-mail to OED_Rules@oregon.gov by December 22, 2017 at 5:00 p.m. All comments received will be given equal consideration before the department proceeds with the permanent rulemaking.

CHANGES TO RULE:

471-030-0074

Benefits and Claims: School Employees ¶

(1) An "academic year" is the time frame within 12 months and separated by break periods in which an educational institution, program(s) within an educational institution, or location(s) of an educational institution ordinarily operates to provide courses of study.¶

(2) ORS 657.167 and 657.221 apply only when the individual claiming benefits was not unemployed, as defined by ORS 657.100, during the period immediately preceding relevant period in the preceding academic year or term.

The relevant period is:

(a) The week prior to the holiday, or vacation or recess period. Where period when the week(s) claimed commenced during a holiday or vacation period, the relevant period is the week immediately prior to the holiday or vacation period. Where,

(b) The prior academic year or term when the week(s) claimed commenced during a customary recess period between academic terms or years, unless the relevant period is the academic year or term immediately prior to the recess period is a specific agreement providing for services between regular, but not successive terms.

(c) The last academic year or term when the week(s) claimed commenced during a recess between non-consecutive academic terms or years when there is a specific agreement providing for services between regular, but not successive terms.

(23) The provisions of ORS 657.167 and 657.221 apply irrespectiver regardless of whether or not the individual performed services only during an academic year or in a year-round position.

(4) When an individual performs services for more than one educational institution, any wages earned by the individual working for an institution for which there is a contract or reasonable assurance are excluded from the determination of the individual's weekly and maximum benefit amount during the period between academic year, term or remainder of a term.

(5) In accordance with ORS 657.660, each educational institution shall provide the Employment Department, annually, the time frames for their break, vacation, or holiday periods. Failure to do so will result in a determination based on the shortest established time frames for similar institutions.

Statutory/Other Authority: ORS 657.610

Statutes/Other Implemented: ORS 657.167, 657.221

AMEND: 471-030-0075

RULE SUMMARY: This change in rule clarifies how the following circumstances impact whether or not school employees have reasonable assurance:

- 1) Contracts;
- 2) Academic terms whether or not successive;
- 3) Economic conditions;
- 4) Employment contingencies;
- 5) The totality of circumstances;
- 6) Employees that cross over from, using the federal definitions, "professional" to "nonprofessional" positions and vice versa;
- 7) Academic year; and
- 8) Employees who work for multiple institutions.

The Employment Department requests public comment on whether other options should be considered for achieving the rules substantive goals, while reducing the negative economic impact of the rule on businesses. The agency is holding a public hearing for this rule on Friday, December 22, 2017 from 2:00 p.m. - 4:00 p.m. in the Employment Department Auditorium (875 Union St NE, Salem, OR 97311). Anyone interested in providing the department feedback on the rule is welcome to attend the public hearing in person. If you are unable to attend the hearing in person but want to provide comments on the rule, you have the option of calling the conference line at 888-850-4523 (Passcode # 440528). Written comments may also be submitted via e-mail to OED_Rules@oregon.gov by December 22, 2017 at 5:00 p.m. All comments received will be given equal consideration before the department proceeds with the permanent rulemaking.

CHANGES TO RULE:

471-030-0075

Benefits and Claims: "Reasonable Assurance" Defined ¶¶

~~(1) With respect to the application of ORS 657.167 and 657.221, "reasonable assurance" means a written contract, written notification or any agreement, express or implied, that the employee will perform services immediately follow~~The following must be present before determining whether an individual has a contract or reasonable assurance:¶¶

~~(a) There must be an offer of employment, which can be written, oral, or implied. The offer must be made by an individual with authority to offer employment.¶¶~~

~~(b) The offer of employment during the ensuing academic year or term must be in the same or similar capacity as the service performed during the prior academic year; or term, vacation period or holiday recess which is in the same or similar capacity, unless the economic terms and conditions of the employment in the second year or period are substantially less. The term 'same or similar capacity' refers to the type of services provided: i.e., a professional' capacity as provided by ORS 657.167 or a nonprofessional' capacity as provided by 657.221.¶¶~~

~~(c) The economic conditions of the offer may not be considerably less in the following academic year, term or remainder of a term than the employment in the first year or term. The term 'considerably less' means the employee will not earn at least 90% of the amount, excluding employer paid benefits, than the employee earned in the first academic year or pteriod. A finding of reasonable assurance may be based on the totality of circumstances.¶¶~~

~~(2) As used in this rule, "substantially less" means:¶¶~~

~~(a) The gross weekly wage offered is less than 90% of the gross weekly wage earned m, or in a corresponding term if the employee does not regularly work successive terms (i.e. the employee works spring term each year).¶¶~~

(2) An individual has a contract to perform services during the ensuing academic year, term, or remainder of a term when there is an enforceable, non-contingent agreement that provides for compensation for an entire academic year or on an annual basis.

(3) An individual has reasonable assurance to perform services during the ~~prior~~ ensuing academic year ~~or term~~ which preceded the weeks of unemployment or,

(b) The average number of hours the individual will be working is less than 90% of the average number of hours worked in the prior academic year or term, which preceded the weeks of unemployment, term, or remainder of a term when:

(a) The agreement contains no contingencies within the employer's control. Contingencies within the employer's control include, but are not limited to, the following:

(A) Course Programming;

(B) Decisions on how to allocate available funding;

(C) Final course offerings;

(D) Program changes;

(E) Facility availability; and

(F) Offers that allow an employer to retract at their discretion.

(b) The totality of circumstances shows it is highly probable there is a job available for the individual in the following academic year or term. Factors to determine the totality of the circumstances include, but are not limited to:

(a) For the purpose of this secunding, including appropriations;

(B) Enrollment;

(C) The nature of the course (required or options, employer paid benefits are not to be considered.

(3) With respect to (1) of this rule, "same or similar capacity" refers to the type of services provided: i.e., a "professional" capacity as provided by ORS 657.167 or a "nonprofessional" capacity as provided by 657.221 taught regularly or sporadically);

(D) The employee's seniority;

(E) Budgeting and assignment practices of the school;

(F) The number of offers made in relation to the number of potential teaching assignments; and

(G) The period of student registration.

(c) It is highly probable any contingencies not within the employer's control in the offer of employment will be met.

(4) An individual who voluntarily leaves work for good cause, as defined under OAR 471-030-0038, does not have reasonable assurance with the employer from whom the person left work.

Statutory/Other Authority: ORS 657.610

Statutes/Other Implemented: ORS 657.167, 657.221