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

CHAPTER 471  
EMPLOYMENT DEPARTMENT

**FILED**

12/27/2021 9:22 AM  
ARCHIVES DIVISION  
SECRETARY OF STATE

FILING CAPTION: Amendment of Availability requirements for Unemployment Insurance Benefits

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 01/31/2022 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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Filed By:  
Anne Friend  
Rules Coordinator

HEARING(S)

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

DATE: 01/18/2022

TIME: 4:00 PM - 6:00 PM

OFFICER: Anne Friend

ADDRESS: Virtual

Oregon Employment Department

Director's Office

Salem, OR 97311

SPECIAL INSTRUCTIONS:

Registration instructions will be on our website at:

[oregon.gov/EMPLOY/Agency/Pages/OED%20Administrative%20Rules.aspx](http://oregon.gov/EMPLOY/Agency/Pages/OED%20Administrative%20Rules.aspx)

NEED FOR THE RULE(S)

The rule amendment is needed to ensure the Unemployment Insurance eligibility guidelines are updated to reflect the shift in nature of the workforce economy. On March 8, 2020, the Governor for the State of Oregon, Kate Brown, declared a State of Emergency due to COVID-19. While the state of emergency has ended, COVID-19 outbreaks continue to impact the workforce availability due to childcare and school schedules. The Employment Department believes that this rule will assist people whose availability to work continues to be impacted by these factors, as well as those with underlying conditions that need to limit their exposure to COVID-19. It is also meant to address longer term economic and workforce trends that have changed since the rule was last updated. This rule may impact UI benefit recipients and employers subject to UI taxes and reimbursement obligations. However, this impact is reduced through the tax relief provided for in HB 3389 (2021).

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

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

## FISCAL AND ECONOMIC IMPACT:

The Employment Department anticipates the adoption of this rule may have a fiscal and economic impact to employers that pay into the trust fund and reimbursing employers; this may include small businesses, state agencies, and units of local government. . This impact is reduced, however, through the tax relief provided for in House Bill 3389 (2021). The Department is carefully monitoring the data generated from the implementation of the temporary rule to monitor potential impacts. Currently, the Department estimates an annual impact of \$2,090,000 to the UI Trust Fund. The Department does not anticipate any impact to administrative costs to the agency from this rule amendment.

## Racial Equity Impact:

A commitment to equity acknowledges that not all people, or all communities, are starting from the same place due to historic and current systems of oppression. Equity is the effort to provide different levels of support based on an individual's or group's needs in order to achieve fairness in outcomes. Equity actionably empowers communities most impacted by systemic oppression and requires the redistribution of resources, power, and opportunity to those communities.

While amending our administrative rules for Unemployment Insurance (UI) eligibility requirements, the UI Division looked at the racial equity impact on these administrative rules and answered the question below.

What are the racial equity impacts of this particular rule(s), policy, or decision and who will benefit from or be burdened?

In amending the administrative rules related to UI eligibility, the UI Division has been careful to ensure that we are thinking through the racial inequity that may occur. Due to historic exclusion and racial disparities, it is likely that Black, Indigenous, Latin/o/a/x, Asian, Pacific Islander and other people of color and their businesses, experience discrimination and other barriers in learning about requirements of, and access to governmental and other programs. Also based on history, the UI Division is aware that denial of benefits due to eligibility factors such as lack of access to childcare, lack of access to transportation and other barriers disproportionately impacts Black, Indigenous, Latin/o/a/x, Asian, Pacific Islander and other people of color.

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## 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)):

There are no state agencies, units of local government, or members of the public likely to be economically affected by the rule.

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

a. Estimate the number and type of small businesses subject to the rule:

As of the third quarter of 2021, there are 751,257 employers with 50 employees or less in Oregon that are subject to UI law.

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

The department does not anticipate any change in expected reporting, record keeping and administrative activities and cost required to comply with the rule.

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

The department does not anticipate any increase in costs of professional services, equipment supplies, labor and increased administration required to comply with the rule.

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

OED hosted six public listening sessions to solicit feedback on the proposed rule changes. Targeted outreach to industry associations representing small businesses was also undertaken to increase participation.

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

The department did not consult with an administrative rule advisory committee. The department opted not to conduct one because, as specified under Oregon Revised Statute ORS 657.695, the department has an Employment Department Advisory Council. By law, this council serves to assist in the effective development of policies and programs with respect to unemployment insurance and employment service and is composed of individuals representing employers and employees in equal numbers, and representatives of the public who shall elect their chairperson. That being said, the department did host six listening sessions to solicit feedback from workers, employers and other stakeholders on the proposed rule amendment. The department consulted with the council prior to the filing of this proposed rulemaking notice and will continue to seek input from stakeholders during the public comment period and at the public hearing.

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AMEND: 471-030-0036

RULE SUMMARY: This proposed rule amendment clarifies when workers are considered available to work in order to be eligible to receive Unemployment Insurance benefits.

CHANGES TO RULE:

471-030-0036

Eligibility Factors ¶¶

(1) In considering suitable work factors under ORS 657.190 and for purposes of determining eligibility under 657.155(1)(c), the Director may require an individual to actively seek the type of work the individual is most capable of performing due to prior job experience and training except that:¶¶

(a) If an individual is unable to secure the individual's customary type of work after contacting the potential employers in their labor market ~~where benefits are being claimed~~ or if the individual is unable to meet the requirements of section (3) of this rule, the Director may require the individual to seek less desirable but similar work or work of another type which the individual is capable of performing by virtue of experience and training.¶¶

(b) If the type of work an individual is most capable of performing does not exist in the labor market where the individual is claiming benefits, the Director may require the individual to seek any work that exists in the labor market for which the individual is suited by virtue of experience and training.¶¶

(c) After the individual has contacted the potential employers in the labor market where benefits are being claimed and is still unable to obtain work as described in (1)(a) and (b) of this section, the Director may require the individual to further expand work-seeking activities.¶¶

(2) For the purposes of ORS 657.155(1)(c), an individual shall be considered able to work in a particular week only if physically and mentally capable of performing the work ~~the or she~~ the individual is actually seeking during all of the week except:¶¶

(a) An occasional and temporary disability for less than half of the week shall not result in a finding that the

individual is unable to work for that week; and¶

(b) An individual with a permanent or long-term "physical or mental impairment" (as defined at 29 CFR 1630.2(h)) which prevents the individual from working full time or during particular shifts shall not be deemed unable to work solely on that basis so long as the individual remains available for some work.¶

(3) For the purposes of ORS 657.155(1)(c), an individual shall be considered available for work if, at a minimum, ~~the or she~~individual is:¶

(a) Willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment; and¶

(b) Capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities; and¶

(c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time; and¶

(d) Physically present in the normal labor market area as defined by section (6) of this rule, every day of the week, unless:¶

(A) The individual is actively seeking work outside his or her normal labor market area; or¶

(B) The individual is infrequently absent from the normal labor market area for reasons unrelated to work search, for less than half of the week, and no opportunity to work or referral to work was missed by such absence.¶

(e) However, an individual with a permanent or long-term physical or mental impairment (as defined at 29 CFR 1630.2(h)) which prevents the individual from working full time or during particular shifts shall not be deemed unavailable for work solely on that basis so long as the individual remains available for some work.¶

(f) For the purposes of ORS 657.155(1)(c), an individual is not available for work in any week claimed if:¶

(A) The individual has an opportunity to perform suitable work during the week and fails to accept or report for such work ~~due to illness, injury or other temporary physical or mental incapacity.~~¶

(B) During the week, the individual is incarcerated during any days or hours customary for the type of work the individual is seeking.¶

(i) "Incarcerated" means in custody at a city, county, state, or federal law enforcement or correctional facility to include any "arrest" as defined in ORS 133.005 or a similar law in another state or jurisdiction.¶

(ii) When an individual is in an alternative sentencing facility operated pursuant to a community corrections plan that individual will not be considered unavailable for work solely because of their non-traditional custody.

Alternative sentencing is defined by the jurisdiction responsible for supervision of the suspect or offender.¶

(iii) "Incarcerated" does not include a "stop" as authorized under ORS 131.605 to 131.625.¶

(iv) "Incarcerated" does not mean being involved in questioning by peace officers as part of an investigation where the individual is free to leave and not charged with a crime.¶

(g) An individual will be considered not available for work if ~~the or she~~individual fails or refuses to seek the type of work required by the Director pursuant to section (1) of this rule.¶

(h) Providing the individual is otherwise eligible for benefits pursuant to OAR 471-030-0036(3)(a) through (g), a person who has been found to be qualified for benefits under the provisions of ORS 657.176(2)(f) or (g) or 657.176(9)(b)(A) shall be considered available for work only during weeks in which the individual is enrolled in and participating in a recognized drug or alcohol treatment program if such participation was a condition in the determination to allow benefits. This provision does not apply if the individual has satisfactorily completed the course of treatment in accordance with the terms and conditions of the recognized treatment program.¶

(A) An individual is participating when engaged in a course of treatment through a recognized drug or alcohol rehabilitation program;¶

(B) A recognized drug or alcohol rehabilitation program is a program authorized and licensed under the provisions of OAR chapter 415.¶

(i) An individual is not available for work in any week claimed under ORS 657.155 if the individual resides or spends the major portion of the week:¶

(A) In Canada unless the individual is authorized to work in Canada;¶

(B) In a country not included in the Compact of Free Association with the United States of America; or¶

(C) outside of the United States, District of Columbia or any territory or political division that is directly overseen by the United States federal government; except,¶

(i) If the individual is the spouse or domestic partner of an individual stationed at a military base or embassy located outside the United States;¶

(ii) Job opportunities exist on the military base or embassy for family members of those stationed there;¶

(iii) The individual lives within a reasonable commuting distance to job opportunities at the military base or embassy; and¶

(iv) The individual is willing to accept the conditions and terms of the available employment provided they are not inconsistent with ORS 657.195.¶

(4) Notwithstanding the provisions of OAR 471-030-0036(3), an individual who is the parent, step-parent, guardian or with a circumstance which restricts their court/legally-appointed caretaker availability such as, but not limited to, lack of a child under 13 years of age or of a child with special needs under the age of 18 who requires a level of care over and above the norm for his or her age, who is not willing to or capable of working a particular shift because of a lack of care for that child acceptable to the individual shall be considered caring for an immediate family member or another person in their household, lack of transportation, or attendance in school or training to improve their job skills or long-term employment opportunities, will not be deemed unavailable for work if:

(a) The work the individual is seeking or is otherwise willing to seek is customarily performed during other shifts, days and hours in the individual's normal labor market area as defined by OAR 471-030-0036(6); and

(b) The individual is willing to and capable of working during such shift(s) full time during other days and hours for which they could reasonably expect employers to schedule them.

(5) This section addresses the requirements for actively seeking work, as required under ORS 657.155(1)(c):

(a) Unless the individual is temporarily unemployed, as described in section (b), or a member of a dispatching union, as described in section (c), a federal employee as described in section (d), or otherwise directed by the director or an authorized representative of the Employment Department, they must conduct at least five work-seeking activities per week. Two of the five work-seeking activities must be a direct contact with an employer who might hire the individual.

(A) Work seeking activities include but are not limited to registering for job placement services with the Employment Department, attending job placement meetings sponsored by the Employment Department, participating in a job club or networking group dedicated to job placement, updating a resume, reviewing the newspaper or job placement web sites without responding to a posted job opening, and making direct contact with an employer.

(B) Direct contact with an employer means making contact with an employer in person, by phone, mail, or electronically to inquire about a job opening or applying for job openings in the manner required by the hiring employer.

(b) For an individual who is temporarily unemployed:

(A) They are considered to be actively seeking work when they remain in contact with their regular employer and are capable of accepting and reporting for any suitable work with that employer;

(B) There is a reasonable expectation that they will be returning to work for their regular employer. The work the individual is returning to must be full time or pay an amount that equals or exceeds their weekly benefit amount;

(C) The department will not consider the individual to be temporarily unemployed if they were separated from their employer for reasons other than a lack of work, the work the individual is returning to is not with their most recent employer, or the length the individual is unemployed is longer than the period described in subsection (D) of this section; and

(D) The department will consider that the period for which an individual is temporarily unemployed:

(i) Begins the last date the individual performed services for the employer. In the case of an individual still working for the employer, it is the last date worked during the week in which the individual had earnings less than their weekly benefit amount; and

(ii) Cannot be greater than four weeks between the week the individual became temporarily unemployed and the week the individual returns to work as described in subsection (B) of this section.

(c) For an individual who is a member in good standing of a union that does not allow members to seek non-union work, such individual is actively seeking work by remaining in contact with that union and being capable of accepting and reporting for work when dispatched by that union.

if the union dispatches its members for work. If the union does not allow its members to accept non-union work but does not dispatch their members to available work, the individual must meet the requirements of subsection (a) of this section.

(d) For an individual who is a federal employee temporarily unemployed due to a government shutdown and expects to resume work with their regular employer once the shutdown ends, they are considered to be actively seeking work when they remain in contact with their regular employer and are capable of accepting and reporting for any suitable work with that employer.

(e) For an individual who is filing a continued claim for the first week of an initial or additional claim:

(A) If the individual worked less than full time and remuneration paid or payable to the individual for services performed during the week is less than the individual's weekly benefit amount, each day the individual worked for the employer shall be considered a direct employer contact.

(B) An individual does not meet the requirements of this subsection if the individual performed no work for an employer during the first week of an initial or additional claim; therefore the individual must seek work consistent with subsection (a) of this section.

(ef) In determining whether to modify the requirements in this section for an individual the Employment

Department may consider among other factors, length of unemployment, economic conditions in the individual's labor market and prospective job openings, weather conditions affecting occupations or industries, seasonal aspects of the individual's regular occupation, expected date of return to work in regular occupation, seniority status of individual, registration with a union hiring hall and normal practices for obtaining the type of work which the individual is seeking pursuant to section (1) of this rule. The department shall provide a written copy of the work search requirements to the individual if the individual's work search requirements are modified.¶

(6)(a) An individual's normal labor market shall be that geographic area surrounding the individual's permanent residence within which employees in similar circumstances are generally willing to commute to seek and accept the same type of work at a comparable wage. The geographic area shall be defined by employees of the ~~adjudicating~~ Employment Department office, based on criteria set forth in this section;¶

(b) When an individual seeks work through a union hiring hall, the individual's normal labor market area for the work sought is the normal referral jurisdiction of the union, as indicated by the applicable contract.¶

(7) Nothing in this rule shall prohibit an individual who is a citizen, permanent legal resident, or otherwise legally authorized to work in the United States from seeking work in other labor market areas in any state or country.

Statutory/Other Authority: ORS 657.610

Statutes/Other Implemented: ORS 657.155