

OFFICE OF THE SECRETARY OF STATE  
DENNIS RICHARDSON  
SECRETARY OF STATE  
  
LESLIE CUMMINGS  
DEPUTY SECRETARY OF STATE



ARCHIVES DIVISION  
MARY BETH HERKERT  
DIRECTOR  
  
800 SUMMER STREET NE  
SALEM, OR 97310  
503-373-0701

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

CHAPTER 471  
EMPLOYMENT DEPARTMENT

**FILED**  
10/22/2018 8:49 AM  
ARCHIVES DIVISION  
SECRETARY OF STATE

FILING CAPTION: Update to Unemployment Rule Regarding Separations for Individuals Performing Home Care Services

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 11/30/2018 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.*

CONTACT: Cristina Koreski  
503-947-1471  
cristina.koreski@oregon.gov

875 Union St NE  
Salem, OR 97311, 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: 11/30/2018

TIME: 2:00 PM - 4:00 PM

OFFICER: David Genz

ADDRESS: Employment Department  
Auditorium

875 Union St NE

Salem, OR 97311

SPECIAL INSTRUCTIONS:

Conference line: 888-850-4523

(Passcode # 440528)

NEED FOR THE RULE(S):

The Employment Department is updating the language in the existing rule to be consistent with the changes to ORS 410.619 resulting from the passage of Senate Bill (SB) 1542 in the 2014 Legislative Session. The change in rule is merely codification of policy which has been in practice since 2014.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

The enrolled version of SB 1542 passed in the 2014 Legislative Session. A copy of the bill is available at <https://olis.leg.state.or.us/liz/2014R1/Downloads/MeasureDocument/SB1542/Enrolled> or from the agency.

Oregon Revised Statutes, available online at [www.oregonlegislature.gov](http://www.oregonlegislature.gov), or from the agency; and Oregon Administrative Rules, available online at: [http://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 does not anticipate any fiscal or economic impact from the changes to this rule because the changes do not create any distinct impact separate from the change to statute in the 2014 Legislative Session.

---

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) There is no cost for state agencies, units of local government, or the public to comply with this rule.

(2)(a) There are no small businesses and types of business and industries with small businesses subject to the rule because only a governmental program where a state agency serves as the employer of record for individuals performing home care services will be subject to this change.

(2)(b) 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.

(2)(c) 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. Although the department does not believe any small businesses will be impacted but the rule, the department will seek external input from the public, including 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. The department did not feel it was necessary to consult with one because as specified under ORS 657.695, the department has an Employment Department Advisory Council. The council consists of external stakeholders and includes an equal number of employer and employee representatives. The department will seek input from the council and continue to seek external input during the public comment and public hearing stages of the process.

---

AMEND: 471-030-0038

RULE SUMMARY: The Employment Department is updating the language in the existing rule to be consistent with the changes to ORS 410.619 resulting from the passage of Senate Bill 1542 in the 2014 Legislative Session. The law identified the state as an employer for home care workers employed by the Oregon Home Care Commission, the Department of Human Services, the Oregon Health Authority, an area agency, or a support services brokerage for the purposes of ORS Chapter 657.

CHANGES TO RULE:

471-030-0038

~~Benefits and Claims: Work Separations, Job Referrals and Job Refusals~~ ¶

(1)(a) As used in ORS 657.176(2)(a), (b) and (c) and sections (1) through (5) of this rule the term "work" means the continuing relationship between an employer and an employee. An employment relationship exists even in circumstances where the work performed is not subject employment as set forth in ORS Chapter 657. This section does not apply where no employment relationship exists because the worker is an independent contractor or

operating an independently established business. With the exception of the provisions of ORS 657.221(2)(a), the date an individual is separated from work is the date the employer-employee relationship is severed. In the case of individuals working for temporary agencies, employee leasing companies, or under a governmental program where a state agency serves as the employer of record for individuals performing home care services, the employment relationship shall be deemed severed at the time that a work assignment ends.

(b) In the case of absence due to labor dispute, the employee is separated from work on the date there is a complete dissociation from all participation in the labor dispute and no re-employment rights are claimed.

(c) As used in this rule, "wantonly negligent" means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

(d) As used in this rule, the following standards apply to determine whether an "isolated instance of poor judgment" occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

(e) For purposes of this rule, "compelling family reasons" means:

(A) Domestic violence, as defined in OAR 471-30-0150, which causes the individual reasonably to believe that the individual's continued employment would jeopardize the safety of the individual or a member of the individual's immediate family; or

(B) The illness or disability of a member of the individual's immediate family necessitates care by another and the individual's employer does not accommodate the employee's request for time off; or

(C) The need to accompany the individual's spouse or domestic partner;

(i) To a place from which it is impractical for such individual to commute; and

(ii) Due to a change in location of the spouse's or domestic partner's employment.

(f) As used in OAR 471-030-0150 and this rule, "a member of the individual's immediate family" includes spouses, domestic partners, parents, and minor children under the age of 18, including a foster child, stepchild or adopted child.

(2) The distinction between voluntary leaving and discharge is:

(a) If the employee could have continued to work for the same employer for an additional period of time the separation is a voluntary leaving of work;

(b) If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer the separation is a discharge.

(3)(a) As used in ORS 657.176(2)(a) and (b) a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct.

(b) Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct.

(c) The willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary

to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual.¶

(d) Discharge for "compelling family reasons," when the individual has made the attempt to maintain the employer-employee relationship, is not misconduct.¶

(4) Good cause for voluntarily leaving work under ORS 657.176(2)(c) is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work. For an individual with a permanent or long-term "physical or mental impairment" (as defined at 29 CFR §1630.2(h)) good cause for voluntarily leaving work is such that a reasonable and prudent person with the characteristics and qualities of such individual, would leave work. Except as provided in OAR 471-030-0038(5)(g), for all individuals, the reason must be of such gravity that the individual has no reasonable alternative but to leave work.¶

(5) In applying section (4) of this rule:¶

(a) If an individual leaves work to accept an offer of other work good cause exists only if the offer is definite and the work is to begin in the shortest length of time as can be deemed reasonable under the individual circumstances. Furthermore, the offered work must reasonably be expected to continue, and must pay:¶

(A) An amount equal to or in excess of the weekly benefit amount; or¶

(B) An amount greater than the work left.¶

(b) Leaving work without good cause includes, but is not limited to:¶

(A) Leaving suitable work to seek other work;¶

(B) Leaving work rather than paying union membership dues;¶

(C) Refusing to join a bona fide labor organization when membership therein was a condition of employment;¶

(D) Leaving to attend school, unless required by law;¶

(E) Willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved, so long as such failure is reasonably attributable to the individual;¶

(F) Resignation to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct;¶

(G) Leaving work for self employment.¶

(c) Good cause for voluntarily leaving work while on layoff status shall be determined solely under the provisions of section (4) of this rule without regard to the provisions of subsections (a) and (b) of this section;¶

(d) Reduction in rate of pay: If an individual leaves work due to a reduction in the rate of pay, the individual has left work without good cause unless the newly reduced rate of pay is ten percent or more below the median rate of pay for similar work in the individual's normal labor market area. The median rate of pay in the individual's labor market shall be determined by employees of the Employment Department adjudicating office using available research data compiled by the department.¶

(A) This section applies only when the employer reduces the rate of pay for the position the individual holds. It does not apply when an employee's earnings are reduced as a result of transfer, demotion or reassignment.¶

(B) An employer does not reduce the rate of pay for an employee by changing or eliminating guaranteed minimum earnings, by reducing the percentage paid on commission, or by altering the calculation method of the commission.¶

(C) An employer does not reduce the rate of pay by loss or reduction of fringe benefits.¶

(D) If the Employment Department cannot determine the median rate of pay, the provisions of OAR 471-030-0038(4) apply.¶

(e) Reduction in hours: If an individual leaves work due to a reduction in hours, the individual has left work without good cause unless continuing to work substantially interferes with return to full time work or unless the cost of working exceeds the amount of remuneration received;¶

(f) Where the gravity of the situation experienced by the individual results from his or her own deliberate actions, to determine whether good cause exists, the actions of the individual in creating the grave situation must be examined in accordance with the provisions of section (4) of this rule.¶

(g) Leaving work with good cause includes, but is not limited to, leaving work due to compelling family reasons.¶

(6) As used in ORS 657.176(2)(d) and (e), the term "work" means the performance of services for which

remuneration, compensation or wages is intended to be received or earned. Good cause as used in ORS 657.176(2)(d) and (e) is such that a reasonable and prudent person, exercising ordinary common sense, would refuse to apply for available suitable work when referred by the employment office or accept suitable work when offered by the employer. For an individual with a permanent or long-term "physical or mental impairment" (as defined at 29 CFR Sec. 1630.2(h)) good cause is such that a reasonable and prudent person with the characteristics and qualities of such individual, would refuse to apply for available suitable work when referred by the employment office or accept suitable work when offered by the employer. In determining disqualification under this section, consideration shall be given to suitable work factors and exceptions as set forth in ORS 657.190 and 657.195.¶

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

Statutory/Other Authority: ~~ORS 657.176~~, 657.260, 657.265, 657.610, ORS 657.176

Statutes/Other Implemented: ORS 657.176, ORS 410.619