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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

BLI 3-2018
CHAPTER 839
BUREAU OF LABOR AND INDUSTRIES

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ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Substitute teachers to receive rest and meal periods in same manner as regular teachers.

EFFECTIVE DATE: 02/22/2018 THROUGH 08/20/2018

AGENCY APPROVED DATE: 02/22/2018

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NEED FOR THE RULE(S):

Amendment of existing regulations is necessary to permit a public school district, education service district, or public charter school to provide rest and meal periods to substitute teachers in the same manner as rest and meal periods are provided to regular teachers.

JUSTIFICATION OF TEMPORARY FILING:

While existing wage and hour regulations exempt salaried teachers from the requirements to receive rest and meal periods, substitute teachers who replace a regular teacher are not exempt. Consequently, substitute teachers are required to receive rest and meal periods in a manner that is not consistent with the daily work schedules of the regular teachers whom they are replacing. Failure to take immediate action may result in the noncompliance of public school districts, education service districts, and public charter schools with the rest and meal period provisions, for which civil penalties may be assessed, because educational facilities confront significant obstacles in providing rest and meal periods to substitute teachers in a manner that differs from the daily work schedules of regular teachers. This temporary action will allow public school districts, education service districts, and public charter schools to avoid violations of the rest and meal period provisions while a permanent rule to address this situation is being considered.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Existing administrative rules pertaining to rest and meal periods are available at http://sos.oregon.gov/archives/Pages/oregon_administrative_rules.aspx. Written communication with organizations representing school administrators, educators, and substitute teachers is available from the agency.

AMEND: 839-020-0050

RULE TITLE: Meal and Rest Periods

RULE SUMMARY: Permits a public school district, education service district, or public charter school to provide rest and meal periods to substitute teachers in the same manner as they provide rest and meal periods to regular teachers whom the substitute teachers are replacing.

RULE TEXT:

- (1) The purpose of this rule is to prescribe minimum meal periods and rest periods for the preservation of the health of employees.
- (2)(a) Except as otherwise provided in this rule, every employer shall provide to each employee, for each work period of not less than six or more than eight hours, a meal period of not less than 30 continuous minutes during which the employee is relieved of all duties.
- (b) Except as otherwise provided in this rule, if an employee is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire 30-minute meal period.
- (c) An employer is not required to provide a meal period to an employee for a work period of less than six hours. When an employee's work period is more than eight hours, the employer shall provide the employee the number of meal periods listed in Appendix A of this rule.
- (d) Timing of the meal period: If the work period is seven hours or less, the meal period is to be taken after the conclusion of the second hour worked and completed prior to the commencement of the fifth hour worked. If the work period is more than seven hours, the meal period is to be taken after the conclusion of the third hour worked and completed prior to the commencement of the sixth hour worked.
- (3) If an employer does not provide a meal period to an employee under section (2) of this rule, the employer has the burden to show that:
- (a) To do so would impose an undue hardship on the operation of the employer's business as provided in section (4), and that the employer has complied with section (5) of this rule;
- (b) Industry practice or custom has established a paid meal period of less than 30 minutes (but no less than 20 minutes) during which employees are relieved of all duty; or
- (c) The failure to provide a meal period was caused by unforeseeable equipment failures, acts of nature or other exceptional and unanticipated circumstances that only rarely and temporarily preclude the provision of a meal period required under section (2) of this rule. If an employee is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire 30-minute meal period.
- (4) As used in section (3)(a) of this rule, "undue hardship" means significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business. For the purpose of determining whether providing a meal period requires significant difficulty or expense, the following factors may be considered:
- (a) The employer's cost of complying with the requirement to provide a meal period under section (2) of this rule.
- (b) The overall financial resources of the employer.
- (c) The number of persons employed at the particular worksite and their qualifications to relieve the employee; the total number of persons employed by the employer; and the number, type and geographic separateness of the employer's worksites.
- (d) The effect of providing the meal period required under section (2) of this rule on worksite operations involving: the startup or shutdown of machinery in continuous-operation industrial processes; intermittent and unpredictable workflow not in the control of the employer or employee; the perishable nature of materials used on the job; and the safety and health of other employees, patients, clients or the public.
- (5) When an employer does not provide a meal period to an employee under section (2) of this rule, and is able to make the required showing under section (3)(a) of this rule:
- (a) The employer shall instead provide the employee adequate paid periods in which to rest, consume a meal, and use the restroom; and
- (b) The employer shall first provide to each employee a notice provided by the commissioner of the Bureau of Labor and Industries regarding rest and meal periods in the language used by the employer to communicate with the employee. The employer shall retain and keep available to the commissioner a copy of the notice for the duration of the employee's employment and for no less than six months after the termination date of the employee. Notices that comply with this subsection are available upon request from the bureau. This subsection takes effect on March 16, 2009.
- (6)(a) Except as provided in subsection (b) of this section, every employer shall provide to each employee, for each

segment of four hours or major part thereof worked in a work period, a rest period of not less than ten continuous minutes during which the employee is relieved of all duties, without deduction from the employee's pay.

(A) As the nature of the work allows, the employer shall provide the rest period approximately in the middle of each segment of four hours or major part thereof worked in a work period. When the employee's work period is more than eight hours, the employer shall provide the employee the number of rest periods listed in Appendix A of this rule.

(B) The employer shall provide rest periods in addition to and taken separately from the time provided for a meal period. An employer may not require or allow an employee to add the rest period to a meal period or deduct the rest period from the beginning or end of the employee's work period to reduce the overall length of the work period.

(C) An employer has the burden to show that the employer provided the rest periods required under this section.

(b) An employer is not required to provide a rest period to an employee when all of the following conditions are met:

(A) The employee is 18 years of age or older;

(B) The employee works less than five hours in any period of 16 continuous hours;

(C) The employee is working alone;

(D) The employee is employed in a retail or service establishment, i.e., a place where goods and services are sold to the general public, not for resale; and

(E) The employee is allowed to leave the employee's assigned station when the employee must use the restroom facilities.

(7) The provisions of this rule regarding meal periods and rest periods may be modified by the terms of a collective bargaining agreement if the provisions of the collective bargaining agreement entered into by the employees specifically prescribe rules concerning meal periods and rest periods.

(8)(a) Pursuant to the provisions of ORS 653.261(5), if an employer agrees, an employee may waive a meal period if all of the following conditions are met:

(A) The employee is employed to serve food or beverages, receives tips, and reports the tips to the employee's employer;

(B) The employee is at least 18 years of age;

(C) The employee voluntarily requests to waive the employee's meal periods no less than seven calendar days after beginning employment;

(D) The employee's request to waive the employee's meal periods is in writing in the language used by the employer to communicate with the employee, on a form provided by the commissioner, and is signed and dated by both the employee and employer;

(E) The employer retains and keeps available to the commissioner a copy of the employee's request to waive the employee's meal period during the duration of the employee's employment and for no less than six months after the termination date of the employee;

(F) The employee is provided with a reasonable opportunity to consume food during any work period of six hours or more while continuing to work;

(G) The employee is paid for any and all meal periods during which the employee is not completely relieved of all duties;

(H) The employee is not required to work longer than eight hours without receiving a 30-minute meal period during which the employee is relieved of all duties;

(I) The employer makes and keeps available to the commissioner accurate records of hours worked by each employee that clearly indicate whether or not the employee has received meal periods; and

(J) The employer posts a notice provided by the commissioner regarding rest and meal periods in a conspicuous and accessible place where all employees can view it.

(b) Either the employer or employee may revoke the agreement for the employee to waive the employee's meal periods by providing at least seven (7) calendar days written notice to the other.

(c) Notwithstanding subsection (b) of this section, an employee who has requested to waive meal periods under this section may request to take a meal period without revoking the agreement to waive such periods. The request to take a meal period must be submitted in writing to the employer no less than 24 hours prior to the meal period requested.

- (d) An employer may not coerce an employee into waiving a meal period.
- (e) An employer will be considered to have coerced an employee into waiving the employee's meal period under the following circumstances:
 - (A) The employer requests or requires an employee to sign a request to waive meal periods;
 - (B) An employee is required to waive meal periods as a condition of employment at the time of hire or at any time while employed;
 - (C) The employer requests or requires any person, including another employee, to request or require an employee to waive meal periods; or
 - (D) The employee signs a form requesting to waive meal periods prior to being employed for seven calendar days.
- (f) Employee waiver forms and notices regarding rest and meal periods that comply with this section are available upon request from the bureau.
- (9) Notwithstanding sections (2) and (6) of this rule, a public school district, education service district, or public charter school may provide any person substituting for a regular teacher with the same rest and meal periods to which the regular teacher is entitled under any applicable law, employment contract, policy, or collective bargaining agreement.
- (10) Rest and meal period requirements specific to minors under 18 years of age are provided in OAR 839-021-0072.
- (11) As used in this rule:
 - (a) "Work period" means the period between the time the employee begins work and the time the employee ends work.
 - (b) "Work period" includes a rest period as provided in section (6) of this rule, and any period of one hour or less (not designated as a meal period) during which the employee is relieved of all duties.
 - (c) "Work period" does not include a meal period unless the meal period is paid work time as provided in section (2) or (5) of this rule.

STATUTORY/OTHER AUTHORITY: ORS 651.060(4), 653.040

STATUTES/OTHER IMPLEMENTED: ORS 653