

# Memo

## NOTICE OF PERMANENT RULEMAKING HEARING

**DATE:** September 27, 2019  
**TO:** Legislators and Interested Parties  
**FROM:** Erin Seiler, Senior Policy Advisor  
**RE:** Permanent Rulemaking amending:

### **OAR 839-005-0026 Employment Protections and Rights Relating to Pregnancy**

**RULE CAPTION:**

Amends Employment Protections and Rights Relating to Pregnancy rule to implement OL CH. 139 (2019)

Not more than 15 words that reasonably identify the subject matter of the agency's intended action.

**NOTICE:** On September 26, 2019, the Oregon Bureau of Labor and Industries filed a Notice of Proposed Permanent Rulemaking Hearing, with the Oregon Secretary of State, to amend the above referenced administrative rule related to Employment Protections and Rights Relating to Pregnancy.

Under current law it is unlawful to discriminate against an employee due to pregnancy. Current law requires employers to provide reasonable accommodation to employees who have conditions that substantially limit one or more major life activities. The law has been unclear with regards to employers' obligations for requests for accommodation from employees who may have limitations related to pregnancy, childbirth, or a related medical condition. As women affected by pregnancy, childbirth, or related medical conditions are to be treated the same for all employment-related purposes as others workers not so affected. Thus, if an employer does not make accommodations for other workers, they do not have to make any for pregnant workers.

In 2019, the legislature passed House Bill 2341 clarifying workplace protections for applicants and employees who may have limitations related to pregnancy, childbirth, or a related medical condition. Unless an undue hardship would result, employers with six or more employees must provide reasonable accommodations to known limitations related to pregnancy, childbirth, or other related condition. Employers with six or fewer employees may be eligible for an exemption if they can show that requirements of the law would impose an undue hardship on their business.

The Bureau of Labor and Industries has an administrative rule, OAR 839-005-0026(2), requiring an employer, when judging the physical ability of an individual to work, pregnant women must be treated the same as males, non-pregnant females and other employees with off-the-job illnesses or injuries. This administrative rule is now in conflict with statute because it will prevent an employer from making reasonable accommodations for known limitations resulting from pregnancy.

A public hearing is scheduled for 2:00 p.m. on October 17, 2019 at the Oregon Bureau of Labor and Industries, 800 NE Oregon St. #1045, Portland, OR, 97232.

**The deadline for public comment on the proposed rules is 5:00 p.m. on October 21, 2019.** Members of the public are welcome to submit comments by mail or email prior to this deadline.

**ATTACHMENTS:** Attached are the Notice of Proposed Rulemaking Hearing, the Statement of Need and Fiscal Impact, and a copy of the rules showing the proposed amendments.

**COMMENTS:** Comments may be emailed to Erin Seiler at [erin.seiler@state.or.us](mailto:erin.seiler@state.or.us) or mailed to Erin Seiler c/o BOLI, 800 NE Oregon St. #1045, Portland OR 97232.

OFFICE OF THE SECRETARY OF STATE  
BEV CLARNO  
SECRETARY OF STATE  
  
A. RICHARD VIAL  
DEPUTY SECRETARY OF STATE



ARCHIVES DIVISION  
STEPHANIE CLARK  
INTERIM DIRECTOR  
  
800 SUMMER STREET NE  
SALEM, OR 97310  
503-373-0701

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

CHAPTER 839  
BUREAU OF LABOR AND INDUSTRIES

**FILED**  
09/26/2019 9:47 AM  
ARCHIVES DIVISION  
SECRETARY OF STATE

FILING CAPTION: Amends Employment Protections and Rights Relating to Pregnancy rule to implement OL CH. 139 (2019)

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 10/21/2019 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: Erin Seiler  
503-382-7934  
erin.seiler@state.or.us

800 NE Oregon St. #1045  
Portland, OR 97232

Filed By:  
Erin Seiler  
Rules Coordinator

HEARING(S)

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

DATE: 10/17/2019

TIME: 2:00 PM - 3:00 PM

OFFICER: staff

ADDRESS: Bureau of Labor and  
Industries

800 NE Oregon St. #1045  
Portland, OR 97232

NEED FOR THE RULE(S):

The Oregon Bureau of Labor and Industries filed a Notice of Proposed Permanent Rulemaking Hearing, with the Oregon Secretary of State, to amend the above referenced administrative rule related to Employment Protections and Rights Relating to Pregnancy.

Under current law it is unlawful to discriminate against an employee due to pregnancy. Current law requires employers to provide reasonable accommodation to employees who have conditions that substantially limit one or more major life activities. The law has been unclear with regards to employers' obligations for requests for accommodation from employees who may have limitations related to pregnancy, childbirth, or a related medical condition. As women affected by pregnancy, childbirth, or related medical conditions are to be treated the same for all employment-related purposes as others workers not so affected. Thus, if an employer doesn't make accommodations for other workers, they don't have to make any for pregnant workers.

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employers with six or more employees must provide reasonable accommodations to known limitations related to pregnancy, childbirth, or other related condition. Employers with six or fewer employees may be eligible for an exemption if they can show that requirements of the law would impose an undue hardship on their business.

The Bureau of Labor and Industries has an administrative rule, OAR 839-005-0026(2), requiring an employer, when judging the physical ability of an individual to work, pregnant women must be treated the same as males, non-pregnant females and other employees with off-the-job illnesses or injuries. This administrative rule is now in conflict with statute because it will prevent an employer from making reasonable accommodations for known limitations resulting from pregnancy.

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DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Enrolled House Bill 2341, 2019, available at <https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB2341>

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FISCAL AND ECONOMIC IMPACT:

Any fiscal or economic impact is as a result of the requirements of the newly enacted statutes. The proposed change makes a necessary change to implement House Bill 2341 (2019). The measure requires employers with six or more employees to provide reasonable accommodations to known limitations related to pregnancy, childbirth, or other related condition. Employers with six or fewer employees may be eligible for an exemption if they can show that requirements of the law would impose an undue hardship on their business. To the extent there is an economic effect it is the result of the underlying legislation rather than the rules.

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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) Any fiscal or economic impacts to state agencies or local governments are a result of the requirements of the newly enacted statutes. The proposed change makes a necessary change to implement House Bill 2341 (2019). The measure requires employers with six or more employees to provide reasonable accommodations to known limitations related to pregnancy, childbirth, or other related condition. Employers with six or fewer employees may be eligible for an exemption if they can show that requirements of the law would impose an undue hardship on their business. To the extent there is an economic effect it is the result of the underlying legislation rather than the rules.

The Bureau of Labor and Industries does not expect these rules to have a direct fiscal or economic impact on members of the general public.

(2)(a) All employers in Oregon are subject to the rule.

(b) None. The proposed amendment imposes no additional requirements on Oregon employers. To the extent there is an impact, it is the result of the

underlying legislation rather than the rules.

(c) None. The proposed amendment imposes no additional requirements on Oregon employers. To the extent there is an impact, it is the result of the underlying legislation rather than the rules.

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

No small businesses were involved in the development of the amendment to the rule.

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

An Advisory Committee was not appointed for the drafting of this rule because the amendment resolves a conflict with a statute amended by HB 2341 (2019).

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AMEND: 839-005-0026

RULE SUMMARY: Implements changes made by HB 2341 (2019): Deletes language that would prevent an employer from providing reasonable accommodations for pregnant women.

CHANGES TO RULE:

839-005-0026

Employment Protections and Rights Relating to Pregnancy ¶¶

(1) Pregnant women are protected from sex discrimination in employment.¶¶

~~(2) In judging the physical ability of an individual to work, pregnant women must be treated the same as males, non-pregnant females and other employees with off-the-job illnesses or injuries.¶¶~~

~~(3) The statutes prohibit discrimination regarding employee and dependent spouse or domestic partner benefits for pregnancy when employee and dependent spouse or domestic partner benefits exist for other medical conditions.¶¶~~

(43) Women needing to be absent from work because of pregnancy or childbirth may have rights under the Oregon Family Leave Act, as provided in ORS 659A.150 to 659A.186 and OAR 839-009-0200 to 839-009-0320.

Statutory/Other Authority: ORS 659A.805

Statutes/Other Implemented: ORS 659A.029, 659A.030, 659A.150-.186, OL CH. 139 (2019)