

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 839-008-0015 Bona Fide Factors that May Be Considered in Paying Employees
Performing Work of Comparable Character at Different
Compensation Levels**

RULE CAPTION:

Repeals definition of “system” to implement OL CH. 617 (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 regarding pay equity.

The Oregon Legislature passed the Oregon Equal Pay Act (the Act) in 2017, which expanded existing equal pay laws based on sex. Effective January 1, 2019, it became an unlawful employment practice to discriminate between employees or applicants in the payment of compensation based on race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, or age. The law provided employers the ability to pay employees for work of comparable character at different compensation levels if all of the differences in compensation levels are based on a bona fide factor related to the position.

In 2019, the legislature passed Senate Bill 123, which made a few specific amendments to the Act. The measure established a statutory definition of “system” for determining pay rates; expressly recognizes that bona fide factors supporting a pay differential may be contained in a collective bargaining agreement; modifies defense against compensatory and punitive damages by eliminating obligation of the employer to review pay freezes; and clarifies that it is not a violation of the Act for an employer to pay a different level of compensation to an employee who is performing modified work.

Prior to the passage of SB 123, “system” was defined only in the administrative rules adopted by the Bureau of Labor and Industries when implementing the original legislation. By defining “system” in statute, the definition of “system” in OAR 839-008-0015(2) needs to be repealed because it conflicts with statute and is beyond the rulemaking authority allowed by the statute the Bureau of Labor and Industries has been authorized to implement.

This Notice of Proposed Permanent Rulemaking does not make any other changes to Chapter 839, Division 8 – Pay Equity rules.

A public hearing is scheduled for 12:00 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 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 9:46 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Repeals definition of "system" to implement OL CH. 617 (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 #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: 12:00 PM - 1:00 PM

OFFICER: staff

ADDRESS: Bureau of Labor and
Industries

800 NE Oregon St. #1045
Portland, OR 97232

NEED FOR THE RULE(S):

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modified work.

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This Notice of Proposed Permanent Rulemaking does not make any other changes to Chapter 839, Division 8 – Pay Equity rules.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Enrolled Senate Bill 123, 2019, available at <https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB123>

FISCAL AND ECONOMIC IMPACT:

No economic or fiscal impact.

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) No economic or fiscal impact upon state agencies or local governments.

The Bureau of Labor and Industries does not anticipate amending the rule will result in an economic or fiscal impact upon businesses.

The Bureau of Labor and Industries does not anticipate amending the rule will have a direct fiscal or economic impact on members of the general public.

(2)(a) All employers in Oregon are subject to the Oregon Equal Pay Act.

(b) None. The proposed amendment imposes no additional requirement on Oregon employers.

(c) None. The proposed amendment imposes no additional requirement on Oregon employers.

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.

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

An Advisory Committee was not consulted because the amendment to the rule resolves a conflict with a statute amended by Senate Bill 123 (2019).

AMEND: 839-008-0015

RULE SUMMARY: Implements changes made by OL. CH. 617 (2019): Repeals definition of "system".

CHANGES TO RULE:

839-008-0015

Bona Fide Factors that May Be Considered in Paying Employees Performing Work of Comparable Character at Different Compensation Levels

(1) Pursuant to ORS 652.220(2), employees may receive different levels of compensation for work of comparable character if the entire compensation differential is based on one or more bona fide factors related to the position in question. The bona fide factors that may be considered in determining the compensation differential between individuals are as follows:¶¶

(a) A seniority system that recognizes and compensates employees based on length of service with the employer. A seniority system utilized by an employer may be considered as a bona fide factor by the employer's successor in interest, as defined by OAR 839-005-0014;¶¶

(b) A merit system that provides for variations in pay based upon employee performance as measured through job-related criteria, for example, a written performance evaluation plan or policy that measures employee performance using a set numerical or other established rating scale, such as from "unsatisfactory" to "exceeds expectations," and takes employees' ratings into account in determining employee pay rates; ¶¶

(c) A system that measures earnings by quantity or quality of production, including piece rate work;¶¶

(d) Notwithstanding any other applicable federal, state or local laws, workplace location considerations may include, but are not limited to, the following: ¶¶

(A) Cost of living;¶¶

(B) Desirability of worksite location; ¶¶

(C) Access to worksite location;¶¶

(D) Minimum wage zones; or¶¶

(E) Wage and hour zones. ¶¶

(e) Necessary and regular travel;¶¶

(f) Education considerations may include, but are not limited to, substantive knowledge acquired through relevant coursework, as well as any completed certificate or degree program; ¶¶

(g) Training considerations may include, but are not limited to, on-the-job training acquired in current or past positions as well as training acquired through a formal training program; ¶¶

(h) Experience considerations include, but are not limited to, any relevant experience that may be applied to the particular job; or¶¶

(i) Any combination of the factors described in subsections (a)-(h) of this section, if the combination of those factors accounts for the entire compensation differential.¶¶

~~(2) As used in subsections (1)(a)-(c) of this rule, "system" means a devised coherent, consistent, verifiable and reasonable method that was in use at the time of the alleged violation to identify, measure and apply appropriate variables in an orderly, logical and effective manner.~~

Statutory/Other Authority: ORS 659A.805

Statutes/Other Implemented: OL CH. 617 (2019), ORS 652.220