

# 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 839-006-0206 Disability and Employment Rights: Reasonable Accommodation**

**RULE CAPTION:**

Amends Disability and Employment Rights rules to implement OL CH. 71 (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 unlawful employment practices regarding the failure of employer to provide reasonable accommodations to an employee or applicant with a disability arising out of transsexualism.

The American with Disabilities Act (ADA) prohibits discrimination against individuals with disabilities in employment. State law parallels the ADA, requiring reasonable accommodations be made by employers for employees with disabilities. Oregon law recognizes reasonable accommodations as making existing facilities accessible and usable; restructuring a job schedule; acquiring or modifying equipment or devices; adjustment of examinations, training materials, or policy; or providing interpreters or readers. In addition, Oregon law specified that an employer may not be found to have engaged in an unlawful employment practice solely because the employer failed to provide reasonable accommodation to an individual with a disability arising out of transsexualism.

In 2019, the Oregon Legislature passed House Bill 2589 which made specific updates to employment discrimination statutes. The measure specified that sexual orientation is not a physical or mental impairment for purposes of employment discrimination statutes and repealed the statutory provision that failure to provide reasonable accommodations for individual with disability arising out of transsexualism is not an unlawful employment practice.

The Bureau of Labor and Industries has an administrative rule, OAR 839-006-0206(8), which mirrors the language related to unlawful employment practices repealed by HB 2589, therefore the rule needs to be repealed because it is now in conflict with statute.

A public hearing is scheduled for 11:00 a.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 9:46 AM  
ARCHIVES DIVISION  
SECRETARY OF STATE

FILING CAPTION: Amends Disability and Employment Rights rules to implement OL CH. 71 (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: 11:00 AM - 12:00 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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DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Enrolled House Bill 2589, 2019, available at  
<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB2589>

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FISCAL AND ECONOMIC IMPACT:

No economic or fiscal impact.

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

None. The Bureau of Labor and Industries does not anticipate amending the rule will result in an economic or fiscal impact upon businesses.

None. 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 rule.

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

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

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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 2589 (2019).

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AMEND: 839-006-0206

RULE SUMMARY: Implements changes made by HB 2589 (2019): Repeals rule that an employer may not be found to have engaged in an unlawful employment practice solely because the employer fails to provide reasonable accommodation to an employee or applicant with a disability arising out of transsexualism.

CHANGES TO RULE:

839-006-0206

Disability and Employment Rights: Reasonable Accommodation ¶¶

(1) "Reasonable Accommodation" means modifications or adjustments:¶¶

(a) To a job application process that enable a qualified applicant with a disability to be considered for the position;¶¶

(b) To the work environment, or to the manner or circumstances under which a position is customarily performed, that enable a qualified employee or applicant with a disability to perform the position's essential functions; or¶¶

(c) That enable a qualified employee or applicant with a disability to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated employees without a disability.¶¶

(2) Reasonable accommodation of a qualified employee or applicant with a disability may include, but is not limited to:¶¶

(a) Making existing facilities used by employees readily accessible to and usable by an employee with a disability;¶¶

(b) Providing job restructuring, such as part-time or modified work schedules or reassignment to vacant positions;¶¶

(c) Acquiring or modifying equipment or devices;¶¶

(d) Appropriately adjusting or modifying examinations, training materials or policies;¶¶

(e) Providing qualified readers or interpreters; or¶¶

(f) Providing a leave of absence.¶¶

(3) Failure of an employer to make reasonable accommodation to the known physical or mental limitations of a qualified employee or applicant with a disability who requests reasonable accommodation or otherwise discloses to the employer a disability that may require reasonable accommodation, will be found to be prohibited discrimination unless the employer can demonstrate that reasonable accommodation would impose an undue hardship on the business of the employer. Undue hardship is defined at ORS 659A.121.¶¶

(4) Once a qualified employee or applicant with a disability has requested reasonable accommodation or otherwise disclosed to the employer a disability that may require reasonable accommodation, the employer has a duty to initiate a meaningful interactive process with the employee or applicant to determine whether reasonable accommodation would allow the employee or applicant to perform the essential functions of a position held or sought.¶¶

(5) A meaningful interactive process is an informal process between a qualified employee or applicant with a disability and an employer in an effort to identify potential reasonable accommodation.¶¶

(a) An interactive process between an employee or applicant with a disability and an employer, that readily identifies mutually agreeable reasonable accommodation, is a meaningful interactive process.¶¶

(b) When reasonable accommodation is not readily identifiable, a meaningful interactive process identifies the nature of the limitations resulting from the disability, relevant to potential reasonable accommodation that could allow the employee or applicant to perform the essential functions of the job.¶¶

(6) A meaningful interactive process is a mandatory step in the reasonable accommodation of a qualified employee or applicant with a disability. Failure of an employer to engage in a meaningful interactive process with a qualified employee or applicant with a disability who has requested reasonable accommodation or has otherwise disclosed to the employer a disability that may require reasonable accommodation is a failure to reasonably accommodate in violation of ORS 659A.112(2)(e) and:¶¶

(a) The employer may be found liable for remedies described in OAR 839-003-0090(5) regardless of whether reasonable accommodation would have been possible; and¶¶

(b) The employer may also be found liable for any other remedies described in OAR 839-003-0090 if reasonable accommodation would have been possible.¶¶

(7) An employer is not required to provide a reasonable accommodation to an individual who meets only the criterion of being regarded as having a physical or mental impairment that substantially limits one or more major life activities.¶¶

~~(8) An employer may not be found to have engaged in an unlawful employment practice solely because the employer fails to provide reasonable accommodation to an employee or applicant with a disability arising out of transsexualism. However, an employer may not:~~

~~(a) Refuse to hire an applicant or promote an employee;~~

~~(b) Bar or discharge an employee or applicant from employment; or~~

~~(c) Discriminate in compensation, terms, conditions or privileges of employment because an employee or applicant is transsexual when the employee or applicant is otherwise qualified.~~

Statutory/Other Authority: ORS 659A.805

Statutes/Other Implemented: OL CH. 71(2019), ORS 659A.103 - 659A.142