

# 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 839-020-0051 Rest Periods for Expression of Milk**

**RULE CAPTION:**

Amends Rest Periods for Expression of Milk rules to implement OL CH. 118 (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 rest periods for expression of milk.

In 2019, the Oregon Legislature passed House Bill 2593 which expanded the protections for employees with a need to express milk. The measure made several changes to the current statute: Removed limitations on frequency and duration of rest periods employer must provide employee to express milk; limited ability to claim undue hardship to employers who have 10 or fewer employees; and extended requirements to all employers by removing exemption for employers with fewer than 25 employees.

The Bureau of Labor and Industries administrative rules related to rest periods for the expression of milk included language that directly mirrored statutory language repealed by HB 2593 and limited application the law to covered employers. Therefore, the proposed amendments to the current rules regarding rest periods for expression of milk are only for the purpose of aligning directly with the statutory changes.

A public hearing is scheduled for 1:00 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 Rest Periods for Expression of Milk rules to implement OL CH. 118 (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: 1:00 PM - 2:00 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 regarding rest periods for expression of milk.

In 2019, the Oregon Legislature passed House Bill 2593 which expanded the protections for employees with a need to express milk. The measure made several changes to the current statute: Removed limitations on frequency and duration of rest periods employer must provide employee to express milk; limited ability to claim undue hardship to employers who have 10 or fewer employees; and extended requirements to all employers by removing exemption for employers with fewer than 25 employees.

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DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Enrolled House Bill 2593, 2019, available at:

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB2593>

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FISCAL AND ECONOMIC IMPACT:

Any fiscal or economic impact is a result of the requirements of the newly enacted statutes. The proposed rules only make the necessary changes to implement House Bill 2593 (2019). The measure removed limitations on frequency and duration of rest periods employer must provide employee to express milk; limited ability to claim undue hardship to employers who have 10 or fewer employees; and extended requirements to all employers by removing exemption for employers with fewer than 25 employees. 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 impact on state agencies or local government is a result of the requirements of the newly enacted statutes. The proposed rules only make the necessary changes to implement House Bill 2593 (2019). The measure removed limitations on frequency and duration of rest periods employer must provide employee to express milk; limited ability to claim undue hardship to employers who have 10 or fewer employees; and extended requirements to all employers by removing exemption for employers with fewer than 25 employees. 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 requirements of the rules.

(b) None. The proposed amendments impose 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 amendments impose 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 proposed amendments to these rules.

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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 these rules because the amendments only remove or

update administrative rules in order to align directly with the statutory changes in HB 2593 (2019).

AMEND: 839-020-0051

RULE SUMMARY: Implements changes made under HB 2593 (2019): Removes limitations on frequency and duration of rest periods employer must provide employee to express milk; limits ability to claim undue hardship to employers who have 10 or fewer employees; extends requirements to all employers by removing exemption for employers with fewer than 25 employees.

CHANGES TO RULE:

839-020-0051

Rest Periods for Expression of Milk ¶¶

~~(1) ORS 653.077 applies to employers who employ 25 or more employees in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which the rest periods are to be taken or in the year immediately preceding the year in which the rest periods are to be taken.¶¶~~

~~(2) ORS 653.077 requires a covered~~ requires employers to provide reasonable rest periods to accommodate an employee who needs to express milk for her child 18 months of age or younger. Any employer not covered by 653.077 and these rules may provide rest periods or other accommodation for expression of milk pursuant to its own policies or by agreement or contract with employees.¶¶

~~(a) A "reasonable rest period," unless otherwise agreed to by the employer and the employee, is no less than 30 minutes during each 4-hour work period, or major part of a 4-hour work period, to be taken by the employee approximately in the middle of each work period.~~ the employee's child 18 months of age or younger. ¶¶

~~(Aa) If feasible, the employee will take the rest periods to express milk at the same time as the rest periods or meal periods that are otherwise provided to the employee. If not feasible, the employee is entitled to take an unpaid rest period of up to 30 additional minutes during each 4-hour period.~~ each time the employee has a need to express milk.¶¶

~~(Bb) If the employer is required by law or contract to provide the employee with paid rest periods, the employer will treat the rest periods used by the employee for expressing milk as paid rest periods, up to the amount of time the employer is required to provide as paid rest periods.¶¶~~

~~(Cc) If an employee takes unpaid rest periods, the employer may, but is not required to, allow the employee to work before or after the employee's normal shift to make up the amount of time used during the unpaid rest periods. If the employee does not work to make up the amount of time used during the unpaid rest periods, the employer is not required to compensate the employee for that time.¶¶~~

~~(Dd) A covered~~ employer may not require an employee, including an employee who is FLSA exempt, to substitute paid leave time for unpaid rest periods provided in compliance with these rules.¶¶

~~(be) As used in ORS 653.077 and this rule, "expression of milk" means the initiation of lactation by manual or mechanical means and does not include breastfeeding. However, any employer may accommodate breastfeeding pursuant to its own policies or, by agreement or contract with employees, or as required under ORS 659A.¶¶~~

~~(32) An employer subject to ORS 653.077 will make a reasonable effort to provide the employee with a private location within close proximity to the employee's work area to express milk.¶¶~~

~~(a) As used in ORS 653.077 and this rule, a "private location" is a place, other than a public restroom or toilet stall, in close proximity to the employee's work area for the employee to express milk concealed from view and without intrusion by other employees or the public and includes, but is not limited to:¶¶~~

~~(A) The employee's work area if the work area permits the employee to express milk concealed from view and without intrusion by other employees or the public.¶¶~~

~~(B) A room connected to a public restroom, such as a lounge, if the room allows the employee to express milk concealed from view and without intrusion by other employees or the public.¶¶~~

~~(C) A child care facility where the employee can express milk concealed from view and without intrusion by other employees or the public.¶¶~~

(D) An empty or unused office, conference room, or a storage space, so long as there is a door that closes and any windows can be covered, and there is a sign that can be placed on the door or handle of the door indicating that the room is in use.¶

(b) As used in ORS 653.077 and this rule, a "public restroom" is a restroom freely available for use by employees or the general public that does not include an attached lounge or room that allows an employee to express milk concealed from view and without intrusion by other employees or the public. A "toilet stall" includes a restroom that contains one toilet, whether or not in plain view, and whether or not the restroom locks from the inside.¶

(c) As used in ORS 653.077 and this rule, "close proximity" means within walking distance from the employee's work area that does not appreciably shorten the rest or meal period.¶

(d) If a private location is not within close proximity to the employee's work area, the employer may not include the time taken to travel to and from the location as part of the break period.¶

~~(43) A covered employer with ten (10) or fewer employees~~ is not required to provide rest periods under this section if to do so would impose an undue hardship on the operation of the employer's business. As defined in ORS 653.077, "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 rest periods for expression of milk requires significant difficulty or expense, the following factors will be considered:¶

(a) The nature and the cost of complying with the requirement to provide a reasonable rest period for the expression of milk.¶

(b) The overall financial resources of the ~~covered~~ employer's facility or facilities involved in complying with the requirement to provide a reasonable rest period for the expression of milk, the number of persons employed at the facility and the effect on expenses and resources or other effects on the operation of the facility caused by the necessity for compliance with the requirement to provide a reasonable rest period in a private location.¶

(c) The overall financial resources of the ~~covered~~ employer, the overall size of the ~~covered~~ employer's business with respect to the number of its employees and the number, type and location of the ~~covered~~ employer's facilities.¶

(d) The type of operations conducted by the ~~covered~~ employer, including the composition, structure and functions of the workforce of the employer and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the ~~covered~~ employer.¶

~~(54) A~~ When possible, an employee who intends to express milk during work hours must give the employer reasonable oral or written notice of ~~the~~ the employee's intention to allow the employer time to make the preparations necessary for compliance with ORS 653.077 and these rules.¶

~~(6) A covered~~ Failure to give notice is not grounds for discipline.¶

(5) An employer must notify all employees, through its policies or other means, of the person or entity to whom an employee should give notice of intent to express milk. If the employer does not provide such notification, the employee's oral or written notice to a supervisor, manager, or human resource or personnel department or their staff will be presumed sufficient.¶

(76) After receiving notice from the employee, the employer may take a reasonable time to make necessary preparations for compliance with ORS 653.077 and this rule. A "reasonable time" must not interfere with the rights provided by 653.077 and this rule, taking into consideration the immediacy of the employee's need to express milk, and that the rights under 653.077 and this rule apply only until the employee's child is 18 months of age. For example, an employer in the process of creating a private location for expressing milk must provide the most adequate space already available for an employee who gives notice of an immediate need.¶

(87) An employee invoking the provisions of ORS 653.077 and this rule is responsible for storing ~~the~~ the employee's expressed milk. The ~~covered~~ employer must allow the employee to bring a cooler or other insulated food container to work for storing the expressed milk and ensure there is adequate space in the workplace to accommodate the employee's cooler or insulated food container. If the employer allows employees access to refrigeration for personal use, the employer may allow, but cannot require, an employee who expresses milk during work hours to use the available refrigeration to store the expressed milk.¶

~~(9) ORS 653.077 and this rule apply to temporary employment agencies that employ 25 or more employees in Oregon for each working day during each of 20 or more calendar workweeks in the year in which the rest periods are to be taken or in the year immediately preceding the year in which the rest periods are to be taken.~~

~~(108) ORS 653.077 and this rule apply to individuals engaged in administrative, executive or professional work as described in ORS 653.020(3).~~

~~(119) The provisions of this rule may be modified by the terms of a collective bargaining agreement if the collective bargaining agreement entered into by the employee includes provisions that prescribe rules pertaining to reasonable rest periods for the expression of milk.~~

~~(120) Each school district board must adopt a policy to accommodate an employee who needs to express milk for t her employee's child.~~

~~(131) In addition to any other penalty provided by law, the commissioner may assess a civil penalty not to exceed \$1,000 against any person who intentionally violates ORS 653.077 or any rule adopted thereunder.~~

~~(142) The commissioner of the Bureau of Labor and Industries will appoint an advisory committee to facilitate compliance with ORS 653.077 and these rules. Upon request by a particular industry or profession, the advisory committee will determine when the ordinary course of such industry or profession makes compliance difficult for an employer in that industry or profession, and submit to the commissioner recommendations for rules to address compliance difficulties in that industry or profession.~~

Statutory/Other Authority: ORS 653.077(11)

Statutes/Other Implemented: ORS 653.077, OLCH. 118 (2019)