

# OFLA/FMLA/ADA/ WC/Sick Leave Law

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## FMLA/OFLA COMPARISON

	<u>FEDERAL FAMILY MEDICAL LEAVE ACT (FMLA)</u>	<u>OREGON FAMILY LEAVE ACT (OFLA)</u>
<u>Eligible Employee</u>	<p>Must have been <u>employed</u> at least 12 months and <u>worked</u> at least 1,250 hours during 12-month period preceding date leave is to begin (approx. 25 hours/week).</p> <p>Flight crews (pilots, flight attendants): must have worked or been paid for at least 60% of the applicable total monthly guarantee and have worked or been paid for at least 504 hours during the previous 12 months.</p>	<p>Must have been <u>employed</u> more than 180 calendar days and <u>worked</u> an average of at least 25 hours/week over 180-day period (<i>except no average hour requirement for parental leave</i>).</p>
<u>Covered Employer</u>	<p>Employs 50 or more people within 75 miles (plus all government employers).</p>	<p>Employs 25 or more persons in Oregon (plus state and local government employers).</p>
<u>Amount of Leave</u>	<p>12 weeks in a “leave year” for most types of FMLA-covered leave, except 26 weeks during a “single 12 month period” for Military Caregiver Leave.</p>	<p>12 weeks in a “leave year” PLUS additional 12 weeks for:</p> <p>(1) mom’s birth- or pregnancy-related disability (includes routine pre-natal care);</p> <p>(2) care for sick child requiring home care if have already taken full 12 weeks for parental leave</p> <p>(Potential total of up to 36 weeks for females and 24 for males).</p> <p>(3) Bereavement leave*: up to two weeks per death of family member up to 12-week maximum in leave year.</p> <p>* 2013 amendment, eff. 1/1/14.</p>
<u>Reasons for Leave</u>	<p>(1) birth of child and to care for child following birth;</p> <p>(2) placement of child with employee for adoption or foster care;</p> <p>(3) care for spouse, child (<i>under 18 or incapable of self-care</i>), or parent with serious health condition;</p> <p>(4) care for own serious health condition;</p> <p>(5) qualifying exigencies due to spouse, son, daughter or parent’s active duty or impending call or order to active duty in the Armed Forces;</p> <p>(6) care for spouse, son, daughter, parent, or next of kin service member with serious injury or illness.</p>	<p>Same as (1)-(4), but not (5) or (6) of federal PLUS:</p> <p>(3) care for “family member” with serious health condition also includes registered same-sex domestic partner (and parents and children of such partner, step parent), parent-in-law, grandparent, <i>adult child</i> (except for sick child and parental leave), grandchild;</p> <p>(7) care for sick child (under 18) requiring home care (need not rise to level of “serious health condition”);</p> <p>(8) to make arrangements necessitated by, to attend funeral/memorial service, or to grieve death of a family member;</p> <p>* BOLI clarification 2015: an employee who has taken serious health condition leave to care for a family member who dies during that leave need not requalify for eligibility to take bereavement leave.</p>

	<u>FEDERAL FAMILY MEDICAL LEAVE ACT (FMLA)</u>	<u>OREGON FAMILY LEAVE ACT (OFLA)</u>
<u>Effect of Workplace Injury on Leave</u>	Time absent due to workers compensation injury counts against 12-week leave entitlement.	Time absent due to workers compensation injury does <i>not</i> count against 12-week leave entitlement, unless employee refuses light duty work. Also, employees off on an approved workers compensation claim need not requalify for eligibility to use OFLA leave after they return to work.* *BOLI clarification 2015.
<u>Paid Versus Unpaid Leave</u>	Employee may elect or employer may require employee to substitute any form of paid leave (including compensatory leave), <i>consistent with employer's paid leave policy</i> . Subject to CBA, employer can choose order in which paid leave is used.	Employee may elect or employer may require employee to substitute any accrued paid sick leave, personal leave, vacation leave, or any other paid leave offered in lieu of vacation leave. Subject to CBA, employer can choose order in which paid leave is used.  As of 1/1/08, employee has had right to use paid leave for <i>any</i> OFLA-covered leave, regardless of employer policy.
<u>Serious Health Condition</u>	An illness, injury, impairment or physical or mental condition that involves: (1) inpatient care; (2) incapacity for more than three full consecutive calendar days, in-person treatment by a health care provider within 7 days of the first day of incapacity, plus either: (a) at least one more in-person treatment by a health care provider within 30 days of the first day of incapacity (unless extenuating circumstances exist); or (b) a regimen of continuing treatment under the supervision of a health care provider; (3) incapacity due to pregnancy or prenatal care; (4) incapacity or treatment due to a chronic serious health condition requiring at least two periodic visits to health care provider per year with episodic incapacity; (5) permanent or long-term incapacity; (6) multiple treatments (e.g. dialysis).	An illness, injury, impairment or physical or mental condition that: (1) requires inpatient care; (2) imposes imminent danger of death or is terminal; (3) requires "constant" or "continuing" care; (4) involves incapacity for more than three calendar days, plus two or more treatments by a health care professional or one treatment plus a regimen of continuing care; (5) results in incapacity due to a chronic serious health condition that requires periodic visits for treatment over an extended period of time with episodic incapacity; (6) involves permanent or long-term incapacity; (7) involves multiple treatments; or (8) involves any period of disability due to pregnancy or childbirth or any absence for prenatal care.
<u>Certification</u>	Employee may require medical certification of serious health condition and need for leave. Employee has 15 calendar days from employer's request to provide it. If returned certification is incomplete or insufficient, employer can ask employee to cure defect within 7 calendar days. Failure to cure may result in denied FMLA leave. If employer has reason to doubt the validity of certification, can get 2 <sup>nd</sup> and 3 <sup>rd</sup> opinions at employer's expense. Periodic recertifications are permitted for ongoing conditions, but 2 <sup>nd</sup> and 3 <sup>rd</sup> opinions are not permitted on recertifications. Employer can require fitness-for-duty certification upon return to work.	Mostly same as Federal, except: - Employer cannot seek certification of parental leave. - Employer can only seek certification of sick child leave for subsequent occurrences if employee "has taken sick child leave on all or any part of three separate days during a leave year." No 2 <sup>nd</sup> opinion permitted for sick child leave. - Time to cure incomplete or insufficient certification is "reasonable period of time." - Employer must pay employee's out-of-pocket costs for any required medical verification.

	<u>FEDERAL FAMILY MEDICAL LEAVE ACT (FMLA)</u>	<u>OREGON FAMILY LEAVE ACT (OFLA)</u>
<u>Employer's Contact with Health Care Provider</u>	Employer's leave administrators, human resources professionals, and management official who are not the employee's supervisor, or the employer's own health care providers may directly communicate with an employee's health care provider for the purposes of "authentication" or "clarification," but not to seek information beyond what is required on the certification.	Employer may not directly request additional information beyond certification from health care provider. With employee's or family member's permission, health care provider representing employer may contact employee's or family member's health care provider to clarify or authenticate certification.
<u>Maintenance of Health Insurance</u>	Group health plan coverage must be maintained during leave subject to regular employer/employee premium contributions (as long as employee returns to work before expiration of leave or is unable to do so).	As of 2015 HB 2600, eff. 1/1/16, OFLA requires continuation of group health coverage during the period of family leave subject to regular employee premium contributions.
<u>Temporary Transfer During Intermittent Leave or Reduced Schedule</u>	If need for intermittent leave or reduced schedule is foreseeable, employer may require employee to transfer temporarily, during the period of intermittent or reduced schedule leave, to an available alternative position with equivalent pay and benefits (but not duties) for which the employee is qualified and which better accommodates recurring leave. Employer cannot transfer in order to discourage use of leave or work hardship on employee (e.g. cannot transfer day shift employee to graveyard shift).	Employer may transfer to alternate position only if: 1) employees accepts transfer voluntarily and without coercion; 2) transfer is temporary, lasts no longer than necessary; 3) alternate position has equivalent pay and benefits; 4) transfer complies with applicable collective bargaining agreement; 5) transfer is used only when there is no other reasonable option available; and 6) transfer is not used to discourage intermittent leave or reduced schedule or to create hardship for employee.
<u>Right to Return to Job</u>	To same position held when leave began or to equivalent position with equivalent pay, benefits, and other terms and conditions of employment (e.g. OT opportunities, shift, duties).	To same position held when leave began. Can only return to equivalent position if same position has been eliminated for legitimate business reasons.
<u>Attendance Bonuses</u>	Bonuses based on attendance may be denied to employees on FMLA leave to the same extent they would be denied to employees on other types of leave.	Bonuses based on attendance may not be denied to employees based on use of protected OFLA leave.



# **Sick Leave In Oregon**

**Christine Meadows, Vigilant**

**Oregon State Bar Labor and Employment Section**

**October 27, 2017**

**Salishan Resort**

## Sick Leave in Oregon

### Christine Meadows, Vigilant

	Oregon	Federal
<ul style="list-style-type: none"> <li>• Law/authorization</li> </ul>	<p><a href="#">Oregon sick leave law</a> ORS 653.601 to 653.661 Effective January 1, 2016</p>	<p><a href="#">Executive Order 13706</a> Effective January 1, 2017</p>
<ul style="list-style-type: none"> <li>• Administrative enforcement</li> </ul>	<p>Oregon Bureau of Labor and Industries (BOLI) OAR 839-007-0000 <i>et. seq.</i></p>	<p>U.S. Department of Labor Wage and Hour Div. 29 CFR Part 13</p>
<ul style="list-style-type: none"> <li>• Preemption</li> </ul>	<p>Local Ordinances preempted</p>	<p>No preemption. All employers must comply with applicable state and local laws.</p>
<ul style="list-style-type: none"> <li>• Provides</li> </ul>	<p>Protected time off – paid in most cases – without reduction in benefits</p>	<p>Protected paid time off</p>
<ul style="list-style-type: none"> <li>• Covered Employers</li> </ul>	<p>All employers with employees in Oregon. Leave must be paid if at least 10 workers in Oregon, or if employer with a location in Portland<sup>1</sup> (or city over 500,000), if at least 6 workers are in Oregon. Excludes federal government workers.</p>	<p>Employers with federal contracts or subcontracts from solicitations on or after January 1, 2017, for: 1. Procurement contracts for construction covered under Davis-Bacon Act; 2. Contracts for services covered by the Services Contract Act; 3. Contracts for concessions; 4. Contracts in connection with federal property or lands related to offering service for federal workers, dependents or the general public.</p>
<ul style="list-style-type: none"> <li>• Covered Employees</li> </ul>	<p>Workers employed in Oregon. Includes state and municipal workers.  Excludes: employees who receive federal government sick leave; independent contractors; work training program participants administered under state/federal assistance program; certain work study;</p>	<p>Workers directly or indirectly performing necessary work under the federal contract or subcontract.  Excludes: workers performing work indirectly connected to covered contracts, if it takes less than 20% per workweek.</p>

<sup>1</sup> Effective January 1, 2018, if the employer's only Portland location is a seasonal farm stand or trailer that is used temporarily on a construction site for office purposes only, it will not be treated as a Portland location. 2017 SB 299, 2017 Or Laws Chap 520.

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	<p>certain railroad workers; individuals employed by parent/spouse/child; union workers hired through hiring hall where benefits provided by joint multi-employer trust or benefit plan.</p>	
<ul style="list-style-type: none"> <li>Covered Leave</li> </ul>	<p>Employee or family member's mental or physical health condition (illness, injury, or health condition, including need for medical diagnosis, care, treatment or preventative medical care).</p> <p>Any reason covered by OFLA (including bereavement leave) (ORS 659A.153, ORS 659A.159)</p> <p>To address situation in which employee, employee's child (under 18 or adult disabled dependent), or someone to whom employee is a guardian is the victim of domestic violence, criminal harassment, sexual assault or stalking. (ORS 659A.272)</p> <p>Public Health Emergency. (Closure of work site, child's school or care provider due to public health emergency; decision by public health official or care provider that presence of worker or covered family member in the community is a threat to others; or when law or regulation requires worker be excluded from the workplace for health reasons.</p>	<p>Employee or family member's physical or mental illness, injury, or medical condition, or need to obtain diagnosis, care, or preventative care from a health provider.</p> <p>Time off to address domestic violence, sexual assault, or stalking of employee or covered family member.</p>
<ul style="list-style-type: none"> <li>Covered Family Members</li> </ul>	<p>Children, spouses, individuals in a lawfully established civil union or domestic partnership, parents, parents of a spouse or same-gender domestic partner, grandparents</p>	<p>Children, parents, spouses, domestic partners (two adults in a committed relationship), and any other individual related by blood or affinity whose association with the worker is</p>

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	and grandchildren. Also adopts OFLA definition, which includes adoptive/foster/step and “in loco parentis” relationships.	the equivalent of a family relationship.
<ul style="list-style-type: none"> <li>• Leave Year</li> </ul>	Employer determines how the year will be calculated. It can include any consecutive 12-month period, the calendar year, a tax year, a fiscal year, a contract year, the worker’s anniversary date or any other 12-month period the employer customarily uses.	Any fixed 12-month period chosen by employer. For example, may start on the date a worker began working on a covered federal contract, the date a covered contract began, a fiscal year, a date relevant under State law, or the date employer uses for determining workers’ leave entitlements under federal Family and Medical Leave Act (FMLA). Must use a consistent option for similarly situated workers.
<ul style="list-style-type: none"> <li>• Required Notice to Employees</li> </ul>	<p>Both individual and general notices are required. Employers may create their own notices or use templates provided by BOLI for the <a href="#">individual notice</a> and the <a href="#">general notice</a>.</p> <p>Individual notice: Employers must notify workers at least quarterly of the amount of accrued and unused sick time available for use. A pay stub is acceptable.</p> <p>General notice: Employers have the option of distributing it electronically or physically, incorporating it into an employee handbook that is available to workers, or posting it in a conspicuous and accessible location in the workplace.</p>	<p>Employers must calculate accruals and notify employees in writing of the amount of accrued paid sick leave at least once a pay period or once a month, whichever period is shorter. A notation on a pay stub or access to an online system that can be checked at any time is sufficient.</p> <p>Employer must display <a href="#">poster</a> in a prominent and accessible place at the worksite where employees can see it. Electronic posting is acceptable as long as it is displayed prominently on employer’s website where other notices to employees are posted about their terms and conditions of employment.</p> <p>The DOL will hold upper-tier contractors responsible for lack of compliance by lower-</p>

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	<ul style="list-style-type: none"> <li>Required Notice to Employers</li> </ul> <p>Employers may require reasonable advance notice, not to exceed 10 days prior to the date the sick time is to begin or as soon as otherwise practicable, for “foreseeable” absences. Employers can require that workers follow the company’s regular leave request and notification policies (‘call-in’ procedures), provided that doing so does not interfere with the worker’s right to use sick time.</p>	<p>tier contractors. At a minimum, employers should refer to the paid sick leave requirements in applicable subcontracts and purchase orders.</p> <p>Worker must give at least 7 calendar days’ notice of the need for foreseeable leave, or in other cases as soon as practicable. For both foreseeable and unforeseeable leave, you may identify a particular person to receive the notice, and you may require the worker to use a particular phone number or email address. Your policy must give workers the option of at least one verbal and one written method of notice.</p>
<ul style="list-style-type: none"> <li>Medical Certification</li> </ul>	<p>Employers may request certification or verification only for absences of more than 3 consecutive scheduled workdays. Workers have 15 calendar days to provide medical certification, and a reasonable time to provide verification of the need for leave to address domestic violence, harassment, sexual assault, or stalking.</p> <p>The employer may also request medical certification if it suspects a “<i>pattern of abuse</i>” of paid sick leave use, including regular requests for leave on days adjacent to weekends, vacation days, and holidays.</p> <p>Employers must pay for any cost of medical verification not covered by insurance.</p>	<p>Employer may request medical certification of health conditions for absences of 3 or more consecutive workdays. Workers have 30 days to provide medical certification, with an additional 5 days to correct any errors employer points out in writing. While waiting for the documentation, employer must give worker the benefit of the doubt and allow the use of any accrued paid sick leave.</p> <p>Employer may request documentation of the need for leave to address domestic violence, harassment, sexual assault, or stalking, with the minimum necessary information to verify the need to miss work time.</p>

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<ul style="list-style-type: none"> <li>Determining Earned Leave</li> </ul>	<p>Accrual begins on first day of employment or January 1, 2016, whichever is later.</p>	<p>Accrual begins on first day of work on or in connection with a covered contract. Accrual only occurs during hours in which (1) employee works directly on a covered contract; or (2) employee performs work in connection with a covered contract for 20 percent or more of the employee’s work hours during that workweek.</p>
<ul style="list-style-type: none"> <li>Rate Leave is Earned</li> </ul>	<p><b>Accrual Method:</b> 1 hour for every 30 hours worked, including overtime hours. Workers who are exempt from overtime are presumed to work 40 hours in each workweek, but if they actually work less, sick time accrues based on the actual workweek.</p> <p><b>Front-Loading Method:</b> Front-load 40 hours in worker’s leave bank as soon as worker is eligible, then again at the beginning of each subsequent leave year. No accrual required. Employer should still record the amount of sick leave used and available.</p> <p><b>New Hires:</b> Employers can pro-rate based on hire date the amount of leave that is front-loaded in the first leave year.</p>	<p><b>Accrual Method:</b> 1 hour for every 30 hours worked on or in connection with a covered contract, including overtime hours. For workers exempt from overtime, employer may assume a 40-hour workweek. If exempt worker regularly works fewer than 40 hours on or in connection with covered contracts each workweek, employer may make a reasonable estimate.</p> <p><b>Front-Loading Method:</b> Front-load 56 hours of paid leave at the beginning of each accrual year. For new hires, employer may front-load a prorated amount into the worker’s leave bank based on the amount of time remaining in the leave year.</p>
<ul style="list-style-type: none"> <li>Maximum Annual Earned Leave</li> </ul>	<p>Up to 40 hours per year</p>	<p>Up to 56 hours  However, if the leave bank under the accrual method already has 56 hours in it (due to carryover from a prior year), then no additional accrual is required until employee draws down the leave bank below 56 hours.</p>

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<ul style="list-style-type: none"> <li>• Carry-Over of Leave to Next Year</li> </ul>	<p>Under the accrual method, workers may carry over up to 40 hours of unused sick time from one year into the next. By policy Employers can cap total accrual at 80 hours and<sup>2</sup> cap use at 40 hours per year.</p> <p>No carryover is required for paid leave if the employer and worker <b>mutually agree</b> that the worker will be paid for all unused paid sick time at the end of the year, and worker's leave bank is front-loaded at the beginning of the next leave year. For unpaid leave, no carryover is required if the employer and worker mutually agree that the worker's leave bank is front-loaded at the beginning of the next year.</p>	<p>For both the accrual method and the front-loading method, workers have the right to carry over unused leave to the next leave year, but employer may cap the carryover at 56 hours.</p>
<ul style="list-style-type: none"> <li>• Maximum Use Required Per Year</li> </ul>	<p>Up to 40 hours</p>	<p><i>Accrual Method:</i> Employer may cap the amount of leave available for use at any given time at 56 hours.</p> <p><i>Front-Loading Method:</i> Employer cannot limit the amount of leave available for use in a year. The practical effect is that a worker may have as many as 112 hours available for use in a leave bank (56 carried over from prior year plus 56 hours front-loaded at beginning of the current year).</p>
<ul style="list-style-type: none"> <li>• Leave First Available</li> </ul>	<p>On 91<sup>st</sup> calendar day of employment</p>	<p>Available to use as soon as worker has leave available. Employer has option of limiting use</p>

<sup>2</sup> The original law stated this as "or" but it was agreed this was a mistake and was corrected by the 2017 legislature, to be effective January 1, 2018. ORS 653.606(3) as amended by 2017 SB 299, 2017 Or Laws Chap 520.

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<ul style="list-style-type: none"> <li>• Increments of Leave</li> </ul>	<p>Workers can take leave in increments as small as 1 hour.</p> <p>Exception: Employer may set minimum increment of 4 hours if it provides at least 56 hours of paid leave per year and can show that 1-hour increments would be an “undue hardship.”<sup>i</sup> Must give affected workers a BOLI-provided <a href="#">notice of undue hardship</a>.</p>	<p>of leave to periods when worker is performing work on or in connection with the covered federal contract.</p> <p>Workers can take leave in increments as small as 1 hour. Exception: If it is physically impossible for worker to begin or end work part-way through a shift (e.g., because of working in a sealed “clean room”) and no equivalent position is available, the entire period the worker is forced to be absent is counted.</p>
<ul style="list-style-type: none"> <li>• “Cash Out”</li> </ul>	<p>No obligation</p>	<p>No obligation</p>
<ul style="list-style-type: none"> <li>• Rehired Workers</li> </ul>	<p>Reinstate accrued unused leave if worker returns within 180 days of separation from employment. If worker leaves employment before the 91<sup>st</sup> day of employment and is later rehired within 180 days of separation, employer must restore accrued sick leave balance and worker may begin taking sick leave after combined total days of employment exceeds 90 calendar days.</p> <p>No obligation to restore leave balance if cashed out at earlier separation.</p>	<p>Reinstate accrued unused leave if worker returns within 12 months of separation from employment.</p> <p>No obligation to restore leave balance if cashed out at earlier separation.</p>
<ul style="list-style-type: none"> <li>• Successor Employer</li> </ul>	<p>Accrued leave transfers to successor employer</p>	<p>No Provision</p>

<sup>i</sup> BOLI’s regulations give the following nonexclusive list of factors that may indicate undue hardship: “The number of persons employed or working at the particular worksite and their qualifications or ability to timely relieve the employee using sick time, given the employer’s operations; the total number of persons employed by the employer; the number, type and geographic separateness of the employer’s worksites; and...[t]he effect of providing sick time in

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hourly increments 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; the perishable or live nature of products being harvested or processed; the time-sensitive or high-volume nature of the employer's operations, if such operations have a direct impact on the public; and the safety and health of other employees, patients, clients or the public.” (OAR 839-007-0000.)



**The Americans with Disabilities Act and  
ORS 659A.103-144**

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**October 27, 2017**

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Title I of the the Americans with Disabilities Act as Amended  
42 U.S.C. § 12111-12117.

ORS 659A.103-144

Oregon law is to be construed consistent with the ADA. *See* ORS 659A.139.

### **Covered Employers:**

The ADA – Generally, 25 or more employees. 42 U.S.C. § 12111(5).

Oregon –6 or more employees. ORS 659A.106.

*But*, be aware that simply because an employer is not a "covered employer" under the statutes does not mean an employer may not be held liable under other theories, such as common law wrongful termination.

### **Disability:**

Employers may become aware that an employee has a disability through a workplace injury report or complaint, or through a request for leave under FMLA/OFMLA.

Since 2008, the definition of disability is broadly construed under the ADA.

An individual has a disability under the ADA if the individual has:

"(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

"(B) a record of such an impairment; or

"(C) being regarded as having such an impairment[.]"

42 U.S.C. § 12111(1); ORS 659A.104.

Major life activities are extensive, and include everything from breathing, eating, standing, and sitting, to bodily functions. *See* 42 U.S.C. § 12102(2); ORS 659A.104.

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## Discrimination

"No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

42 U.S.C. § 12112.

"It is an unlawful employment practice for any employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment on the basis of disability."

ORS 659A.112.

Discrimination includes the failure to provide reasonable accommodations to employees with a known disability unless it would pose an undue hardship. 42 U.S.C. § 12112(b)(5); ORS 659A.112(2)(e).

Whether a person is disabled must be considered with or without the individual's ameliorative measures, such as medication.

## Interactive Process

Once an employer is aware that an employee has the need for a reasonable accommodation, the employer has an obligation to begin the interactive process with the employee, even if the employee has not requested an accommodation. *Humphrey v. Mem'l Hosp. Ass'n*, 239 F.3d 1128, 1137 (9th Cir. 2001); 29 C.F.R. § 1630.9 App; OAR 839-006-0206(2)(f).

The employer, during the interactive process should do the following:

- "(1) Analyze the particular job involved and determine its purpose and essential functions;
- "(2) Consult with the individual with a disability to

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ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

"(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

"(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

29 C.F.R. § 1630.9 App.

Failure to engage in the interactive process is an independent violation of the ADA and Oregon law if a reasonable accommodation would otherwise have been possible. *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1139 (9th Cir. 2001); OAR 839-006-0206(6).

NOTE: The interactive process does not mean the employer may request information regarding an employee's disability at any time. The disability must first impact the employee's ability to perform the essential functions of the employee's position, or the employee should first request an accommodation. See 42 U.S.C. § 12112(d)(4)(A) (prohibiting inquiries into an employee's disability unless it is job-related and consistent with business necessity); ORS 659A.136(1) (same).

### **Reasonable Accommodations:**

An employee returning to work from a workplace injury or after exhausting FMLA or OFMLA may be entitled to accommodations under the ADA/Oregon law.

An employer need not provide reasonable accommodations to an employee who merely is "regarded as" disabled. However, some accommodations may be required to an employee who has a record of a disability (such as leave for follow-up appointments or monitoring).

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*What is a reasonable accommodation?* The EEOC defines it as:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

28 C.F.R. § 1630.2(o).

"The term 'reasonable accommodation' may include

"(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

"(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."

42 U.S.C. § 12111(9); *see also* ORS 659A.118.

A leave of absence also qualifies as a reasonable accommodation under the ADA and Oregon law. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999); OAR 839-006-0206(2)(f).

However, an employer is not required to eliminate any essential functions

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of the employment position. *See* 42 U.S.C. § 12111(8); ORS 659A.115.

### **Undue hardship.**

Under FMLA/OMFLA, an employer is required to provide leave as a matter of right. Under the ADA, a reasonable accommodation need not be provided if the employer can demonstrate (employer has burden to show) that it would cause an undue hardship on the employer to provide the accommodation.

"Undue hardship" means significant difficulty or expense. *See* 42 U.S.C. § 12111(10)(A); ORS 659A.121(1).

Several factors determine whether an accommodation poses an undue hardship on an employer:

- (1) The nature and cost of the accommodation;
- (2) The financial resources of the location or facility involved and number of persons employed and the effect the accommodation would have on the expenses and resources available at the particular facility;
- (3) The overall financial resources of the employer, the size of the employer, and the number and type of locations and facilities;
- (4) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

*See* 42 U.S.C. § 12111(10)(B); ORS 659A.121(2).

# Employment – Labor Law, The Interplay with Oregon Workers' Compensation Law

## Chapter 656 – Workers' Compensation

- ORS 656.018 – Effect of providing coverage – “Exclusive Remedy”
- ORS 656.023 – Who are subject employers?
- ORS 656.210 – Temporary total disability
- ORS 656.212 – Temporary partial disability
- ORS 656.240 – Deduction of benefits from sick leave payments paid to employees
- ORS 656.262 - Processing of claims and payments of compensation
- ORS 656.268 - Claim closure
- ORS 656.325 - Required medical examination

## Chapter 659A – Unlawful Discrimination in Employment Law

- 659A.040 – Applying for workers' compensation benefits
- 659A.043 – Reinstatement of injured worker to former position
- 659A.046 – Reemployment of injured worker in other available suitable work
- 659A.049 – Rights of reinstatement and reemployment protected
- 659A.052 – Reemployment rights of injured State workers
- 659A.063 – Group health benefits, State employees

## For Discussion

- General Overview
- What is not exclusive
- Interplay with sick leave
- Interplay with health insurance
- Interplay with ADA
- Interplay with return to work
- Interplay with CBA
- Interplay with Federal Employment Laws

# Chapter 656

## 656.018 Effect of providing coverage

**(1)(a)** The liability of every employer who satisfies the duty required by ORS **656.017 (Employer required to pay compensation and perform other duties)** (1) is exclusive and in place of all other liability arising out of injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment that are sustained by subject workers, the workers' beneficiaries and anyone otherwise entitled to recover damages from the employer on account of such conditions or claims resulting therefrom, specifically including claims for contribution or indemnity asserted by third persons from whom damages are sought on account of such conditions, except as specifically provided otherwise in this chapter.

**(b)** This subsection shall not apply to claims for indemnity or contribution asserted by a railroad, as defined in ORS **824.020 (Definitions for ORS 824.020 to 824.042)**, or by a corporation, individual or association of individuals which is subject to regulation pursuant to ORS chapter 757 or 759.

**(c)** Except as provided in paragraph (b) of this subsection, all agreements or warranties contrary to the provisions of paragraph (a) of this subsection entered into after July 19, 1977, are void.

**(2)** The rights given to a subject worker and the beneficiaries of the subject worker under this chapter for injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment are in lieu of any remedies they might otherwise have for such injuries, diseases, symptom complexes or similar conditions against the worker's employer under ORS **654.305 (Protection and safety of persons in hazardous employment generally)** to **654.336 (Comparative negligence)** or other laws, common law or statute, except to the extent the worker is expressly given the right under this chapter to bring suit against the employer of the worker for an injury, disease, symptom complex or similar condition.

**(3)** The exemption from liability given an employer under this section is also extended to the employer's insurer, the self-insured employer's claims administrator, the Department of Consumer and Business Services, and to the contracted agents, employees, partners, limited liability company members, general partners, limited liability partners, limited partners, officers and directors of the employer, the employer's

insurer, the self-insured employer's claims administrator and the department, except that the exemption from liability shall not apply:

(a) If the willful and unprovoked aggression by a person otherwise exempt under this subsection is a substantial factor in causing the injury, disease, symptom complex or similar condition;

(b) If the worker and the person otherwise exempt under this subsection are not engaged in the furtherance of a common enterprise or the accomplishment of the same or related objectives;

(c) If the failure of the employer to comply with a notice posted pursuant to ORS **654.082 (Prohibiting use of equipment involved in violation)** is a substantial factor in causing the injury, disease, symptom complex or similar condition; **or**

(d) If the negligence of a person otherwise exempt under this subsection is a substantial factor in causing the injury, disease, symptom complex or similar condition and the negligence occurs outside of the capacity that qualifies the person for exemption under this section.

(4) The exemption from liability given an employer under this section applies to a worker leasing company and the client to whom workers are provided when the worker leasing company and the client comply with ORS **656.850 (License)** (3).

(5)(a) The exemption from liability given an employer under this section applies to a temporary service provider, as that term is used in ORS **656.850 (License)**, and also extends to the client to whom workers are provided when the temporary service provider complies with ORS **656.017 (Employer required to pay compensation and perform other duties)**.

(b) The exemption from liability given a client under paragraph (a) of this subsection is also extended to the client's insurer, the self-insured client's claims administrator, the department, and the contracted agents, employees, officers and directors of the client, the client's insurer, the self-insured client's claims administrator and the department, except that the exemption from liability shall not apply:

(A) If the willful and unprovoked aggression by a person otherwise exempt under this subsection is a substantial factor in causing the injury, disease, symptom complex or similar condition;

(B) If the worker and the person otherwise exempt under this subsection are not engaged in the furtherance of a common enterprise or the accomplishment of the same or related objectives;

(C) If the failure of the client to comply with a notice posted pursuant to ORS **654.082 (Prohibiting use of equipment involved in violation)** is a substantial factor in causing the injury, disease, symptom complex or similar condition; **or**

(D) If the negligence of a person otherwise exempt under this subsection is a substantial factor in causing the injury, disease, symptom complex or similar condition and the negligence occurs outside of the capacity that qualifies the person for exemption under this subsection.

(6) Nothing in this chapter shall prohibit payment, voluntarily or otherwise, to injured workers or their beneficiaries in excess of the compensation required to be paid under this chapter.

(7) The exclusive remedy provisions and limitation on liability provisions of this chapter apply to all injuries and to diseases, symptom complexes or similar conditions of subject workers arising out of and in the course of employment whether or not they are determined to be compensable under this chapter.

### **656.023 Who are subject employers?**

Every employer employing one or more subject workers in the state is subject to this chapter. [1965 c.285 §8]

### **656.210 Temporary total disability**

(1) When the total disability is only temporary, the worker shall receive during the period of that total disability compensation equal to 66-2/3 percent of wages, but not more than 133 percent of the average weekly wage nor less than the amount of 90 percent of wages a week or the amount of \$50 a week, whichever amount is less. Notwithstanding the limitation imposed by this subsection, an injured worker who is not otherwise eligible to receive an increase in benefits for the fiscal year in which compensation is

paid shall have the benefits increased each fiscal year by the percentage which the applicable average weekly wage has increased since the previous fiscal year.

**(2)(a)** For the purpose of this section, the weekly wage of workers shall be ascertained:

**(A)**For workers employed in one job at the time of injury, by multiplying the daily wage the worker was receiving by the number of days per week that the worker was regularly employed; **or**

**(B)**For workers employed in more than one job at the time of injury, by adding all earnings the worker was receiving from all subject employment.

**(b)**Notwithstanding paragraph (a)(B) of this subsection, the weekly wage calculated under paragraph (a)(A) of this subsection shall be used for workers employed in more than one job at the time of injury unless the insurer, self-insured employer or assigned claims agent for a noncomplying employer receives:

**(A)**Within 30 days of receipt of the initial claim, notice that the worker was employed in more than one job with a subject employer at the time of injury; **and**

**(B)**Within 60 days of the date of mailing a request for verification, verifiable documentation of wages from such additional employment.

**(c)**Notwithstanding ORS [656.005 \(Definitions\)](#) (7)(c), an injury to a worker employed in more than one job at the time of injury is not disabling if no temporary disability benefits are payable for time lost from the job at injury. Claim costs incurred as a result of supplemental temporary disability benefits paid as provided in subsection (5) of this section may not be included in any data used for ratemaking or individual employer rating or dividend calculations by an insurer, a rating organization licensed pursuant to ORS chapter 737, the State Accident Insurance Fund Corporation or the Department of Consumer and Business Services if the injured worker is not eligible for permanent disability benefits or temporary disability benefits for time lost from the job at injury.

**(d)**For the purpose of this section:

**(A)**The benefits of a worker who incurs an injury shall be based on the wage of the worker at the time of injury.

**(B)**The benefits of a worker who incurs an occupational disease shall be based on the wage of the worker at the time there is medical verification that the worker is unable to work because of the disability caused by the occupational disease. If the worker is not working at the time that there is medical verification that the worker is unable to work because of the disability caused by the occupational disease, the benefits shall be based on the wage of the worker at the worker's last regular employment.

**(e)**As used in this subsection, "regularly employed" means actual employment or availability for such employment. For workers not regularly employed and for workers with no remuneration or whose remuneration is not based solely upon daily or weekly wages, the Director of the Department of Consumer and Business Services, by rule, may prescribe methods for establishing the worker's weekly wage.

**(3)**No disability payment is recoverable for temporary total or partial disability suffered during the first three calendar days after the worker leaves work or loses wages as a result of the compensable injury unless the worker is totally disabled after the injury and the total disability continues for a period of 14 consecutive days or unless the worker is admitted as an inpatient to a hospital within 14 days of the first onset of total disability. If the worker leaves work or loses wages on the day of the injury due to the injury, that day shall be considered the first day of the three-day period.

**(4)**When an injured worker with an accepted disabling compensable injury is required to leave work for a period of four hours or more to receive medical consultation, examination or treatment with regard to the compensable injury, the worker shall receive temporary disability benefits calculated pursuant to ORS [656.212 \(Temporary partial disability\)](#) for the period during which the worker is absent, until such time as the worker is determined to be medically stationary. However, benefits under this subsection are not payable if wages are paid for the period of absence by the employer.

**(5)(a)** The insurer of the employer at injury or the self-insured employer at injury, may elect to be responsible for payment of supplemental temporary disability benefits to a worker employed in more than

one job at the time of injury. In accordance with rules adopted by the director, if the worker's weekly wage is determined under subsection (2)(a)(B) of this section, the insurer or self-insured employer shall be reimbursed from the Workers' Benefit Fund for the amount of temporary disability benefits paid that exceeds the amount payable pursuant to subsection (2)(a)(A) of this section had the worker been employed in only one job at the time of injury. Such reimbursement shall include an administrative fee payable to the insurer or self-insured employer pursuant to rules adopted by the director.

**(b)**If the insurer or self-insured employer elects not to pay the supplemental temporary disability benefits for a worker employed in more than one job at the time of injury, the director shall either administer and pay the supplemental benefits directly or shall assign responsibility to administer and process the payment to a paying agent selected by the director.

### **656.212 Temporary partial disability**

**(1)**No disability payment is recoverable for temporary disability suffered during the first three calendar days after the worker leaves work or loses wages as a result of the compensable injury. If the worker leaves work or loses wages on the day of the injury due to the injury, that day shall be considered the first day of the three-day period.

**(2)**The payment of temporary total disability pursuant to ORS **656.210 (Temporary total disability)** shall cease and the worker shall receive that proportion of the payments provided for temporary total disability which the loss of wages bears to the wage used to calculate temporary total disability pursuant to ORS **656.210 (Temporary total disability)**. [Amended by 1953 c.672 §2; 1995 c.332 §16; amendments by 1995 c.332 §16a repealed by 1999 c.6 §1; 1999 c.538 §1]

### **656.240 Deduction of benefits from sick leave payments paid to employees**

Notwithstanding any other law, an employer, with the consent of the worker, may deduct from any sick leave payments made to an individual amounts equal to benefits received by the individual under this chapter with respect to the same injury that gave rise to the sick leave. However, the deduction of sick leave shall not exceed an amount determined by taking the worker's daily wage for the period less daily time loss benefits received under this chapter divided by the worker's daily wage. [1969 c.398 §2; 1983 c.816 §5]

## 656.262 Processing of claims and payment of compensation

(1) Processing of claims and providing compensation for a worker shall be the responsibility of the insurer or self-insured employer. All employers shall assist their insurers in processing claims as required in this chapter.

(2) The compensation due under this chapter shall be paid periodically, promptly and directly to the person entitled thereto upon the employer's receiving notice or knowledge of a claim, except where the right to compensation is denied by the insurer or self-insured employer.

(3)(a) Employers shall, immediately and not later than five days after notice or knowledge of any claims or accidents which may result in a compensable injury claim, report the same to their insurer. The report shall include:

(A) The date, time, cause and nature of the accident and injuries.

(B) Whether the accident arose out of and in the course of employment.

(C) Whether the employer recommends or opposes acceptance of the claim, and the reasons therefor.

(D) The name and address of any health insurance provider for the injured worker.

(E) Any other details the insurer may require.

(b) Failure to so report subjects the offending employer to a charge for reimbursing the insurer for any penalty the insurer is required to pay under subsection (11) of this section because of such failure. As used in this subsection, "health insurance" has the meaning for that term provided in ORS [731.162](#) ("Health insurance").

(4)(a) The first installment of temporary disability compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of the claim and of the worker's disability, if the attending physician or nurse practitioner authorized to provide compensable medical services under ORS [656.245](#) (Medical services to be provided) authorizes the payment of temporary disability compensation. Thereafter, temporary disability compensation shall be paid at least once each two weeks,

except where the Director of the Department of Consumer and Business Services determines that payment in installments should be made at some other interval. The director may by rule convert monthly benefit schedules to weekly or other periodic schedules.

**(b)**Notwithstanding any other provision of this chapter, if a self-insured employer pays to an injured worker who becomes disabled the same wage at the same pay interval that the worker received at the time of injury, such payment shall be deemed timely payment of temporary disability payments pursuant to ORS [656.210 \(Temporary total disability\)](#) and [656.212 \(Temporary partial disability\)](#) during the time the wage payments are made.

**(c)**Notwithstanding any other provision of this chapter, when the holder of a public office is injured in the course and scope of that public office, full official salary paid to the holder of that public office shall be deemed timely payment of temporary disability payments pursuant to ORS [656.210 \(Temporary total disability\)](#) and [656.212 \(Temporary partial disability\)](#) during the time the wage payments are made. As used in this subsection, "public office" has the meaning for that term provided in ORS [260.005 \(Definitions\)](#).

**(d)**Temporary disability compensation is not due and payable for any period of time for which the insurer or self-insured employer has requested from the worker's attending physician or nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#) verification of the worker's inability to work resulting from the claimed injury or disease and the physician or nurse practitioner cannot verify the worker's inability to work, unless the worker has been unable to receive treatment for reasons beyond the worker's control.

**(e)**If a worker fails to appear at an appointment with the worker's attending physician or nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#), the insurer or self-insured employer shall notify the worker by certified mail that temporary disability benefits may be suspended after the worker fails to appear at a rescheduled appointment. If the worker fails to appear at a rescheduled appointment, the insurer or self-insured employer may suspend payment of temporary disability benefits to the worker until the worker appears at a subsequent rescheduled appointment.

(f) If the insurer or self-insured employer has requested and failed to receive from the worker's attending physician or nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#) verification of the worker's inability to work resulting from the claimed injury or disease, medical services provided by the attending physician or nurse practitioner are not compensable until the attending physician or nurse practitioner submits such verification.

(g) Temporary disability compensation is not due and payable pursuant to ORS [656.268 \(Claim closure\)](#) after the worker's attending physician or nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#) ceases to authorize temporary disability or for any period of time not authorized by the attending physician or nurse practitioner. No authorization of temporary disability compensation by the attending physician or nurse practitioner under ORS [656.268 \(Claim closure\)](#) shall be effective to retroactively authorize the payment of temporary disability more than 14 days prior to its issuance.

(h) The worker's disability may be authorized only by a person described in ORS [656.005 \(Definitions\)](#) (12)(b)(B) or [656.245 \(Medical services to be provided\)](#) for the period of time permitted by those sections. The insurer or self-insured employer may unilaterally suspend payment of temporary disability benefits to the worker at the expiration of the period until temporary disability is reauthorized by an attending physician or nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#).

(i) The insurer or self-insured employer may unilaterally suspend payment of all compensation to a worker enrolled in a managed care organization if the worker continues to seek care from an attending physician or nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#) that is not authorized by the managed care organization more than seven days after the mailing of notice by the insurer or self-insured employer.

### **656.268 Claim closure**

(1) One purpose of this chapter is to restore the injured worker as soon as possible and as near as possible to a condition of self support and maintenance as an able-bodied worker. The insurer or self-

insured employer shall close the worker's claim, as prescribed by the Director of the Department of Consumer and Business Services, and determine the extent of the worker's permanent disability, provided the worker is not enrolled and actively engaged in training according to rules adopted by the director pursuant to ORS [656.340 \(Vocational assistance procedure\)](#) and [656.726 \(Duties and powers to carry out workers' compensation and occupational safety laws\)](#), when:

(a) The worker has become medically stationary and there is sufficient information to determine permanent disability;

(b) The accepted injury is no longer the major contributing cause of the worker's combined or consequential condition or conditions pursuant to ORS [656.005 \(Definitions\)](#) (7). When the claim is closed because the accepted injury is no longer the major contributing cause of the worker's combined or consequential condition or conditions, and there is sufficient information to determine permanent disability, the likely permanent disability that would have been due to the current accepted condition shall be estimated;

(c) Without the approval of the attending physician or nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#), the worker fails to seek medical treatment for a period of 30 days or the worker fails to attend a closing examination, unless the worker affirmatively establishes that such failure is attributable to reasons beyond the worker's control; **or**

(d) An insurer or self-insured employer finds that a worker who has been receiving permanent total disability benefits has materially improved and is capable of regularly performing work at a gainful and suitable occupation.

(2) If the worker is enrolled and actively engaged in training according to rules adopted pursuant to ORS [656.340 \(Vocational assistance procedure\)](#) and [656.726 \(Duties and powers to carry out workers' compensation and occupational safety laws\)](#), the temporary disability compensation shall be proportionately reduced by any sums earned during the training.

(3) A copy of all medical reports and reports of vocational rehabilitation agencies or counselors shall be furnished to the worker, if requested by the worker.

**(4)** Temporary total disability benefits shall continue until whichever of the following events first occurs:

**(a)** The worker returns to regular or modified employment;

**(b)** The attending physician or nurse practitioner who has authorized temporary disability benefits for the worker under ORS [656.245 \(Medical services to be provided\)](#) advises the worker and documents in writing that the worker is released to return to regular employment;

**(c)** The attending physician or nurse practitioner who has authorized temporary disability benefits for the worker under ORS [656.245 \(Medical services to be provided\)](#) advises the worker and documents in writing that the worker is released to return to modified employment, such employment is offered in writing to the worker and the worker fails to begin such employment. However, an offer of modified employment may be refused by the worker without the termination of temporary total disability benefits if the offer:

**(A)** Requires a commute that is beyond the physical capacity of the worker according to the worker's attending physician or the nurse practitioner who may authorize temporary disability under ORS [656.245 \(Medical services to be provided\)](#);

**(B)** Is at a work site more than 50 miles one way from where the worker was injured unless the site is less than 50 miles from the worker's residence or the intent of the parties at the time of hire or as established by the pattern of employment prior to the injury was that the employer had multiple or mobile work sites and the worker could be assigned to any such site;

**(C)** Is not with the employer at injury;

**(D)** Is not at a work site of the employer at injury;

**(E)** Is not consistent with the existing written shift change policy or is not consistent with common practice of the employer at injury or aggravation; **or**

**(F)** Is not consistent with an existing shift change provision of an applicable collective bargaining agreement;

(d) Any other event that causes temporary disability benefits to be lawfully suspended, withheld or terminated under ORS [656.262 \(Processing of claims and payment of compensation\)](#) (4) or other provisions of this chapter; **or**

(e) Notwithstanding paragraph (c)(C), (D), (E) and (F) of this subsection, the attending physician or nurse practitioner who has authorized temporary disability benefits under ORS [656.245 \(Medical services to be provided\)](#) for a home care worker who has been made a subject worker pursuant to ORS [656.039 \(Election of coverage for workers not subject to law\)](#) advises the home care worker and documents in writing that the home care worker is released to return to modified employment, appropriate modified employment is offered in writing by the Home Care Commission or a designee of the commission to the home care worker for any client of the Department of Human Services who employs a home care worker and the home care worker fails to begin the employment.

### **656.325 Required medical examination**

(1) (a) Any worker entitled to receive compensation under this chapter is required, if requested by the Director of the Department of Consumer and Business Services, the insurer or self-insured employer, to submit to a medical examination at a time reasonably convenient for the worker as may be provided by the rules of the director. No more than three independent medical examinations may be requested except after notification to and authorization by the director. If the worker refuses to submit to any such examination, or obstructs the same, the rights of the worker to compensation shall be suspended with the consent of the director until the examination has taken place, and no compensation shall be payable during or for account of such period. The provisions of this paragraph are subject to the limitations on medical examinations provided in ORS [656.268 \(Claim closure\)](#)..

(2) For any period of time during which any worker commits insanitary or injurious practices which tend to either imperil or retard recovery of the worker, or refuses to submit to such medical or surgical treatment as is reasonably essential to promote recovery, or fails to participate in a program of physical rehabilitation, the right of the worker to compensation shall be suspended with the consent of the director and no payment shall be made for such period. The period during which such worker would otherwise be

entitled to compensation may be reduced with the consent of the director to such an extent as the disability has been increased by such refusal.

**(3)**A worker who has received an award for permanent total or permanent partial disability should be encouraged to make a reasonable effort to reduce the disability; **and** the award shall be subject to periodic examination and adjustment in conformity with ORS [656.268 \(Claim closure\)](#).

**(4)**When the employer of an injured worker, or the employer's insurer determines that the injured worker has failed to follow medical advice from the attending physician or nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#) or has failed to participate in or complete physical restoration or vocational rehabilitation programs prescribed for the worker pursuant to this chapter, the employer or insurer may petition the director for reduction of any benefits awarded the worker. Notwithstanding any other provision of this chapter, if the director finds that the worker has failed to accept treatment as provided in this subsection, the director may reduce any benefits awarded the worker by such amount as the director considers appropriate.

**(5)(a)** Except as provided by ORS [656.268 \(Claim closure\)](#) (4)(c) and (11), an insurer or self-insured employer shall cease making payments pursuant to ORS [656.210 \(Temporary total disability\)](#) and shall commence making payment of such amounts as are due pursuant to ORS [656.212 \(Temporary partial disability\)](#) when an injured worker refuses wage earning employment prior to claim determination and the worker's attending physician or nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#), after being notified by the employer of the specific duties to be performed by the injured worker, agrees that the injured worker is capable of performing the employment offered.

**(b)**If the worker has been terminated for violation of work rules or other disciplinary reasons, the insurer or self-insured employer shall cease payments pursuant to ORS [656.210 \(Temporary total disability\)](#) and commence payments pursuant to ORS [656.212 \(Temporary partial disability\)](#) when the attending physician or nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#) approves employment in a modified job that would have been offered to the worker if the worker had remained employed, provided that the employer has a written policy of offering modified work to injured workers.

(c) If the worker is a person present in the United States in violation of federal immigration laws, the insurer or self-insured employer shall cease payments pursuant to ORS [656.210 \(Temporary total disability\)](#) and commence payments pursuant to ORS [656.212 \(Temporary partial disability\)](#) when the attending physician or nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#) approves employment in a modified job whether or not such a job is available.

## Chapter 659A

### **659A.040 Discrimination against worker applying for workers' compensation benefits prohibited**

(1) It is an unlawful employment practice for an employer to discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656 or has given testimony under the provisions of those laws.

(2) This section applies only to employers who employ six or more persons. [2001 c.621 §32]

### **659A.043 Reinstatement of injured worker to former position**

(1) A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment upon demand for such reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of such position. A worker's former position is available even if that position has been filled by a replacement while the injured worker was absent. If the former position is not available, the worker shall be reinstated in any other existing position that is vacant and suitable. A certificate by the attending physician or a nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#) that the physician or nurse practitioner approves the worker's return to the worker's regular employment or other suitable employment shall be prima facie evidence that the worker is able to perform such duties.

**(2)**Such right of reemployment shall be subject to the provisions for seniority rights and other employment restrictions contained in a valid collective bargaining agreement between the employer and a representative of the employer's employees.

**(3)**Notwithstanding subsection (1) of this section:

**(a)**The right to reinstatement to the worker's former position under this section terminates when whichever of the following events first occurs:

**(A)**A medical determination by the attending physician or, after an appeal of such determination to a medical arbiter or panel of medical arbiters pursuant to ORS chapter 656, has been made that the worker cannot return to the former position of employment.

**(B)**The worker is eligible and participates in vocational assistance under ORS [656.340 \(Vocational assistance procedure\)](#).

**(C)**The worker accepts suitable employment with another employer after becoming medically stationary.

**(D)**The worker refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary.

**(E)**Seven days elapse from the date that the worker is notified by the insurer or self-insured employer by certified mail that the worker's attending physician or a nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#) has released the worker for employment unless the worker requests reinstatement within that time period.

**(F)**Three years elapse from the date of injury.

**(b)**The right to reinstatement under this section does not apply to:

**(A)**A worker hired on a temporary basis as a replacement for an injured worker.

**(B)**A seasonal worker employed to perform less than six months' work in a calendar year.

(C)A worker whose employment at the time of injury resulted from referral from a hiring hall operating pursuant to a collective bargaining agreement.

(D)A worker whose employer employs 20 or fewer workers at the time of the worker's injury and at the time of the worker's demand for reinstatement.

(4)Notwithstanding ORS [659A.165 \(Notice to employer\)](#), a worker who refuses an offer of employment under subsection (3)(a)(D) of this section and who otherwise is entitled to family leave under ORS [659A.150 \(Definitions for ORS 659A.150 to 659A.186\)](#) to [659A.186 \(Exclusivity of provisions\)](#):

(a)Automatically commences a period of family leave under ORS [659A.150 \(Definitions for ORS 659A.150 to 659A.186\)](#) to [659A.186 \(Exclusivity of provisions\)](#) upon refusing the offer of employment; **and**

(b)Need not give additional written or oral notice to the employer that the employee is commencing a period of family leave.

(5)Any violation of this section is an unlawful employment practice. [Formerly [659.415](#); 2003 c.811 §§21,22; 2005 c.22 §§469,470; 2007 c.365 §11; 2007 c.633 §§4,5]

#### **659A.046 Reemployment of injured worker in other available and suitable work**

(1) A worker who has sustained a compensable injury and is disabled from performing the duties of the worker's former regular employment shall, upon demand, be reemployed by the worker's employer at employment which is available and suitable.

(2)A certificate of the worker's attending physician or a nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#) that the worker is able to perform described types of work shall be prima facie evidence of such ability.

(3)Notwithstanding subsection (1) of this section, the right to reemployment under this section terminates when whichever of the following events first occurs:

(a)The worker cannot return to reemployment at any position with the employer either by determination of the attending physician or a nurse practitioner authorized to provide compensable

medical services under ORS **656.245 (Medical services to be provided)** or upon appeal of that determination, by determination of a medical arbiter or panel of medical arbiters pursuant to ORS chapter 656.

**(b)**The worker is eligible and participates in vocational assistance under ORS **656.340 (Vocational assistance procedure)**.

**(c)**The worker accepts suitable employment with another employer after becoming medically stationary.

**(d)**The worker refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary.

**(e)**Seven days elapse from the date that the worker is notified by the insurer or self-insured employer by certified mail that the worker's attending physician or a nurse practitioner authorized to provide compensable medical services under ORS **656.245 (Medical services to be provided)** has released the worker for reemployment unless the worker requests reemployment within that time period.

**(f)**Three years elapse from the date of injury.

**(4)**Such right of reemployment shall be subject to the provisions for seniority rights and other employment restrictions contained in a valid collective bargaining agreement between the employer and a representative of the employer's employees.

**(5)**Notwithstanding ORS **659A.165 (Notice to employer)**, a worker who refuses an offer of employment under subsection (3)(d) of this section and who otherwise is entitled to family leave under ORS **659A.150 (Definitions for ORS 659A.150 to 659A.186)** to **659A.186 (Exclusivity of provisions)**:

**(a)**Automatically commences a period of family leave under ORS **659A.150 (Definitions for ORS 659A.150 to 659A.186)** to **659A.186 (Exclusivity of provisions)** upon refusing the offer of employment; **and**

**(b)**Need not give additional written or oral notice to the employer that the employee is commencing a period of family leave.

(6) Any violation of this section is an unlawful employment practice.

(7) This section applies only to employers who employ six or more persons. [Formerly **659.420**; 2003 c.811 §§23,24; 2007 c.365 §12; 2007 c.633 §§6,7]

### **659A.049 Rights of reinstatement and reemployment protected**

The rights of reinstatement afforded by ORS **659A.043 (Reinstatement of injured worker to former position)** and **659A.046 (Reemployment of injured worker in other available and suitable work)** shall not be forfeited if the worker refuses to return to the worker's regular or other offered employment without release to such employment by the worker's attending physician or a nurse practitioner authorized to provide compensable medical services under ORS **656.245 (Medical services to be provided)**. [Formerly **659.417**; 2003 c.811 §§25,26; 2007 c.365 §13]

### **659A.052 Reemployment rights of injured state workers**

(1) In addition to the rights provided to injured workers under ORS **659A.043 (Reinstatement of injured worker to former position)** and **659A.046 (Reemployment of injured worker in other available and suitable work)**, if all permanent restrictions of an injured worker are known and:

(a) The injured worker was employed at the time of injury by any agency in the legislative department of the government of this state, the injured worker shall have the right to reinstatement or reemployment at any available and suitable position in another agency in the legislative department.

(b) The injured worker was employed at the time of injury by any agency in the judicial department of the government of this state, the injured worker shall have the right to reinstatement or reemployment at any available and suitable position in another agency in the judicial department.

(c) The injured worker was employed at the time of injury by any agency of the executive or administrative department of the government of this state, the injured worker shall have the right to reinstatement or reemployment at any available and suitable position in another agency of the executive or administrative department.

(2) Notwithstanding ORS **659A.043 (Reinstatement of injured worker to former position)** and **659A.046 (Reemployment of injured worker in other available and suitable work)**, an injured worker referred to in subsection (1) of this section has preference for entry level and light duty

assignments with agencies described in subsection (1) of this section. The legislative and judicial departments of the government of this state may adopt rules to define entry level and light duty assignments. The Administrator of the Personnel Division by rule shall adopt a process to identify entry level and light duty assignments within the executive or administrative department of the government of this state.

**(3)**In accordance with any applicable provision of ORS chapter 240, the Administrator of the Personnel Division shall compel compliance with this section and ORS [659A.043 \(Reinstatement of injured worker to former position\)](#) and [659A.046 \(Reemployment of injured worker in other available and suitable work\)](#) by any agency of the executive or administrative department of the government of this state. [Formerly [659.412](#); 2005 c.22 §471; 2009 c.315 §1; 2015 c.232 §1]

#### **659A.063 State to continue group health benefits for injured worker and covered dependents**

**(1)**The State of Oregon shall cause group health benefits to continue in effect with respect to that worker and any covered dependents or family members by timely payment of the premium that includes the contribution due from the state under the applicable benefit plan, subject to any premium contribution due from the worker that the worker paid before the occurrence of the injury or illness. If the premium increases or decreases, the State of Oregon and worker contributions shall be adjusted to remain consistent with similarly situated active employees. The State of Oregon shall continue the worker's health benefits in effect until whichever of the following events occurs first:

**(a)**The worker's attending physician or a nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#) has determined the worker to be medically stationary and a notice of closure has been entered;

**(b)**The worker returns to work for the State of Oregon, after a period of continued coverage under this section, and satisfies any probationary or minimum work requirement to be eligible for group health benefits;

(c)The worker takes full- or part-time employment with another employer that is comparable in terms of the number of hours per week the worker was employed with the State of Oregon or the worker retires;

(d)Twelve months have elapsed since the date the State of Oregon received notice that the worker filed a workers' compensation claim pursuant to ORS chapter 656;

(e)The claim is denied and the claimant fails to appeal within the time provided by ORS [656.319 \(Time within which hearing must be requested\)](#) or the Workers' Compensation Board or a workers' compensation hearings referee or a court issues an order finding the claim is not compensable;

(f)The worker does not pay the required premium or portion thereof in a timely manner in accordance with the terms and conditions under this section;

(g)The worker elects to discontinue coverage under this section and notifies the State of Oregon in writing of this election;

(h)The worker's attending physician or a nurse practitioner authorized to provide compensable medical services under ORS [656.245 \(Medical services to be provided\)](#) has released the worker to modified or regular work, the work has been offered to the worker and the worker refuses to return to work; **or**

(i)The worker has been terminated from employment for reasons unrelated to the workers' compensation claim.

(2)If the workers' compensation claim of a worker for whom health benefits are provided pursuant to subsection (1) of this section is denied and the worker does not appeal or the worker appeals and does not prevail, the State of Oregon may recover from the worker the amount of the premiums plus interest at the rate authorized by ORS [82.010 \(Legal rate of interest\)](#). The State of Oregon may recover the payments through a payroll deduction not to exceed 10 percent of gross pay for each pay period.

(3)The State of Oregon shall notify the worker of the provisions of ORS [659A.060 \(Definitions for ORS 659A.060 to 659A.069\)](#) to [659A.069 \(Discrimination against state worker applying for benefits](#)

**under ORS 659A.060 to 659A.069 prohibited)**, and of the remedies available for breaches of ORS **659A.060 (Definitions for ORS 659A.060 to 659A.069)** to **659A.069 (Discrimination against state worker applying for benefits under ORS 659A.060 to 659A.069 prohibited)**, within a reasonable time after the State of Oregon receives notice that the worker will be absent from work as a result of an injury or illness for which a workers' compensation claim has been filed pursuant to ORS chapter 656. The notice from the State of Oregon shall include the terms and conditions of the continuation of health benefits and what events will terminate the coverage.

**(4)**If the worker fails to make timely payment of any premium contribution owing, the State of Oregon shall notify the worker of impending cancellation of the health benefits and provide the worker with 30 days to pay the required premium prior to canceling the policy.

**(5)**It is an unlawful employment practice for the State of Oregon to discriminate against a worker, as defined in ORS **659A.060 (Definitions for ORS 659A.060 to 659A.069)**, by terminating the worker's group health benefits while that worker is absent from the place of employment as a result of an injury or illness for which a workers' compensation claim has been filed pursuant to ORS chapter 656, except as provided for in this section. [Formerly **659.455**; 2003 c.811 §§27,28; 2007 c.365 §14]