

BUREAU OF LABOR AND INDUSTRIES

DIVISION 6

INJURED WORKERS; DISABILITY; VETERANS AND PERSONS IN UNIFORMED SERVICES

Injured Workers: Prohibited Discrimination; Rights to Reinstatement and Reemployment

839-006-0100

[Purpose and Scope] Injured Workers: Prohibited Discrimination; Rights to Reinstatement and Reemployment

[(1) The Civil Rights Division of the Bureau of Labor and Industries enforces the provisions of ORS 659A.040 to 659A.049, prohibiting discrimination against employees who use the Workers' Compensation statutes and providing specific reinstatement and reemployment requirements.

(2) It is an unlawful employment practice for an employer to discriminate against a worker injured on the job who applies for benefits under or in other ways invokes or uses the Oregon Workers' Compensation system. An employer may not discriminate against workers who have testified, are about to give testimony, or who are perceived as having testified in connection with Oregon Workers' Compensation procedures or civil procedures pursuant to ORS 659A.040, 659A.043, 659A.046.

(3) A worker or injured worker claiming a violation under Oregon's injured worker statutes may file a complaint with the Civil Rights Division as provided in OAR 839-003-0025.]

(1) The Civil Rights Division of the Bureau of Labor and Industries enforces the provisions of ORS 659A.040 to 659A.049, which pertain to discrimination against, and rights of, workers with respect to ORS chapter 656, the Workers' Compensation statutes.

(2) It is an unlawful employment practice under ORS 659A.040 for an employer of six or more persons to discriminate with respect to hire or tenure or any term or condition of employment because a worker has applied for benefits or invoked or utilized the procedures of ORS chapter 656.

(3) It is an unlawful employment practice under ORS 659A.040 for an employer of six or more persons to discriminate against a worker because the worker has testified, will testify or is perceived as having testified under the provisions of ORS chapter 656.

(4) It is an unlawful employment practice for an employer to count the time an injured worker is off the job due to a compensable injury when calculating the injured worker's absenteeism rate, as long as the absences are covered by time loss compensation or are medically certifiable by the attending physician or authorized nurse practitioner in connection with the compensable injury.

(5) ORS 659A.043 requires that a worker who has sustained a compensable injury be reinstated to the worker's former position upon demand if the position exists and is available and the worker is not disabled from performing the duties of the position. ORS 659A.043 applies to employers of 21 or more workers at the time of the worker's injury or at the time of the demand.

(6) ORS 659A.046 requires that a worker who has sustained a compensable injury and is disabled from performing the duties of the worker's former position, be reemployed at available and suitable employment upon demand. ORS 659A.046 applies to employers of six or more persons at the time of the worker's injury or at the time of the demand.

(7) Except as provided in ORS 659A.040-.049 and these rules, an injured worker has no greater right to a position or other employment benefit than if the worker had not been injured.

(8) Pursuant to ORS 659A.030(1)(g), it is an unlawful employment practice for a person, whether an employer or employee, to aid, abet, incite, compel or coerce an individual to do any of the acts forbidden by ORS 659A.040 to 659A.049, or attempt to do so.

(9) A worker alleging a violation of ORS 659A.040–659A.049 may file a complaint with the Civil Rights Division as provided in ORS 659A.820 and OAR 839-003-0025.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.040 - ORS 659A.049

839-006-0105

Definitions regarding Injured Worker Discrimination, Reinstatement and Reemployment

(1) "Attending physician" means a physician or physician's assistant primarily responsible for the treatment of a worker's on-the-job injury as described in ORS 656.005(12).

(2) "Authorized nurse practitioner" means a nurse practitioner authorized to provide compensable medical services under ORS 656.245.

[(3) "Bureau" means the Bureau of Labor and Industries.]

(3) "Compensable injury" for purposes of reemployment and reinstatement as used in ORS 659A.043 and 659A.046 and OAR 839-006-0100 through 839-006-0150 includes an injury for which a claim is denied by:

(a) The injured worker's employer;

(b) The insurer of the employer's workers' compensation insurance; or

(c) The third party administrator of the employer's workers' compensation insurance,

which may be accepted at a later date.

[(4) "Demand" means the injured worker informing the employer that the worker seeks reinstatement or reemployment.

(5) "Division" means the Civil Rights Division of the Bureau of Labor and Industries.]

(4) "Employer" includes:

(a) For purposes of ORS 659A.040, persons employing six or more persons within or outside of Oregon on a full-time, part-time or seasonal basis, at the time of the discriminatory act in violation of ORS 659A.040.

(b) For purposes of ORS 659A.043, persons employing 21 or more workers within or outside of Oregon on a full-time, part-time or seasonal basis:

(A) At the time of a worker's on-the-job injury; or

(B) At the time of demand for reinstatement to the worker's former position.

(c) For purposes of ORS 659A.046, persons employing six or more persons within or outside of Oregon on a full-time, part-time or seasonal basis:

(a) At the time of a worker's on-the-job injury; or

(b) At the time of demand for reemployment of the injured worker.

[(6) **(5)** "Injured worker" means a worker who has a compensable injury as defined in ORS 656.005(7)(a) **and includes a worker with compensable injuries described in subsection (3) of this rule.** [Injured worker, for purposes of ORS 659A.040, includes a worker who has invoked the protection of the Oregon Workers' Compensation statutes. Injured worker, for the purposes of reinstatement rights under ORS 659A.043, does not include:

(a) a worker hired on a temporary basis as a replacement for an injured worker;

(b) a seasonal worker hired for and actually employed for less than six months in a calendar year; or

(c) a worker whose employment at the time of the injury resulted from working short terms of employment as the result of referral by a hiring hall operating pursuant to a collective bargaining agreement.]

[(7) **(6)** "Invoke," as used in ORS 659A.040, includes, but is not limited to, a worker's reporting of an on-the-job injury, **inquiring about worker's compensation,** or a perception by the employer that the worker has been injured on the job or will report an injury.

[(8) "Release to the former position" means a release to the position a worker held prior to an on-the-job injury as provided in ORS 659A.043.]

[(9) "Release to an available, suitable position" means a release to work that meets an injured worker's medical restrictions and for which the worker possesses the necessary skills and abilities as provided in ORS 659A.046. An available, suitable position may vary in duties or hours from the worker's former position and may be a different position or a modified version of the injured worker's former position. An available, suitable position is paid at the rate normally paid by the employer for that position].

[(10) "Supervisor" means a person exercising direct supervisory authority over a worker's position.]

[(11) **(7)** "Worker:"

(a) Means any person, including a minor[,], whether lawfully or unlawfully employed, **who engages** [engaged] to furnish services for **a** remuneration, subject to the direction and control of an employer.

[A worker also] **(b) I** [I] includes salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, whether or not the worker is supervised by the employer.

(c) For [the] purposes of ORS 659A.040, [also] includes an applicant for a job.

(d) [A worker d] **D**oes not include any person whose services are performed as an inmate or ward of a state institution or any person whose services are performed as part of the eligibility requirements for a public assistance grant[, as provided in ORS 656.005(30)].

Stat. Auth.: ORS 659A.805

Stats. Implemented: **ORS 656.005(30);** ORS 659A.040 - 659A.049

839-006-0115

[Covered Employees and Employers]

Duties of Successor Employers to Reinstate Injured Workers under ORS 659A.043 or to Reemploy Injured Workers under ORS 659A.046

(1) The duty under ORS 659A.043 to reinstate an injured worker to the worker's former position or under ORS 659A.046 to reemploy an injured worker in an available, suitable position extends to a successor employer to the worker's employer at the time of the worker's injury.

(2) Determining whether a respondent is a successor employer involves a nine-part test. Not every element of the test need be present to find an employer to be a successor; the facts must be considered together to reach a determination:

(a) Whether respondent had notice of the injured worker at the time of acquiring or taking over the business;

(b) The ability of the predecessor to reinstate or reemploy the injured worker;

(c) Whether there has been a substantial continuity of business operations;

(d) Whether the respondent uses the same plant as the predecessor;

(e) Whether respondent uses the same or substantially the same work force as the predecessor;

(f) Whether respondent uses the same or substantially the same supervisory personnel as the predecessor;

(g) Whether under respondent the same jobs exist under substantially the same working conditions as under the predecessor;

(h) Whether respondent uses the same machinery, equipment and methods of production as the predecessor;

(i) Whether respondent produces the same product as the predecessor.

(1) As provided in ORS 659A.040, an employer may not discriminate against employees or applicants 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 ORS 659A.040 to 659A.049 or has given testimony, is about to give testimony or is perceived as having testified under the provisions of such sections. As provided in ORS 659A.046, an employer must reemploy an injured worker who is unable to perform the duties of the worker's former position to an available, suitable position. "Employer" for the purposes of ORS 659A.040 and 659A.046 includes persons employing six or more employees on a full-time, part-time or seasonal basis at one of the following times:

(a) At the time of the worker's on-the-job injury;

(b) At the time of the injured worker's demand for reemployment under ORS 659A.046; or

(c) At the time of the discriminatory act alleged under ORS 659A.040.

(2) As provided in ORS 659A.043, an employer must reinstate an injured worker to the worker's former position. If the former position no longer exists the employer must offer the worker a vacant, suitable position. "Employer" for the purposes of ORS 659A.043 are those employing 21 or more workers at one of the following times:

(a) At the time of the worker's on-the-job injury; or

(b) At the time of the worker's demand for reinstatement to the worker's former position under ORS 659A.043.

(3) The "six or more persons" referred to in section (1) and the "21 or more employees" referred to in section (2) need not be employed within Oregon.

Stat. Auth.: ORS 659A.805

Stats. Implemented: [ORS 659A.100, ORS 659A.040, ORS 659A.043 - ORS 659A.046 & ORS 659A.049] **ORS 659A.043 and .046**

[839-006-0117

Prohibited Discrimination

(1) Pursuant to ORS 659A.040, unlawful employment practices include:

(a) Refusal to hire or promote, to bar or discharge from employment or to discriminate in compensation, terms, conditions or privileges of employment because a person applies for benefits under or in other ways invokes or uses Oregon Worker's Compensation system as provided for in ORS Chapter 656.

(b) Discriminating against a person who has testified, is about to give testimony, or who is perceived as having testified in connection with Oregon Worker's Compensation procedures or civil procedures pursuant to ORS 659A.040, 659A.043 and 659A.046.

(2) Pursuant to ORS 659A.030(1)(g), it is an unlawful employment practice for a person, whether an employer or employee, to aid, abet, incite, compel or coerce an individual to do any of the acts forbidden by ORS 659A.040 to 659A.049, or attempt to do so.]

[(3) When disciplining workers for excessive absenteeism, an employer cannot count the time an injured worker is off the job because of a compensable injury when calculating the injured worker's absenteeism rate, as long as the time

off the job is covered by time loss compensation or are absences medically certifiable by the attending physician in connection with the compensable injury.]

[(4) A person claiming a violation under Oregon's injured worker statutes may file a complaint with the Civil Rights Division as provided in OAR 839-003-0025.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.030(1)(g), ORS 659A.040 & ORS 659A.820]

839-006-0130

Injured Worker Reinstatement [U]nder ORS 659A.043

(1) As provided in ORS 659A.043 and subject to these rules, an injured worker has the right to reinstatement to the worker's former position, which is the position the worker held at the time of the on-the-job injury.

[(1)] **(2)** An employer with 21 or more employees at the time of a worker's on-the-job injury or at the time an injured worker demands reinstatement to the former position must reinstate the worker to the worker's former position if:

(a) The injured worker's former position [still] exists. **The position still exists:**

(A) If it [has not been eliminated for bona fide reasons]; and

(B) [The former position "exists" even though] Regardless of whether the position has [may have] been renamed or reclassified;

(b) The injured worker's former position is available. A worker's former position is "available" even if that position has been filled by a replacement worker while the injured worker was absent and regardless of the employer's possible preference for the replacement worker;

(c) The injured worker is not disabled from performing the duties of the former position; and

(d) Timely demand **that the worker be reinstated** is made as provided in [OAR 839-006-0130(5)(d)]**OAR 839-006-0150.**

(3) A certificate by the attending physician or authorized nurse practitioner that the attending physician or authorized 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.

(a) In addition to an attending physician or authorized nurse practitioner certificate, the employer may require, within a reasonable period of time and at the employer's expense, further evidence of the injured worker's physical ability to perform the duties of the former position. The employer may, in a manner consistent with worker's compensation statutes and rules and other applicable law[regulations], consult the worker's attending physician or authorized nurse practitioner regarding the worker's condition as it relates to the worker's ability to perform the duties of the former position.

(b) The employer may not question the attending physician's or authorized nurse practitioner's release as a subterfuge to avoid employer responsibilities under ORS 659A.043.

[(2)]**(4)** If the **worker's** former position exists but is not available [(due to seniority or other employment restrictions contained in a valid collective bargaining agreement that the injured worker does not meet[;] (see subsection [(8)] **(9)** of this rule), the employer must offer the injured worker a vacant, suitable position.

(a) For the purposes of ORS 659A.043, a suitable position is one that is most similar to the former position in compensation, duties, responsibilities, skills, location, duration (full or part-time, temporary or permanent), and shift.

(b) If a suitable position is not available at the worker's [normal] **pre-injury** work location, the employer must **identify and consider the** vacant, suitable positions in all the employer's facilities within reasonable commuting distance **of the worker**, not just the facility where the injured worker was previously employed.

[(c) Prior to beginning a vacant, suitable position, the injured worker has the right to discuss position duties with the employer and to receive written clarification of the specific duties.]

[(3)]**(5) If [A] at the time of the injured worker's demand for reinstatement, [if] the worker's former position no longer exists or is not available, and [no other position exists that is vacant and suitable] a suitable position is not available:** [the injured worker must follow the employer's reporting policy until the employer offers the worker the former position or a vacant, suitable position. The employer's reporting policy must be written, non-discriminatory and effectively made known to the employer's work force. If the employer has no such reporting policy, the employer may require the injured worker to inform the employer of any change in address and telephone number within ten days of the change, provided the employer gives prior written notice of this requirement to the injured worker.]

(a) The employer is required to review all position vacancies for three years from the date of the worker's injury and to offer the injured worker the first available, suitable position, provided no conditions of OAR 839-006-0136 have occurred that would cause the injured worker to lose the right to reinstatement or reemployment.

(b) For purposes of compliance with subsection (a), an employer may require an injured worker waiting for an available, suitable position:

(A) To follow a written, nondiscriminatory reporting policy effectively made known to the employer's work force; or

(B) To inform the employer within ten days after any change in the worker's address and telephone number provided the employer gives prior written notice of this requirement to the injured worker;

until the employer offers the injured worker an available, suitable position or until the worker is released to return to and is returned to the time-of-injury position (see subsection (6) of this rule) or until 3 years elapse from the date of injury, whichever occurs first.

(c) If the injured worker's former position no longer exists, and there is no vacant, suitable position, the employer has no obligation to create a position for a returning injured worker. If the employer creates such a position, the position may be discontinued at any time. The injured worker still retains the right to reinstatement or reemployment for three years from the date of injury.

[(4) A certificate by the attending physician or authorized nurse practitioner that the attending physician or authorized 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.

(a) In addition to an attending physician or authorized nurse practitioner certificate, the employer may require, within a reasonable period of time and at the employer's expense, further evidence of the injured worker's physical ability to perform the duties of the former position. The employer may, in a manner consistent with worker's compensation regulations, consult the worker's attending physician or authorized nurse practitioner regarding the worker's condition as it relates to the worker's ability to perform the duties of the former position.

(b) The employer may not question the attending physician's or authorized nurse practitioner's release as a subterfuge to avoid employer responsibilities under ORS 659A.043.

[(5) The injured worker must make demand for reinstatement to the former position according to the employer's written policy effectively made known to the employer's workforce. If the employer has no such policy, the injured worker's demand:

(a) May be oral or written;

(b) Must be made to a supervisor, personnel officer or person in management;

(c) May be made by the injured worker or the injured worker's attorney; and

(d) May be made at any time after the attending physician or authorized nurse practitioner has released the injured worker for reinstatement to the former position, but must be made no later than seven calendar days after receiving certified mail notice from the insurer or self-insured employer that the worker's attending physician or authorized nurse practitioner has released the worker for return to the worker's former position. For purposes of this section, receipt of notice is deemed to have occurred on the day the worker signs a receipt for the mailing or three days following the deposit of the certified mail with the U.S. Postal Service, whichever occurs first, provided such mail is sent to the worker's last known address and that address is within the state. If the worker's last known address is outside of the state, the date of notice is the date the worker signs a receipt for the mailing or seven days after the mailing, whichever occurs first.

[(6) Extenuating circumstances may, in very rare instances, extend the time allowed for timely demand for reinstatement.

(6) If the injured worker is first released to and accepts reemployment in an available, suitable position and is later released for reinstatement to the former position, the employer must return the injured worker to the former position unless it no longer exists or is not available, even if the position is held by another worker, as long as the demand for reinstatement to the former position is made timely after notice to the worker of the release as provided in OAR 839-006-0150 and within three years of the date of the worker's injury.

[(7) When the injured worker has not made demand for reinstatement to the former position because the employer has made it known to the worker that reinstatement will not be considered, even if a suitable position is vacant, and that an actual demand would therefore be futile, the division will deem the worker to have made timely demand.]

(7) Prior to beginning work in a vacant, suitable position, an injured worker has the right to receive written clarification of the specific duties of the position and to discuss the position duties with the employer.

(8) The right of an injured worker to reinstatement to the former position held at the time-of-injury is guaranteed by ORS 659A.043[.] subject to the conditions in ORS 659A.043 and these rules. [Conditions of reinstatement are] Such right is also subject to 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.

[(9) If the injured worker's former position no longer exists, and there is no vacant, suitable position, the employer has no obligation to create a position for a returning injured worker. If the employer creates such a position, the position may be discontinued at any time.

[(10) Except as provided in these rules, an injured worker has no greater right to a position or other employment benefit than if the worker had not been injured.]

[(11)] **(9)** The duty under ORS 659A.043 to reinstate an injured worker to the worker's former position extends to a successor employer to the worker's employer at the time of injury **as provided in OAR 839-006-0115.** [Determining whether a respondent is a successor employer involves a nine-part test. Not every element of the test need be present to find an employer to be a successor; the facts must be considered together to reach a determination:

(a) Whether respondent had notice of the injured worker at the time of acquiring or taking over the business;

(b) The ability of the predecessor to reinstate the injured worker;

(c) Whether there has been a substantial continuity of business operations;

(d) Whether the respondent uses the same plant as the predecessor;

(e) Whether respondent uses the same or substantially the same work force as the predecessor;

- (f) Whether respondent uses the same or substantially the same supervisory personnel as the predecessor;
(g) Whether under respondent the same jobs exist under substantially the same working conditions as under the predecessor;
(h) Whether respondent uses the same machinery, equipment and methods of production as the predecessor;
(i) Whether respondent produces the same product as the predecessor.]

(10) The right to reinstatement under ORS 659A.043 does not apply to:

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

(b) A seasonal worker hired for and actually employed for less than six months in a calendar year; or

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

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.043

[839-006-0131

Loss of Reinstatement Rights Under ORS 659A.043

(1) An injured worker meeting the requirements for reinstatement under ORS 659A.043 loses the right to reinstatement to the worker's former position when any of the following occurs:

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

(b) The worker is eligible for and participates in vocational assistance under ORS 656.340;

(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 which is suitable prior to becoming medically stationary, except as provided under section (2) of this rule;

(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 an authorized nurse practitioner has released the worker for employment unless the worker requests reinstatement within that time period;

(f) Three years elapse from the date of injury;

(g) The worker is discharged for bonafide reasons not connected with the injury and for which others are or would be discharged; or

(h) The worker clearly and unequivocally abandons employment with the employer.

(2) A worker who refuses an offer of employment under subsection (1)(d) of this rule and who otherwise is entitled to Oregon Family Leave Act (OFLA) leave under ORS 659A.150 to 659A.186:

(a) Automatically commences a period of OFLA leave upon refusing the offer of employment; and

(b) Need not give notice to the employer that would otherwise be required under OAR 839-009-0250 that the employee is commencing a period of OFLA leave. See ORS 659A.162 and 659A.043.

(3) The right to reinstatement does not apply to:

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

(b) A seasonal worker hired for and actually employed for less than six months in a calendar year; or

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

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - ORS 659A.186]

839-006-0135

Injured Worker Reemployment [U]nder ORS 659A.046

(1) An employer with six or more employees at the time of [the] a worker's on-the-job injury or at the time of the injured worker's demand for reemployment must reemploy an injured worker disabled from performing the duties of the worker's former regular employment to an available, suitable position if:

(a) The injured worker is medically released to perform the duties of the available, suitable position; and

(b) Timely demand is made as provided in [OAR 839-006-0135(8)(d)] **OAR 839-006-0150.**

(2) A certificate of the worker's attending physician or authorized nurse practitioner that the worker is able to perform described types of work shall be prima facie evidence of such ability.

(a) The employer may require, within a reasonable period of time and at the employer's expense, further evidence of the worker's physical ability to perform the available, suitable position. The employer may, consistent with worker's compensation regulations and other applicable law, consult the worker's attending physician or authorized nurse practitioner regarding the worker's condition as it relates to the worker's ability to perform the available, suitable position.

(b) The employer may not question the attending physician's or authorized nurse practitioner's release as a subterfuge to avoid employer responsibilities under ORS 659A.046.

[(8) *The injured worker must make demand for reemployment to an available, suitable position according to the employer's written policy effectively made known to the employer's workforce. If the employer has no such policy, the injured worker's demand:*

(a) *May be oral or written;*

(b) *Must be made to a supervisor, personnel officer or person in management;*

(c) *May be made by the injured worker or the injured worker's attorney; and*

(d) *May be made any time after the attending physician or authorized nurse practitioner has released the injured worker to an available, suitable position, but must be made no later than seven calendar days after receiving certified mail notice from the insurer or self-insured employer that the worker's attending physician or authorized nurse practitioner has released the worker for reemployment to an available, suitable position. For purposes of this section, receipt of notice is deemed to have occurred on the day the worker signs a receipt for the mailing or three days following the deposit of the certified mail with the U.S. Postal Service, whichever occurs first, if such mail is sent to the worker's last known address and that address is within the state. If the worker's last known address is outside the state, the date of notice is the date the worker signs a receipt for the mailing or seven days after the mailing, whichever occurs first;*

(9) *Extenuating circumstances may, in very rare instances, extend the time allowed for timely demand for reemployment.*

(10) *When the injured worker has not made demand for reemployment to an available, suitable position because the employer has made it known to the worker that reemployment will not be considered even if a suitable position is available and that an actual demand would therefore be futile, the division will deem the worker to have made timely demand.]*

(2) For [the] purposes of ORS 659A.046, an available position is one that is vacant and for which the worker meets seniority or other employment restrictions contained in any applicable valid collective bargaining agreement (see subsection [(1)] (9) of this rule).

(3) For [the] purposes of ORS 659A.046, a suitable position is one that meets the injured worker's medical restrictions and for which the worker possesses the necessary skills and abilities. A suitable position is as similar as practicable to the worker's former position in compensation, duties, responsibilities, skills, location, duration (full or part-time, temporary or permanent) and shift. A suitable position under ORS 659A.046 is paid at the rate normally paid by the employer for that position.

(4) Prior to beginning **work in** an available, suitable position, the injured worker has the right to **receive written clarification of the specific duties of the position and** to discuss the duties of the [available, suitable] position with the employer [and to receive written clarification of the specific duties].

(5) Notwithstanding OAR 839-006-0136(6), an injured worker who meets the requirements of ORS 659A.046 and who has been placed in an available, suitable position is entitled to remain in the position, provided the worker's restrictions continue to allow the worker to perform the duties of the position and the position is not eliminated for bona fide reasons. If an injured worker recovers to the point that the worker can perform the duties of the worker's former position, the worker must make timely demand for reinstatement to the former position, subject to [OAR 839-006-0130] **OAR 839-006-0150.**

(6) **If [A]at the time of the injured worker's demand for reemployment, a suitable position [may] is not [be] available:**

(a) The employer is required to review all position vacancies for three years from the date of the worker's injury and to offer the injured worker the first available, suitable position, provided no conditions of OAR 839-006-0136 have occurred that would cause the injured worker to lose the right to reemployment.

(b) For purposes of compliance with subsection (a), an employer may require an injured worker waiting for an available, suitable position:

(A) To follow a written, nondiscriminatory reporting policy effectively made known to the employer's work force; or

(B) To inform the employer within ten days after any change in the worker's address and telephone number [within ten days of the change], provided the employer gives prior written notice of this requirement to the injured worker; until the employer offers the injured worker an available, suitable position or until 3 years elapse from the date of injury, whichever occurs first.

(7) If an employer has no suitable position available, the employer has no obligation to create a position for a returning injured worker. If the employer creates such a position, the position may be discontinued at any time. A modified version of the worker's former position is not a created position.

(8) If a suitable position is not available at the time an injured worker's attending physician or authorized nurse practitioner finds the worker to be medically stationary but unable to perform the duties of the former position, the injured worker continues to retain the right to be reemployed in an available, suitable position for three years from the date of the injury, provided no other conditions of OAR 839-006-0136 have occurred.

[(11)] (9) The right of **an injured worker disabled from performing the duties of the worker's former regular employment** to reemployment **in an available, suitable position** is guaranteed [by] **subject to the conditions in ORS 659A.046 and these rules.** [Conditions of reemployment are] **Such right is also subject to 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. [The right of reinstatement is guaranteed by ORS 659A.046].

[(12) Except as provided in these rules, an injured worker has no greater right to a position or other employment benefit than if the worker had not been injured.

[(13)](10) The duty under ORS 659A.046 to reemploy an injured worker to an available, suitable position extends to a successor employer to the worker's employer at the time of injury **as provided in OAR 839-006-0115**. [Determining whether a respondent is a successor employer involves a nine-part test. Not every element of the test need be present to find an employer to be a successor; the facts must be considered together to reach a determination:

- (a) Whether respondent had notice of the injured worker at the time of acquiring or taking over the business;
- (b) The ability of the predecessor to reemploy the injured worker;
- (c) Whether there has been a substantial continuity of business operations;
- (d) Whether the respondent uses the same plant as the predecessor;
- (e) Whether respondent uses the same or substantially the same work force as the predecessor;
- (f) Whether respondent uses the same or substantially the same supervisory personnel as the predecessor;
- (g) Whether under respondent the same jobs exist under substantially the same working conditions as under the predecessor;
- (h) Whether respondent uses the same machinery, equipment and methods of production as the predecessor;
- (i) Whether respondent produces the same product as the predecessor.]

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.046

839-006-0136

Loss of Reinstatement Rights under ORS 659A.043 or of Reemployment Rights [U]nder ORS 659A.046

An injured worker meeting the requirements **for reinstatement to the worker's former position under ORS 659A.043 or for** reemployment to an available, suitable position under ORS 659A.046 loses the right to **reinstatement or** reemployment when any of the following occurs:

(1) A medical determination by the attending physician or authorized nurse practitioner or, after an appeal of such determination, by a medical arbiter or panel of medical arbiters pursuant to ORS chapter 656, that the worker cannot be reinstated to the former position (ORS 659A.043) or be reemployed by the employer (ORS 659A.046):

(2) The worker is eligible for and participates in vocational assistance under ORS 656.340;

(3) The worker accepts suitable employment with another employer after becoming medically stationary;

(4) The worker refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary. Except that a worker who refuses an offer of employment under this section, and who otherwise is entitled to Oregon Family Leave Act (OFLA) leave under ORS 659A.150 to 659A.186:

(a) Automatically commences a period of OFLA leave upon refusing the offer of employment; and

(b) Need not give notice to the employer that would otherwise be required under OAR 839-009-0250 that the employee is commencing a period of OFLA leave. See ORS 659A.162 and ORS 659A.043 and .046;

(5) 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 authorized nurse practitioner has released the worker for **reinstatement (ORS 659A.043) or for** reemployment **(ORS 659A.046)**, unless the worker requests [the] **either reinstatement or** reemployment **as provided by the release** within that time period;

(6) Three years elapse from the date of injury;

(7) The worker is discharged for bona fide reasons not connected with the injury and for which others are or would be discharged; or

(8) The worker clearly and unequivocally abandons employment with the employer.

(9) An injured worker does not lose the right to reinstatement or reemployment under ORS 659A.043 or 659A.046 if:

(a) 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;

(b) The employer discharges all employees who are off the job for a certain amount of time and discharges the injured worker under this policy for time off covered by time-loss compensation or for absences medically certifiable by the attending physician or authorized nurse practitioner in connection with the compensable injury;

(c) The employer discharges the injured worker for reasons other than for cause;

(d) The injured worker quits or resigns involuntarily or under mistake of fact;

(e) The injured worker making a timely demand for reinstatement or reemployment takes a position that is not suitable with another employer while waiting for a suitable position to become available;

(f) The injured worker, disabled from performing the duties of the worker's former regular employment, accepts an available, suitable position with the same employer under ORS 659A.046 and these rules.

(g) The injured worker, in compliance with the duty to mitigate damages, seeks, acquires or commences employment with another employer prior to becoming medically stationary.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.**043-049**.[046], 659A.150-.186

839-006-0145

Suitable Employment

(1) An employer required to return an injured worker **whose former position no longer exists or is not available**, to a vacant, suitable position under ORS 659A.043, or **to return an injured worker disabled from performing the worker's former position to** an available, suitable position under 659A.046, is not required to offer the worker a selection of suitable positions.

(2) In determining whether a particular position is suitable, the division will consider the employer's size, diversity, nature and pattern of position openings and whether the injured worker is qualified to perform the position.

(3) "Qualified" means:

(a) The injured worker meets minimum standards used by the employer to fill the position;

(b) The injured worker has performed the position in an acceptable manner; or

(c) The injured worker would be qualified for the position with the same training given to another worker newly placed in the position.

(4) For the purposes of ORS 659A.043, a "suitable position" is one that is most similar to the former position in compensation, duties, responsibilities, skills, location, duration (full or part-time, temporary or permanent), and shift. For the purposes of ORS 659A.046, a "suitable position" **is a position that** also meets the injured worker's medical restrictions **and for which the worker possesses the necessary skills and abilities**. *An available, suitable position may vary in duties or hours from the worker's former position and may be a different position or a modified version of the injured worker's former position. An available, suitable position is paid at the rate normally paid by the employer for that position.*

(a) "Similar compensation" is the normal compensation the employer pays to others of the same education, skill and seniority employed in that position. This compensation may be greater than, the same as, or less than the rate the injured worker was earning at the time of injury, provided that it is not a subterfuge for the employer to avoid responsibilities;

(b) "Similar location" means that the position is within reasonable commuting distance, except where the former work site is no longer in operation or the nature of the employer's business routinely involves the transfer of employees. A position outside of Oregon is suitable if the worker and employer mutually agree **that it is**.

(5) An employer is neither required to offer nor prohibited from offering a position that would promote the returning injured worker. A managerial or supervisory position is suitable for a returning injured worker whose former position was managerial or supervisory. Should a returning injured worker compete or bid for a managerial or supervisory position, nothing in this rule allows the employer to use the injury as a reason to discriminate against the worker.

(6) The employer may assign the injured worker to different duties at the worker's regular compensation provided that:

(a) The assignment is temporary and is part of a return-to-work program;

(b) The worker is returned to available and suitable work when the worker is physically capable; and

(c) The assignment is not a subterfuge for the employer to avoid responsibilities.

(7) If an employer offers a position that the injured worker believes the worker is physically unable to perform, the worker is not required to accept the position, but must provide **oral** [*verbal*] or written notice to the employer that the worker believes the worker is physically unable to perform the duties of the position. The employer may offer a suitable position or may require the worker to provide medical evidence of the worker's inability to perform the duties of the position. If an employer requires medical verification, the employer must give the worker written notice that the worker has 20 calendar days from the receipt of the notice to provide medical evidence of the worker's physical inability to perform the duties of the position.

(8) If an injured worker accepts an offer of suitable work and, after beginning the position, the worker is physically unable to perform the duties of the position, the worker must provide [*verbal*] **oral** or written notice to the employer that the worker believes the worker is physically unable to perform the duties of the position. The employer may offer a suitable position or may require the worker to provide medical evidence of the worker's inability to perform the duties of the position. If an employer requires medical verification, the employer must give the worker written notice that the worker has 20 calendar days from the receipt of the notice to provide medical evidence of the worker's physical inability to perform the duties of the position. **Consistent with ...the employer shall pay the cost of any medical verification.**

(9) If an employer offers an injured worker a position that the worker considers not suitable for reasons other than physical ability, the worker must accept the offered position. The worker must then provide [*verbal*] **oral** or written notice to the employer that the worker considers the position not suitable. The employer may offer a suitable position or may require the worker to provide the reasons, under the criteria of section (4) of this rule, that the worker

considers the position not suitable. If the employer requires such information, the employer must give the worker written notice that the worker has 20 calendar days from the receipt of the notice to provide the reasons in writing. (10) When an injured worker timely provides the evidence required in sections (7), (8) and (9) of this rule, the position will be considered not suitable and the employer must make a suitable position offer as required under ORS 659A.043 or 659A.046. If the worker fails to timely provide the information requested under sections (7), (8) and (9) of this rule, or the information is not sufficient, the position will be considered suitable.

(11) If the employer and the injured worker disagree about the suitability of an offered position, and the worker files a complaint as provided by statute and these rules, the division will determine the position's suitability.

(12) The Civil Rights Division may accept a complaint where a worker did not object to the position offered by the employer as required in sections (7), (8) and (9) of this rule when the worker had a verifiable, legitimate fear that an objection to the offered position would result in an adverse employment action.

[(13) *If an injured worker makes a timely demand for reemployment to an available, suitable position under ORS 659A.046, an employer is required to review all position vacancies for three years from the date of injury and to offer the injured worker the first available, suitable position provided no other conditions of OAR 839-006-0136 have occurred.*]

[(14) *If the injured worker's former position has been eliminated for bona fide reasons, and the worker makes a timely demand for reinstatement to the worker's former position under ORS 659A.043, an employer is required to review all position vacancies for three years from the date of injury and to offer the injured worker the first vacant, suitable position provided no other conditions of OAR 839-006-0131 have occurred.*]

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.043 & 659A.046

839-006-0150

[Retention and Loss of Reinstatement and Reemployment Rights]

Demand for Reinstatement or Reemployment

[(1) *An injured worker does not lose the right to reinstatement or reemployment under ORS 659A.043 or 659A.046 if:*
(a) *An employer discharges all employees who are off the job for a certain amount of time and discharges the injured worker under this policy for time off covered by time-loss compensation or for absences medically certifiable by the attending physician or authorized nurse practitioner in connection with the compensable injury.*

(b) *An employer discharges the injured worker for reasons other than for cause;*

(c) *An injured worker quits or resigns involuntarily or under mistake of fact;*

(d) *An injured worker making a timely demand for reinstatement or reemployment takes a position that is not suitable with another employer while waiting for a suitable position to become available; or*

(e) *An injured worker, disabled from performing the duties of the worker's former regular employment, accepts an available, suitable position with the same employer under ORS 659A.046 and these rules.]*

(1) An injured worker must make demand for reinstatement to the former position under ORS 659A.043 or for reemployment to an available, suitable position under ORS 659A.046, according to the employer's written policy effectively made known to the employer's workforce. If the employer has no such policy, the injured worker's demand:

(a) May be oral or written;

(b) Must be made to a supervisor exercising direct supervisory authority over a worker's position, personnel officer or person in management;

(c) May be made by the injured worker or the injured worker's attorney; and

(d) May be made at any time after the attending physician or authorized nurse practitioner has released the injured worker for reinstatement to the former position under ORS 659A.043 or for reemployment to an available, suitable position under ORS 659A.046, but must be made no later than seven calendar days after receiving certified mail notice from the insurer or self-insured employer that the worker's attending physician or authorized nurse practitioner has released the worker for return to the worker's former position under ORS 659A.043 or to an available, suitable position under ORS 659A.046. For purposes of this section, receipt of notice is deemed to have occurred on the day the worker signs a receipt for the mailing or three days following the deposit of the certified mail with the U.S. Postal Service, whichever occurs first, provided such mail is sent to the worker's last known address and that address is in the state. If the worker's last known address is outside of the state, the date of notice is the date the worker signs a receipt for the mailing or seven days after the mailing, whichever occurs first.

(3) If the injured worker is first released for, accepts and begins reemployment in an available, suitable position and is later released for reinstatement to the former position, the employer must return the injured worker to the former position unless it no longer exists or is not available, even if the position is held by another worker, as long as the demand for reinstatement to the former position is made timely after notice to the worker of the release and within three years of the date of the injury.

(2) If an injured worker recovers to the point that the worker can perform the duties of the worker's former position, the worker must make timely demand for reinstatement to the former position, subject to the requirements of OAR-006-0130.

(3) If an injured worker is unable to perform the duties of the former position but is released by the attending physician or authorized nurse practitioner to perform duties that meet the workers medical restrictions, the worker must make timely demand for reemployment to an available, suitable position, subject to the requirements of OAR 839-006-0135.

(4) *Compliance with the duty to mitigate damages by seeking employment with another employer will not extinguish an injured worker's reinstatement rights, except when the injured worker acquires and commences suitable employment with another employer after becoming medically stationary.*

(2) Extenuating circumstances may, in very rare instances, extend the time allowed for timely demand for reinstatement under ORS 659A.043 or for reemployment under ORS 659A.046.

(3) When the injured worker has not made demand:

(a) For reinstatement to the former position under ORS 659A.043 because the employer has made it known to the worker that reinstatement will not be considered even if the former position is available or a suitable position is vacant; or

(b) For reemployment to an available suitable position under ORS 659A.046 because the employer has made it known to the worker that reemployment will not be considered, even if a suitable position is vacant; and that an actual demand would therefore be futile, the division will deem the worker to have made timely demand.

Stat. Auth.: ORS 659A.805

Stats. Implemented: [ORS 659A.040,] 659A.043 & 659A.046

Disability and Employment Rights

839-006-0240

Temporary or Progressive Impairments

(1)The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of ORS 659A.104 and these rules.

(2)Conditions that are progressive (including, but not limited to, cancer, Hodgkin's disease, multiple sclerosis and HIV infection, whether or not such condition substantially limits the individual in any major life activity at the time of the alleged discrimination) may not form the basis for an employer to refuse to employ or promote; bar or discharge from employment; or discriminate in compensation, terms, conditions or privileges of employment.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103-659A.142

839-006-0244

Direct Threat to Health or Safety, Employment

(1) Notwithstanding other provisions of these rules, an employer may refuse to employ an individual with a disability posing a direct threat to the health or safety of others. Direct threat means significant risk of substantial harm that cannot be eliminated or reduced below the level of significant risk of substantial harm by reasonable accommodation.

(2) The determination that an individual with a disability poses a "direct threat" is based on an individualized assessment of the individual's present ability to safely perform the essential functions of the position. The assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge or on the best available objective evidence. In making the determination, factors to be considered include:

- (a) The duration of risk;
- (b) The nature and severity of potential harm;
- (c) The likelihood that potential harm will occur; and
- (d) The imminence of potential harm.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103-659A.142

Discrimination against Persons with Disabilities by State Government

839-006-0280

Definitions — Discrimination by State Government on the Basis of Disability

(1) For purposes of ORS 659A.142(5) and these rules, "state government" has the meaning given to that term in ORS 174.111 and includes the executive, judicial and legislative departments of state government. Consistent with ORS 174.108(3), it does not include the Oregon Health and Science University, the Oregon State Bar, any

intergovernmental entity formed by a public body with another state or with a political subdivision of another state, or any intergovernmental entity formed by a public body with an agency of the federal government.

(2) Pursuant to ORS 174.112, "executive department" means all statewide elected officers other than judges, and all boards, commissions, departments, divisions and other entities, without regard to the designation given to those entities, that are within the executive department of government as described in Article III, Section 1 of the Oregon Constitution, and that are not in the judicial department, legislative department, local governments or special government bodies. "Executive department" includes:

(a) An entity created by statute for the purpose of giving advice only to the executive department and that does not have members who are officers or employees of the judicial department or legislative department;

(b) An entity created by the executive department for the purpose of giving advice to the executive department, if the document creating the entity indicates that the entity is a public body; and

(c) Any entity created by the executive department other than an entity described in paragraph (b) of this subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the executive department.

(3) Pursuant to ORS 174.113, "judicial department" means the Oregon Supreme Court, the Oregon Court of Appeals, the Oregon Tax Court, the Oregon circuit courts and all administrative divisions of those courts, whether denominated as boards, commissions, committees or departments or by any other designation. "Judicial department" includes:

(a) An entity created by statute for the purpose of giving advice only to the judicial department and that does not have members who are officers or employees of the executive department or legislative department;

(b) An entity created by the judicial department for the purpose of giving advice to the judicial department, if the document creating the entity indicates that the entity is a public body; and

(c) Any entity created by the judicial department other than an entity described in paragraph (b) of this subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the judicial department.

(4) Pursuant to ORS 174.114, "legislative department" means the Legislative Assembly, the committees of the Legislative Assembly and all administrative divisions of the Legislative Assembly and its committees, whether denominated as boards, commissions or departments or by any other designation. "Legislation department" includes:

(a) An entity created by statute for the purpose of giving advice only to the legislative department and that does not have members who are officers or employees of the executive department or judicial department;

(b) An entity created by the legislative department for the purpose of giving advice to the legislative department, but that is not created by statute, if the document creating the entity indicates that the entity is a public body; and

(c) Any entity created by the legislative department by a document other than a statute and that is not an entity described in paragraph (b) of this subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the legislative department.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.104, 659A.106, 659A.109, 659A.139, 659A.142

839-006-0290

Other Statutes, Regulations and Agencies Governing Access by or Discrimination [A]against Persons with Disabilities

(1) Public transportation services, programs, and activities of public entities are subject to Title II of the federal Americans with Disabilities Act and regulated by the U.S. Department of Transportation. See 42 USC 12141 [i] § 221 and 49 CFR [i] §37. Public transportation is covered by ORS 659A.142(4).

(2) Accessibility of government facilities is subject to Title II of the Americans with Disabilities Act, 42 USC [i] §12131. The U.S. Department of Justice regulates existing government facilities (28 CFR [i] §35.150) and new construction and alterations to government facilities (28 CFR [i] §35.151). The Oregon Department of Consumer and Business Services has jurisdiction over disability access to state and local government facilities in Oregon. See ORS 447.210 to 447.310 and administrative rules and standards adopted pursuant thereto.

(3) The federal Rehabilitation Act provides that no otherwise qualified individual with a disability in the United States shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any federal executive agency or by the United States Postal Service. 29 USC [i] §794.

(4) Discrimination against individuals with disabilities in employment is subject to ORS 659A.103 to 659A.139 and OAR 839-006-0200 to 0265.

(5) Discrimination against individuals with disabilities by places of public accommodation, **which include public bodies with some exceptions**, is subject to ORS 659A.142(4), **659A.400** and OAR 839-006-0300 to 0335.

(6) Assistance animals in places of public accommodation or access to state government are subject to **ORS 659A.143**[*SB 610, 77th Leg., Reg. Session (Or. 2013)*] and OAR 839-006-0345.

(7) Discrimination against individuals with disabilities in real property transactions is subject to ORS 659A.142, 659A.145 and OAR 839-005-0195 to 839-005-0220.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103–**143 and ORS 659A.400** [*. 142, HB 2668, 77th Leg., Reg. Session (Or. 2013) and SB 610, 77th Leg., Reg. Session (Or. 2013)*]

Rights of Persons with Disabilities With Respect to Places of Public Accommodation

839-006-0305

Definitions

(1) "Disability" has the meaning given in OAR 839-006-0205.

(2) "Major life activity" has the meaning given in OAR 839-006-0205(6).

(3) "Physical or mental impairment" has the meaning given in OAR 839-006-0205 (9).

(4) "Place of public accommodation" means:

(a) Any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise;

(b) Any place that is open to the public and owned or maintained by a public body, as defined in ORS 174.109, regardless of whether the place is commercial in nature; or

(c) Any service to the public that is provided by a public body, as defined in ORS 174.109, regardless of whether the service is commercial in nature.

(5) A place of public accommodation does not include:

(a) A Department of Corrections institution as defined in ORS 421.005;

(b) A state hospital as defined in ORS 162.135;

(c) A youth correction facility as defined in ORS 420.005;

(d) A local correction facility or lockup as defined in ORS 169.005; or

(e) An institution, bona fide club or place of accommodation that is in its nature distinctly private.

(6) "Substantially limits" has the meaning given in OAR 839-006-0205(12).

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.142, **ORS 659A.400**[*HB 2668, 77th Leg., Reg. Session (Or. 2013)*]

839-006-0335

Direct Threat to Health or Safety: Places of Public Accommodation

(1) Notwithstanding other provisions of these rules, places of public accommodation may refuse to permit an individual with a disability to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation if the individual with a disability poses a direct threat to the health or safety of others. Direct threat means significant risk of substantial harm that cannot be eliminated or reduced below the level of significant risk of substantial harm by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.

(2) In determining whether an individual with a disability poses a direct threat to the health or safety of others, places of public accommodation must make an individualized assessment, based on reasonable judgment that relies on the most current medical knowledge, or on the best available objective evidence, to ascertain:

(a) The duration of risk;

(b) The nature and severity of potential harm;

(c) The likelihood that potential harm will occur;

(d) The imminence of potential harm; and

(e) Whether reasonable modifications of policies, practices or procedures will mitigate the risk.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103; [&] 659A.142

839-006-0340

Discrimination Theories: Discrimination [A] against Individuals with Disabilities by State Government or Places of Public Accommodation

(1) A violation of discrimination laws against individuals with disabilities may involve either intentional or unintentional discrimination. Discrimination against individuals with disabilities need not be intentional to be unlawful. Unintentional discrimination may occur, for example, in situations involving adverse impact. To be protected from discrimination based on disability, an individual must have a disability, as defined in ORS 659A.104 and the relevant rules.

(2) Substantial evidence of intentional unlawful discrimination against an individual exists if the investigation of the Civil Rights Division ("division") reveals evidence that a reasonable person would accept as sufficient to support the following elements:

(a) The respondent is a respondent as defined by ORS 659A.001(10) and OAR 839-005-0003(12~~14~~) of these rules;

(b) The individual has a disability;

(c) The individual was harmed by an action of the respondent; and

(d) The individual's disability was the motivating factor for the respondent's action. In determining whether the individual's disability was the motivating factor for the respondent's action, the division uses whichever of the following theories applies:

(A) Specific Intent Theory: The respondent knowingly and purposefully discriminates against an individual because that individual has a disability.

(B) Different or Unequal Treatment Theory: The respondent treats individuals with disabilities differently than others who do not have disabilities. When the respondent makes this differentiation because of the individual's disability and not because of legitimate, non-discriminatory reasons, unlawful discrimination exists. In establishing a case of different or unequal treatment:

(i) There must be substantial evidence that the individual was harmed by an action of the respondent under circumstances that make it appear that the respondent treated the individual differently than comparably situated individuals who do not have disabilities. Substantial evidence of discrimination exists if the division's investigation reveals evidence that a reasonable person would accept as sufficient to support that an individual's disability was a motivating factor for the respondent's alleged unlawful action. If the respondent fails to rebut this evidence with evidence of a legitimate non-discriminatory reason, the division will conclude that substantial evidence of unlawful discrimination exists.

(I) Pretext: If the respondent rebuts the evidence with evidence of a legitimate non-discriminatory reason, but there is substantial evidence that the respondent's reason is a pretext for discrimination, the division will conclude there is substantial evidence of unlawful discrimination.

(II) Mixed Motive: If the respondent presents substantial evidence that a legitimate, non-discriminatory reason contributed to the respondent's action, but the division finds the individual's disability was also a substantial factor in the respondent's action, the division will determine there is substantial evidence of discrimination.

(ii) The individual with a disability at all times has the burden of proving that the individual's disability was the motivating factor for the respondent's unlawful action.

(3) Adverse impact by a place of public accommodation or by state government on the basis of disability: Substantial evidence of adverse impact discrimination does not require establishment of intentional discrimination as provided in (2) of this rule. Adverse impact discrimination exists if the division's investigation reveals evidence that a reasonable person would accept as sufficient to support the following elements:

(a) The respondent is a respondent as defined by ORS 659A.001(10) and OAR 839-005-0003(12) of these rules;

(b) The respondent has a standard or policy that is applied equally.

(c) The standard or policy has the effect of screening out or otherwise affecting members of a protected class at a significantly higher rate than others who are not members of that protected class; and

(d) The complainant is a member of the protected class adversely affected by the respondent's standard or policy and has been harmed by the respondent's application of the standard or policy.

(4) Harassment by a place of public accommodation or by state government on the basis of disability:

(a) Conduct of a verbal or physical nature on the basis of disability is unlawful when substantial evidence of the elements of intentional discrimination, as described in section (2) of this rule, is shown and:

- (A) Such conduct is sufficiently severe or pervasive to have the purpose or effect of creating an intimidating, hostile or offensive environment; or
 - (B) Submission to such conduct is made either explicitly or implicitly a term or condition of receiving services, accommodations, advantages, facilities or privileges from a place of public accommodation or services, programs or activities of state government; or
 - (C) Submission to or rejection of such conduct is used as the basis for decisions affecting that individual.
- (b) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive environment is whether a reasonable person in the circumstances of the individual against whom the harassment is directed would so perceive it.
- Stat. Auth.: ORS 659A.805
 Stats. Implemented: ORS 659A.103, [&] 659A.142

839-006-0345

Assistance Animals in Places of Public Accommodation or of Access to State Government

- (1) "Assistance animal" means a dog or other animal designated by administrative rule that has been individually trained to do work or perform tasks for the benefit of an individual.
- (2) "Assistance animal trainee" means an animal that is undergoing a course of development and training to do work or perform tasks for the benefit of an individual that directly relate to the disability of the individual.
- (3) "Assistance animal trainer" means an individual exercising care, custody and control over an assistance animal trainee during a course of training designed to develop the trainee into an assistance animal.
- (4) A place of public accommodation or of access to state government services, programs or activities may not:
 - (a) Ask an individual about the nature or extent of a disability that the individual has or may have;
 - (b) Require an individual to provide documentation proving that an animal is an assistance animal or an assistance animal trainee; or
 - (c) Notwithstanding any fee or admission charge imposed for pets, require that a person with a disability or an assistance animal trainer pay a fee or admission charge for an assistance animal or assistance animal trainee.
- (5) A place of public accommodation or of access to state government services, programs or activities may:
 - (a) Ask whether an animal is required due to a disability; and
 - (b) Ask about the nature of the work or task that an animal is trained to do or perform or is being trained to do or perform, unless it is readily apparent that the animal performs or is being trained to perform work or a task for the benefit of a person with a disability.
- (6) If a place of public accommodation or of access to state government services, programs or activities customarily charges a person for damages that the person causes to the place, the place may charge a person with a disability or an assistance animal trainer for damages that an assistance animal or assistance animal trainee causes to the place.
- (7) A person with a disability or an assistance animal trainer must maintain control of an assistance animal or assistance animal trainee.
 - (a) Except as provided in this subsection, control shall be exerted by means of a harness, leash or other tether.
 - (b) If the use of a harness, leash or other tether would interfere with the ability of the animal to do the work or perform the tasks for which the animal is trained or is being trained, control may be exerted by the effective use of voice commands, signals or other means.
 - (c) If an animal is not under control as required in this subsection, a place of public accommodation or of access to state government services, programs or activities may consider the animal to be out of control for purposes of subsection (8) of this section.
- (8)(a) Except as provided in this subsection, a place of public accommodation or of access to state government services, programs or activities may not deny a person with a disability or an assistance animal trainer the right to be accompanied by an assistance animal or assistance animal trainee in any area of the place that is open to the public or to business invitees.
 - (b) A place of public accommodation or of access to state government services, programs or activities may require a person with a disability or an assistance animal trainer to remove an assistance animal or assistance animal trainee if:
 - (A) The animal is not housebroken; or
 - (B) The animal is out of control and effective action is not taken to control the animal.
 - (c) A place of public accommodation or of access to state government services, programs or activities may impose legitimate requirements necessary for the safe operations of the place of public accommodation or the services,

programs or activities. The place of public accommodation or of access to state government services, programs or activities shall ensure that the safety requirements are based on actual risks, not on speculation, stereotypes or generalizations about persons with disabilities.

(9) A place of public accommodation or of access to state government services, programs or activities shall make reasonable modifications as necessary to allow an opportunity for a person with a disability who is benefited by the use of an assistance animal to obtain goods, services and the use of the advantages, facilities and privileges of the place or the advantages, facilities and privileges of the state government services, programs or activities. For purposes of this subsection, except as provided in subsections (5) and (7) of this section, in addition to any other applicable accommodation requirement, allowing the presence of the assistance animal is a reasonable modification.

(10) If a place of public accommodation or of access to state government services, programs or activities requires a person with a disability to remove an assistance animal under subsection (8) of this section, the place or state government shall give the person with a disability a reasonable opportunity to obtain goods, services and the use of the advantages, facilities and privileges of the place or the advantages, facilities and privileges of the state government services, programs or activities without the assistance animal's presence.

(11) A place of public accommodation or of access to state government services, programs or activities is not required to provide care or supervision for an assistance animal or assistance animal trainee.

(12) The protection granted under this section to a person with a disability or an assistance animal trainer does not invalidate or limit the remedies, rights and procedures of any other federal, state or local laws that provide equal or greater protection of the rights of a person with a disability, an assistance animal trainer or individuals associated with a person with a disability.

Stat. Auth.: ORS 659A.805

Stats. Implemented: **ORS 659A.143, 659A.400** [SB 610, 77th Leg., Reg. Session (Or. 2013)]

Veterans' Preference in Public Employment

839-006-0435

Veterans' Preference in Public Employment

(1) It is the policy of the State of Oregon that a public employer grant a preference in hiring and promotion to veterans and disabled veterans under the provisions of ORS 408.230.

(2) The requirement to grant a preference in hiring and promotion to veterans and disabled veterans under the provisions of ORS 408.230 applies only to a public employer's civil service positions.

(3) That a private employer may give employment preference in the hiring or promotion of employees under OL Ch. 86, Sec. 2 2014 does not preclude the filing of a complaint under ORS chapter 659A.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 408.230, 408.235, **OL Ch. 86, Sec.2 2014**

839-006-0440

Definitions: Veterans' Preference

(1) "Active duty" does not include attendance at a school under military orders, except schooling incident to an active enlistment or a regular tour of duty, or normal military training as a reserve officer or member of an organized reserve or a National Guard unit.

(2) "Armed Forces" means the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, including the reserve components thereof. (Title 38 USC Part I Chapter 1 Section 101). Reserve components mean:

- (a) The Army Reserve;
- (b) The Navy Reserve;
- (c) The Marine Corps Reserve;
- (d) The Air force Reserve;
- (e) The Coast Guard Reserve;
- (f) The Army National Guard of the United States; and
- (g) The Air National Guard of the United States.

(3) "Civil service position" means any position for which a hiring or promotion decision is made or required to be made based on the results of a merit based, competitive process that includes, but is not limited to, consideration of an applicant's or employee's relative ability, knowledge, experience and other skills.

- (a) A “civil service” position need not be labeled a “civil service position.”
- (4) “Combat zone” means an area designated by the President of the United States by executive order in which, on the dates designated by executive order, the Armed Forces of the United States are or have engaged in combat.
- (5) “Disabled veteran” means a person who has a disability rating from the United States Department of Veterans Affairs, a person whose discharge or release from active duty was for a disability incurred or aggravated in the line of duty or a person who was awarded the Purple Heart for wounds received in combat.
- (6) “Eligibility list” means a list of ranked eligible candidates for a civil service position who have become eligible for the position through a test or series of tests and who will be considered for the civil service position in ranked order. Rankings of eligible candidates identified as tiers, bands or other names function as eligibility lists for purposes of these rules.
- (7) “Military leave” means any period of time for which a person is absent from a permanent civil service position for the performance of active duty in the Armed Forces of the United States.
- (8) “Promotion” means any position with a higher maximum salary rate.
- (9) “Public employer” includes a public body as defined in ORS 174.109, and any person authorized to act on behalf of the public body, with respect to control, management or supervision of any employee. “Public employer” includes but is not limited to:
- (a) Employers in local governments;
- (b) Employers in a public corporation created under a statute of this state and specifically designated as a public corporation; and
- (c) Employers in any public body that is created by statute, ordinance or resolution that is not part of state government or local government.
- (10) “Special qualifications” means qualifications added to minimum qualifications necessary at the time of appointment based on specific duties of the position to be filled. Special qualifications may include, but are not limited to bilingual skills, or licenses, permits and certifications required by law and screenings otherwise permitted by law, such as reference, criminal background and credit checks and physical fitness and drug tests.**
- (10) **(11)** “Transferable skill” means a skill that a veteran has obtained through military education or experience that substantially relates, directly or indirectly, to the civil service position for which the veteran is applying.
- (11) **(12)** “Veteran” means a person who:
- (a) Served on active duty with the Armed Forces of the United States;
- (B) For a period of more than 90 consecutive days beginning on or before January 31, 1955, and was discharged or released under honorable conditions;
- (C) For a period of more than 178 consecutive days beginning after January 31, 1955, and was discharged or released from active duty under honorable conditions;
- (D) For 178 days or less and was discharged or released from active duty under honorable conditions because of a service-connected disability;
- (E) For 178 days or less and was discharged or released from active duty under honorable conditions and has a disability rating from the United States Department of Veterans Affairs; or
- (F) For at least one day in a combat zone and was discharged or released from active duty under honorable conditions;
- (b) Received a combat or campaign ribbon or an expeditionary medal for service in the Armed Forces of the United States and was discharged or released from active duty under honorable conditions; or
- (c) Is receiving a non service-connected pension from the United States Department of Veterans Affairs.
- (d) For questions regarding military discharge, consult the Oregon Department of Veterans’ Affairs website at http://www.oregon.gov/ODVA/docs/PDFs/Criminal_Justice_Portal/Military_discharge.pdf?ga=t
- Stat. Auth.: ORS 659A.805
 Stats. Implemented: ORS 408.225, 408.230, 408.235[, OL 2011, Ch 484, OL 2011, Ch 29]

839-006-0450

Applying the Employment Preference

- (1) A public employer shall grant a preference to a veteran or disabled veteran who applies for a vacant civil service position or who seeks promotion to a civil service position with a higher maximum salary rate and who:
- (a) Successfully completes an initial application screening or an application examination for the position; or
- (b) Successfully completes a civil service test the employer administers to establish eligibility for the position; and

- (c) Meets the minimum qualifications and any special qualifications for the position.
- (2) At each stage of the application process a public employer will grant a preference to a veteran or disabled veteran who successfully completes an initial application screening or an application examination or a civil service test the public employer administers to establish eligibility for a vacant civil service position.
- (3) For an initial application screening used to develop a list of persons for interviews, the public employer will add five preference points to a veteran's score and ten preference points to a disabled veteran's score.
- (4) For an application examination, given after the initial application screening, that results in a score, the public employer will add five preference points to a veteran's and ten preference points to a disabled veteran's total combined examination score without allocating the points to any single feature or part of the examination.
- (5) If a public employer uses an application examination that consists of an evaluation method of ranking an applicant that does not result in a score, the public employer will devise and apply methods by which the public employer gives special consideration in the public employer's hiring decision to veterans and disabled veterans.
- (6) When an interview is a component of the selection process for a civil service position or for an eligibility list for a civil service position, a public employer shall interview each veteran:
- (a) Whom the public employer determines meets the minimum qualifications and special qualifications for the civil service position or eligibility list; and
- (b) Who submits application materials that the public employer determines show sufficient evidence that the veteran has the transferable skills required and requested by the public employer for the civil service position or eligibility list.
- (7) A public employer is not required to comply with subsection (6) of this rule if the employer's practice is to generate an eligibility list without conducting interviews of possible candidates.
- (8) A public employer may consult with the Oregon Military Department and the Department of Veterans' Affairs to determine whether certain military education or experience produces a transferable skill. To evaluate a veteran's transferable skills from a transcript of military training, a public employer may consult the American Council on Education's website, "A Guide to the Evaluation of Educational Experiences in the Armed Services," at <http://www.acenet.edu/news-room/Pages/Military-Guide-Online.aspx>
- Stat. Auth.: ORS 659A.805
 Stats. Implemented: ORS 408.230, 408.235, [&] 408.237

839-006-0455

Employment Preference for Promotions

A public employer will grant a preference to a person seeking promotion in the manner described at OAR 839-006-0450.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 408.225, 408.230, 408.235[, *OL 2011, Ch 484*]

839-006-0470

Enforcement: Veterans' Preference

The Civil Rights Division of the Bureau of Labor and Industries enforces the provisions of ORS 408.230. A person claiming a violation of ORS 408.230 may file a verified written complaint with the Civil Rights Division in accordance with ORS 659A.820.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 408.230, 408.235, 659A.820[, *OL 2011, Ch 484*]

Discrimination Based on Uniformed Service[s]

839-006-0480

Discrimination Based on Uniformed Service

(1) For purposes of this rule:

- (a) "Service" means the performance of duty on a voluntary or involuntary basis in a uniformed service that may involve active duty, active duty for training, initial active duty for training, inactive duty for training, full time duty in the National Guard, funeral honors duty or an examination to determine fitness for service in a uniformed service; and
- (b) "Uniformed service" means the Armed Forces of the United States, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training or full-time National Guard duty, the

commissioned corps of the United States Public Health Service and any other category of persons designated by the President of the United States in a time of war or national emergency.

(2) It is an unlawful employment practice for an employer to discriminate against a person because of the person's service in a uniformed service by:

(a) Denying a public officer or public employee the status or rights provided by ORS 408.240 to 408.240 and 408.290, if the employer is a public body.

(b) Discharging, expelling, disciplining, threatening or otherwise retaliating against the person for exercising or attempting to exercise the status or rights provided by this section.

(c) Denying any of the following because a person is a member of, applies to be a member of, performs, has performed, applies to perform or has an obligation to perform service in a uniformed service:

(A) Initial employment;

(B) Reemployment following a leave from employment taken by reason of service in a uniformed service;

(C) Retention in employment;

(D) Promotion; or

(E) Any other term, condition or privilege of employment, including but not limited to compensation.

(3) An employer does not commit an unlawful employment practice under this rule if the employer acted based on a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business and the employer's actions could not be avoided by making a reasonable accommodation of the person's service in a uniformed service.

(4) The federal Uniformed Services Employment and Reemployment Act, 38 USC 43 (USERRA) provides that an employee reemployed following a period of uniformed service is entitled to the seniority and seniority-based rights and benefits that the employee had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if the employee had remained continuously employed. Federal Department of Labor regulation 20 CFR 1002.210 provides that in determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute.

(5) To the extent possible, this rule shall be construed in a manner that is consistent with similar provisions of the federal Uniformed Services Employment and Reemployment Rights Act of 1994, 38 USC 43.

(6) Protections for spouses and domestic partners of uniformed service members may be found under the Oregon [Family] Military **Family** Leave Act, ORS 659A.090 to 659A.099 and OAR 839-009-0370 - 839-009-0460.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.082[, OL 2011, Ch 18]