

DIVISION 4

RETALIATION FOR OPPOSITION TO HEALTH AND SAFETY HAZARDS

839-004-0001

Background, Purpose and Scope of the Oregon Safe Employment Act and these Rules

(1) The Oregon Safe Employment Act (OSEA) is comprised of the following statutes:

(a) ORS 654.001 to .295, providing for safety and health conditions in places of employment, workplace safety committees, hazard communication and hazardous substances, and health and sanitation inspections.

(b) ORS 654.412 to .423, providing for safety of health care employees.

(c) ORS 654.750 to .780, providing for hazardous chemicals in agriculture.

(2) ORS 654.062 provides that an employee should notify the employer of any violation of law, regulation or standard pertaining to safety and health in the place of employment when the violation comes to the knowledge of the employee. Any employee or representative of the employee may complain of such violation to the Oregon Department of Consumer and Business Services (DCBS) whether or not the employee notifies the employer. DCBS will follow the procedures provided by ORS 654.062 (3) and (4).

(3) The Civil Rights Division (division) of the Bureau of Labor and Industries has jurisdiction to enforce ORS 654.062(5), which provides that it is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee because that individual has opposed any practice prohibited by OSEA; made any complaint or instituted or caused to be instituted any proceeding under or related to OSEA; testified or is about to testify in any such proceeding or exercised on behalf of the employee, prospective employee or others any right afforded by OSEA.

Employees and perspective employees are also protected from discrimination if they:

(a) Are perceived to take any actions described; or

(b) Opposed a practice the employee or prospective employee had a good faith belief was prohibited under OSEA.

(4)The purpose of these rules is to clarify the division's interpretation and application of ORS 654.062(5).

[(1) The Oregon Safe Employment Act (OSEA) recognizes the right of employees to have a safe and healthy workplace. In addition to the OSEA health and safety provisions enforced by the Oregon Occupational Safety and Health Division (OR-OSHA), OSEA prohibits discrimination against employees because of an employee's complaint about or opposition to health and safety hazards in the workplace. The Bureau of Labor and Industries, through its Civil Rights Division, is responsible for enforcing the prohibitions against discrimination for opposition to health and safety hazards, pursuant to ORS 654.062(5). Provisions of OSEA should be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Occupational Safety and Health Act of 1970 (OSHA), 29 USC 651 (1999).

(2) It is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee because that employee has opposed any practice forbidden under or related to OSEA.

(3) Employees or prospective employees having reason to believe they have been discriminated against may file a complaint with the division, as described in OAR 839-003-0025.

(4) Health and safety discrimination complaints must be filed with the division within 90 days of the date the employee has reasonable cause to believe that a violation has occurred.]

Stat. Auth.: ORS 654.062(5), 659A.805

Stats. Implemented: ORS 654.062(5)

839-004-0003

Definitions: Retliation for Opposition to Health and Safety Hazards

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

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

(2) "OSEA" means the Oregon Safe Employment Act: ORS 654.001 to .295; ORS 654.412 to .423; and ORS 654.750 to .780.

[(3) "Employee" means] (2) As defined in ORS 654.005:

(a) "Employee" includes:

(A) [a]Any individual, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, financial or otherwise, subject to the direction and control of an employer, [and includes]

(B) [s]Salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, [, or]

(C) [a] Any individual **including but not limited to a volunteer** who is provided with workers' compensation coverage as a subject worker pursuant to ORS [C]chapter 656, whether by operation of law or by election.

[(4)] **(b)** "Employer" [means] **includes:**

(A) [a] Any person who has one or more employees[, or].

(B) [a] Any sole proprietor or member of a partnership who elects workers' compensation coverage as a subject worker pursuant to ORS 656.128.

(C) Any successor or assignee of an employer. As used in this paragraph, "successor" means a business or enterprise that is substantially the same entity as the predecessor employer according to criteria adopted by DCBS in OAR 437-001-0015..

[(5)] **(c)** "Person" means one or more individuals, legal representatives, partnerships, joint ventures, associations, corporations (whether or not organized for profit), business trusts, [or] any organized group of persons, [and includes] the state, state agencies, counties, municipal corporations, school districts and other public corporations or subdivisions. **"Person" is not limited to the employer of an employee or prospective employee, but includes, for example, labor organizations and employment agencies.**

(d) "Place of employment" includes:

(A) Every place, whether indoors or out or underground, and the premises and structures appurtenant thereto, where either temporarily or permanently an employee works or is intended to work; and

(B) Every place where there is carried on any process, operation or activity related, either directly or indirectly, to an employer's industry, trade, business or occupation, including a labor camp, wherever located, provided by an employer for employees or by another person engaged in providing living quarters or shelters for employees.

(e) "Place of employment" does not include:

(A) Any place where the only employment involves non subject workers employed in or about a private home; and

(B) Any corporate farm where the only employment involves the farm's family members, including parents, spouses, sisters, brothers, daughters, sons, daughters-in-law, sons-in-law, nieces, nephews or grandchildren.

Stat. Auth.: ORS 654.062(5); **ORS 659A.805**; [& ORS 659A.001]

Stats. Implemented: ORS 654.005, ORS 654.062[, ORS 659A.001]

[839-004-0004

Prohibited Discrimination by Employers

(1) OSEA provides that no person may discriminate against an employee or prospective employee for engaging in activities protected under the act. Discrimination for this purpose includes:

(a) Refusing to hire or employ, or barring or discharging an individual from employment; or

(b) Discriminating against an employee or prospective employee in compensation, terms, conditions or privileges of employment.

(2) Protected activities include, but are not limited to:

(a) Opposing any practice forbidden by OSEA;

(b) Making any complaint under or related to OSEA;

(c) Instituting or causing to be instituted any proceeding under or related to OSEA;

(d) Testifying or being about to testify in any such proceeding; or

(e) Exercising on behalf of the employee, other employees or prospective employees any right afforded by OSEA.]

Stat. Auth.: ORS 654.062(5)

Stats. Implemented: ORS 654.062(5) & ORS 659A.820]

[839-004-0011

Prohibited Discrimination by Persons Other than Employers

Discrimination prohibited by OSEA is not limited to actions taken by employers against the employer's own employees. This prohibition also includes actions taken against an employee or prospective employee by unions, employment agencies, or any other person in a position to discriminate against another person's employee or prospective employee.]

Stat. Auth.: ORS 654.062(5)

Stats. Implemented: ORS 654.062(5)]

[839-004-0016

Protection from Discrimination Under OSEA

(1) ORS 654.062(5) protects employees and prospective employees exercising rights under OSEA. Such employees are protected whether they are exercising these rights on their own behalf or on the behalf of other employees or prospective employees. "Employees" include volunteers who are covered under the Oregon workers' compensation

system. Employees or prospective employees on whose behalf another employee or person acts are also protected if:

(a) The employee or prospective employee is perceived to be complaining about or opposing an unsafe or unhealthy workplace;

(b) The complaint was, in fact, the employee's or prospective employee's, but was made by another person.

(2) ORS 654.062(5) protects employees from employer retaliation in instances where the employer does not know the identity of the employee making a health or safety complaint, but takes action against those the employer perceives to have made the complaint or against employees who may have complained.

(3) ORS 654.062(5) does not protect an employee who refuses to comply with OSEA or the employer's legitimate safety rules.

Stat. Auth.: ORS 654.062(5)

Stats. Implemented: ORS 654.062(5)]

839-004-0018

Procedures for Complaints; Statutes of Limitation; Private Right of Action; Statutory Construction; Remedies

(1) Employees or prospective employees alleging violations of ORS 654.062(5) of the Oregon Safe Employment Act (OSEA) may file a complaint with the Civil Rights Division (division) of the Bureau of Labor and Industries (Bureau) as provided in ORS 659A.820 and OAR 839-003-0025.

(2) Complaints of violations of ORS 654.062(5) must be filed with the division within 90 days of the date the employee or prospective employee has reasonable cause to believe they have been discriminated against.

(3) Upon receipt of a complaint the commissioner shall process the complaint under the procedures, policies and remedies established by ORS chapter 659A and the policies established by ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780 in the same way and to the same extent that the complaint would be processed if the complaint involved allegations of unlawful employment practices under ORS 659A.030 (1)(f).

(4) Within 90 days after receipt of a complaint filed under this subsection, the commissioner of the Bureau (commissioner) shall notify the complainant of the commissioner's determination.

(5) Provisions of OSEA are to be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Occupational Safety and Health Act of 1970, 29 USC ch.15 § 651-678 as amended (OSHA).

(6) An aggrieved employee or prospective employee may bring a civil action in any circuit court of the State of Oregon against any person alleged to have violated ORS 654.062 (5). The civil action must be commenced within one year after the employee or prospective employee has reasonable cause to believe a violation has occurred, unless a complaint has been timely filed under ORS 659A.820.

(7) The commissioner of the Bureau of Labor and Industries or the circuit court may order all appropriate relief including rehiring or reinstatement to the employee's former position with back pay.

Stat. Auth.: ORS 654.062; ORS 659A.805

Stats. Implemented: ORS 654.062 (5); ORS 659A.030(1)(f)

839-004-0021

Employee Opposition to Health and Safety Hazards

(1) ORS 654.062(5) prohibits discrimination against an employee because the employee "opposed" health and safety hazards in the workplace. OSEA does not specify to whom or in what manner an employee must oppose health and safety hazards and be protected. The concern is not with how the opposition is communicated, but with the employer's reaction to the opposition. What constitutes opposition covers a broad range of activities including, but not limited to the following:

(a) An employee opposing health and safety hazards in a co-worker discussion that is overheard by management;

(b) An employee opposing employee health and safety hazards in a letter to a newspaper read by management; or

(c) An employee opposing employee health and safety hazards by written or verbal protest to the employer.

(2) OSEA does not normally cover an employee opposing health and safety hazards if the employee refuses to work or walks off the job. If an employee, however, refuses to perform work that presents risk of serious injury or death, the employee would have OSEA protection under the following conditions:

(a) The employee has reasonable cause to believe the work or work area poses an imminent risk of serious injury or death due to hazardous conditions not inherent in the job; and

(b) The employee has reasonable cause to believe there is insufficient time or opportunity to seek employer redress or to resort to regulatory enforcement channels. (For example, the employer refuses to correct the hazard, denies the danger exists, is not available, or no regulatory representative is available.)

(3) A person alleging discrimination for reporting or opposing unsafe or unhealthy work conditions under ORS 654.062 must contact the division within 90 days of having reasonable cause to believe that such violation has occurred. An employee would have reasonable cause to believe a violation has occurred on the earliest date that the employee:

(a) Believed retaliation had occurred against the employee for opposing employee health and safety hazards; and
(b) Knew or should have known of the right to file a complaint with the division and of the requirement that the complaint be filed within 90 days of the alleged retaliation.

Stat. Auth.: ORS 654.062(5)

Stats. Implemented: ORS 654.005; [&] 654.062(5)