

BUREAU OF LABOR AND INDUSTRIES

DIVISION 6

INJURED WORKER AND DISABILITY DISCRIMINATION

Disability Discrimination in Employment

839-006-0200

Purpose and Scope

- (1) It is the policy of the State of Oregon to guarantee **individuals** [*persons*] with disabilities the fullest possible participation in the social and economic life of the state, including employment. The people of Oregon have the right to employment without discrimination **on the basis of** [*due to*] disability.
- (2) It is an unlawful employment practice for any employer to refuse to hire or promote, to bar or discharge from employment or to discriminate in compensation, terms, conditions or privileges of employment because **a qualified individual** [*an otherwise qualified person*] has a disability.
- (3) Prohibited discrimination includes, but is not limited to:
- (a) Limiting, segregating or classifying applicants or employees with disabilities in a way that adversely affects opportunities or status;
- (b) Participating in a contractual or other arrangement with the effect of discriminating against applicants or employees with disabilities, including but not limited to, relationships with employment or referral agencies, labor unions, organizations providing fringe benefits, or training and apprenticeship programs;
- (c) **Using** [*Utilizing*] standards, criteria or methods of administration that have the effect of discrimination against applicants or employees with disabilities;
- (d) Excluding or denying equal employment or benefits to **a qualified individual** [*an otherwise qualified person*] because the **individual** [*person*] is known to have an association with **an individual** [*a person*] with a disability;
- (e) Failing to make reasonable accommodation to the known physical or mental limitations of **a** [*an otherwise*] qualified applicant or employee with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the business of the employer;
- (f) Using qualification standards, tests or other criteria, **including those based on an individual's uncorrected vision or unaided hearing**, that screen out or tend to screen out **an individual** [*a person*] with a disability or a class of **individuals** [*persons*] with disabilities unless the standard, test or other selection criterion, as used by the employer, is job related for the position in question and is consistent with business necessity;

(g) Failing to select and administer tests in a way that accurately reflects the skills and aptitude of applicants or employees with disabilities that impair sensory, manual or speaking skills. An employer may, however, administer tests measuring sensory, manual and speaking skills of applicants and employees.

(4) It is an unlawful employment practice for an employment agency to:

(a) Fail or refuse to refer for employment, or otherwise discriminate against an individual because that individual has a disability; or

(b) Classify or refer an individual for employment because that individual has a disability.

(5) It is an unlawful employment practice for a labor organization to exclude or to expel from its membership, or to discriminate in any way against an individual because that individual has a disability.

(6) It is an unlawful employment practice for any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any **individual** [person] because the **individual** [person] has opposed any practices forbidden by ORS 659A.142 and 659A.112 to 659A.139.

(7) It is an unlawful employment practice for any person, whether an employer or an employee, to aid, abet, incite, compel or coerce an individual to do any of the acts forbidden by ORS 659A.142 and 659A.112 to 659A.139 or to attempt to do so.

(8) The Civil Rights Division of the Bureau of Labor and Industries has the responsibility to protect the rights of employees and applicants with disabilities through the enforcement of ORS 659A.142 and 659A.112 to 659A.139. OAR 839-006-0200 to 839-006-0265 interpret these statutes and apply to all complaints and inquiries relating to these statutes received on or after the effective date of these rules.

(9) A person claiming a violation of ORS 659A.142 and 659A.112 to 659A.139 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.100, 659A.103, 659A.142 & 659A.112 - 659A.139, **OL 2009 Ch. 508**

839-006-0202

Determining Disability under ORS 659A.100 to 659A.145

The determination of whether an individual has a disability shall be construed in favor of broad coverage of individuals under ORS 659A.100 to 659A.145, to the maximum extent permitted by the terms of ORS 659A.100 to 659A.145.

Stat. Auth.: ORS 659A.805

Stats. Implemented: OL 2009 Ch. 508

Definitions

(1) "Disability" means:

(a) A physical or mental impairment that substantially limits one or more major life activities of the individual.

(b) A record of having a physical or mental impairment that substantially limits one or more major life activities of the individual. An individual has a record of having a physical or mental impairment if the individual has a history of, or has been misclassified as having, a physical or mental impairment that substantially limits one or more major life activities of the individual.

(c) A physical or mental impairment that the individual is regarded as having, which would substantially limit one or more major life activities of the individual.

(A) An individual is regarded as having a physical or mental impairment if the individual has been subjected to an action prohibited under ORS 659A.112 to 659A.139 because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity of the individual.

(B) An individual is not regarded as having a physical or mental impairment if the individual has an impairment that is minor and that has an actual or expected duration of six months or less.

[, with respect to a person:

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

(b) A record of such an impairment; or

(c) Being regarded as having such an impairment.]

(2) "Employer" means any person that employs six or more persons and includes the state, counties, cities, districts, authorities, public corporations and entities and their instrumentalities, except the Oregon National Guard, as provided in ORS 659A.106. The "six or more persons" need not be employed within Oregon.

(3) "Employment agency" includes any person undertaking to procure employees or opportunities to work.

(4) "Essential functions" are the fundamental duties of a position **an individual** [a person] with a disability holds or desires.

(a) A job function may be essential for any of several reasons, including but not limited to, the following:

(A) The position exists to perform that function;

- (B) A limited number of employees is available to carry out the essential function; or
 - (C) The function is highly specialized so that the position incumbent was hired for the expertise or ability required to perform the function.
- (b) Evidence of whether a particular function is essential includes but is not limited to:
- (A) The amount of time spent performing the function;
 - (B) The consequences of not performing the function;
 - (C) The terms of a collective bargaining agreement;
 - (D) The work experience of past incumbents in the job; and
 - (E) The current work experience of incumbents in similar jobs.
- (5) "Labor organization" includes any organization constituted for the purpose, in whole or in part, of collective bargaining or dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employees.
- (6) "Major life activity" includes, but is not limited to: [,]

(a) Caring for oneself;

(b) Performing manual tasks;

(c) Seeing;

(d) Hearing;

(e) Eating;

(f) Sleeping;

(g) Walking;

(h) Standing;

(i) Lifting;

(j) Bending;

(k) Speaking;

(L) Breathing;

(m) Learning;

(n) Education;

(o) Reading;

(p) Concentrating;

(q) Thinking;

(r) Communicating;

(s) Working;

(t) Socializing;

(u) Sitting;

(v) Reaching;

(w) Interacting with others;

(x) Employment;

(y) Ambulation;

(z) Transportation;

(aa) Operation of a major bodily function, including but not limited to:

(A) Functions of the immune system;

(B) Normal cell growth; and

(C) Digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions; and

(bb) Ability to acquire, rent or maintain property.

[self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

(a) Examples of specific major life activities include, but are not limited to, walking, sitting, standing, lifting, reaching, speaking, interacting with others, thinking, seeing, hearing, breathing, learning, reading, eating, sleeping, performing manual tasks, reproduction and working.]

(7) [(b)] To be substantially limited in the major life activity of working, a person must be significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to the ability of an average person with comparable skill, experience, education or other job-related requirements needed to perform those same positions.

(8) [(7)] "Medical," as used in ORS 659A.133 and 659A.136 and these rules, means any information, whether oral, written or electronic that:

(a) Is created or received by an employer; and

(b) Relates to the past, present, or future physical or mental health status or condition of **an individual** [a person].

(9) [(8)] "Misclassified," as used in ORS 659A.100(2)(b), means an erroneous or unsupported medical diagnosis, report, certificate or evaluation.

(10) [(9)] **A "qualified individual** [An "otherwise qualified person] with a disability" is **an individual** [a person] with a disability who satisfies the requisite skill, experience, education and other job-related requirements of a position that the **individual** [person] holds or desires, and who can, with or without reasonable accommodation, perform the position's essential functions.

(11) [(10)] "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, traumatic brain injury, emotional or mental illness, and specific learning disabilities.

(12) [(11)] "Reasonable accommodation" is defined in OAR 839-006-0206.

(13) [(12)] "Substantially limits" means [.]**that an individual has an impairment, had an impairment or is perceived as having an impairment that materially restricts one or more major life activities of the individual.**

(a) An impairment that substantially limits one major life activity of the individual need not limit other major life activities of the individual.

(b) An impairment that is episodic or in remission is considered to substantially limit a major life activity of the individual if the impairment would substantially limit a major life activity of the individual when the impairment is active.

[(a) The impairment renders the person unable to perform a major life activity that the average person in the general population can perform; or

(b) The impairment significantly restricts the condition, manner or duration under which a person can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.]

(c) Factors that could affect whether an impairment "substantially limits a major life activity" include, but are not limited to, the presence of other impairments that combine to make the impairment disabling.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.100, 659A.103, 659A.142, 659A.112 - 659A.139, **OL 2009 Ch. 508**

839-006-0206

Reasonable Accommodation

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

(a) To a job application process that enable a [*an otherwise*] qualified applicant with a disability to be considered for the position;

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

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

(2) Reasonable accommodation of a [*an otherwise*] qualified employee or applicant with a disability may include, but is not limited to:

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

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

(c) Acquiring or modifying equipment or devices;

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

(e) Providing qualified readers or interpreters; or

(f) Providing a leave of absence.

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

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

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

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

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

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

(a) The employer may be found liable for remedies described in OAR 839-003-0090(6) regardless of whether reasonable accommodation would have been possible; and

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

(7) An employer is not required to provide a reasonable accommodation to an individual who meets only the criterion of being regarded as having a physical or mental impairment that substantially limits one or more major life activities. For example, if an employer regards an individual as being substantially limited in the major life activity of standing, but the individual has never had and does not have a disability, the employer has not engaged in an unlawful employment practice if the employer fails to provide the accommodation of a place to sit during work hours when similarly situated employees are not also provided a place to sit.

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

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

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

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

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.142 & 659A.112 - 659A.139, **OL 2009 Ch. 508**

839-006-0212

Determining Whether an Individual Is Substantially Limited

(1) When determining whether an impairment substantially limits a major life activity of an individual, the determination shall be made without regard to the ameliorative effects of mitigating measures, including:

(a) Medication;

(b) Medical supplies, equipment or appliances;

(c) Low vision devices or other devices that magnify, enhance or otherwise augment a visual image, except that ordinary eyeglasses or contact lenses or other similar lenses that are intended to fully correct visual acuity or eliminate refractive error may be considered when determining whether an impairment substantially limits a major life activity of an individual;

(d) Prosthetics, including limbs and devices;

(e) Hearing aids, cochlear implants or other implantable hearing devices;

(f) Mobility devices;

(g) Oxygen therapy equipment or supplies;

(h) Assistive technology;

(i) Reasonable accommodations or auxiliary aids or services; or

(j) Learned behavioral or adaptive neurological modifications.

(2) [(1)] The following factors **may** [should] be considered in determining whether a person with an impairment is substantially limited in a major life activity:

- (a) The nature and severity of the impairment;
- (b) The length of time an impairment persists or is expected to persist; and
- (c) The permanent or expected long-term effect resulting from the impairment.

(3) [(2)] The determination of whether a person is substantially limited in a major life activity must be made on a case-by-case basis.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.100, ORS 659A.103, ORS 659A.142 & ORS 659A.112 - ORS 659A.139, **OL 2009 Ch. 508**

839-006-0240

Temporary and Progressive Impairments

(1) Temporary, non-chronic impairments, with little or no long-term or permanent effect, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis and influenza.

(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, ORS 659A.142 & ORS 659A.112 - ORS 659A.139

839-006-0242

Medical Evaluation

(1) An employer may not require any applicant to obtain a medical examination or evaluation prior to an offer of employment.

(2) An employer may require a medical examination or evaluation after making an employment offer but before the **individual** [*person*] commences work, only if all **individuals** [*persons*] receiving offers of employment in that same job category are required to obtain a medical examination or evaluation.

(3) A drug test is not considered a medical examination or evaluation, for purposes of ORS 659A.133, 659A.136 and sections (1) and (2) of this rule, limiting employer actions in regard to medical examinations and inquiries.

(4) As provided in ORS 659A.306, the employer must pay the cost of any medical examination or evaluation or test, including a drug test, or the production of any health certificate required by the employer.

(5) An employer may not use qualification standards based on vision tests of an individual's uncorrected vision unless the qualification standards are shown to be job-related for the position in question and are consistent with business necessity.

(6) [(5)] An employer obtaining medical information about an employee or applicant must collect and maintain the information on separate medical forms and in separate medical files to be treated as confidential medical records, except as follows:

(a) Supervisors and managers may be informed regarding necessary restrictions on the work duties of an employee or necessary accommodations;

(b) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(c) Officers and employees of the Division investigating compliance with disability discrimination laws must be provided relevant information on request.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, ORS 659A.142 & ORS 659A.112 - ORS 659A.139, **OL 2009 Ch. 508**

839-006-0244

Direct Threat

(1) Notwithstanding other provisions of these rules, an employer may refuse to employ **an individual** [*a person*] 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** [*a person*] with a disability poses a "direct threat" is based on an individualized assessment of the **individual's** [person'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 & 659A.112 - 659A.139

839-006-0250

Customer or Co-Worker Preference

An employer may not consider the attitude or preference of employers, managers, supervisors, co-workers, customers, clients or the general public toward **an individual's** [*a person's*] perceived or actual impairment in determining whether **an individual** [*a person*] is [*otherwise*] qualified for a position.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, ORS 659A.142 & ORS 659A.112 - ORS 659A.139

839-006-0255

Effect of Law

Where a state or federal law or regulation prevents employment in a particular position of **an individual** [*a person*] with a specified, medically verifiable impairment or specified severity of impairment, an employer is not required to employ **an individual** [*a person*] with a disability with such an impairment in that position. Nothing in this rule will be construed to permit denial of employment to such **individual** [*person*] in a position that is not subject to such law or regulations.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.142 & 659A.112 - 659A.139

839-006-0265

Subterfuge

An employer may not use the provisions of these rules as a subterfuge to avoid the employer's duty to not discriminate under ORS 659A.142 and 659A.112 to 659A.139.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, ORS 659A.142 & ORS 659A.112 - ORS 659A.139

Discrimination against Individuals with Disabilities [*Disabled Persons*] by State Government

839-006-0270

Purpose and Scope

(1) ORS 659A.103 provides that it is the policy of the State of Oregon to guarantee **individuals** [*persons with disabilities*] the fullest possible participation in the social and economic life of the state, including participating in and receiving the benefits of the services, programs and activities of state government, **without discrimination on the basis of disability.**

(2) ORS 659A.142(4) provides that it is an unlawful practice for state government to exclude an individual from participation in or deny an individual the benefits of the services, programs or activities of state government or to make any distinction, discrimination or restriction because the individual has a disability.

(3) State government shall make reasonable modifications in services, programs or activities, including but not limited to policies and procedures, when the modifications are necessary for state government to comply with ORS 659A.142(4) unless state government can demonstrate that making the modifications would result in a fundamental alteration in the nature of the service, program, or activity or would result in undue financial or administrative burdens on state government. This will be determined on a case by case basis.

(4) ORS 659A.142(4) and these rules are not intended to:

- (a) Create an independent entitlement to any service, program or activity of state government; or
- (b) Require state government to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program or activity or would result in undue financial or administrative burdens, as determined on a case-by-case basis.

(5) In determining whether financial and administrative burdens are undue for purposes of ORS 659A.142(4) and these rules, all resources available for use in the funding and operation of the service, program, or activity will be considered.

(6) Nothing in ORS 659A.142(4) or these rules prohibits state government from providing benefits, services, or advantages to individuals with disabilities beyond those required by 659A.142(4) or these rules.

(7) **An individual** [*A person*] claiming a violation of ORS 659A.142(4) 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.100, 659A.103, 659A.142

Definitions — Disability

(1) For purposes of ORS 659A.142(4) and these rules, “**individual** [person] with a disability” means an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

(2) "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, traumatic brain injury, emotional or mental illness, and specific learning disabilities.

(3) "Substantially limits" means [.]**that an individual has an impairment, had an impairment or is perceived as having an impairment that materially restricts one or more major life activities of the individual.**

(a) An impairment that substantially limits one major life activity of the individual need not limit other major life activities of the individual.

(b) An impairment that is episodic or in remission is considered to substantially limit a major life activity of the individual if the impairment would substantially limit a major life activity of the individual when the impairment is active.

[(a) The impairment renders the person unable to perform a major life activity that the average person in the general population can perform; or

(b) The impairment significantly restricts the condition, manner or duration under which a person can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.]

(4) "Major life activity" includes, but is not limited to:

(a) Caring for oneself;

(b) Performing manual tasks;

(c) Seeing;

(d) Hearing;

(e) Eating;

(f) Sleeping;

(g) Walking;

(h) Standing;

(i) Lifting;

(j) Bending;

(k) Speaking;

(L) Breathing;

(m) Learning;

(n) Education;

(o) Reading;

(p) Concentrating;

(q) Thinking;

(r) Communicating;

(s) Working (see OAR 839-006-0205(7));

(t) Socializing;

(u) Sitting;

(v) Reaching;

(w) Interacting with others;

(x) Employment;

(y) Ambulation;

(z) Transportation;

(aa) Operation of a major bodily function, including but not limited to:

(A) Functions of the immune system;

(B) Normal cell growth; and

(C) Digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions; and

(bb) Ability to acquire, rent or maintain property.

[self care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property. Examples of specific major life activities include, but are not limited to, walking, sitting, standing, lifting, reaching, speaking, interacting

with others, thinking, seeing, hearing, breathing, learning, reading, eating, sleeping, performing manual tasks, reproduction and working.]

(5) "Has a record of such an impairment" means that the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. "Has been misclassified as having" means the individual has been or is the subject of an erroneous or unsupported medical diagnosis, report, certificate or evaluation.

(6) "Is regarded" as having impairment means that the individual:

(a) Has a physical or mental impairment that does not substantially limit major life activities but is treated by state government as having such an impairment;

(b) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or

(c) Has none of the impairments described in subparagraphs (a) or (b) of this paragraph, but is treated by state government as having a mental or physical impairment that substantially limits a major life activity.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.100, 659A.103, 659A.142, **OL 2009 Ch. 508**

839-006-0280

Definitions - State Government

(1) For purposes of ORS 659A.142(4) 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.100, 659A.103, 659A.142

839-006-0290

Other Statutes, Regulations and Agencies Governing Access by or Discrimination 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 § [/]221 and 49 CFR § [/]37.

(2) Accessibility of government facilities is subject to Title II of the Americans with Disabilities Act, 42 USC § [/]12131. The U.S. Department of Justice regulates existing government facilities (28 CFR § [/]35.150) and new construction and alterations to government facilities (28 CFR § [/]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** [447.280] 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 § [/]794.

(4) Discrimination against **individuals** [persons] with disabilities in employment is subject to ORS 659A.100 to 139, 659A.142 and OAR 839-006-0200 to 0265.

(5) Discrimination against **individuals** [persons] with disabilities with respect to goods and services offered in a commercial manner by places of public accommodation is subject to ORS 659A.142 and OAR 839-006-0300 to 0335.

(6) Discrimination against **individuals** [persons] with disabilities in real property transactions is subject to ORS 659A.142, 659A.145 and OAR **839-005-0195 to 839-005-0220** [839-006-0400 to 0425].

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.100, 659A.103 & 659A.142

839-006-0295

Provision of Auxiliary Aids and Services

(1) Except as provided for in subsection (3) of this section, state government must provide auxiliary aids and services when necessary to ensure equal access to state government programs, services, and activities.

(2) Auxiliary aids and services may include:

(a) Qualified interpreters, note takers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDDs), videotext displays, computer aided real time captioning (CART), or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(b) Qualified readers, taped texts, audio recordings, brailled materials, large print materials, e-mail, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(c) Acquisition or modification of equipment or devices; and

(d) Other similar services and actions.

(3) State government is not required to provide auxiliary aids or services that state government can demonstrate would result in a fundamental alteration in the nature of a service, program or activity of state government or would result in undue financial or administrative burdens on state government. This will be determined on a case by case basis.

(4) State government may not place a surcharge on an individual with a disability to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual with the nondiscriminatory treatment required by ORS 659A.142(4).

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.100, 659A.103, 659A.142

**Discrimination Against Individuals with Disabilities [*Disabled Persons*] by
Places of Public Accommodation**

839-006-0300

Purpose and Scope

(1) It is the policy of the State of Oregon to guarantee individuals [*persons with disabilities*] equal access to and enjoyment of places of public accommodation as defined in ORS 659A.142 and 659A.400. No place of public accommodation may discriminate against an individual [*a person*] by any distinction or restriction on the basis of [*because that person has a*] disability.

(2) Discrimination on the basis of disability by places of public accommodation is an unlawful practice and the Civil Rights Division of the Bureau of Labor and Industries has the responsibility to protect the rights of individuals [*persons*] with disabilities through the enforcement of ORS 659A.142 and 659A.121. OAR 839-006-0300 to 839-006-0335 interpret these statutes and apply to all complaints and inquiries relating to these statutes received on or after the effective date of these rules.

(3) An individual [*A person*] claiming a violation of ORS 659A.142 and 659A.121, pertaining to discrimination against individuals on the basis of disability [*of persons with disabilities*] by places of public accommodation, 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.100, 659A.103, 659A.142, 659A.121 & 659A.400

839-006-0305

Definitions

(1) "Disability" means, with respect to a person:

- (a) A physical or mental impairment that substantially limits one or more major life activities;
- (b) A record of such an impairment; or
- (c) Being regarded as having such an impairment.

(2) "Major life activity" includes, but is not limited to: [,]

(a) Caring for oneself;

(b) Performing manual tasks;

(c) Seeing;

(d) Hearing;

(e) Eating;

(f) Sleeping;

(g) Walking;

(h) Standing;

(i) Lifting;

(j) Bending;

(k) Speaking;

(L) Breathing;

(m) Learning;

(n) Education;

(o) Reading;

(p) Concentrating;

(q) Thinking;

(r) Communicating;

(s) Working (see OAR 839-006-0205(7));

(t) Socializing;

(u) Sitting;

(v) Reaching;

(w) Interacting with others;

(x) Employment;

(y) Ambulation;

(z) Transportation;

(aa) Operation of a major bodily function, including but not limited to:

(A) Functions of the immune system;

(B) Normal cell growth; and

(C) Digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions; and

(bb) Ability to acquire, rent or maintain property.

[self care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

(a) Examples of specific major life activities include, but are not limited to, walking, sitting, standing, lifting, reaching, speaking, interacting with others, thinking, seeing, hearing, breathing, learning, reading, eating, sleeping, performing manual tasks, reproduction and working.

(b) To be substantially limited in the major life activity of working, a person must be significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to the ability of an average person with comparable skill, experience, education or other job-related requirements needed to perform those same positions.]

(3) "Misclassified," as used in ORS 659A.100(2)(b), means an erroneous or unsupported medical diagnosis, report, certificate or evaluation.

(4) "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, traumatic brain injury, emotional or mental illness, and specific learning disabilities.

(5) "Places of public accommodation" means any places or services offering the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise. However, places of public accommodation do not include institutions, bona fide clubs or places of accommodation that are in their nature distinctly private.

(6) "Substantially limits" means [.] **the individual has an impairment, had an impairment or is perceived as having an impairment that materially restricts one or more major life**

activities of the individual. An impairment that substantially limits one major life activity of the individual need not limit other major life activities of the individual. An impairment that is episodic or in remission is considered to substantially limit a major life activity of the individual if the impairment would substantially limit a major life activity of the individual when the impairment is active.

[(a) The impairment renders the person unable to perform a major life activity that the average person in the general population can perform; or

(b) The impairment significantly restricts the condition, manner or duration under which a person can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.]

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 30.675, 659A.100, 659A.103, 659A.142 & 659A.121, **OL 2009 Ch. 508, OL 2009 Ch. 415**

839-006-0305

Discrimination Theories: 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 in situations involving adverse impact, the failure to permit reasonable modifications, the refusal to make reasonable accommodations or the failure to design and construct covered buildings under applicable rules. To be protected from discrimination based on disability, an individual must have a disability, as defined in ORS 659A.100(1) and (2) and the relevant rules. Reasonable modifications in services, programs or activities, provision of auxiliary aids, services by state government, removal of barriers to facilities, goods and services and provision of auxiliary aids by public accommodations are covered by ORS 659A.142 and these rules.

(2) Substantial evidence of intentional unlawful 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(10) of these rules;

(b) The complainant is an individual with a disability;

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

(d) The complainant's disability was a motivating factor for the respondent's action. In determining whether the complainant's disability was the reason 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 complainant was harmed by an action of the respondent under circumstances that make it appear that the respondent treated the complainant 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 complainant at all times has the burden of proving that the complainant's disability was the reason for the respondent's unlawful action.

(3) Harassment in Public Accommodations: Harassment on the basis of a disability, including sexual harassment, is an unlawful practice in places of public accommodation when:

(a) Substantial evidence of the elements of OAR 839-005-0010(1) is shown; and

(b) Such conduct has the purpose or effect of creating an intimidating, hostile or offensive environment. The standard for determining whether harassment in places of public accommodation creates an intimidating, hostile or offensive environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.

839-006-0310

Removal of Physical Barriers to Facilities

(1) Places of public accommodation must remove physical barriers to entering and using existing facilities when such removal is readily achievable.

(2) "Readily achievable" means the barrier removal is easily accomplishable and can be carried out without much difficulty or expense. In determining whether a barrier removal is readily achievable, the factors to be considered include:

- (a) The nature and cost of the action needed;
- (b) The overall financial resources of the site or sites involved in the action;
- (c) The number of persons employed at the site;
- (d) The effect on expenses and resources;
- (e) Legitimate safety requirements that are necessary for safe operation, including crime prevention measures;
- (f) The impact otherwise of the barrier removal upon the operation of the site;
- (g) The administrative or fiscal relationship of the site or sites in question to any parent corporation or entity; and
- (h) The overall financial resources of any parent corporation or entity.

Stat. Auth.: ORS 659A.805

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

839-006-0320

Provision of Auxiliary Aids

(1) Places of public accommodation must provide auxiliary aids and services when necessary to ensure equal access to offered goods, privileges, services or facilities.

(2) Places of public accommodation are not required to provide auxiliary aids that would result in significant difficulty or expense, or in a fundamental alteration in the nature of the offered goods, privileges or services. This is to be determined on a case-by-case basis.

Stat. Auth.: ORS 659A.805

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

839-006-0330

Removal of Barriers to Goods and Services

(1) Places of public accommodation must remove physical and administrative barriers, if readily achievable (as defined in OAR 839-006-0310) in order to make offered goods and services accessible.

(2) If barrier removal is not readily achievable, places of public accommodation must take alternative steps to make offered goods and services accessible, such as providing goods and services at the door, sidewalk or curb; providing home delivery; retrieving merchandise from

inaccessible shelves or racks; relocating activities to accessible locations; or relaxing administrative policies.

(3) Places of public accommodation may not impose charges on **individuals** [*persons*] with disabilities to recover costs of barrier removal.

(4) Removal of physical or administrative barriers that would result in significant difficulty or expense or in a fundamental alteration in the nature of the offered goods or services is not required and is to be determined on a case-by-case basis.

Stat. Auth.: ORS 659A.805

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

839-006-0332

Access to Facilities for Individuals with Disabilities or Eligible Medical Conditions

(1) A place of public accommodation that has an employee toilet facility shall allow a customer to use that facility during normal business hours if the customer requesting the use of the employee toilet facility suffers from one of the following eligible medical conditions:

(a) The use of an ostomy device; or

(b) A diagnosis of:

(A) Crohn's disease;

(B) Ulcerative colitis;

(C) Irritable bowel syndrome; or

(D) Any other inflammatory bowel disease.

(c) "Customer" means an individual who is lawfully on the premises of a place of public accommodation.

(2) Additional information regarding this requirement is available at OL 2009 Ch. 415.

(3) A transient lodging provider shall ensure that in transient lodging facilities of 175 or more rooms or suite of rooms that at least one room or suite of rooms has a lift system or multiple lift systems that enable an individual with a disability to access a bed, a toilet, and a shower or bathtub in the room or suite of rooms occupied by the individual with a disability.

(a) "Lift System" means a system that:

(A) Is used to transfer a person to a bed, toilet, shower or bathtub, but does not provide the individual with independent mobility;

(B) May be a manual lift, an electronic lift or a lift that uses a track system; and

(C) May require operation by an assistant.

(b) “Transient lodging” means a unit consisting of a room or suite of rooms that:

(A) Is not occupied as a principal residence;

(B) Is typically occupied for a period of fewer than 30 consecutive days; and

(C) Includes services that are part of the regularly charged cost of occupancy, including maid and linen services.

(6) Additional information regarding this requirement is available at OL 2009 Ch 841.

(7) Any violation of section 3 of this rule is an unlawful practice.

Stat. Auth.: ORS 659A.805

Stats. Implemented: OL 2009 Ch. 415, OL 2009 Ch 841

839-006-0335

Direct Threat

(1) Notwithstanding other provisions of these rules, places of public accommodation may refuse to permit **an individual** [*a person*] with a disability to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation if the **individual** [*person*] 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** [*a person*] 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

Uniformed Services and Veterans In Employment [*Veterans' Preference in 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.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 408.230, 408.235, 659A.885

839-006-0440

Definitions

(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 position that requires merit-based selection and promotion to be ascertained by competitive examination. Such positions need not be denominated "civil service" positions].*

(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 entitled to disability compensation under the laws administered by the U.S. 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) “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.

(7) “Promotion” means any position with a higher maximum salary rate.

(8) “Public employer” means **a public body, as that term is defined in ORS 174.109, and any person authorized to act on behalf of the public body,** *[the state or any agency or political subdivision of the state and any person authorized to act on behalf of the state or any agency or political subdivision of the state]* with respect to control, management or supervision of any employee. “Public employer” includes:

(a) Employers in local governments;

(b) Employers of a public corporation created under a statute of this state and specifically designated as a public corporation; and

(c) Employers of any entity that is created by statute, ordinance or resolution that is not part of state government or local government.

(9) “Veteran” means a person who:

(a) Served on active duty with the Armed Forces of the United States:

(i) For a period of more than 178 consecutive days and was discharged or released from active duty under honorable conditions;

(ii) For 178 days or less and was discharged or released from active duty under honorable conditions because of a service-connected disability; or

(iii) For at least one day in a combat zone and was discharged or released from active duty under honorable conditions; or

(b) Received a combat or campaign ribbon for service in the Armed Forces of the United States.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 408.225, 408.230, 408.235, 659A.885, **OL 2009 Ch. 370**

839-006-0445

Eligibility for Employment Preference

(1) A veteran is eligible to use the preference provided for in OAR 839-006-0450 and 839-006-0455 *[only]* for a **civil service** position for which application is made **at any time after** *[within 15 years of]* discharge or release from service in the Armed Forces of the United States. *[Such time limit will not apply in the case of a disabled veteran.]*

(2) Except as provided in (1) of this rule there are no limitations to the number of times a person can claim the preference.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 408.230, 408.235, 659A.885, OL 2009 Ch. 370

839-006-0450

Applying the Employment Preference

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.

(1) 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.

(2) 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.

(3) 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.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 408.230, 408.235, 659A.885

839-006-0455

Employment Preference for Promotions

(1) A public employer will grant a preference to a person seeking promotion and who is employed by the public employer in a permanent civil service position only if the person:

(a) Was granted military leave by the public employer to serve in the Armed Forces of the United States;

(b) Returned from the military leave to the civil service position;

(c) Qualified as a veteran or disabled veteran, as defined in OAR 839-006-0440(5) and (2), by reason of the person's service during the military leave or otherwise;

(d) Successfully completed a test or examination for the promotional position; and

(e) Meets the minimum qualifications and any special qualifications for the promotional position.

(3) If a person meets the criteria for a promotional preference under subsection (1) of this rule, 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 the purposes of a promotional preference under subsection (1) of the rule, 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.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 408.225, 408.230, 408.235, 659A.885

839-006-0460

Appointment to a Position

(1) A public employer will appoint an otherwise qualified veteran or disabled veteran to a vacant civil service position if the results of a veteran's or disabled veteran's application examination, when combined with the veteran's or disabled veteran's preference, are equal to or higher than the results of an application examination for an applicant who is not a veteran or disabled veteran.

(2) Preferences of the type described in OAR 839-006-0450 and 839-006-0455 are not a requirement that a public employer appoint a veteran or disabled veteran to a civil service position.

(3) [(4)] A public employer may base a decision not to appoint the veteran or disabled veteran solely on the veteran's or disabled veteran's merits or qualifications with respect to the vacant civil service position.

(4) [(5)] If a public employer does not appoint a veteran or disabled veteran to a vacant civil service position, upon written request of the veteran or disabled veteran, the public employer, will provide the public employer's reasons for the decision not to appoint the veteran or disabled veteran to the position.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 408.230, 408.235, 659A.885

839-006-0465

Certification

(1) A public employer may require an applicant to provide certification that the person is an eligible veteran or disabled veteran under OAR 839-006-0440(5) and (9).

(2) An applicant for a position with a public employer claiming veteran's or disabled veteran's preference points may submit as certification of eligibility under OAR 839-006-0440(5) and (9) a copy of the Certificate of Release or Discharge from Active Duty (a federal DD Form 214 or 215) with the application for employment.

(3) Disabled veterans may also submit a copy of their veteran's disability preference letter from the U.S. Department of Veterans Affairs, unless the information is included in the federal DD Form 214/215.

(4) If a person's record appears to show service qualifying for the preference the public employer may provisionally designate an applicant as an eligible veteran or disabled veteran. However, before the person can be appointed, the person must submit proof of the entitlement to the preference.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 408.225, 408.230, 408.235, 659A.885

839-006-0470

Enforcement

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, 659A.885

839-005-0480

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 Army, Navy, Air Force, Marine Corps, Coast Guard, National Guard or military reserve forces.

(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. Under USERRA, a reemployed service member would be eligible for leave under OFLA if the number of days and the number of hours of work for which the service member was employed by the civilian employer, together with the number of days and number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet OFLA's eligibility requirements. In the event that a service member is denied OFLA leave for failing to satisfy the OFLA days and hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under OFLA. [Note: USERRA also applies to leave under the federal Family and Medical Leave Act of 1993, 29 USC 2601-2654 (FMLA).]

(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 Leave Act, OL 2009 Ch. 559, and OAR 839-009-0370 to 839-009-0460.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A, OL 2009 Ch 378

