

BEFORE THE COMMISSIONER
OF THE
BUREAU OF LABOR AND INDUSTRIES

In the matter of rules regulating wage claim)
enforcement, administration of the Wage)
Security Fund, and notification of various) PROPOSED RULES
parties on termination of group health)
insurance coverage)

839-001-0495
Violations Separate and Distinct

Each violation of ORS 652.110, 652.140, 652.145, 652.610(4), 652.750, **Enrolled House Bill 2595 (2009)** or any rule adopted pursuant thereto is a separate and distinct offense. In the case of continuing violations, each day's continuance is a separate and distinct violation.

839-001-0496
Civil Penalties

(1) When assessing a civil penalty for violations of ORS 652.110, 652.140, 652.145, 652.610(4), 652.750, **Enrolled House Bill 2595 (2009)** or any rule adopted pursuant thereto, the commissioner may consider the following mitigating and aggravating circumstances in determining the amount of the civil penalty to be assessed and cite those the commissioner finds to be appropriate:

- (a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes or rules;
- (b) Prior violations, if any, of statutes or rules;
- (c) The magnitude and seriousness of the violation;
- (d) Whether the employer knew or should have known of the violation.

Note: Material in [brackets] and *italics* is material that is deleted. Material that is **underlined** and **bold** is material to be added.

(2) The commissioner may consider what amount of civil penalty is likely to deter an employer from committing violations in the future.

(3) Notwithstanding any other section of this rule, the commissioner shall consider all aggravating circumstances presented by any employee or any other person for the purpose of increasing the amount of the civil penalty to be assessed.

(4) It shall be the responsibility of the employer to provide the commissioner any mitigating evidence concerning the amount of the civil penalty to be assessed.

(5) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the employer for the purpose of reducing the amount of the civil penalty to be assessed.

839-001-0515

Matters to be Considered in Making Determinations

(1) In determining that an employer has ceased doing business the Commissioner [*shall*]**may** consider:

- (a) Whether the business premises are no longer occupied by the employer;
- (b) Whether business operations are being conducted;
- (c) Whether customers of the employer are being served;
- (d) Whether the employer is employing employees;
- (e) Any other information indicating whether the business has ceased its operations.

(2) In determining that an employer is without sufficient assets to fully and promptly pay the wage claim at the cessation of business, the Commissioner [*shall*]**may** consider:

- (a) Whether the debts of the employer exceed the total amount of assets;
- (b) Whether the liquid assets of the employer are not sufficient to pay the wages due;
- (c) Whether the accounts receivable of the employer are not sufficient to pay the wages due;

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- (d) Whether the claims of a secured creditor on the assets of the employer would exceed the amount due in wages;
- (e) Whether the employer has filed for protection under the **Bankruptcy Code** (The filing of bankruptcy in and of itself does not determine the insufficiency of assets.);
- (f) Whether the assets of the employer are in the process of being involuntarily liquidated;
- (g) Any other information indicating that the assets of the employer are insufficient to promptly pay the wage claim at the cessation of business.

(3) In determining that a wage claim cannot otherwise be fully and promptly paid the Commissioner [*shall*]**may** consider:

- (a) Whether the employee has a right of claim against a bond or deposit held by the employer, which may be used for the purpose of paying wage claims;
- (b) Whether the business is in receivership and the type of receivership;
- (c) Whether there is a successor to the employer's business;
- (d) Any other information indicating that the wage claim cannot otherwise be fully and promptly paid.

(4) In determining that the wage claim is valid the Commissioner [*shall*]**may** consider:

- (a) Whether there is judgment of the court;
- (b) Whether there is a final administrative order issued pursuant to statute or rule;
- (c) Whether the employer acknowledges the amount of wages owed;
- (d) The results of the Division's investigation of the wage claim;
- (e) Any other information indicating that the wage claim is valid.

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the agency.]

839-001-0520

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Amount of Claim to be Paid

(1) Except as provided in [section]sections (2) **and (3)** of this rule, after a wage claim is determined to be eligible for payment from the Fund, the amount to be paid shall be[*the lessor of*]:

(a) The **unpaid** amount of wages earned [*but unpaid up to \$4,000*]**within 60 days before the date of the cessation of business**; or

(b) [*The amount of wages earned, but unpaid during the 60 day period preceding the date the employer ceased doing business or if*]**If** the claimant filed a wage claim before the cessation of business, the **unpaid** amount of wages earned[, *but unpaid*] within 60 days before the last day the claimant was employed.

(2) **The commissioner shall pay the amount of wages earned as provided in section (1) only to the extent of \$4,000.**

(3) When the amount of a valid wage claim determined to be eligible for payment is greater than the amount available in the Fund for paying such claims, payments on wage claims shall be prorated in accordance with OAR 839-001-0530.

839-001-0700

Definitions

As used in ORS 652.710 and in OAR 839-001-0700 to 839-001-0800, unless the context requires otherwise:

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

(2) "Commissioner" means the Commissioner of the Bureau of Labor and Industries.

(3) "Contract" includes a group health insurance policy.

(4) "Contractor" includes any person who enters into an agreement with an employer to provide health care services to employees. "Contractor" also includes any person who enters into an

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agreement with an employer to provide insurance coverage pursuant to the terms of a group health insurance policy.

(5) [*"Department" means the Department of Insurance and Finance.*

(6)]"Employ" includes to suffer or permit to work.

[(7)]**(6)** "Employee" means any individual employed by an employer.

[(8)]**(7)** "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee.

[(9)]**(8)** "Group [*Health Insurance Policy*]**health insurance policy**" as used in ORS 652.710(3) has the same meaning as that defined in ORS 743.522.

[(10)]**(9)** "Health [*Care Services*]**care services**" includes services that provide medical and surgical attention, hospital care, x-rays, ambulance, nursing or other related service or care for sickness or injury. Health care services also include services that are provided under the terms of a group health insurance policy.

[(11)]**(10)** "Home [*Address*]**address**" means the last known mailing address as recorded in the employer's records.

[(12)]**(11)** "Insurer" as used in ORS 652.710(3) has the same meaning as that defined in ORS 731.106 and includes a contractor as defined in section (4) of this rule.

[(13)]**(12)** "Promptly be [*Paid*]**paid**" or "Promptly [*Pay*]**pay**" means that trust funds are paid no later than the date agreed to by the employer and the contractor.

[(14)]**(13)** "Termination" or "Terminated", as used in ORS 652.710(3), means the cessation of coverage on the last day of the period through which coverage is paid up; provided, however, that a group health insurance policy that provides for a grace period for paying premium on the policy terminates on the final day of the grace period. Termination of coverage under a group

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health insurance policy also includes the amendment or reissuance of a policy to delete one or more classes of certificate holders from coverage.

[(15)]**(14)** "Trust [*Funds*]**funds**" means all moneys collected by an employer from employees of the employer or moneys retained from the employee's wages for the purposes of providing or furnishing to the [*employees*]**employee's** health care services pursuant to a contract.

[(16)]**(15)** "Violation" means a transgression of any statute or rule or any part thereof and includes both acts and omissions.

[(17)]**(16)** "Working [*Day*]**day**" means any day the business of the employer is open for business to its customers or day the employees of the employer are actually working on the employer's business.

[839-001-0750

Employer Notification Form

ORS 743.560(1) requires the Commissioner of the Bureau of Labor and Industries and the Director of the Department of Insurance and Finance to establish the form of the notice that an insurer is to send to the employer. The notice is established in OAR 836-052-0860, administrative rules of the Department of Insurance and Finance, Insurance Division, and reflects the agreement of the two agencies.]

G:\whd\rules\839-001 proposed rules (October, 2009)

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