

Draft Rules for RAC Discussion on July 11, 2018

Bureau of Labor and Industries
Chapter 839
Division 8
PAY EQUITY

839-008-0000

Definitions

Note for RAC Process only: Definitions of terms in black are provided in the legislation. Definitions in red are proposed definitions for terms not defined in the legislation

As used in ORS 652.210 to 652.235 and these rules:

(1) "Benefits" means:

(a) The rate of contribution that an employer makes irrevocably to a trustee or to a third person under a plan, fund or program; or

(b) The rate of costs to the employer in providing benefits to an employee not required by federal, state or local law pursuant to an enforceable commitment to carry out a financially responsible plan or program which is committed to the employee affected, including, but not limited to, the following:

(A) Medical or hospital care;

(B) Pensions on retirement or death;

(C) Compensation for injuries or illness resulting from occupational activity;

(D) Insurance to provide any of (A) through (C);

(E) Unemployment benefits;

(F) Life insurance;

(G) Disability and sickness insurance;

(H) Accident insurance;

(I) Vacation or holiday pay; or

(J) Defraying costs of other bona fide fringe benefits. Other bona fide fringe benefits do not include reimbursement to workers for meals, lodging or other travel expenses.

(c) For purposes of ORS 652.210 to 652.235 and these rules:

(A) The cost of a bona fide benefit offered by an employer, but declined by an employee may be considered as part of the total amount of compensation paid to the employee. For example, if an

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employee chooses not to take advantage of a health insurance policy offered by an employer because the employee is covered under their spouse's plan, the cost of providing the benefit that would have been incurred by the employer to provide the employee with the benefit offered may be included as part of the employee's total compensation rate for purposes of calculating the employee's total compensation under this law.

(B) An employer may provide different benefits to employees so long as each employee is offered or provided the same opportunity to obtain the benefit under the same circumstances. For example, an employer may provide and pay for a higher-cost health care policy to an employee who also insures the employee's spouse and dependent children under the plan than an employee who is individually insured, so long as both employees are provided the same health care options under the same circumstances.

(2) "Bonus" means an amount that is paid in addition to the employee's regular rate of pay and is typically paid as an incentive.

(3) "Compensation" includes wages, salary, bonuses, benefits, fringe benefits and equity-based compensation.

(4) "Employee" means any individual who, otherwise than as a copartner of the employer, as an independent contractor or as a participant in a work training program administered under the state or federal assistance laws, renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate. However, when services are rendered only partly in this state, an individual is not an employee unless the contract of employment of the employee has been entered into, or payments thereunder are ordinarily made or to be made, within this state.

(5)(a) "Employer" means any person employing one or more employees, including the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter.

(b) "Employer" does not include the federal government.

(6) "Equal-pay analysis" means an evaluation process to assess and correct wage disparities among employees who perform work of comparable character.

(7) "Equity-based compensation" means non-cash payments that represent ownership, membership interests, or opportunity for investment in the employer's business and may include, but is not limited

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to, restricted stock awards, stock options, employee stock purchase plans, stock appreciation rights and other similar compensation schemes.

(8) “Fringe benefits” means benefits as described in section (1) of this rule.

(9) “Protected class” means a group of persons distinguished by their known or perceived race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age.”

(10) “Rate” with reference to wages means:

(a) The basis of compensation for services by an employee for an employer; and

(b) Compensation based on the time spent in the performance of the services, on the number of operations accomplished or on the quantity produced or handled.

(11) “Salary” has the meaning provided in OAR 839-020-0004(29) and means a predetermined amount constituting all or part of the employee’s compensation paid for each pay period of one week or longer (but not to exceed one month.) The predetermined amount may not be any amount less than the equivalent of a monthly salary calculated by multiplying the wage set pursuant to ORS 653.025 by 2,080 hours per year, then dividing by 12 months.

(12) “Sexual orientation” has the meaning given that term in ORS 174.100 and means an individual’s actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.

(13) “Unpaid wages” means the difference between the wages actually paid to an employee and the wages required under ORS 652.220 to be paid to the employee.

(14) “Veteran status” means an individual is a veteran as defined in ORS 408.225.

(15) “Wages” means all compensation for performance of service by an employee for an employer, whether paid by the employer or another person or paid in cash or any medium other than cash.

(16) “Working conditions” includes work environment, hours, time of day, physical surroundings and potential hazards encountered by an employee as those terms are defined in OAR 839-008-0010.

(17) “Work of comparable character” means work that requires substantially similar knowledge, skill, effort, responsibility and working conditions in the performance of work as defined in OAR 839-008-0010.

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839-008-0005

Screening Job Applicants Based on Compensation

(1) Pursuant to ORS 659A.357, it is an unlawful practice under ORS chapter 659A for an employer or prospective employer to seek the salary history of an applicant or employee from the applicant or employee or a current or former employer of the applicant or employee.

(2) Pursuant to ORS 652.220(1)(a), it is an unlawful employment practice under ORS chapter 659A for an employer to screen job applicants based on current or past compensation. As used in ORS 652.220(1)(c) and these rules, “to screen job applicants based on current or past compensation” includes using information, however obtained, about a job applicant’s current or past compensation to determine:

- (a) A prospective job applicant’s suitability for employment to group, sort, or select at any stage of the hiring process; or
- (b) A current employee’s eligibility for a transfer, move or hire to a new position with the same employer.

(3) The unsolicited disclosure of a job applicant’s current or past compensation by a job applicant, employee or a current or former employer of the applicant or employee that is not considered by an employer does not constitute a violation of ORS 659A.357 or ORS 652.220(1)(c).

(4) Pursuant to ORS 659A.357, it is an unlawful practice under ORS chapter 659A for an employer or prospective employer to determine compensation for a position based on current or past compensation of a prospective employee.

(5) Although an employer may not screen job applicants based on current or past compensation, employers may consider compensation of a current employee during the transfer, move or hire of the employee to a new position with the same employer.

(6) Sections (1) and (2) of this rule are not intended to prevent an employer from requesting from a prospective employee written authorization to confirm prior compensation after the employer makes an offer of employment to the prospective employee that includes an amount of compensation.

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839-008-0010

Work of Comparable Character

(1) As used in ORS 652.210 to ORS 652.235 and these rules, “work of comparable character” includes substantially similar knowledge, skill, effort, responsibility and working conditions as defined or described as follows, with no single factor being determinative:

(a) Knowledge considerations include, but are not limited to, the following:

- (A) Certifications;
- (B) Education;
- (C) Experience; or
- (D) Training.

(b) Skill considerations include, but are not limited to, the following:

- (A) Ability;
- (B) Agility;
- (C) Coordination;
- (D) Efficiency; or
- (E) Experience.

(c) Effort considerations include, but are not limited to, the following:

- (A) Amount of physical or mental exertion needed;
- (B) Amount of sustained activity; or
- (C) Complexity of job tasks performed.

(d) Responsibility considerations include, but are not limited to, the following:

- (A) Accountability, decision-making discretion, or impact of an employee's exercise of their job functions on the employer's business;
- (B) Amount, level, or degree of significance of job tasks;
- (C) Autonomy or extent to which the employee works without supervision;
- (D) Extent to which the employee exercises supervisory functions; or
- (E) Extent to which an employee’s work or actions expose an employer to risk or liability.

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(e) Working condition considerations include the following:

(A) Work environment;

(B) Hours, which may include, but are not limited to, the following considerations:

(i) Alternative scheduling such as split shifts;

(ii) Level of busyness during hours of work;

(iii) Limited duration assignments;

(iv) Number of hours;

(v) Overtime hours; or

(vi) Part time or full time.

(C) Time of day, which may include, but is not limited to, the consideration of shift differentials related to the days or times work shifts are scheduled.

(D) Physical surroundings, which may include, but are not limited to, the following considerations:

(i) Air quality;

(ii) Distractions;

(iii) Dust;

(iv) Exposure to weather;

(v) Isolation;

(vi) Lighting;

(vii) Noise;

(viii) Physical design or layout;

(ix) Temperature;

(x) Ventilation; or

(xi) Wetness.

(E) Potential hazards, which may include, but are not limited to, the following considerations:

(i) Degree or severity of potential injury;

(ii) Frequency of exposure;

(iii) Intensity;

(iv) Physical hazards;

(v) Risk of injury; or

(vi) Toxicity.

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(2) Minor differences in knowledge, skill, effort, responsibility, and working conditions will not prevent jobs from being comparable.

839-008-0015

Bona Fide Factors that may be Considered in Paying Employees Performing Work of Comparable Character at Different Compensation Levels

(1) Pursuant to ORS 652.220(2), whether a difference in compensation is related to one or more bona fide factors is determined by whether the bona fide factor(s) considered has a reasonable relationship to the job duties required of an employment position. The bona fide factors that may be considered in making a determination for difference in pay are as follows:

- (a) A seniority system that recognizes and compensates employees based on length of service with the employer or successor in interest;
- (b) A merit system that provides for variations in pay based upon employee performance as measured through legitimate, job-related criteria, for example, a written performance evaluation plan or policy that measures employee performance using a set numerical or other established rating scale, such as from “unsatisfactory” to “exceeds expectations,” and takes employees’ ratings into account in determining employee pay rates.
- (c) A system that measures earnings by quantity or quality of production, including piece rate work.
- (d) Notwithstanding any other applicable federal or state laws, workplace considerations may include the following:
 - (A) Cost of living;
 - (B) Desirability of worksite location;
 - (C) Access to worksite location;
 - (D) Minimum wage zones; or
 - (E) Wage and hour zones.
- (e) Necessary and regular travel, which does not include normal travel between home and work.
- (f) Education considerations may include substantive knowledge acquired through relevant coursework, as well as any completed certificate or degree program.

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- (g) Training considerations may include training acquired on the job or through a formal training program.
- (h) Experience considerations include any relevant experience that may be applied to the particular job.
- (i) Any combination of the factors described in subsections (a)–(h) of this rule, if the combination of those factors accounts for the entire compensation differential.
- (2) As used in subsections (1)(a)–(c) of this rule, “system” means a devised coherent, consistent, written and reasonable method by which to identify, measure and apply appropriate variables in an orderly, logical and effective manner.
- (3) An employer may not invoke as a defense a system that was not known, documented and implemented at the time of any alleged violation of ORS 652.220.

839-008-0020

Employee Reductions in Compensation

- (1) Pursuant to ORS 652.220(4), an employer may not reduce the compensation level of an employee to comply with the provisions of ORS 652.210 to 652.235 and these rules.
- (2) Red circling, freezing, or otherwise holding an employee’s salary constant, as other salary positions come into alignment, is not considered a reduction in compensation level for the employee whose wage is being held constant.

839-008-0025

Equal-Pay Analyses

- (1) Pursuant to ORS 652.235(1), in a civil action under ORS 652.230 or 659A.885(1) alleging a violation of ORS 652.220, the employer may file a motion to disallow an award of compensatory and punitive damages which shall be granted by the court if the employer demonstrates by a preponderance of the evidence that the employer:
 - (a) Completed, within three years before the date that the employee filed the action, an equal-pay analysis of the employer’s pay practices in good faith that was:
 - (A) Reasonable in detail and in scope in light of the size of the employer; and

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(B) Related to the protected class asserted by the plaintiff in the action; and

(b) Eliminated the wage differentials for the plaintiff and has made reasonable and substantial progress toward eliminating wage differentials for the protected class asserted by the plaintiff.

(2) An employer conducting an equal-pay analysis pursuant to ORS 652.235 may ask its employees to voluntarily complete a survey eliciting protected class status information as defined in ORS 652.210(5), provided that the employee responses are not used or disseminated in any manner separate from the equal-pay analysis, and any summary of the equal-pay analysis does not identify individual employees by any protected class status.

(3) An employer who surveys employees to elicit protected class status information pursuant to subsection (1) of this rule must inform employees of the purpose of the survey, and must give employees the means and option to complete the survey without including their name or other personal identifying information.

- **Note for the RAC discussion (not part of rule):** Whether an equal pay analysis is reasonable in detail and in scope in light of the size of the employer will be fact specific to each employer. BOLI will be including additional resources on its Technical Assistance (TA) website to provide further guidance.

839-008-0030

Required Posting and Notice Requirements

(1) The Bureau of Labor and Industries shall make available to employers a template that meets the required notice provisions of ORS 652.220(7).

(2) Employers shall display the poster in every establishment where employees work. If displaying the poster is not feasible, an employer may comply with the requirement to provide written notice as required in ORS 652.220 by any of the following:

(a) Distributing the written notice to each employee personally, by regular mail or email, or by including it with a paycheck;

(b) Incorporating the written notice into a handbook or manual made available to employees, whether in a print or electronic format; or

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(c) Posting the written notice in a conspicuous and accessible location in each workplace of the employer or via electronic format that is reasonably conspicuous and accessible.

839-008-0035

Agreements in Conflict with Law Prohibited

(1) The provisions of ORS 652.210 to 652.235 and these rules may not be modified or superseded by any agreement between an employer and employee or applicant for employment or by any representative of an employer or an employee or applicant for employment.

(2) No agreement for compensation at a rate less than the rate to which such employee is entitled under ORS 652.210 to 652.235 is a defense to any action under ORS 652.210 to 652.235. *See also* Equal Pay Act of 1963, 29 CFR § 1620.23.

- **Note for the RAC discussion (not part of rule):** Federal Equal Pay Act § 1620.23: Collective bargaining agreements not a defense. The establishment by collective bargaining or inclusion in a collective bargaining agreement of unequal rates of pay does not constitute a defense available to either an employer or to a labor organization. Any and all provisions in a collective bargaining agreement which provide unequal rates of pay in conflict with the requirements of the EPA are null and void and of no effect.

839-008-0040

Individual Acts of Remuneration as Distinct Violations

An employer commits an unlawful compensation practice each time an employee is remunerated in violation of ORS 652.220.