

WHISTLEBLOWING[DISCLOSURES BY EMPLOYEES]

839-010-0000

Purpose and Scope

(1) The Civil Rights Division of the Oregon Bureau of Labor and Industries enforces the provisions of ORS 659A.200 to 659A.233, **ORS 652.355, and ORS 653.060** prohibiting discrimination against employees based on whistleblowing **disclosures or** activities that are described in the statutes. These rules apply to all such complaints and inquiries received on or after the effective date of these rules.

(2) The purpose of these rules is to clarify the provisions of the statutes.

(3) In accordance with ORS 659A.820, an individual claiming a violation of ORS 659A.200 to 659A.233, **ORS 652.355, ORS 653.060**, or these rules, may file a complaint with the Civil Rights Division, as provided in OAR 839-003-0025.

Stat. Auth.: ORS 659A.805 & ORS 659A.221, **ORS 652.355(2) & ORS 653.060(2)**

Stats. Implemented: ORS 659A.200 - ORS 659A.233, **ORS 652.355 & ORS 653.060**

Disclosures by Public Employees

839-010-0010

Definitions

As used in ORS 659A.200 to 659A.224 and these rules:

(1) "Abuse of authority" means to deliberately exceed or make improper use of delegated or inherent authority or to employ it in an illegal manner.

(2) [*"Disciplinary action" means any adverse action including dismissal, demotion, transfer, reassignment, supervisory reprimand, warning of possible dismissal or withholding of work, whether or not the action affects or will affect employee compensation.*]**"Agency" for the purposes of OAR 839-010-0010 to OAR 839-010-0060 refers to the state or any agency of or political subdivision in the state.**

(3) [*"Gross waste of funds" means to spend or use funds or to allow funds to be used without valuable result in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.*]

"Disciplinary action" means any adverse action including dismissal, demotion, transfer, reassignment, supervisory reprimand, warning of possible dismissal, or withholding of work, whether or not the action affects or will affect employee compensation.

(4) [*"Mismanagement" means the exercise of an executive function in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.*]**"Disclosure" means a formal or informal internal or extra-agency communication, not including a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee providing the disclosure reasonably believes that the disclosure evidences:**

- (a) **A violation of any federal or state law, rule, or regulation by the agency;**
- (b) **Mismanagement;**
- (c) **Gross misuse or waste of public resources or funds;**
- (d) **Abuse of authority in connection with the administration of a public program or the execution of a public contract; or**
- (e) **A substantial and specific danger to public health or safety resulting from agency action.**

(5) "Employee" means a person employed by or under contract with:

- (a) The state or any agency of or political subdivision in the state;
- (b) Any person authorized to act on behalf of the state, or agency of the state or subdivision in the state, with respect to control, management or supervision of any employee;
- (c) Employees of the public corporation created under ORS 656.751;
- (d) Employees of a contractor who performs services for the state, agency or subdivision, other than employees of a contractor under contract to construct a public improvement; and
- (e) Any person authorized by contract to act on behalf of the state, agency or subdivision.

(6) [*"Public employer" means:*

(a) *The state or any agency of or political subdivision in the state; and*

(b) *Any person authorized to act on behalf of the state, or any agency of or political subdivision in the state, with respect to control, management or supervision of any employee.]* **"Gross waste of funds" means [to spend or use funds or to allow funds to be used without valuable result in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation] an expenditure that is significantly out of proportion to the benefit expected to accrue to the agency and is more than a debatable expenditure.**

(7) [*"Reckless disregard for its truth or falsity" means a conscious disregard of a substantial and justifiable risk that the information disclosed is false.]* **"Mismanagement" means [the exercise of an executive function in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation] serious agency misconduct having the effect of actually or potentially undermining the agency's ability to fulfill its public mission.**

(8) "Public employer" means:

(a) The state or any agency of or political subdivision in the state; and

(b) Any person authorized to act on behalf of the state, or any agency of or political subdivision in the state, with respect to control, management or supervision of any employee.

(9) "Reckless disregard for its truth or falsity" means a conscious disregard of a substantial and justifiable risk that the information disclosed is false.

(10) "Substantial and specific danger" means a **specified** risk of serious injury, illness, peril or loss, to which the exposure of the public is a gross deviation from the standard of care or competence that a reasonable person would observe in the same situation.

Stat. Auth.: ORS 659A.805 & ORS 659A.221

Stats. Implemented: ORS 659A.233 & ORS 659A.200 - ORS 659A.224

[Whistleblowing Disclosures by Public Employees]

839-010-0020

[Purpose and Scope of ORS 659A.200 to ORS 659A.224] **Prohibited Discrimination by Public Employers**

(1) Oregon public employee whistleblower statutes prohibit public employers from taking action against or prohibiting employees from:

(a) Responding to legislative requests;

(b) Disclosing information the employee believes is evidence of violation of laws or disclosing evidence of mismanagement, gross waste or abuse of authority; or

(c) Reporting public endangerment resulting from an action by a public employer.

(2) No public employer may require an employee to give notice prior to making any disclosure described in sections (1)(a), (b) and (c) of this rule.

(3) No public employer may identify the employee who discloses the following information during any investigation of the information provided by the employee without the written consent of the employee:

(a) Matters described in ORS 659A.203(1)(b); and

(b) Reports required by ORS 659A.206(2).

(4) No public employer may prohibit or take action against employees for disclosing that a person receiving public assistance is also subject to arrest.

Stat. Auth.: ORS 659A.805 & ORS 659A.221

Stats. Implemented: ORS 659A.233 & ORS 659A.200 - ORS 659A.224

839-010-0040

Discussions with [Representatives of the] Legislative Assembly Members

(1) ORS 659A.203(1)(a) and (d) prohibit a public employer from prohibiting, discouraging, restraining, dissuading, coercing or otherwise interfering with any employee responding to an official legislative request to discuss the activities of the state or any branch, agency or political subdivision thereof, or from discussing the activities of any person authorized to act on behalf of those entities.

(2) In order to be protected by ORS 659A.203(1)(a), a public employee must be responding to an official legislative request, whether orally or in writing. The request must be made by or at the direction of a [*member of the*] Legislative Assembly **member** and must invite discussion with a [*member of the*] Legislative Assembly **member** or legislative committee staff acting under the direction of a [*member of the*] Legislative Assembly **member**;

(a) No employee may be required to inform the employer prior to engaging in the requested legislative discussion except when the legislative request for information is directed to the agency and the employee will speak or testify on behalf of the agency;

(b) Regarding legislative testimony or discussion with [*representatives of the*] Legislative Assembly **members**, the whistleblower law is not intended to:

(A) Authorize an employee to represent the employee's personal opinions as the opinions of the agency or subdivision;

(B) Authorize an employee to disclose information required to be kept confidential under state or federal law, rule or regulation, or allow disclosure of records exempt from disclosure except as provided in ORS 192.501 to 192.505 or 659A.212;

(C) Prevent public employers from prohibiting employee disclosure of information of an advisory nature to the extent that it covers other than purely factual materials and is preliminary to any final agency determination of policy or action.

(3) An employee is not entitled to leave work without following the employer's applicable rules and policies pertaining to leave, unless the employee is requested by a [*member of the*] Legislative Assembly **member** or a legislative committee to appear before a legislative committee. If the employee's testimony is so requested, the employee may elect to take personal time off in accordance with the employer's normal procedure.

- (a) The employer may confirm the date and time for testimony but may not inquire into the substance of the testimony.
 - (b) The employer must excuse the employee's absence from work during the time required for testimony and travel to and from the location of the committee.
 - (c) If an employee appears to testify and testimony is not taken at the designated date and time, the absence must be treated in the same manner as if the testimony had been taken.
 - (d) If an employee is subsequently recalled to testify, the subsequent request must be treated by the employer and employee in the same manner an initial request is treated.
 - (e) An employee may take time off to testify following the employer's regular time off policy without notifying the employer of the purpose of the absence.
- (4) No public employer may take any disciplinary action against an employee for employee activity described by ORS 659A.203(1)(a). An employer, however, is not precluded from taking disciplinary action if:

- (a) The information disclosed by the employee is known to be false;
- (b) The employee discloses the information with reckless disregard for its truth or falsity;
- (c) The information disclosed relates to the employee's own violations, mismanagement, gross waste of funds, abuse of authority, or endangerment of the public health and safety.

Stat. Auth.: ORS 659A.805 & ORS 659A.221
 Stats. Implemented: ORS 659A.200 - ORS 659A.224

[Whistleblowing Disclosures by Public and Private Employees] **Public and Private Employee Protection from Discrimination for Reporting Criminal Activity or Statutory Violation or Initiating or Aiding Administrative, Criminal or Civil Proceeding**

839-010-0100

[Statement of Purpose] **Prohibited Discrimination by Employers**

- (1) ORS 659A.230 prohibits any employer with one or more employees in Oregon from **knowingly** discriminating or retaliating against an employee because the employee has in good faith:
- (a) Reported **to any person, orally or in writing**, criminal activity by any person;
 - (b) **Reported to any person, orally or in writing, any activity the employee in good faith believed to be criminal or caused criminal charges to be brought against any**

person whether by the complainant's information or by a complaint, as defined in ORS 131.005(3) and (4) [Caused a complainant's information or complaint to be filed against any person];

(c) Cooperated with a law enforcement agency criminal investigation, **whether or not under subpoena;**

(d) Brought a civil proceeding against an employer; or

(e) Testified at a civil proceeding or criminal trial, **whether or not under subpoena.** (With regard to civil proceedings, see also OAR 839-010-0140.)

(2) *[The Civil Rights Division of the Oregon Bureau of Labor and Industries enforces the provisions of the Oregon whistleblower statutes prohibiting discrimination because of whistleblower activities.]* **ORS 659A.233 prohibits any employer with one or more employees in Oregon from discriminating or retaliating against a current, former, or any other employer's employee because the employee has in good faith:**

(a) Reported possible violations of ORS chapter 441, ORS 443.400 to 443.455;

(b) Testified at an unemployment compensation hearing; or

(c) Testified at a hearing conducted pursuant to ORS chapter 657.

(3) **ORS 652.355 prohibits any employer with one or more employees in Oregon from discriminating or retaliating against a current, former, or any other employer's employee because:**

(a) The employee has made a wage claim or has discussed with anyone, inquired of anyone, or consulted an attorney or agency about a wage claim; or

(b) The employee has caused to be instituted, has testified in or is about to testify in any proceedings under or related to ORS 652.310 to 652.414.

(4) **ORS 659A.060 prohibits any employer with one or more employees in Oregon from discharging or in any other manner discriminating against a current, former, or any other employer's employee because:**

(a) The employee has made an oral or written complaint to anyone that the employee has not been paid wages in accordance with ORS 653.010 to 653.261;

(b) The employee has caused to be instituted or is about to cause to be instituted or has testified or is about to testify in any proceeding under or related to ORS 653.010 to 653.261.

(5) As used in section (1) of this rule, “knowingly” means the employer knows or believes the employee engaged in the reporting acts described above.

Stat. Auth.: ORS 659A.805, **ORS 652.355(2) & ORS 653.060(2)**
Stats. Implemented: ORS 659A.230, **ORS 652.355 & ORS 653.060**

[839-010-0110

Reporting Criminal Activity and Cooperating in a Criminal Investigation

An employee reporting criminal activity is protected by ORS 659A.230(1) and these rules if:

(1) The employee reports to any person, orally or in writing, the criminal activity of any person;

(2) The employee has in good faith reported activity the employee believed to be criminal, or caused criminal charges to be brought against any person. This can be done by either the complainant's information or by a complaint, as defined in ORS 131.005(3) and (4);

(3) The employee cooperated in good faith, whether or not under subpoena, in an investigation conducted by a law enforcement agency;

(4) The employee testified in a criminal trial, whether or not under subpoena; or

(5) The employer knows or believes that the employee engaged in the reporting acts described above.

Stat. Auth.: ORS 659A.805
Stats. Implemented: ORS 659A.230]

[Whistleblowing]Disclosures by Nursing Staff