

839-005-0000

Purpose and Scope

- (1) It is the policy of the State of Oregon that unlawful discrimination on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, age, disability and other classes protected under Oregon statutes is a matter of state concern and that such discrimination threatens individual rights and privileges and menaces the institutions and foundations of a free democratic state.
- (2) Prohibited discrimination is a basis of unlawful practices and unlawful employment practices described in ORS chapter 659A and other chapters of the Oregon statutes.
- (3) The Civil Rights Division of the Bureau of Labor and Industries is responsible for protecting individual rights through the enforcement of civil rights statutes prohibiting unlawful practices and unlawful employment practices over which the bureau has jurisdiction.
- (4) The purpose of these rules is to implement, interpret and describe the division's approach to civil rights enforcement under the bureau's jurisdiction.
- (5) These rules apply to all inquiries and complaints received by the division on or after the effective date of these rules.
- (6) An individual claiming a violation of the civil rights statutes may file a complaint with the Civil Rights Division as provided in OAR 839-003-0025 or 839-003-0200 for complaints alleging housing discrimination filed under ORS 659A.145, 659A.421 or federal housing law.
Stat. Auth.: ORS 659A.805
Stats. Implemented: ORS chapter 659A

839-005-0003

Definitions

As used in enforcing ORS chapter 659A, including housing discrimination under ORS 659A.145 or 659A.421 or federal housing law:

- (1) "Bureau" means the Bureau of Labor and Industries.
- (2) "Complainant" means an individual who files a complaint with the division, personally or through the individual's attorney, pursuant to the guidelines provided in OAR 839-003-0025 or 839-003-0200 for complaints alleging housing discrimination filed under ORS 659A.145, 659A.421 or federal housing law.
- (3) "Division" means the Civil Rights Division of the Bureau of Labor and Industries.
- (4) "Employee" does not include any individual employed by that individual's parents, spouse or child or in the domestic service of any person.
- (5) "Employer" means any person in this state who, directly or through an agent, engages or utilizes the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed. Employer also includes any public body that, directly or through an agent, engages or utilizes the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed, including all officers, agencies, departments, divisions, bureaus, boards and commissions of the legislative, judicial and administrative branches of the state, all county and city governing bodies, school districts, special districts, municipal corporations and all other political subdivisions of the state.
- (6) "Employment agency" includes any person undertaking to procure employees or opportunities to work.
- (7) "Gender expression" means the manner in which an individual's gender identity is expressed, including, but not limited to, through dress, appearance, manner, or speech, whether or not that

expression is different from that traditionally associated with the individual's assigned sex at birth.

(8) "Gender identity" means an individual's gender-related identity, whether or not that identity is different from that traditionally associated with the individual's assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous.

(9) "Labor organization" includes any organization that is constituted for the purpose, in whole or in part, of collective bargaining or in dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employees.

(10) "Person" includes one or more individuals, partnerships, associations, labor organizations, limited liability companies, joint-stock companies, corporations, legal representatives, trustees, and trustees in bankruptcy or receivers. "Person" also includes a public body as defined in ORS 30.260. For the purposes of ORS 659A.145 or 659A.421 or federal housing law, "person" also includes fiduciaries, mutual companies, trusts and unincorporated organizations.

(11) "Protected class" means a group of people protected by law from discrimination on the basis of a shared characteristic, such as race, sex, sexual orientation, disability, or other, or a perception of that characteristic.

(12) "Respondent" includes any person against whom a complaint or charge of unlawful practices is filed with the division or whose name has been added to such complaint or charge pursuant to ORS 659A.835(1).

(13) "Sex" means the anatomical, physiological and genetic characteristics associated with being male or female.

(14) "Sexual orientation" 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 assigned sex at birth.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS chapter 659A

839-005-0005

Unlawful Discrimination

(1) To discriminate means to make a distinction between individuals or groups based on common characteristics, real or perceived. Certain kinds of discrimination are unlawful. Oregon civil rights laws generally prohibit making decisions in employment, housing, places of public accommodation and career schools because an individual is a member of a class protected by these statutes.

(2) When an individual files a complaint with the division alleging unlawful discrimination, the division must determine whether substantial evidence of such discrimination exists.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS chapter 659A

839-005-0010

Discrimination Theories: Employment

(1) 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 a member of a protected class;
 - (c) The complainant was harmed by an action of the respondent; and
 - (d) The complainant's protected class was the motivating factor for the respondent's action. In determining whether the complainant's protected class 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 of that individual's membership in a protected class, unless the respondent can show that a bona fide occupational qualification or a bona fide voluntary, court-ordered affirmative action plan (OAR 839-005-0013) allows the action.
 - (B) Different or Unequal Treatment Theory: The respondent treats members of a protected class differently than others who are not members of that protected class. When the respondent makes this differentiation because of the individual's protected class 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 were not members of the complainant's protected class. Substantial evidence of discrimination exists if the division's investigation reveals evidence that a reasonable person would accept as sufficient to support that protected class membership 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 protected class membership 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 protected class was the reason for the respondent's unlawful action.
- (2) Adverse Impact Discrimination: Substantial evidence of adverse impact discrimination does not require establishment of intentional discrimination as provided in (1) of this rule. Adverse impact 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 respondent has a standard or policy that is applied equally.
 - (c) The standard or policy has the effect of screening out or otherwise affecting members of a protected class at a significantly higher rate than others who are not members of that protected class; and
 - (d) The complainant is a member of the protected class adversely affected by the respondent's standard or policy and has been harmed by the respondent's application of the standard or policy.

(3) An employer must reasonably accommodate an employee or applicant's religious belief, observance or practice unless the employer can demonstrate that such accommodation would cause undue hardship on the employer's business (see OAR 839-005-0140).

(4) Harassment: Harassment based on an individual's protected class is a type of intentional unlawful discrimination. In cases of alleged unlawful sexual harassment in employment see OAR 839-005-0030.

(a) Conduct of a verbal or physical nature relating to protected classes other than sex is unlawful when substantial evidence of the elements of intentional discrimination, as described in section (1) of this rule, is shown and:

(A) Such conduct is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment;

(B) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or

(C) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.

(b) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.

(c) Employer Proxy: An employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the employer's president, owner, partner or corporate officer.

(d) Harassment by Supervisor plus Tangible Employment Action: An employer is liable for harassment by a supervisor with immediate or successively higher authority over an individual when the harassment results in a tangible employment action that the supervisor takes or causes to be taken against the individual. A tangible employment action includes, but is not limited to, any of the following:

(A) Terminating employment, including constructive discharge;

(B) Failing to hire;

(C) Failing to promote; or

(D) Changing a term or condition of employment, such as work assignment, work schedule, compensation or benefits or making a decision that causes a significant change in an employment benefit.

(e) Harassment by Supervisor, No Tangible Employment Action: When harassment by a supervisor with immediate or successively higher authority over the individual is found to have occurred, but no tangible employment action was taken, the employer is liable if:

(A) The employer knew of the harassment, unless the employer took immediate and appropriate corrective action.

(B) The employer should have known of the harassment. The division will find that the employer should have known of the harassment unless the employer can demonstrate:

(i) That the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and

(ii) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

(f) Harassment by Coworkers or Agents: An employer is liable for harassment by the employer's employees or agents who do not have immediate or successively higher authority over the

complaining individual when the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action.

(g) Harassment by Non-Employees: An employer is liable for harassment by non-employees in the workplace when the employer or the employer's agents knew or should have known of the conduct unless the employer took immediate and appropriate corrective action. In reviewing such cases, the division will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees.

(h) Withdrawn Consent: An employer may be liable for harassment by the employer's supervisory or non-supervisory employees, agents or non-employees even if the acts complained of were of a kind previously consented to by the complaining individual, if the employer knew or should have known that the complaining individual had withdrawn consent to the offensive conduct.

(i) When employment opportunities or benefits are granted because of an individual's submission to an employer's harassment, the employer is liable for unlawful discrimination against other individuals who were qualified for but denied that opportunity or benefit.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS chapter 659A & 42 U.S.C. 3601 et seq.

Employment Discrimination Based on Sex or Sexual Orientation

839-005-0021

Discrimination Based On Sex

(1) Employers are not required to treat all employees exactly the same, but are prohibited from using sex as the basis for employment decisions with regard to hiring, promotion or discharge; or in terms, conditions or privileges of employment such as benefits and compensation.

(2) Discrimination because of sex includes sexual harassment, discrimination based on pregnancy, childbirth and medical conditions and occurrences related to pregnancy and childbirth.

(3) In very rare instances, sex may be a bona fide occupational qualification (BFOQ), as defined in OAR 839-005-0013.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.029 & 659A.030

839-005-0195

Purpose and Scope

(1) The public policy of the State of Oregon guarantees all individuals the fullest possible participation in the social and economic life of the state, including the right to purchase, lease, rent or occupy property without discrimination on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, disability, familial status, source of income and other classes protected under Oregon statutes. The Bureau of Labor and Industries, through the Civil Rights Division, protects these rights by enforcement of ORS 659A.145, 659A.421 and the Fair Housing Act (42 U.S.C. 3601 et seq.) for which the U.S. Department of Housing and Urban Development has jurisdiction.

(2) An individual claiming to be aggrieved by an alleged unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law may file a complaint with the Civil Rights Division as described in OAR 839-003-0200.

(a) An individual claiming to be aggrieved by an alleged unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law includes an individual who believes that the individual has been injured by an unlawful practice or discriminatory housing practice or will be injured by an unlawful practice or discriminatory housing practice that is about to occur.

(3) These rules apply to all complaints and inquiries relating to these sections received on or after the effective date of these rules.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.142 & 659A.145, 659A.421 & 42 U.S.C. 3601 et. seq.

839-005-0200

Definitions: Housing

(1) "Aggrieved person" includes a person who believes that the person:

(a) Has been injured by an unlawful practice or discriminatory housing practice; or

(b) Will be injured by an unlawful practice or discriminatory housing practice that is about to occur.

(2) "Complainant" means an individual who files a complaint with the division, personally or through the individual's attorney, pursuant to the guidelines provided under OAR 839-003-0200 for complaints alleging housing discrimination filed under ORS 659A.145, 659A.421 or federal housing law.

(3) "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.

(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.

(4) "Dwelling" means any building, structure, or portion of a building or structure that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location of any such building, structure, or portion of such a building or structure. "Family" includes a single individual.

(5) "Familial status" means the relationship between one or more individuals who have not attained 18 years of age and the individual with whom they are domiciled who is:

(a) A parent or another person having legal custody of the individual; or

(b) The designee of the parent or other person having such custody, with the written permission of the parent or other person.

(c) "Familial status" includes any individual, regardless of age or domicile, who is pregnant or is in the process of securing legal custody of an individual who has not attained 18 years of age.

- (d) "Domiciled" includes but is not limited to part-time residence in a dwelling where an individual has a reasonable expectation of a continuing right to return.
- (6) "Federal Housing Law" means The Fair Housing Act (42 U.S.C. 3601 et seq.) for which the U.S. Department of Housing And Urban Development has jurisdiction.
- (7) "Major life activity" includes, but is not limited to:
- (a) Caring for oneself;
 - (b) Performing manual tasks;
 - (c) Seeing;
 - (d) Hearing;
 - (e) Eating;
 - (f) Drinking;
 - (g) Sleeping;
 - (h) Walking;
 - (i) Standing;
 - (j) Lifting;
 - (k) Bending;
 - (L) Twisting;
 - (m) Speaking;
 - (n) Breathing;
 - (o) Cognitive functioning;
 - (p) Learning;
 - (q) Education;
 - (r) Reading;
 - (s) Concentrating;
 - (t) Remembering;
 - (u) Thinking;
 - (v) Communicating;
 - (w) Working:
- (A) To be substantially limited in the major life activity of working, an individual 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;
- (x) Socialization;
 - (y) Sitting;
 - (z) Reaching;
 - (aa) Interacting with others;
 - (bb) Sexual relations;
 - (cc) Employment;
 - (dd) Ambulation;
 - (ee) Transportation;
 - (ff) 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
 - (gg) Ability to acquire, rent or maintain property.

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

(9) "Person" includes one or more individuals, partnerships, associations, labor organizations, limited liability companies, joint stock companies, corporations, legal representatives, trustees, trustees in bankruptcy or receivers, fiduciaries, mutual companies, trusts and unincorporated organizations and public bodies as defined in ORS 30.260 that have the primary purpose of serving, representing or otherwise benefiting the protected class.

(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.

(11) "Property" and "real property" means property used or intended for commercial, business or residential purposes including, but not limited to a dwelling.

(12) "Purchaser" includes an occupant, prospective occupant, renter, prospective renter, lessee, prospective lessee, buyer or prospective buyer.

(13) "Receipt or alleged receipt of treatment for a mental disorder," as used in ORS 659A.142(5), means actual treatment of an individual for a mental condition or an assertion that the person received such treatment.

(14) "Regarded as having an impairment," as used in ORS 659A.100(2)(c), means:

(a) An individual having a physical or mental impairment that does not substantially limit a major life activity but who has been treated as having an impairment by a seller, lessor, advertiser, real estate broker or salesperson, or the agent of any seller, lessor, advertiser, real estate broker or salesperson;

(b) An individual having a physical or mental impairment that substantially limits a major life activity only as a result of the attitude of others toward such impairment; or

(c) An individual having no physical or mental impairment but who is treated as having an impairment by a seller, lessor, advertiser, real estate broker or salesperson, or the agent of any seller, lessor, advertiser, real estate broker or salesperson.

(15) "Residential real estate related transaction" means any of the following:

(a) The making or purchasing of loans or providing other financial assistance:

(A) For purchasing, constructing, improving, repairing or maintaining a dwelling; or

(B) Secured by residential real estate; or

(b) The selling, brokering or appraising of residential real property.

(16) "Substantially limits" means that an individual has an impairment, had an impairment or is perceived as having an impairment that 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) To have a disability (or to have a record of a disability) an individual must be substantially limited in performing a major life activity as compared to most people in the general population.

(c) 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.

(d) The term “substantially limits” shall be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of ORS 659A.100 to 659A.145 and ORS 659A.400 to 659A.425, and should not require extensive analysis.

(17) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(18) "Treatment" includes examination, evaluation, diagnosis and therapy by a health professional within the scope of the professional's applicable license.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.142 & 659A.145, 659A.421 & 42 U.S.C. 3601 et. seq.

839-005-0205

Prohibited Discrimination

(1) A person may not, because of race, color, religion, sex, sexual orientation, national origin, marital status, disability, familial status, source of income and other classes protected under Oregon statutes of any individual:

(a) Refuse to sell, lease or rent any real property to a purchaser;

(b) Expel a purchaser from any real property;

(c) Make any distinction, discrimination or restriction against a purchaser in price, terms, conditions or privileges relating to the sale, rental, lease or occupancy of real property or in the furnishing of any facilities or services in connection with real property;

(d) Attempt to discourage the sale, rental, lease or occupancy of any real property to a purchaser;

(e) Publish, circulate, issue or display or cause to be published, circulated, issued or displayed, any communication, notice, advertisement, or sign of any kind whether oral, written or electronic, relating to the sale, rental or leasing of real property that indicates any preference, limitation, specification or unlawful discrimination based on race, color, religion, sex, sexual orientation, national origin, marital status, disability, familial status, source of income and other classes protected under Oregon statutes;

(f) Assist, induce, incite or coerce another person to commit an act or engage in a practice that violates ORS 659A.145, 659A.421, federal housing law or these rules;

(g) Coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by ORS 659A.145, 659A.421, federal housing law or these rules;

(h) Deny access to, or membership or participation in, any multiple listing service, real estate broker's organization or other service, organization or facility relating to the business of selling or renting dwellings, or discriminate against any individual in the terms or conditions of the access, membership or participation;

(i) Represent to an individual that a dwelling is not available for inspection, sale, rental or lease when the dwelling in fact is available for inspection, sale, rental or lease;

(j) Otherwise make unavailable or deny a dwelling to an individual.

(2) A person whose business includes engaging in residential real estate related transactions may not discriminate against any individual in making a transaction available, or in the terms or conditions of the transaction, because of race, color, religion, sex, sexual orientation, national origin, marital status, disability, familial status, source of income and other classes protected under Oregon statutes.

(3) A real estate licensee may not accept or retain a listing of real property for sale, lease or rental with an understanding that a purchaser may be discriminated against with respect to the sale, rental or lease thereof because of race, color, religion, sex, sexual orientation, national origin, marital status, disability, familial status, source of income and other classes protected under Oregon statutes.

(4) A person may not, for profit, induce or attempt to induce any other person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of an individual or individuals of a particular race, color, religion, sex, sexual orientation, national origin, marital status, disability, familial status, source of income and other classes protected under Oregon statutes.

(5) For purposes of OAR 839-005-0205(1) to (4), "source of income" does not include federal rent subsidy payments under 42 U.S.C. 1437f, income from specific occupations or income derived in an illegal manner.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.142 & 659A.145, 659A.421 & 42 U.S.C. 3601 et. seq.

839-005-0206

Discrimination Theories: Housing

(1) For the purposes of housing discrimination complaints under ORS 659A.145 or 659A.421 or discrimination complaints under federal housing law, a complainant need not be a member of a protected class. An aggrieved person may file a complaint of housing discrimination.

(2) Substantial evidence of intentional unlawful discrimination exists if the division's investigation reveals, based on the totality of circumstances known at the time of the decision, 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 839-005-003(10); and

(b) The individual to whom an action of respondent is directed or about to be directed is a member of a protected class; and

(c) The individual or aggrieved person was harmed by an action of the respondent; and

(d) The individual's protected class was the motivating factor for the respondent's action. In determining whether the individual's protected class 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 of that individual's membership in a protected class.

(B) Different or Unequal Treatment Theory: The respondent treats members of a protected class differently than others who are not members of that protected class. When the respondent makes this differentiation because of the individual's protected class 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 individual was harmed or was about to be harmed by the action of the respondent under circumstances that make it appear that the respondent treated the individual differently than comparably situated individuals who were not members of the individual's protected class. Substantial evidence of discrimination exists if the division's investigation reveals evidence that a reasonable person would accept as sufficient to support that protected class membership 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 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 protected class membership was also a substantial factor in the respondent's action, the division will determine there is substantial evidence of unlawful discrimination.

(ii) The complainant at all times has the burden of proving that the individual's protected class was the motivating factor for the respondent's unlawful action.

(3) Adverse Impact Discrimination in Housing:

(a) For the purposes of interpreting ORS 90.390, a court or the commissioner may find that a person has violated or is going to violate ORS 659A.145 or 659A.421 if:

(A) The person applies a facially neutral housing policy to a member of a protected class;

(B) Application of the policy adversely impacts members of the protected class to a greater extent than the policy impacts persons generally.

(b) In determining under subsection (a) of this section whether a violation has occurred or will occur and, if it is determined that a violation has occurred or will occur, what relief should be granted, a court or the commissioner will consider:

(A) The significance of the adverse impact on the protected class;

(B) The importance and necessity of any business purpose for the facially neutral housing policy; and

(C) The availability of less discriminatory alternatives for achieving the business purpose for the facially neutral housing policy.

(4) As used in enforcing ORS 659A.145 or 659A.421 or federal housing law, harassment on the basis of a protected class is an unlawful practice in housing when:

(a) Conduct of a verbal or physical nature relating to protected classes is unlawful when substantial evidence of the elements of intentional discrimination, as described in section (2) of this rule is shown; and

(A) Such conduct is sufficiently severe or pervasive to have the purpose or effect of creating an offensive, intimidating, hostile, or offensive environment; or

(B) Submission to such conduct is made either explicitly or implicitly a term or condition of housing; or

(C) Submission to or rejection of such conduct is used as the basis for housing decisions affecting that individual.

(b) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive environment is whether a reasonable person in the circumstances of the individual against whom the harassment is directed would so perceive it.

(5) Discrimination based on disability may involve intentional discrimination, including harassment, or discrimination that need not be intentional, including adverse impact, or 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 described in ORS 659A.104 and the relevant rules. Reasonable accommodation in real property transactions

is covered by ORS 659A.145 and OAR 839-005-0220. Reasonable modifications in housing and the design and construction of covered buildings are covered by ORS 659A.145. Claims of disability discrimination brought under federal housing law are defined under that law.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.142 & 659A.145, 659A.421 & 42 U.S.C. 3601 et. seq.

839-005-0215

Religious Exemption

It is not an unlawful practice for a bona fide church or other religious institution to take any action with respect to housing based on a bona fide religious belief about sexual orientation as long as the housing is closely connected with or related to the primary purpose of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution (see OAR 839-005-0031).

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.421 & 42 U.S.C. 3601 et. seq.

839-005-0220

Individuals with Disabilities

- (1) Individuals protected from discrimination on the basis of disability in real property transactions include any individual with a disability associated with a purchaser.
- (2) In addition to the prohibitions in OAR 839-005-0205, discrimination in real property transactions based on an individual's disability includes, but is not limited to:
 - (a) Refusing to permit, at the expense of an individual with a disability, reasonable modifications of existing premises occupied or to be occupied by that individual if such modifications may be necessary to afford that individual full enjoyment of the premises, except that, in the case of rental, the landlord may, where it is reasonable to do so, condition permission for modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted;
 - (A) In the case of a rental, a disabled renter is only required to restore the interior premises to the condition that existed before the modification when the landlord required restoration as a condition to granting the disabled renter's reasonable modification request.
 - (b) Refusing to make reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford an individual with a disability equal opportunity to use and enjoy a dwelling and;
 - (c) Failure to design and construct a covered multifamily dwelling as required by the Fair Housing Act (42 U.S.C. 3601 et seq.).
- (3) Direct Threat. A lessor or agent may engage in conduct otherwise prohibited by ORS 659A.145 when:
 - (a) Leasing or rental of the subject property by an individual with a disability would constitute a direct threat to the health or safety of other individuals or would result in substantial physical damage to the property of others; and
 - (b) No reasonable accommodation is possible that would eliminate or acceptably minimize the risk to health and safety.

(4) A lessor or agent must allow alterations of existing premises if the premises are occupied by or to be occupied by an individual with a disability, and the individual with a disability pays for the alterations, as provided in section 2 of this rule.

(5) Receipt or alleged receipt of treatment for a mental disorder does not constitute evidence of an individual's inability to acquire, rent or maintain property.

(6) In the sale, lease or rental of real estate, a person may not disclose to any person that an occupant or owner of real property has or died from human immunodeficiency virus or acquired immune deficiency syndrome.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.142 & 659A.145, 659A.421 & 42 U.S.C. 3601 et. seq.

RIGHTS OF INJURED WORKERS; DISCRIMINATION ON THE BASIS OF DISABILITY; RIGHTS OF VETERANS AND PERSONS IN UNIFORMED SERVICES

839-006-0200

Purpose and Scope

(1) It is the policy of the State of Oregon to guarantee individuals 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 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 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 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 because the individual is known to have an association with an individual with a disability;

(e) Failing to make reasonable accommodation to the known physical or mental limitations of a 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 with a disability or a class of individuals 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 because the individual has opposed any practices forbidden by ORS 659A.103 to 659A.142.
- (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.103 to 659A.142 or to attempt to do so.
- (8) The Civil Rights Division of the Bureau of Labor and Industries has the authority to protect the rights of employees and applicants with disabilities through the enforcement of ORS 659A.103 to 659A.142. 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) An individual claiming a violation of ORS 659A.103 to 659A.142 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.103 to 659A.142

839-006-0202

Determining Disability under ORS 659A.103 to 659A.142

The determination of whether an individual has a disability shall be construed in favor of broad coverage of individuals under ORS 659A.103 to 659A.142, to the maximum extent permitted by the terms of ORS 659A.103 to 659A.142.

Stat. Auth.: ORS 659A.805

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

839-006-0205

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.

(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.

(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 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) Drinking;

(g) Sleeping;

(h) Walking;

(i) Standing;

(j) Lifting;

(k) Bending;

(L) Twisting;

(m) Speaking;

(n) Breathing;

(o) Cognitive functioning;

(p) Learning;

(q) Education;

(r) Reading;

(s) Concentrating;

(t) Remembering;

- (u) Thinking;
- (v) Communicating;
- (w) Working:
 - (A) To be substantially limited in the major life activity of working, an individual 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;
- (x) Socialization;
- (y) Sitting;
- (z) Reaching;
- (aa) Interacting with others;
- (bb) Sexual relations;
- (cc) Employment;
- (dd) Ambulation;
- (ee) Transportation;
- (ff) 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
- (gg) Ability to acquire, rent or maintain property.
- (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.
- (8) "Misclassified," as used in ORS 659A.104(b), means an erroneous or unsupported medical diagnosis, report, certificate or evaluation.
- (9) "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.
- (10) A "qualified individual with a disability" is an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of a position that the individual holds or desires, and who can, with or without reasonable accommodation, perform the position's essential functions.
- (11) "Reasonable accommodation" is defined in OAR 839-006-0206.
- (12) "Substantially limits" means that an individual has an impairment, had an impairment or is perceived as having an impairment that 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) In determining whether an impairment substantially limits a major life activity, the ability of the individual with the impairment to perform that major life activity is compared to that of individuals in the general population.

(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.

(d) 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.

Stat. Auth.: ORS 659A.805

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

839-006-0206

Reasonable Accommodation

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

(a) To a job application process that enable a 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 qualified employee or applicant with a disability to perform the position's essential functions; or

(c) That enable a 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 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 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 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 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 qualified employee or applicant with a disability. Failure of an employer to engage in a meaningful interactive process with a 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(5) 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.

(8) 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 to 659A.142

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) 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.103 to 659A.142

839-006-0240

Temporary and Progressive Impairments

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 to 659A.142

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 commences work, only if all individuals 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) 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 to 659A.142

839-006-0244

Direct Threat

(1) Notwithstanding other provisions of these rules, an employer may refuse to employ an individual 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 with a disability poses a "direct threat" is based on an individualized assessment of the individual'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 to 659A.142

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 perceived or actual impairment in determining whether an individual is qualified for a position.

Stat. Auth.: ORS 659A.805

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

839-006-0255

Effect of Law

Where a state or federal law or regulation prevents employment in a particular position of an individual with a specified, medically verifiable impairment or specified severity of impairment, an employer is not required to employ an individual 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 in a position that is not subject to such law or regulations.

Stat. Auth.: ORS 659A.805

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

839-006-0265

Subterfuge

An employer may not use the provisions of these rules as a subterfuge to avoid the employer's duty not to discriminate under ORS 659A.103 to 659A.142.

Stat. Auth.: ORS 659A.805

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

Discrimination against Individuals with Disabilities 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 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(5) 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(5) 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(5) 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(5) 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(5) or these rules prohibits state government from providing benefits, services, or advantages to individuals with disabilities beyond those required by 659A.142(5) or these rules.
 - (7) An individual claiming a violation of ORS 659A.142(5) 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.103, 659A.104, 659A.106, 659A.109, 659A.139 and 659A.142

839-006-0275

Definitions — Disability

- (1) "Disability" has the meaning given in OAR 839-006-0205 (1) and (8).
- (2) "Major life activity" has the meaning given in OAR 839-006-0205 (6).
- (3) "Physical or mental impairment" has the meaning given in OAR 839-006-0205(10).
- (4) "Substantially limits" has the meaning given in OAR 839-006-0205(12).

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.104, 659A.106, 659A.109, 659A.139 and 659A.142

839-006-0280

Definitions - State Government

- (1) For purposes of ORS 659A.142(5) 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.103, 659A.104, 659A.106, 659A.109, 659A.139 and 659A.142

839-006-0290

Other Statutes, Regulations and Agencies Governing Access by or Discrimination Against Individuals 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 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 with disabilities in employment is subject to ORS 659A.103 to 659A.142 and OAR 839-006-0200 to 0265.

(5) Discrimination against individuals 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 with disabilities in real property transactions is subject to ORS 659A.142, 659A.145 and OAR 839-005-0195 to 839-005-0220.

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(5).

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103, 659A.104, 659A.106, 659A.109, 659A.139 and 659A.142

Discrimination Against Individuals with Disabilities by Places of Public Accommodation

839-006-0300

Purpose and Scope

(1) It is the policy of the State of Oregon to guarantee individuals 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 by any distinction or restriction on the basis of 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 authority to protect the rights of individuals with disabilities through the enforcement of ORS 659A.142(4). OAR 839-006-0300 to 839-006-0335 interpret this statute and apply to all complaints and inquiries relating to these statutes received on or after the effective date of these rules.

(3) An individual claiming a violation of ORS 659A.142(4), pertaining to discrimination against individuals on the basis of disability by a place 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.142

839-006-0305

Definitions

(1) "Disability" has the meaning given in OAR 839-006-0205(1) and (8).

(2) "Major life activity" has the meaning given in OAR 839-006-0205(6).

(4) "Physical or mental impairment" has the meaning given in OAR 839-006-0205(10).

(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" has the meaning given in OAR 839-006-0205(12).

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.142

839-006-0307

Discrimination Theories: Public Accommodation of Individuals with Disabilities

(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, the failure to design and construct covered buildings under applicable rules or the failure to remove physical barriers from facilities as provided in OAR 839-006-0310. To be protected from discrimination based on disability, an individual must have a disability, as described in ORS 659A.104 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 the motivating factor for the respondent's action. In determining whether the complainant's disability was the motivating factor 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 motivating factor for the respondent's unlawful action.

(3) Adverse impact by a place of accommodation on the basis of disability: Substantial evidence of adverse impact discrimination does not require establishment of intentional discrimination as provided in (2) of this rule. Adverse impact 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 respondent has a standard or policy that is applied equally.
- (c) The standard or policy has the effect of screening out or otherwise affecting members of a protected class at a significantly higher rate than others who are not members of that protected class; and
- (d) The complainant is a member of the protected class adversely affected by the respondent's standard or policy and has been harmed by the respondent's application of the standard or policy.

(4) Harassment by a place of public accommodation on the basis of disability:

(a) Conduct of a verbal or physical nature on the basis of disability is unlawful when substantial evidence of the elements of intentional discrimination, as described in section (2) of this rule, is shown and:

(A) Such conduct is sufficiently severe or pervasive to have the purpose or effect of creating an intimidating, hostile or offensive environment; or

(B) Submission to such conduct is made either explicitly or implicitly a term or condition of public accommodations; or

(C) Submission to or rejection of such conduct is used as the basis for decisions affecting that individual.

(b) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive environment is whether a reasonable person in the circumstances of the individual against whom the harassment is directed would so perceive it.

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 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

839-006-0335

Direct Threat

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

Employment Rights of Veterans and Persons in Uniformed Services

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 and 408.235

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) 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” includes a public body as defined in ORS 174.109, and any person authorized to act on behalf of the public body, with respect to control, management or supervision of any employee. “Public employer” includes but is not limited to:
 - (a) Employers in local governments;
 - (b) Employers in a public corporation created under a statute of this state and specifically designated as a public corporation; and
 - (c) Employers in any public body 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

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 for a civil service position for which application is made at any time after discharge or release from service in the Armed Forces of the United States.
- (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 and 408.235

839-006-0450

Applying the Employment Preference

(1) 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.

(2) 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.

(3) 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.

(4) 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

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 (9), 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

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) 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) 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

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

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

839-006-0480

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.

(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, ORS 659A.090 to 659A.099 and OAR 839-009-0370 to 839-009-0460.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.082