

Oregon Adult Care Home Conference

WAGE AND HOUR LAWS FOR ADULT CARE PROVIDERS

October 30, 2018

Oregon Bureau of Labor and Industries
Technical Assistance for Employers Program

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Technical Assistance for Employers

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AGENDA

- Oregon Minimum Wage and Overtime
- Exemptions to Minimum Wage and Overtime
- Rest and Meal Periods Requirements
- Sleep Time Rules
- Permissible Payroll Deductions
- Final Paychecks
- A Word about Oregon Sick Time

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Minimum Wage

	Statewide	Portland Metro	Rural counties
July 1, 2016	\$9.75	\$9.75	\$9.50
July 1, 2017	\$10.25	\$11.25	\$10.00
July 1, 2018	\$10.75	\$12.00	\$10.50
July 1, 2019	\$11.25	\$12.50	\$11.00
July 1, 2020	\$12.00	\$13.25	\$11.50
July 1, 2021	\$12.75	\$14.00	\$12.00
July 1, 2022	\$13.50	\$14.75	\$12.50
July 1, 2023	CPI	\$1.25 over statewide minimum wage	\$1 less than statewide minimum wage

Statewide—Excludes Rural/Non-urban counties

Portland Metro

Location within the urban growth boundary of the metropolitan service district

Rural/Non-urban counties

Baker-Coos-Crook-Curry-Douglas-Gilliam-Grant-Harney-Jefferson-Klamath-Lake-Malheur-Morrow-Sherman-Umatilla-Union-Wallowa-Wheeler

Note: rates based on employer location

Portland Metro Urban Growth Boundary

Portions of Multnomah, Washington
and Clackamas Counties
Identified by the
Metropolitan Service District



http://www.oregonmetro.gov/sites/default/files/2015_urban_growth_boundary_UGB_map.pdf

Overtime



General Rule –

An overtime premium must be paid for all hours worked after 40 hours in a “workweek”

29 U.S.C. § 207(a), ORS 653.261



Overtime

Defining the “workweek” –

Workweek means any seven (7) consecutive twenty four (24) hour period determined by the employer.

The workweek may be changed if the change is intended to be permanent and is not designed to evade the payment of overtime

29 C.F.R. § 778.105, OAR 839-020-0030(2)(a)

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Overtime 8 & 80 Rule

Hospitals & Residential Care Facilities:

- If the parties agree before work commences, the employer may pay overtime using the “8 & 80 Rule”
OAR 839-020-0080(5); 29 CFR Section 778.601
- Overtime is earned after eight hours in any workday or 80 hours in a work period of 14 consecutive days
- Employers must calculate both daily and bi-weekly overtime totals and pay whichever is higher
- For more information, see USDOL Fact Sheet #54

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Minimum Wage & Overtime Exemptions



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Exemptions for Adult Care Homes

- **Resident Managers of Adult Foster Homes**
 - A resident manager of an adult foster home licensed pursuant to ORS 443.705 to 443.825 and who is domiciled (i.e., has his or her permanent residence) at the adult foster home is exempt from state minimum wage and overtime. ORS 653.020(17); OAR 839-020-0004(14).
- **NOTE: Federal law does not provide a similar exemption.** A resident manager may qualify for exemption as a salaried executive or perhaps administrative employee. Absent exemption under another provision of federal law, any employer subject to the FLSA will need to ensure employees receive at least federal minimum wage (\$7.25) and overtime due for all hours worked over 40.

Exemptions (cont'd.)

- **In-home companions to the elderly or infirm**
 - Individuals employed in domestic service *in a family home* to provide **companionship services** need not be paid minimum wage or overtime. ORS 653.020(14); 29 U.S.C. § 213(a)(15).
 - “Companionship services” consist of providing fellowship and protection for individuals who cannot care for their own needs because of advanced age or mental or physical infirmity.

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Big Changes Came in 2015

- Federal regulations, effective 1/1/15:
 - defined “companionship services” more narrowly
 - limited exemptions from MW and OT to the individual, family or household using the services
 - revised recordkeeping requirements for employers of live-in domestic service employees



New Definition of “Companionship Services”

- Effective 1/1/15:
 - Provision of fellowship and protection for an elderly person or person with an illness, injury or disability who requires assistance in caring for himself/herself
 - Also includes “care” if provided in conjunction with and attendant to providing fellowship and protection if limited to 20% of total hours worked per person and per work week.

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New Definitions of “Fellowship” and “Protection”

- Effective 1/1/15:
 - Fellowship means engaging the person in social, physical and mental activities
 - Protection means being present with the person in the home or outside the home to monitor the person’s safety and wellbeing
- Examples may include:
 - Conversation, reading, games, crafts, taking the person on walks or to run errands or to appointments or social events

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New Definition of “Care” Services

- Effective 1/1/15, care services in conjunction with or attendant to companionship services, limited to 20% of weekly hours worked, meaning assistance with activities of daily living, including: dressing, grooming, feeding, bathing, toileting, and transferring
- And instrumental activities of daily living (tasks which enable the person to live independently at home), including: meal prep, driving, light housework, managing finances, assistance with physically taking medications and arranging medical care

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More Clarification from the New Rules

- Household work must be limited to directly benefitting the elderly person or person with an illness, injury or disability.
 - Prohibited: meal preparation or laundry for other members of the household
 - Result: loss of the MW/OT exemption for that work week



Medically Related Services

- Not included in “Companionship Services”, if they are typically performed by trained personnel (registered nurses, licensed practical nurses or certified nursing assistants)
- Determination not based on actual training or occupational title of worker



Third-Party Employers

- Effective 1/1/15, home care staffing agencies and other employers of direct care workers will not be permitted to claim the ***federal*** companionship services exemption from MW and OT, even when the worker is jointly employed by the agency and the family or individual or household using the services.
- The individual, family or household using the services may claim the exemption, however.

Want more?

- See US Department of Labor Fact Sheets for further information:
 - Fact Sheet #25 Home Health Care and the Companionship Services Exemption under the FLSA
 - Fact Sheet #79A Companionship Services under the FLSA
 - Fact Sheet #79B Live-in Domestic Service Employment under the FLSA

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Working Conditions

Rest and Meal periods



"You no longer have any excuses for not getting your work done. I hired someone to take your lunch and bathroom breaks for you."

Rest Breaks

- Federal law says rest breaks are given with pay and count as work time. 29 C.F.R. § 785.18
- State law says adults get 10 continuous minutes of paid break time for every 4 hours, or major portion thereof, worked in each work period during which the employee is relieved of all duty ORS 653.261, OAR 839-020-0050(6)(a)
- Failure to provide adequate meal or rest periods carries a maximum penalty of \$1,000 per violation – OAR 839-020-1010,1020

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Rest Breaks Timing

- Employers must provide the rest period approximately in the middle of each segment of four hours
- Rest breaks are given in addition to meal periods; it is prohibited for an employer to allow employees to add rest periods to a meal period or to deduct them from the beginning or the end of the employees shift
- The employer has the burden to show they provided appropriate rest periods

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Rest Breaks Required for Work Periods of Up to 24 hours:

Length of work period	Number of rest breaks required
2 hrs or less	0
2 hrs 1 min - 5 hrs 59 min	1
6 hrs	1
6 hrs 1 min - 10 hrs	2
10 hrs 1 min - 13 hrs 59 min	3
14 hrs	3
14 hrs 1 min - 18 hrs	4
18 hrs 1 min - 21 hrs 59 min	5
22 hrs	5
22 hrs 1 min - 24 hrs	6

Meal Periods

Federal law stipulates *bona fide* meal periods are not work time and are given without pay provided:

- The employee is (must be) completely relieved of all duty,
- The meal period is 30 minutes or more in duration
- Employer need not allow employee to leave premises
- 29 C.F.R. § 785.19

Meal Periods & Timing

State law allows / requires uninterrupted meal periods of 30 minutes or more without pay

- Not required on shifts less than 6 hours
- 6 to 7 hour shifts meals should be take between 2nd & 5th hours
- Shifts of 7+ hours meals should be taken between 3rd & 6th hours
- New clarifying rule: after conclusion of the 2nd/3rd hour and prior to the commencement of the 5th/6th hour

ORS 653.261, OAR 839-020-0050(1)(c)

Meal Periods Required for Work Periods of Up to 24 hours:

Length of work period	Number of meal periods required
2 hrs or less	0
2 hrs 1 min - 5 hrs 59 min	0
6 hrs	1
6 hrs 1 min - 10 hrs	1
10 hrs 1 min - 13 hrs 59 min	1
14 hrs	2
14 hrs 1 min - 18 hrs	2
18 hrs 1 min - 21 hrs 59 min	2
22 hrs 1 min - 24 hrs	3

Meal Periods Exceptions

Employers who do not provide a meal period as stipulated under OAR 839-020-0050 have the burden to show that:

1. The failure to provide the meal period was caused by unforeseeable equipment failures, acts of nature or exceptional and unanticipated circumstances that only rarely and temporarily preclude the provision of a meal period, or
2. [Industry practice has established a paid meal period of not less than 20 minutes,] or
3. To provide the required meal period would pose an “undue hardship” on the operation of the employer's business

Meal Periods “Undue Hardship”

“Undue hardship” means a *significant difficulty or expense* when considered in relation to:

- The size of the employer's business,
- The financial resources of the employer's business,
- The nature of the employer's business, or
- The structure of the employer's business

OAR 839-020-0050(4)

Meal Periods “Undue Hardship”

To determine whether providing a meal period requires significant difficulty or expense, the following factors will be considered:

- The cost of providing an uninterrupted meal period,
- The overall financial resources of the employer
- The number of people employed at the worksite
- Their qualifications to relieve the employee,
- The total number of employees employed,
- The number of worksites, and

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Meal Periods “Undue Hardship”

- The type of worksites,
- The geographic separateness of the worksites
- Startup or shutdown of machines in continuous operation processes intermittent and unpredictable workflow not within control of employer or employee,
- The perishable nature of materials used on the job, and
- The safety and health of employees, patients, clients or the public

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Meal Periods “Undue Hardship”

When an employer is unable to provide a meal period due to bona fide “undue hardship,” the employer shall instead provide the employee:

- Adequate periods in which the employee may rest, consume a meal and use the restroom;
- Without deduction from the employee’s pay; and
- Provide a notice to each employee of their meal and rest period rights in the language the employer uses to communicate with their employees; and
- The employer must keep a copy of the notice provided for at least 6 months after the separation.

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The screenshot shows the Oregon Wage and Hour Division website. The browser window is titled "State of Oregon: Wage and Hour Division - Windows Internet Explorer" and the address bar shows "http://www.oregon.gov/BOLI/WHD/index.shtml". The website header includes the Oregon.gov logo and the URL "www.oregon.gov/boli/whd". The main content area is titled "Wage and Hour Division" and features a sidebar with navigation links such as "About Us", "Contact Us", "Required Posters", "State Laws/Wages", "Leyes Estatales-Sueldos", "Filing a Wage Claim or Complaint", "Formulario de Reclamo", "Formulario de Queja", and "Related Sites". The main content area is divided into two columns. The left column is titled "The Wage and Hour Division Welcomes You" and contains a section titled "How to Get Minimum Wage Posters" with text about the division's efforts to contain costs and preserve limited budget resources. The right column is titled "PWR" and contains a section titled "Avakian Announces PWR Survey Changes for 2010" with text about the division's efforts to improve the survey process. A red arrow points from the "Tools" menu in the browser to the "Undue Hardship Employee Notice" link in the "Current Topics" sidebar. The sidebar also includes links for "Child Labor", "Farm Labor", "Prevailing Wage", "Business Closures/Wages", "Oregon Revised Statutes", "OR Administrative Rules", and "Current Topics". The "Current Topics" section lists "2011 Minimum Wage", "Minimum Wage Poster (2011)", "Cartel de Salario Minimo (2011)", "FAQs/Fact Sheets", "New/Proposed Rules", "Food Server Meal Period Waivers/Notice", "Undue Hardship Employee Notice", and "Undue Hardship Employee Notice Form". The browser window also shows the "Internet | Protected Mode: On" status bar and the system clock indicating 11:39 AM on 9/2/2011.

Rest Periods for Expression of Milk



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Rest Periods Expression of Milk

Oregon Law

- All employers with 25 or more employees
- All non-exempt employees as well as “white collar” salaried exempt employees are eligible
- 30 minute break for each four-hour segment (or major portion of a four-hour segment) of the work period

Federal Law

- All employers covered by the FLSA
- All employees not exempt from the provisions of Section 207 (maximum hours) of the FLSA are eligible
- A break “each time an employee has need to express milk” for “a reasonable time”

Rest Periods

Expression of Milk

Oregon Law

- Employers need not provide rest breaks for the expression of milk if doing so would impose an “undue hardship”
- Requires accommodations for the mother of a child 18 months of age or younger

Federal Law

- Federal law only allows an undue hardship exemption for employers of less than 50 employees
- Requires accommodations for the mother of a child 1 year of age or younger

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Sleep Time



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Sleep Time

- If the duty is less than 24-hours, no wage reduction for sleep is allowable OAR 839-020-0042(1)
- If the duty is 24 hours or more, the employer and employee may agree to exclude compensation for bona fide meal periods and up to eight hours of sleep time (but must get at least 5 hours uninterrupted sleep time) 29 C.F.R. §785.20, OAR 839-020-0042(2)
- If residing on the employer's premises, any reasonable agreement between the employer and employee regarding number of hours worked that takes all pertinent facts into consideration will be accepted
- 29 C.F.R. § 785.23, OAR 839-020-0042(3).

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Deductions From Employee Wages ORS 652.610(3)

No employer may withhold, deduct or divert any portion of an employee's wages unless:

- Employer is required to do so by law (taxes, social security, garnishment)
- Deductions are authorized in writing by employee, are for the employee's benefit and are recorded in employer's books (additional restrictions on final paycheck)

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Deductions From Employee Wages

ORS 652.610(3)

No employer may withhold, deduct or divert any portion of an employee's wages unless (cont'd):

- Employee voluntarily signed authorization for deduction for any other item, provided ultimate recipient of money is not the employer and deduction is recorded in employer books (charitable contributions)
- Deduction is authorized by collective bargaining agreement (union dues)
- Deduction is authorized under ORS 18.736 (garnishments), plus \$2.00 processing fee per pay period.

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Deductions From Employee Wages

- An employer may deduct for the cost of meals and lodging or other goods or services as long as:
 - They are for the private benefit of the employee; and
 - The employee signs a written authorization.

OAR 839-020-0025

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Deduction From Final Paychecks (Loans)

Repayment of a loan made by the employer to the employee is allowed if the following criteria are met:

- Employee voluntarily signs agreement;
- Paid to employee in cash or check (ORS 652.110);
- Loan solely for employee's benefit;
- Not connected to employee's employment;
- Deduction does not exceed amount permitted by garnishment (ORS 18.385)
- Deduction is recorded in employer's books.

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Deductions for Loans to Employees

- ORS 18.385 exempts 75% of the individual's "disposable earnings" from garnishment, AND
- Under no circumstance must the employee be left with less than the following amounts:
 - \$218 – one week or less
 - \$435 – two week period
 - \$468 – half month period (\$471.25 federal)
 - \$936 – one month period (\$942.50 federal)
- These requirements also apply to deductions from final wages for the repayment of a loan.

Prohibited Deductions

- Breakage or loss by employee.
- Uniforms or laundering of such.
- Cash shortages.
- Bad checks or credit cards.
- Cell phone usage for private calls.
- Employers may not deduct for tools, equipment or their maintenance or for deposits on uniforms, tools or equipment.

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Final Paychecks



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Final Paycheck

Employee quits without notice –

- Final paycheck always due within 5 business days, excluding weekends & holidays, or next regular payday; whichever is first.
ORS 652.140
- “Business day” includes Monday through Friday – but does not include state holidays – on which business operations are conducted.

OAR 839-001-0410(1)

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Final Paycheck

Employee quits with notice of 48 hours or more
(excluding weekends & holidays) –

- Final paycheck is due on the employee’s final day of work.

ORS 652.140

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Final Paycheck

Employer terminates employee (or separation by mutual consent, i.e., employee wants to resign instead of being fired) –

- All compensation is due no later than the end of next business day after termination.

ORS 652.140

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Final Paycheck

Lay off

- With expectation of return within 35 days - employee may be paid on next regular payday
- If no expectation of return, the layoff is a termination

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Final Paycheck Penalties

ORS 652.150

As a penalty for the nonpayment of final wages, the wages or compensation of the employee shall continue from the date due ...

- at the same hourly rate
- for eight hours per day
- until paid or until action therefor is commenced.

ORS 652.150

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A Word about Oregon Sick Leave

- Applies to ALL employers with at least 1 employee in Oregon
- An employee can accrue, use, and carry-over **up to 40 hours per year.**

Used for:

- Diagnosis, care, or treatment; includes preventive medical and routine dental care
- Family member's diagnosis, care, or treatment; includes preventive care
- All OFLA covered absences
- Domestic Violence, harassment, sexual assault, or stalking
- Public health emergencies which close school, work, or child care
- Employee excluded from workplace due to illness

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If we are out of time.....

Contact Technical Assistance for Employers

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Thank you for coming!